Certainty In Islamic Legal Theory


Ph.D Thesis

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I declare that the work presented in this thesis is my own.

Ali Ali
Dedication

I dedicate this work to my wife Ranya, who endured and supported me greatly to endure during three difficult years for our family, for this I am ever greatful. My gratitude is extended to my daughters and my parents for all their love and support.

I also thank my supervisor, professor Barry Rider for his valuable guidance and advice which made this work possible.
Abstract

This research aims to critically investigate the arguments upon which the certainty of Islamic Legal Theory (Usul al-fiqh) is based. Muslim scholars have argued along the centuries that usul al-fiqh is a methodology constituted of certain sources of law: Quran, Sunna, and Ijma’; there are other sources that are not certain. By certain, the usulis (scholars of Usul) mean that the sources have certain authority to produce law and, under certain conditions, this law will convey the certain divine will. This makes the law divine and hence, absolutely rigid and unchangeable. The prohibition of riba (usury or interest) and alcohol is certain, therefore, this prohibition cannot be changed in any time or circumstance except under the rule of necessity (darūra) which is usually regarded as exceptional circumstances.

The usulis along with modern Muslim scholars have always argued that Sharia is an adaptable system despite its divine nature which entails immutability. For this to be the case, it is divided into a constant (thābit) and changing (mutaghayyir) parts. The constant part is the certain sources and certain law derived from them; these have timeless validity, whereas the changing part is based on uncertain sources or mechanisms of deriving law and is thus the field of ijtihad (legal reasoning). This latter part forms the adaptable side of Sharia and, thus, gives it eternal validity.

This research is concerned with the former part. It will critically look at the arguments made by the usulis to establish the certainty and unchangeability of Sharia and how this certainty has affected Islamic law, particularly, in finance. These effects are manifested in many areas of modern financial industry like the prohibition of banks interest, Insurance, and many forms of financial derivatives. They show how the theoretical and abstract polemics of Islamic legal Theory have impacted the mundane, real-life issues of Muslims in the modern times.
It is the finding of this research that the arguments made by the usulis to demonstrate the absolute certainty of the sources of Sharia, Quran, Sunna, and Ijma’, are unfounded. There is no agreement between them on the main pillars of certainty such as the concept of tawatur (concurrent testimony), the history of the written Quran, the soundness and validity of hadith, and the concept and authoritativeness of Ijma’. Nor is there clear conceptualization or demonstration of this certainty in the arguments presented by the usulis, arguments which suffer from internal inconsistencies and unfounded conclusions.

The law which has been derived from these sources, thus, is characteristic of unjustified rigidity which is a result of the perceived certainty of its sources. And throughout the history of Sharia, jurists have tried to circumvent the law in different ways, such as the rule of necessity, since they could not change the certain law. This research finds that this rigidity was manifest in the case of the prohibition of banks interests as a result of considering it to be the forbidden riba.
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Finding the right balance between adaptability and stability is a constant challenge in any system of law. A legal system requires a mechanism that facilitates changing existing laws when this is needed as well as the ability to legislate anew. Similarly, it will need to maintain for its existing laws some degree of stability, resistance to change that will allow its subjects to know in advance the position of the law on certain issues. In the case of Sharia, this challenge is amplified because its balance is heavily tilted towards resisting change, making the greater challenge in Sharia to find the right methods of changing its law when change is necessary. Unlike secular legal systems, the reasons for the relative legal rigidity in Sharia go beyond the quest for legal stability; this rigidity has its roots in the perceived divinity of its sources. Sharia is perceived to be the law of God and God’s commands cannot be changed by human legislation regardless of the aptitude of, or the reasons behind, the proposed change. Furthermore, with the precept that God has indeed decreed on His subjects rules to follow and abide by, it was thought imperative for the subjects, or those among them who take that challenge, to find God’s intent with the utmost degree of certainty. People can believe in God, but they have to know his law. However, and since the discovery of God’s will from revelation required an extensive hermeneutical process which is ultimately a human effort, it was not possible to ascertain that Islamic law in its entirety was the true will of Allah; creating, thus, a dichotomy of certain/probable or changeable/unchangeable in Sharia.

In order to systemically classify the sources of Sharia according to their epistemological weight and to extract or find the will of God from the sources, Muslim scholars developed a theory of
law called *Usul al-fiqh* (the origins or the sources of fiqh (lit. understanding)). In this system, revelation (Quran and Sunna (traditions of the Prophet)) provided the raw material of law, qiyas (analogical reasoning) and other tools provided the mechanisms of inferring law; and Ijma’ (consensus) generated or sanctioned legal opinion.

The Quran is the ultimate source of law in Islam; its authenticity is perfect and supposedly did not require demonstration in *usul al-fiqh*. Notwithstanding the certain authenticity of the Quranic text, the certainty of its interpretation was limited since there are different interpretations for most of the Quran. Still, the usulis (scholars of *usul al-fiqh*) affirm that there are hermetic verses which are certain in their meaning. Law that is derived from a hermetic Quranic verse is a law derived from a source certain in authenticity and meaning; hence, it will be considered a certain law, one that delivers the true will of Allah and thus, one that cannot be changed.

Sunna, a pre-Islamic concept that denotes tradition, which developed in Islam to denote the traditions of the Prophet Muhammad mostly transmitted and preserved in a corpus of oral reports called hadith, can only yield probable authenticity since it did not enjoy the same rigorous transmission as that of the Quran. Nonetheless, the usulis considered Sunna legally valid because they knew with certainty that the Prophet and his companions accepted the reports of solitary transmission and acted upon them. Hadith had only to be *sahīh* (sound) to be considered trust-worthy and, thus, legally binding. Sunnaic law, therefore, is also rigid notwithstanding its unproven authenticity and other aspects of uncertainty that might affect its legal validity.

Ijma’ is considered by some usulis to be a source of law, that is, it generates new law when there is no text revealed on the matter. Other usulis argue that Ijma’ can only sanction a legal opinion that was based on revelation. In either case, Ijma’ bestows certainty upon law and no law based on Ijma’ can later be changed unless, according to some usulis, it is changed by another Ijma’. Other sources of usul like qiyas (analogical reasoning), ‘urf, and istishab
(presumption of continuity) are not considered certain by the usulis and, therefore, will not be included in the analysis of this research.

The usulis, however, have maintained that the certain part of Sharia remains limited and most of it is a domain for ijtihad (juristic effort). This ensures that Sharia is flexible and adaptable to be timelessly valid. Yet, and considering that the major works on *fiqh* preceded those of *usul al-fiqh*, arguments about the flexibility of Sharia seem to have been written retrospectively. It is evident that very little, if any, have changed in *fiqh* since the formation of the major five schools of *fiqh* in Islam. Admittedly, the argument that ‘the gate of ijtihad was closed’ is a controversial one and the better explanation given to this stagnation in Islamic law since the fourth century is that it is due to the natural tendency for legal stability once the law reaches a certain degree of maturity. However, many aspects of this rigidity cannot be simply explained by the quest for stability since they were problematic during rather than after the formation of the classical schools of *fiqh*. For example, the jurists developed a host of methods to circumvent the law in matters of the penal law called *hudud* ‘limits’ and in the law that governs financial transactions; it was named the *fiqh* of *hiyal* (ruses). Law was usually formed in strict conformity to the text, and in the cases where the law was problematic (due to change of social or historical context for example) the jurists would attempt to find a way around the law instead of changing it. This seems to have become a legal culture in Islam as the law has scarcely departed from classical *fiqh* during fourteen centuries of Islamic history. And while the problematic nature of some legal issues was known since the classical period, the social changes brought about by modernity intensified the test of the timelessness of Sharia to breaking point. Issues of the status of women, slavery, human rights, and many others have shown Sharia to be extremely rigid and unadaptable. The chief explanatory factor for such rigidity is the certainty by which law is portrayed as the true law of God. Muslims could only abide by it or find ways around it,

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3 Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press) 44.
but they could not change it as it was considered sacred, and it was the task of the usulis to demonstrate this certainty to buttress *fiqh*’s resistance to change.

The objective of this research is to critically analyse the concept of certainty in the Islamic jurisprudential discourse: how is it justified, what evidence did the usulis give to demonstrate it, how did it affect the development of law, and how the rigidity of law has affected Muslims responses to modern issues particularly in Islamic finance. It is important to note here that the scope of this study will be mainly on the philosophy of Islamic law, in particular, the epistemological issues of certainty. The role of Islamic finance will be to provide a marginal case study of the effects of certainty on the development of law. The choice of Islamic finance is not imperative, but it is not arbitrary either. Family law or penal law would have been equally possible but the law of Islamic finance, in addition to being substantially affected by the certainty of usul (much of the *fiqh* of *hiyal* is related to contracts and transactions), gives us a highly advantageous viewpoint on how Islam and modernity interact. Finance is one of the main pillars (perhaps the main one) of the modern economic system, and Islam has very specific rules on finance that, to some degree, sets it apart from the global financial system of today. The prohibition of interest (which will be the focus of the work on Islamic finance) is the major distinguishing feature of Sharia from conventional finance. Yet, in practice, Islamic finance has always found ways to circumvent this prohibition sometimes to the point of rendering it ineffective and, thus, its distinction from conventional finance symbolic. It was viable for jurists to use legal stratagems rather than to review the law and possibly change it if necessary. The reason behind this legal phenomenon (this practice is not confined to finance) is mainly the perceived divinity of the law underscored by the certainty of that divinity. Riba is prohibited in the authentic Quran by explicit terms, and the prohibition was further elaborated by Sunna and Ijma’, all of which are certain sources of law. This certainty will impede any attempt to change the law. But the problem is further complicated by the fact that this certainty is mostly epistemological; this means that the use of reason to critique the validity of the law will mostly be irrelevant. The prohibition was not based on reason in the first place, it was based, rather, on text and a presumed consensus. True, there has been some debate on the rationale of prohibiting banks interest and arguments have been exchanged to present the
virtues or vices of interest, but the crunch point in these debates will always come down to the point that since Allah has prohibited it there can be no debate on any benefit (maslaha) to society from it. No argument of reason or logic, no matter how sound, will out-weigh the certainty of the Quranic injunction. Therefore, the only possible way to address the issue of legal rigidity is by looking at the epistemological origins of its underlying certainty.

2

Scholarly context

Not much literature has been written\(^4\) to critically analyse the concept of certainty in \textit{usul al-fiqh} with an eye on its effects on the development of the law, in particular, the law of Islamic finance. Most of the works written within the Islamic literature on certainty tend to be descriptive and avoided, due to the sensitivity of the subject, critical analysis. Whereas, works from without the Islamic tradition either share the sensitivities of their Muslim counterparts, are narrower in their scope, or do not include the dimension of practical legal effects of certainty.

A paper written by Ahmad Habib discusses the adaptability of Sharia with focus on how it can and has helped the development of Islamic finance in modern times. Habib’s work, however, is not focused on certainty nor \textit{usul al-fiqh}; it simply states that Sharia, in its domain of transactions (\textit{mu’amalat}), is based on the general rule of permissibility (\textit{hiba}) and that transactions, based on this principle, are only precluded when they violate the clear injunctions on riba (usury) and \textit{gharar} (uncertainty). Moreover, Habib does not provide a critical analysis to the precepts of Islamic tradition with regards to the adaptability of Sharia, he says "Shari’ah provides the immutable principles that jurists cannot violate. These Sharia principles can be considered similar to the statutory laws and codes in the civil law tradition that judges have to

\(^4\) To the best of my knowledge.
abide by in giving Judgements. The difference between the two, however, is that while statutory laws can be changed by legislation, the Shari’ah principles are considered divine and immutable⁵. In this light, the adaptability that Sharia can provide, according to Habib, is mostly confined to classical nominal contracts (like salam), an adaptation of them to modern needs (like the case of ‘arbun), or similar methods which will not essentially add anything new to what already exists in classical fiqh.

Another work that tries to examine how the concept of certainty affects the work of the jurists in modern times, is a study by Sami Salahat who did not depart from the familiar descriptive arguments about certainty in Sharia which asserts a dichotomy of certain and probable (al-qat’ wa al-zann) in Sharia that gives it the flexibility to adapt. Salahat uses this argument to discuss the issue of American Muslim soldiers who fight Muslims in Afghanistan. Scholars like Qaradawi gave a fatwa that this can be allowed under the fiqh of necessity (darūra) but they should try to avoid involvement in combat as much as they can. To Salahat, this fatwa was wrong since he did not see any possibility to circumvent the certain laws which absolutely prohibit the killing of a fellow Muslim.⁶

A thorough study of the epistemology of usul al-fiqh was made by Aron Zysow for his PhD thesis in 1984.⁷ He analysed the epistemological mechanism of the usul system with focus on the school of Ahnaf and Zahirīyya. This study, however, is methodically different from Zysow’s. Zysow seems to take the principles of usul as givens to his work and confine his analysis to the conspicuous differences between the different schools of usul with regards to its mechanisms. His analysis of the concept of tawatur (concurrent testimony), for example, does not provide a critique of how the usulis demonstrated its certainty, only a brief account of some of the usulis’

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arguments. This is further evidenced by the fact that Zysow followed the usulis approach by starting the discussion of usul with the issue of bayan (manifestation) which is concerned with the interpretation of the Quran. The authenticity of the Quran was never discussed in usul as the usulis did not think it belonged to that field, and Zysow did not depart from this. He argued that Quran authenticity belonged to theology, but even the structure of the major works of theology did not include the demonstration of Quranic authenticity. Zysow’s work is aptly subtitled ‘An Introduction to the typology of Islamic legal theory’ which clarifies the scope of the study. Zysow provides for the students of usul al-fiqh an insightful introduction which avails a thorough analysis of how the different schools of usul contributed to the field; he does not, however, provide a critique to the main arguments and ideas which form the building blocks of usul al-fiqh.

The book of Wael Hallaq ‘A History of Islamic Legal Theories: An Introduction To Sunni Usul al-fiqh’ is, as the title suggests, a work of historical analysis. Admittedly, the word ‘introduction’ is a modest description of a thoroughly comprehensive work on usul, still, it remains faithful to its ‘historical’ objective. He elucidates this point in his arguments about Ijma’ as follows:

“Goldziher’s and Schacht’s results about the spuriousness of hadith literature, though quite illuminating and indispensable for a more accurate understanding of the early developments in Islam, have no bearing whatsoever on whether consensus was authoritative or baseless. Muslims considered (and the majority still do) the Sunna to be a pillar of Islam and as such we must address it in the present inquiry. It must be immediately added that the question of the authoritativeness of consensus must be dealt with as a subject of intellectual history. All propositions designated by the great majority of Muslim scholars as premises to their arguments must be treated as true premises”.8 This illustrates Hallaq’s approach which, like that of Zysow, does not question the main premises of the Islamic tradition, preferring, instead, to orient their analysis towards intellectual history. This, of course, is an undoubtedly legitimate

approach which has its merits; but it does not negate the legitimacy of the approach taken by Goldziher and Schacht (and also followed in this study) in which they take aim at the arguments presented by the usulis to demonstrate the truth, certainty, or authoritiveness of a particular source. Hallaq maintained this method in other works\(^9\) on usul where he confines his analysis to the historical aspects rather than the intellectual.

Other important works on aspects of certainty can be found in the works of Bernard Weiss. Weiss’s main work on usul, ‘The Search for God’s Law’, is a comprehensive analysis of the work of the renowned usuli Saif al-Dīn al-Amidī and his book ʿlhkam. This, however, was mostly a work on usul al-fiqh rather than certainty in spite of the discussions of issues of certainty imperative to any analysis of usul. He offers more analysis of the sources of usul on his insightful book ‘The Spirit of Islamic Law’ but this is an analysis provided in the wider context of Islamic Law in general. An important, albeit limited, contribution to the issues of certainty is found in Weiss’s paper about tawatur.\(^{10}\) In this work, Weiss offers an insightful critical analysis of the concept of tawatur in the Islamic legal philosophy with a special focus on the arguments of Ghazali. This study benefited from Weiss’s work on tawatur (and to a lesser degree that of Hallaq’s) and built upon it to include the added perspective of modern studies on testimony as a source of knowledge, an important addition which was not within the scope of Weiss’s paper.

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There are numerous other works that deal with different aspects of *usul al-fiqh* from an epistemological perspective\(^{11}\) which cannot all be discussed here, and for which the works already mentioned are sufficient representatives for the purposes of this study. Nonetheless, there are a number of aspects in which this study can still make a contribution to the wealth of literature already available. First, it studies certainty as an epistemological generic concept underlying the entire field of *usul al-fiqh*. Available works on *usul* certainty written within the Islamic tradition mostly avoid any critique of certainty even if the work is a critique of *usul*. This is because the use of the arguments for certainty extends beyond *usul al-fiqh* into matters of theology which includes fundamental issues of religion such as the existence of God, the truth of Muhammad’s prophecy and of the Quran, etc. Non-Muslim writers, on the other hand, tend to address certainty by analysing its particular components like *tawatur*, Quranic manuscripts, hadith, and *Ijma*; but there is yet to be a study, to the best of my knowledge, that approaches certainty as the governing theme of Islamic legal philosophy from a critical perspective.

Second, this study tries to ground the philosophical analysis to a modern legal application. Using issues of Islamic finance as cases-in-point will provide the reader with real-life implications of how an abstract philosophical concept like certainty can affect mundane daily matters of Muslim societies. A detailed analysis of the modern aspects of Islamic finance law, however, falls outside the scope of this study. The analysis here is confined to understanding how certainty creates rigidity and stagnation in the law. This provides the missing prelude to a myriad of literature on Islamic finance that deals with how it can fit in the modern finance industry or, perhaps, provide a viable alternative to it. This study, therefore, refrains from substantive discussion of how to accommodate, particularly in a legal framework, Islamic finance in the modern world since there is sufficient work on this regard, and limits its objective to providing a bridge between the roots of most legal difficulties in Islam, that is, certainty, with

the practical aspects where these difficulties become manifest. For this purpose, Islamic finance will be used to provide examples and temporal case studies at each chapter of this study but will not be the main topic of inquiry.

3

Methodology

Epistemological stance:

Knowledge has always been a concept difficult to define and more difficult to demonstrate.\(^\text{12}\) This is related to the fact that attempts to refute scepticism have never been conclusively successful, which, ultimately, makes any claim for absolute certainty or knowledge questionable at best. Nevertheless, arguments for the certainty of some basic principles have always been presented and defended by philosophers; such as basic arithmetic and logical propositions: \(2+2=4\); the whole is greater than the part; etc. This concept was adopted by the usulis who had different classifications of what counts as certain knowledge, but they shared the idea that some certain knowledge was possible in some way (even by divine bestowal as Ghazali argued). This study accepts (with some reservations which will not be reflected in the analysis) that there is certain knowledge in the form of simple arithmetic and logic as well as knowledge from concurrent testimony such as the existence of Baghdad or the fact that Julius Cesar was assassinated. What will be contested here, however, is the arguments made by the usulis to demonstrate that the certainty of usul belongs to this genre of certain knowledge aforementioned. The upshot of the findings regarding certainty is that the usulis failed to

demonstrate that the certainty of the Sharia sources is exactly the same as those of the existence of Makkah or Muhammad.

**Method of research:**

The research conducted for this study is entirely literature-based. And although this is not a comparative study of law, some of the discussion will contain comparisons between Islamic law and other systems of law. Arguments from natural law will be used in Chapter One to draw comparisons with Sharia on how to find ultimate sources of law that are external to humans rather than made by them. There is a brief comparison in Chapter Two on how constitutions, the ultimate sources of secular law, are changeable, unlike sources that are considered divine or external to humans. Moreover, H.L.A Hart’s theory of the Rule of Recognition and Rule of Change will be briefly used in Chapter Four to parallel with the usulis arguments on the validity of hadith. Clearly, this is not to judge their arguments by referring to Hart, but it shows that, although the logical process is quite similar, the usulis, for reasons discussed later, did not follow it through to the expected conclusions. With regards to certainty, the concept of legal certainty which is sought for stability and predictability is discussed in Chapter Two and compared to the concept of epistemic certainty sought by the usulis for Sharia sources. Although the two concepts are different in some respects, they, nonetheless, share the characteristic of fixity which merits the comparison between the two legal theories. However, and since this study is focused on epistemic certainty (with discussion extending to legal certainty as the context requires), the subject of adaptability of the law will not be discussed in a comparative manner.

**Critical approach:**

This is not a study on intellectual history. The objective here is to critically analyse the arguments presented by the usulis to demonstrate the certainty of usul. The approach
preferred by some writers\textsuperscript{13} where the premises advanced by the usulis are readily accepted as true is understandable in a study of intellectual history. This has the merit of avoiding what might be seen as a presumptuous judgement of people’s beliefs or cultural preferences. Nonetheless, and being a matter of choice, this argument does not preclude the option of conducting a thorough critical analysis of subjects of religious and cultural substance. Furthermore, the critique presented in this study will not aim at issues of faith or culture, since the usulis themselves deliberately avoided making their arguments on such basis, and tried to demonstrate their ideas with evidence from history, logic, and reason. Therefore, it is academically legitimate to scrutinize these arguments upon the same bases. George F. Hourani defended his critical approach to consensus arguing that “it needs no apology”; “[i]t seems to me” he adds “the only way to contribute to a further understanding of Islam, by Muslims and non-Muslims alike. A historical account alone will not do this, for however much it may clarify what Muslims in the past have actually thought, and why, it will leave us with no estimate of the Islamic validity of all this thought”.\textsuperscript{14}

Although Hourani did not question, in his study of consensus, the authenticity of Quran, his rationale applies to it nonetheless. And although this study does not accept the arguments made by the usulis to demonstrate the absolute certainty of the Quranic text, it is, nonetheless, a fact that the Quran is highly authentic in its text (few minor changes might have taken place, see the section on \textit{qiraʾāt} in Chapter Three) and the substance of its message is intact. Still, and as Quran is the sole proof purported by the usulis for the possibility to attain absolute certainty, it was important for this research to demonstrate by careful and detailed historical and logical analysis that this claim was unfounded. The vitality of this finding justifies, in my view, the lengthy analysis of the subject in Chapter Three. If the evidence provided for the certainty of the Quran are shown to be insufficient, it becomes much more difficult for the usulis and jurists

\textsuperscript{13} Hallaq and Zysow are examples.

\textsuperscript{14} George F. Hourani.
to argue for the certainty or unchangeability of law. The target here is the concept of certainty and its function in the legal system rather than it being the authenticity of the Quran.

4

Thesis Structure

Chapter One will provide an introduction to the concept of Sharia. Sharia, it will be argued, has a dual dimension: a relation to the mundane and another to the divine. Discussion of the former will be on how Sharia is defined in relation to jurisprudence, fiqh, and law (qanun). It traces the development of the concept of Sharia along the lines of social norms and state law which, when we add the religious dimension, makes of Sharia in the minds of Muslims a grand concept in religion that has no clear definition or boundaries. The second part introduces the epistemological problem manifested in the quest of Muslim jurists to divinize Sharia by divinizing its sources or arguing for a divinity from nature.

Chapter Two introduces the concept of certainty as it is presented in the major works of usul al-fiqh. Here the analysis targets the justification of the quest for certainty by the usulis and briefly compares that with the quest for legal certainty in Western legal theory. The chapter also discusses how the usulis attempted to define certainty (yaqīn or qat’) in a manner that would substantiate the divinity of the products of usul al-fiqh.

Chapter Three is dedicated to studying the certainty in the Quran. The usulis pronounce a certain Quranic rule (hukm) if the text is authentic and the meaning is hermetic. Authenticity is based on the historical process of the collection of the written manuscripts of Quran which insured the perfect transmission of a written version of Quran. In addition to this, an oral
version was also transmitted through generations of Muslim readers and reciters via a method of concurrent testimony called *tawatur*. Both methods of transmission will be critically analysed in addition to the arguments of achieving certain understanding of the Quran, which includes issues of language, semantics and context. This completes the process of finding God’s will; legislation, thence, becomes possible where the law produced by this methodology will be a certainly divine, hence, unchangeable law. The chapter will conclude by studying how this Quranic law has affected the law of finance particularly, the issue of riba.

Chapter Four looks at how Sunna and *Ijmaʿ* are fitted in the certainty framework of usul. The usulis acknowledge the probable nature of hadith authenticity, but they argue that its validity is nonetheless certain. They argue that we know with certainty that the Prophet and his companions accepted solitary reports, which justifies its place as a source of law. They failed to show, however, why this acceptance by the Prophet and companions justifies a universal validity for solitary reports with the only qualification being the trustworthiness of the reporter. *Ijmaʿ* is considered a source of certainty in usul in spite of the fact that the usulis could not agree on any aspect of it. It remains entirely unidentifiable in terms of definition, scope, or validity, yet the overwhelming majority accept that *Ijmaʿ* – as a concept – yields certainty. Moreover, the arguments for *Ijmaʿ* suffer from issues of circularity which will be illustrated. Similarly, the chapter will conclude with a discussion of how the Sunna and *Ijmaʿ* have affected the *fiqh* of finance.

Chapter Five will survey some of the attempts by modern Muslim thinkers to reform or renew *usul al-fiqh*. The works of Qaradawi, Turabi, Ibn Ashur, Shaḥrūr, and Fazlur Rahman will be critically analysed to examine whether their contributions can provide a significant change in usul or Sharia in general. The discussion of their works will include an analysis of their stances regarding Islamic finance in light of their theoretical propositions. A discussion on the false dichotomy of changeable and unchangeable in Sharia will look at how even modern thinkers maintain this dichotomized conception of Sharia while showing little evidence or justification for it.
Finally, a conclusion will summarize the findings of this thesis and presents recommendations for further research and intellectual or social endeavours which can contribute to the improvement of Islamic legal thought.
Chapter One

The Concept of Sharia

In order to understand how Sharia affects the legal order in the Muslim world or any aspect of the Muslims' lives for that matter, it seems only apt to start with the simple question: what is Sharia? It is perhaps odd that the concept of Sharia is not as clear as it may seem first hand, considering the centrality of Sharia in Islam in general. It will be a misleading simplification to define Sharia as Islamic law, as it will be equally misleading to assign any explicit definition to it for the simple fact that there is none. The semantic obscurity of the term reflects, perhaps, one of the main characteristics of Sharia itself, whichever way it is conceived (Islamic law, Islamic way of life or Islam proper), that is, its richness with diversity. There is hardly an issue in Sharia where one can find total agreement in spite of its portrayal as a system based on certitude.

Important to remember here, is the fact that multiplicity of opinions in Sharia is not a purposive feature where jurists try intentionally to differ; it is, rather, a natural outcome of the nature of human ideas and opinions where variety is highly expected. And while it is true in many respects, that plurality of opinions in Sharia provided a much-needed flexibility and margins for mutation, it is difficult to object to the fact that having constant variety and multiplicity of opinions where the mechanisms of preference are, themselves, a matter of disagreement; indeterminacy and obscurity are frequently an expected outcome. And indeterminacy creates a disturbing tension with the notion of certainty in Sharia, something evident in the concept of Sharia itself.

It is not a mere academic definition that is at stake here. It is one thing to say that there is no one definition of 'law', for most people would have a reasonable idea of what is meant by 'law'; it is quite another when the meaning of a word can range between 'way of life', 'moral code', 'law proper', 'state constitution', 'religion proper' and so on. The implications of the potential
indeterminacy in the latter case are far greater than they could be in the former. Take, for example,\textsuperscript{15} to illustrate the conceptual obscurity of Sharia, the case of a man who divorces his wife by saying the word 'taliq',\textsuperscript{16} presumably, by mistake. The judge (qadi) would rule that the divorce is binding because he has to rule according to the facts, whereas a jurist (mufti) would rule that the divorce is not binding because he takes into account the intention of the husband who claims he said the word by mistake. Both rulings are based on Sharia; one, however, is based on Sharia as a law that is concerned with regulating the community; the other is based on Sharia as a set of religious rulings that regulate the individual's adherence to Islam. It is not clear what the fate of this family would be and on what bases. But this example shows that the implications of the conceptual obscurity of Sharia are not contained in the philosophical abstract, but they penetrate into the everyday lives of people. It naturally follows that the implications of considering Sharia to be law or not law at all, are far greater.

Yet, while understanding Sharia's connection to the people, which can be manifested as law or as a political constitution among other things, is important to understanding the concept of Sharia, it is equally important to understand the connection of Sharia with God; in other words, understand the divinity of Sharia. The ultimate distinguishing feature of Sharia is the unshakable belief of its followers in its divinity. However, and as it is always the case with Sharia, the nature, degree and sources of this divinity are matters of much disagreement. Yet, the view is perhaps unanimous that Sharia provides a bridge between the Divine and the mundane; it is what Muslims turn to in order to learn what Allah wants from them, but the unanimity is lost once Muslims get to the details of the nature of this learning and how it should take place. The implications of the obscurity of Sharia's divine nature are not less than those of Sharia's relation to the mundane, if not greater. This obscurity creates a constant conflict

\textsuperscript{15} This example is given by Qaradawi. He argues that Sharia rulings are two types, judicial and religious, which are not necessarily consistent with each other; they can be legally binding but not religiously binding \textit{`nafith qadd'an ghair nafith diyanatan'}. This, according to Qaradawi, is attributed to the dual nature of Sharia, which is, both, religious and civil, this-worldly and other-worldly; a duality celebrated by Qaradawi. See: Yûsuf Qaradânî, \textit{Madkhal Li Dirasat Al-Shari'â Al-Islamiyyah} (Mu'assasat al-Risalah 1993) 93.

\textsuperscript{16} A word that imposes severance of marriage. Marriage is irrevocably severed if the word is repeated three times but according to conditions.
between the substantive doctrine of Sharia and the ever-changing realities of life, particularly evident in, but by no means limited to, the case of riba (usury).\textsuperscript{17}

This chapter is concerned with the problematization of the concept of Sharia, a subject not sufficiently studied in the literature. Much of the pre-modern writings were on jurisprudence (\textit{fiqh}) and had little concern with the complexities of the concept of Sharia. In fact, the word ‘Sharia’ was scarcely used in the titles of jurisprudential books in the time of the formation of the main \textit{fiqh} schools of Islam. It can be argued that the introduction of the modern state was a major factor in obscuring the concept of Sharia. It was Wael Hallaq who argued that the "most pervasive problem in the legal history of the modern Muslim world has ... been the introduction of the nation-state and its encounter with the Sharia".\textsuperscript{18} The nation-state brought with it to the Muslim world concepts that were ostensibly alien to it, such as state constitution and state positive law among other state institutions and culture. To de-alienate these institutions, Muslims sought to ‘Islamize’ them by making them Sharia-compliant. This expanded the influence of what used to be a socio-religious set of rules, to the sphere of politics, adding to the confusion about the concept. Thus, this chapter will show the problem of the concept of Sharia by looking, on the one hand, at the connection of Sharia with the mundane; that is, its different definitions and its role as law. On the other hand, the chapter will look at the perceived connection of Sharia to God, that is, where and how Sharia gets its divine authority. These two dimensions of Sharia manifest in the context of certainty as a probable, changeable, mundane part of Sharia (\textit{fiqh}); and a certain, unchangeable, divine part (usul). Examining this multi-dimensional aspect of Sharia will help shed light on its complexities and how it has affected, and may affect, the development of Islamic law in general, and the principles of Islamic finance in particular.

\textsuperscript{17} Coulson, \textit{Conflicts and Tensions in Islamic Jurisprudence} 69. More details will follow below. \textsuperscript{18} Hallaq, \textit{Sharīʻa : Theory, Practice, Transformations} 359.
Sharia’s relation to the mundane

A problem of definition:

The objective here is not to assign a precise definition to Sharia; it is, rather, to show the wide range and variety of Sharia definitions and how this obscured the concept of Sharia among Muslims. It is worth pointing out that there seems to be a tradition for providing what is called the logical definition (al-ḥadd al-mantiqī) among the Muslim jurists and scholars when addressing an important concept. The renowned philosopher and theologian Ghazali (d. 1111) provided a comprehensive methodology (rooted in a Greek tradition) of constructing a logical definition for any concept. Ghazali did this in his introduction to his book in jurisprudence al-Mustasfa. His objective, it seems, was to provide a concrete logical foundation for the ‘science’ of usul al-fiqh, and he started by defining usul al-fiqh. He did not, however, define or even use the word Sharia. A ‘definition’ according to the aforementioned tradition, called ‘al-ta’rif al-jāmi’ al-máni’, is a “statement that includes those attributes belonging to a concept and that simultaneously excludes those that do not belong to that concept”. This method is still used today to define concepts in Sharia. But the attempts to define Sharia don’t seem to give much weight to providing such a concise definition of the concept itself despite its centrality to Islam. The definitions found for Sharia use a more traditional and less ‘scientific’ method where a literal meaning for a word is given from some accepted lexicon, then an idiomatic meaning is given as the proper definition of the ‘concept’ rather than just the ‘word’. Most of the definitions using this method are more or less discursive descriptions of the concept rather than a methodical attempt at a definition.

20 Hallaq, Shari‘a: Theory, Practice, Transformations 81.
21 A familiar phrasing for defining a concept based on this tradition is similar to: ‘by saying so and so, we exclude so and so’ (wa yakhruju bi qawli...), see for example: Muḥammad Sāliḥ ‘Uthaymīn, al-Usūl min ʿilm al-usūl (Mu‘assasat al-Risālah 2001) 8.
Furthermore, and when trying to understand Islamic terminology, there is, seemingly, a circular relationship between Arabic language and the Quran. For one looks for the meaning of a Quranic word in the lexicon; but the lexicons, when explaining a word – including Quranic words – use the Quran to give context to the word. This method, of course, is not without its problems, for there is a tacit presumption about the Quranic context which is not always justified. Take for example the meaning given by the famous Arabic lexicographer Ibn Manẓūr to the word ‘Sharia’. The root of the word is ‘shara’ which means ‘reaching for the water’ and the derivative word ‘Sharia’ means ‘pathway to the water’\(^\text{22}\). He then explains Sharia (and the other derivative shir\( \text{a}\)) as an Islamic idiom quoting the Quran: “And now have We set thee (O Muhammad) on a clear road of (Our) commandment; so follow it, and follow not the whims of those who know not”\(^\text{23}\), and “For each We have appointed a divine law and a traced-out way”\(^\text{24}\). He explains ‘Sharia, shir\( \text{a}\)’ to be “what Allah has commanded like fasting, prayer, giving alms, etc.”, and shir\( \text{a}\) as the religion, the road, the path, and so on.\(^\text{25}\)

Going from ‘pathway to the water’ to ‘Allah’s commands’ is not a straightforward step. Ibn Manẓūr clearly had to make a semantic leap here being influenced by a cultural understanding of what ‘Sharia’ is, and then feeding this back into his lexicon to give a contextual meaning of Sharia using the Quran. It would seem to the reader that the authority of this meaning is coming from the Quran, giving it substance and power, while the fact is, the meaning was imposed on the Quran from a culturally constructed idiom.\(^\text{26}\) The fact that the Quran and Islam have greatly influenced the Arabic culture and language is evident, and the fact that the Arabic lexicon contains many religiously charged terms is acknowledged by the usulis. The problem is, if the Quran is made to be the source of meaning to words, these Quranic meanings will then bestow upon the carrier-terms a sense of sacredness which will be reflected in law. This is

\(^{22}\) Muhammad ibn Mukarram Ibn Manẓūr, *Lisān al-‘arab* (Dār Sādir) 421.

\(^{23}\) Quran 45:18, my italics refer to translation of Sharia

\(^{24}\) Quran 5:48, my italics refer to translation of shir\( \text{a}\)

\(^{25}\) ibid.

\(^{26}\) Notice that the Quranic English translation used the words ‘divine law’ in place of ‘shir\( \text{a}\)’ which should literary mean ‘the way’ or ‘the road’, instead, the translation opted for the idiomatic meaning, influenced, like Ibn Manẓūr, or possibly because of him, by the social use of the word, in this case, law. For a useful essay about the cultural effects on language and how this reflected on the words ‘law’ and ‘Sharia’, see: Hallaq, *Sharīʿa : Theory, Practice, Transformations* 1–13.
encountered in the case of riba. The literal meaning of riba is ‘increase’ or ‘extra’, according to Ibn Manẓūr, but ‘increase’ will not suffice in interpreting the word ‘riba’ in Quran, for this, Ibn Manẓūr uses the juristic definition of riba ‘every loan that entails gain’ citing a known jurist. For the lay inquirer, Ibn Manẓūr will seem to have got the meaning of riba from the Quran overlooking, in the process, the underlying juristic substance that shaped the meaning of riba. This reverence for religious terminology persists in the modern day. The modern lexicon, al-Mu’jam al-Wasīt, gives the meaning of riba as ‘increase’ but adds: “in economics it is a loan which is paid back in excess upon certain conditions”. It is possible to consider, in this light, the mutation of the word ‘riba’ after the invention of banks where it was assigned to banks’ interest. Such mutations of religious terms, however, are rigid, when compared to ordinary words in language, for their Quranic weight. Terms such as ‘ṣalah’, ‘Sharia’, and ‘riba’ can hardly be used in their literal meanings without causing confusion. But people who assign a certain meaning to riba give it a religious authority because riba is mentioned in the Quran.

One of the earliest definitions or explanations of Sharia in an Islamic context can be found in the exegesis of al-Tabari (d. 301 AH). Al-Tabari gives a number of meanings to the word ‘Sharia’ in the aforementioned verse: clear way, method, approach, Allah’s ordinances and prohibitions, religion, etc. These meanings are more or less echoed by most pre-modern scholars. It is clear that the indeterminacy about what Sharia actually means was present from early days, for it could easily be synonymous to religion itself, hence encompassing any other possible religious meaning. But the significance of this indeterminacy was not acute since the term ‘Sharia’ was not as central or in excessive use as it became in the modern time. Evidence for this, is the notable fact that the term ‘Sharia’ appeared only once in the whole corpus of hadith (traditions of the Prophet Mohammad).

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28 More on this later.
31 See: N and Calder and MB Hooker, ‘Shari‘a’. 
according to the Encyclopaedia of Islam, makes the Quran and Sunna unlikely sources for them.\(^{32}\)

By comparing the pre-modern era with the modern, the influence of modernity, namely the state, on the concept of Sharia is evident. Many of the modern definitions, or simply, understandings, for some of them are not claimed to be proper definitions, are vibrant with political and cultural charge. Sharia has become, according to Hallaq, “a marker of modern identity, engulfed by modern notions of culture and politics”.\(^{33}\) As an example of this, the Iranian Shi‘i scholar Muhammad Husain al-Tabatiba’i explains Sharia in the aforementioned verse in his exegesis, *al-Mīzan*, as ‘*al-Sharia al-islamiyyah*’ (Islamic Sharia) which Allah put his messenger Mohammad on as a special way of the divine religion, one that is different from what Allah gave the Jews.\(^{34}\) Notice here the use of the suffix ‘islamiyya’ which is a modern addition (rarely used in pre-modern literature) that seems to emphasize Islamic identity. Such emphasis was less needed when Islamic language and culture were more dominant. Apart from this observation, most exegeses followed, more or less, the same tradition of the pre-modern ones; that is, identifying Sharia as the ‘Islamic way’\(^{35}\). A definition that makes Sharia, more or less, synonymous to religion.\(^{36}\)

This synonymy between religion and Sharia may seem innocuous, but the political charge becomes evident and influential when Sharia is associated with the call for ‘implementation’. If Sharia is the same as religion, the call to implement religion – in this case Islam – among Muslims is an obscure demand. It becomes much clearer if Sharia implementation is introduced to simply mean the implementation of Islamic *fiqh* as law, or some specific rules as state constitution; but this notion of Sharia as a holistic concept seems obscure when considering how it is used in the modern time. And while it is understandable and expected that the cultural

\(^{32}\) ibid.


and linguistic heritage will have influenced the formation of the concept of Sharia, it is also quite possible that the politico-religious discourse has shaped the concept to some degree. Take for example the word ‘haram’ (prohibited) in the Quranic vocabulary. Because the connotation of the word is quite lucid, one can hardly find any author who attempts to argue for the permissibility of anything that is said to be haram in the Quran, like eating pork or taking riba. However, when the Quran used the word ‘ijtanibuh’ with regards to alcohol, some writers, like Mohammad Shaḥrūr, argued that alcohol was not categorically prohibited in the Quran because the word ‘ijtanibuh’ literally means ‘avoid’ which carries less prohibitive weight. It is not surprising then that Shaḥrūr describes ‘al-Sharia al-Islamiyya’ expression as “essentially wrong and illusory”.

There seem to be common approaches to defining Sharia or explaining what it means among modern writers. One approach is defining/explaining by negation; that is, identifying what Sharia does NOT mean. This is usually coupled with a distinction approach where Sharia is distinguished from other concepts like fiqh or tashrīʿ (legislation). For example, Muhammad Saʿīd al-ʿashmawi, an Egyptian lawyer and Judge who is known for his fierce opposition to political Islam, rejects that Sharia in its linguistic or Quranic meaning refers to legislation or to law. He objects to the use of the word ‘Sharia’ to mean all the rulings in Islam whether they appeared in the Quran, Sunna, Ijmaʿ (consensus), or in the exegeses; a process, he argues, similar to what happened in Judaism. Similarly, Hassan Turabi, a Sudanese political Islamist and thinker who wrote on the subject of Islamic jurisprudence, argues that Sharia is not the same as tashrīʿ (legislation), for tashrīʿ is the human activation of divine Sharia which does not provide detailed rulings. Similar arguments are given by Kamali who distinguishes, hesitantly, between Sharia and fiqh. He argues “Fiqh is legal science and can be used synonymously with Sharia, but they are different in that Sharia is closely identified with divine revelation, fiqh is

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38 Ibid 472.
40 Ibid 31–34.
developed by the jurists. The path of Sharia is laid down by God and His messenger; the edifice of *fiqh* is erected by human endeavour". The same line of argument was taken by Burhan Ghulioun, a Syrian and French academic; who stressed that it is necessary to distinguish between Sharia as a religion attributed to Allah, and Sharia as a juristic product attributed to the jurist. The common idea in the examples above is the assertion to distinguish between the divine and the mundane. The naming might differ; where some would consider ‘Sharia’ to be an all-encompassing rubric, others may prefer to distinguish between ‘Sharia’ and ‘*fiqh*’ or ‘*tashriḥ*’.

But the objective is clear; they want to contain what is considered divine, hence immune from human interference, in Sharia as much as possible in the abstract and segregate it from the mundane Sharia which readily deals with life’s ever-changing details without trespassing on God’s domain. But the clear and persistent hurdle to this objective is the question of where to draw the line and who can decide on this subtle, yet paramount, distinction?

This problem is manifested in the arguments of Qaradawi, who uses the same approach of distinguishing between Sharia and *fiqh*, but to different conclusions. Qaradawi vehemently rejects the notion of the dispensability of *fiqh* arguing that it would lead to the rejection of Sharia as a whole. He rejects the distinction between Sharia as divine revelation and *fiqh* as positive law because *fiqh* is based on divine revelation, and the accepted way to renovate *fiqh* (*tajdeed*) is by juristic effort (*ijtihad*) in the light of the hermetic texts (*nusūs muhkama*). The question of what counts as a hermetic text or how *ijtihad* can use it will be faced once again by a multiplicity of different opinions taking the discussion back to where it started; rendering, thus, the negation/distinction approach insufficient to give concrete meaning or definition to ‘Sharia’.

Another approach to define/explain Sharia is explaining its function. According to Ghulioun, Sharia is the constitution that defines the main values and principles for the life of the community. Kamali expands on Ghulioun’s idea and says that Sharia “regulates legal rights and obligations, but also non-legal matters and provides moral guidance for human conduct in

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45 Ghalyūn 366.
general... Sharia provides the individual with a code of reference consisting of moral, legal and cultural values that can be reassuring and purposeful.” Turabi, on the other hand, was focusing on *tashrīṭ* rather than Sharia. For him, Sharia was a high providence which function was to give guidance (*hawadi*) for people; any legislative process should fall under the rubric of *tashrīṭ*.

Qaradawi once again was keen on maintaining the strong bond between Sharia and *fiqh* arguing that Sharia’s function, unlike the law, was not only to regulate matters of society but to create good individuals, good society and good state. Sharia according to him came to regulate ethics, unlike the Roman law that came to regulate customs. Qaradawi was evidently unapologetic about his idea of marrying Sharia and *fiqh* to give Sharia, henceforth, complete authority over Muslims lives. Ghulioun and Turabi seem to be conscious of the subtle conflict between the divinity of Sharia and the unavoidable human involvement in deducing its rulings, so they tried in their descriptions of Sharia’s function to limit its sphere and raise it. But this conflict didn’t seem to trouble Qaradawi, and to some extent Kamali, where they acknowledge the need for Muslims to be engaged in renovating Sharia to respond to the changing issues; yet they seem to maintain divine authority for Sharia at the same time with no clear demarcation between the two domains.

Finally, some writers tried to define/explain Sharia by describing it in some generic terms. Some descriptions were somewhat rhetoric in nature, like the description by Ghulioun who explained Sharia to be “obedience to Allah”, “brotherly solidarity and cooperation” and “the method from which many and different rulings can be taken”.

Similarly, Ashmawi says that Sharia is “interaction with life...principles for realistic life”, “the method of faith and righteousness”, and that the Sharia of Mohammad was ‘mercy’ as oppose to Jesus’s ‘love’ and Muses’ ‘truth’.

An ontological description was given by Hallaq who argued that “the Sharia defined, in good part (and together with Sufism), paradigmatic cultural knowledge. Enmeshed with local

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48 Ghalīyūn 366.
49 *Ashmāwī* 70.
50 ibid 84.
51 ibid 179.
customs, moral values and social practices, it was a way of life”. The only attempt, among the writers discussed above, to provide a definition in the juristic method ‘al-ḥadd’ for Sharia was Qaradawi who defined it as “ordinances decreed from Allah that are established by evidence from Quran and Sunna and what stems from them of Ijma’ and Qiyas”. What is meant by ‘al-ḥadd’ is a definition that meets the criteria set by Ghazali mentioned above; that is, to describe the concept by all its unique essentials so that it includes those attributes belonging to it and simultaneously excludes those that do not.

Clearly, any attempt to define Sharia in this concise manner will be faced with the problem of drawing clear lines between the divine and the mundane in Sharia, while maintaining a bit of both. This distinction should allow for Sharia to be timeless and its efficiency not bound by place or people; a task that is, in spite of Qaradawi’s efforts, logically problematic for epistemological reasons. Coulson’s definition of Sharia may be in line with this argument; he says that Sharia “is a comprehensive scheme of human behaviour which derives from the one ultimate authority of the will of Allah. So, the dividing line between law and morality is by no means clear”. Coulson’s notion of morality and law can be equated, with little reservation, with our notion of divine and mundane respectively. If Sharia is to remain active in society, it must be so through human agency; this would immediately entail a question of authority: what gives a certain person authority to decide what Sharia says? This applies whether the matter in question was a minor one of, for example, how to pray, or a methodological matter concerning the structure of Sharia and how it should work. The problem of presumption is soluble only by denying any claim to divinity for one’s opinion which would ultimately deprive Sharia of its divinity as Qaradawi feared. In this sense, the only way to attain what the majority of Muslims now have come to expect from Sharia is to maintain its conceptual obscurity. This is not suggesting that this obscurity is necessarily intentional; however, it shows that precision and firm definiteness will cost Sharia either its divinity or its efficacy.

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52 Hallaq, Shari’a : Theory, Practice, Transformations 544.
53 Qaradawi, Madkhal Li Dirasat Al-Shari’a Al-Islamiyyah 21.
54 See n.6 above
55 The very decision of what counts as divine is, ultimately, human. More on this below.
56 Coulson, Conflicts and Tensions in Islamic Jurisprudence 79.
57 More discussion on the divinity of Sharia in the second part of this chapter
Sharia as Islamic law:

It was mentioned before, that equating Sharia and Islamic law was a misleading simplification. Sharia is usually seen to be a wider concept than law in the strict sense. Law according to the Oxford dictionary is “the whole system of rules that everyone in a country or society must obey”; but Sharia is, almost unanimously, higher than just law because it involves, besides regulating one’s relation to society (in the view of many), regulating one’s relation to God. In the words of Schacht “Islamic law [Schacht uses it here synonymous to Sharia] is part of a system of Islamic duties blended with non-legal elements”,58 ‘system of Islamic duties’ is what is now commonly known as Sharia. In order to understand how Sharia as a concept has mutated in the imagination of Muslims into Islamic law, it is useful to look at three different but related factors.

The first factor is terminology. It has been mentioned before that Sharia in its literal meaning means ‘path to water’ or just ‘the path’; the terms that were in more use in relation to rulings and injunctions which were deduced from revealed sources, were fiqh or ahkam. Therefore, in order for Sharia to become Islamic law, it had to go through fiqh first. But fiqh had two elements to it; it regulated one’s relationship to society (Mu’amalat) and to God (ibadat). Thus, the term ‘fiqh’ was reduced to the domain of the latter, while the term ‘Sharia’ took up the former. Therefore, the notion of Sharia became assigned to law (in the modern sense); while the notion of fiqh became assigned to issues of worship.59 If we use logical syllogism, this relation can be shown as follows:

a. Sharia (at least partly) = fiqh----------premise 1
b. Fiqh (at least partly) = law -----------premise 2
c. Sharia = law -------------------------conclusion

The problem with the above syllogism lies, naturally, with its premises. Ashmawi contends that fiqh which is “mistakenly called Sharia is, in fact, people’s legislation for people”.60 He argues that there is a big difference between Sharia, which one can hypothetically accept it to be the

59 This, of course, is a description of how the terms are used in general, not a strict re-assignment of meanings.
decrees in the revealed sources, and *fiqh* which is the collection of opinions produced by Muslim jurists, scholars and lawyers.\textsuperscript{61} But the problem that Ashmawi doesn’t address thoroughly here, is that people who call for the implementation of Sharia as law, like Qaradawi, and while initially accepting the distinction between Sharia and *fiqh* as presented by Ashmawi, fuse them together on the grounds that jurists who produce *fiqh* opinions can only do so by reference to the revealed sources, hence, tying the mundane with the divine. Ashmawi rejected this approach without clearly explaining how to make the distinction between Sharia and *fiqh*, particularly in the context of law.

Ashmawi’s arguments also contain an objection to the second premise, the equation between *fiqh* and law. He sees no problem of *fiqh*, in its *Mu’amalat* part, being a source of law; the problem for him is that a static and historic *fiqh* cannot produce law for all times.\textsuperscript{62} This view is shared by all the authors mentioned above and it is the subject of an ongoing debate on the reformation of *usul al-fiqh*. But with regards to the two terms being synonymous, they are not; for *fiqh created* what became known as Islamic law;\textsuperscript{63} and while there is no serious objection to the principle of associating *fiqh* and law in the form of whole and part, the objection will arise with regards to the details: how can *fiqh* constantly produce law for the betterment of society?

Ghulioun opted to hit directly at the conclusion, i.e. the equation of Sharia and law. He describes the mutation of the concept of Sharia as going from simply meaning obedience and submission to Allah, to mean an Islamic communion (*millah*), which happened as a result of the increasing aspirations of Muslims to form their independent political self. And as a result of the emergence of the nation-state, the concept of Sharia was ‘reduced’ to simply mean ‘the law’ that is deduced from Islamic values and decrees.\textsuperscript{64} But the mutation of Sharia is not a ‘reduction’ as Ghulioun puts it; it is, rather, a change of form and shape, not a change in essence (an essence that is still not clear but is ever-present). In other words, Sharia never ceased to be regarded as religion, *fiqh*, or Islamic law; but the perception of Sharia seems to

\begin{itemize}
  \item \textsuperscript{61} ibid 323.
  \item \textsuperscript{62} ibid 305–333.
  \item \textsuperscript{63} J Goldziher, J and Schacht and J Schacht, ‘Fiqh’ 886–891.
  \item \textsuperscript{64} Ghalyūn 359–360.
\end{itemize}
focus on a particular aspect of it depending on the circumstances; and under the pressures of
the modern state, the focus on law is prevalent. However, and as it was discussed above,
authors who attempt to define or explain what Sharia is, don’t tend to confine it to law, but
usually object to this confinement.

The second factor is history. In order for Sharia to go from being conceived as ‘the path’ or
‘religion’ to being conceived as ‘the law’, it had to go through a long historical process. To
understand this process, we need to look at the relationship between Sharia and kanun.
‘Kanun’ is the modern Arabic equivalent to ‘law’.\(^6\) According to the Encyclopaedia of Islam, the
word kanun “was adopted into Arabic presumably with the continuation, after the Muslim
conquest of Egypt and Syria, of the pre-Islamic tax system”.\(^6\) It also, then, acquired the sense of
state law. Matters that needed to be regulated by the state/ruler like tax, administrative law,
penal law, etc. were considered to be within the framework of Sharia until Imam Shafi’i wrote
his book on the principles of jurisprudence ‘al-Risala’ which narrowed the framework of Sharia
and the new administrative regulations were considered outside of the Sharia framework; they
became the province of a new ‘state law’. This created an independent body of law that
steadily developed under the authority of the ruler; a law that was increasingly taking charge of
matters of public life that Sharia was thought to be silent on. This development was legitimimized
early on by scholars of Sharia (fuqahā; sing. faqih) such as al-Mawardi (d. 463/1072) in his book
‘al-Ahkām al-Sultaniyya’ (The Ordinances of Government).\(^6\) During the time of the Ottoman
Empire, the struggle between Sharia and state law (now officially called kanun) exacerbated
and the prevalence of one over the other depended sometimes on the Sultan.\(^6\) The
disputations which arose in Muslim societies entering upon the path of modernization
concentrated upon the question of the relationship between Sharia and kanun. European laws
started to find their way into the Ottoman legal system in the form of kawanin (sing. kanun)

\(^6\) Kanun is not originally Arabic, it is Greek.
\(^6\) (Y. Linant de Bellefonds) and others, ‘KANUN’, Encyclopaedia of Islam, Second Edition (Brill) 556
\(^6\) ibid 559.
\(^6\) For example, Sultan Selim I rejected intervention of religious authorities in state affairs, while Sultan Sulayman I
favoured Sharia. ibid 560.
exacerbating, thus, the tension between Sharia and kanun further. The effects of European laws was made all the more evident during colonial times where whole or part of English and French law where promulgated throughout the Muslim world. According to Hallaq, “between the early years of the nineteenth century and the second decade of the twentieth, the Sharia – which had dominated the legal scene for over a millennium in the central lands of Islam, and for centuries in other regions – was largely reduced in scope of application to the area of personal status, including child custody, inheritance, gifts and, to some extent, waqf”. But the marsh of the kanun into the domains of Sharia did not stop; for Turkey abandoned Sharia completely in favour of the Swiss civil code in 1923; Tunisia introduced Law of Personal Status which prohibited polygamy in 1957, notwithstanding its permission in Sharia; and the Muslim Family Laws Ordinance was introduced in Pakistan in 1961 which changed Sharia inheritance system, to mention but a few examples.

It was clear by then, perhaps earlier, that kanun or ‘law’ was a comprehensive regulating system that does not share its power with other systems except with tension and conflict; so, in order for Sharia to retain its place in Muslim society, it had to merge itself with law so that both will become ‘Islamic law’. This, naturally, entailed some compromise. Sharia had to surrender its social structure, that is, its bottom-up, society-driven method, and use the top-down, state-imposed method; what Hallaq calls the “contaminating influence of the state”.

The third factor is politics. When the Muslim societies gained their independence, they were on a quest to affirm their Islamic identity that was, to them, distorted by colonialism. The biggest change brought by the colonial powers to the Muslim world was the nation-state. And while some sought to abolish the nation-state all together and return to the Caliphate as an emblem of their Islamic identity; the more realistic quest was to Islamize the nation-state. The main feature of the modern state which Islam could significantly change was the law; where a long

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69 Ibid.
70 For a detailed analysis of this phenomenon see: Hallaq, Shari’a : Theory, Practice, Transformations 396–442.
71 Ibid 443.
72 Coulson, Conflicts and Tensions in Islamic Jurisprudence 101.
73 Ibid 102.
74 Ibid 104.
75 Hallaq, Shari’a : Theory, Practice, Transformations 549.
history of conflict between Sharia and law had already taken place and law had prevailed particularly under the colonialists and post-colonial secular governments. In other words, Islamization of the state could be achieved by gaining back for Sharia what is thought to have been lost to law.

The term ‘Sharia’ was, perhaps still is, the best term to use, owing to its all-encompassing connotation, to indicate the Islamicness of anything. It is a safe choice to give an Islamic connotation to an alien concept because even if this concept was not well comprehended, the danger of misrepresenting it in Islam was small; for when we say we have ‘Sharia’ instead of, say law or constitution, it means we have Islam; a sufficient statement to fulfil the quest for Islamic identity regardless of the matter in question.

Take for example the argument Qaradawi makes for the case of ‘Dawlat al-Islam’ (the state of Islam). He argues that the Islamic state is a civil state like all other civil states, only distinguished by its high reference being Islamic Sharia. He stresses his point by arguing that an Islamic state is not a theocratic state, it is governed by a civilian who is freely chosen by the people. Ashmawi, on the other hand, raises the question of what is meant by an ‘Islamic government’ (in this context it is the same as the state). He argues that this is generally taken to mean a government that implements Sharia, which for him means the implementation of a political and legal system that developed in history; in short, the legalization of fiqh. Ghalyūn expands slightly on this, but to the same conclusion, arguing that an ‘Islamic state’ could be understood in terms of its populous structure, the orientation and political program of its government, or, and this is the case in point, its paradigm for power. In this latter case, the main characteristic of an Islamic state is the adoption of Sharia, in its classical fiqh sense, as the sole source of civil legislation.

Thus, the ‘implementation of Sharia’ became an integral part of the political debate in the Muslim world. It became the principal agenda of the Islamists and the one thing that sets them apart from all others. But the implementation of Sharia as a political program can only be

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76 Yūsuf Qaradāwī, al-Dīn wa-al-siyāsah : taʾṣīl wa-radd shubuhāt (Dār al-Shurūq 2007). 158
77 ibid 158–170.
78 ‘Ashmāwī 155–156.
79 Ghalyūn 352–353.
significantly manifested in the form of law, and in particular, the implementation of *hudud* (limits) and the prohibition of riba; both of which are among the most controversial issues in Sharia in modern time. Their controversy is perhaps due to their potential impact on the modern Muslim society, but it nourished, nevertheless, the debate about Sharia: what it is? What is its function? And how should it work?

2

Sharia’s relation to the Divine

Divinity from the sources, an epistemological problem:

By virtue of their faith, Muslims are required to believe in *ghayb* (the unseen). The Quran says, “This is the Book, there is no doubt in it, a guidance to the Godwary; who believe in the Unseen, and maintain the prayer, and spend out of what We have provided for them”.\(^8^0\) This belief includes the belief in God, His angels, His revealed books, and His messengers. For Muslims who have not witnessed the Prophet Mohammad, all these will be described as *ghayb* except for the book, the Quran; but one still has to believe that the present Quran is the word of the unseen God. Once this faith foundation is established, a Muslim can regard the Quran as the primary source for religious guidance; in other words, the knowledge of what a Muslim should do in adherence to Islam is obtained primarily from the Quran, and this is where the epistemological problem lies.

According to the principles of epistemology, there are five sources of knowledge: perception, introspection, memory, reason, and testimony; all of which are not indisputably infallible, some more than others.\(^8^1\) If we consider the divinity of Quran to be based on faith, it can be taken as

\(^8^0\) Quran, v 2:2-3.

\(^8^1\) For a comprehensive entry to this subject see: Matthias Steup, ‘Epistemology’ <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=epistemology>.
a postulate; but the knowledge gained by humans from the Quran does not qualify to the same status because it is susceptible to the fallibility of human knowledge. This means that there is no logical way in which the divinity of the Quran can be transferred to the human understanding of the Quran. There is a serious problem that would result from this argument, which may explain why it is not addressed by most Muslim scholars who insist that the Quran and Sunna are the revealed, thus divine, sources of Sharia. The problem is it would render the divinity of Quran, in matters of practice, obsolete. The belief in the divinity of the Quran is irrelevant so long as this divinity cannot be manifested in practice. The human knowledge of the Quran cannot be purported as divine based simply on the fact that it used a divine source; there will always be an unbridgeable gulf between the divine and the mundane for the simple fact that the human understanding is inherently error-prone.

The problem of the divinity of Sharia was recognized, but not resolved, by many authors. Khalid Abu El Fadl’s arguments on this can be presented as follows: God is sovereign, but his sovereignty can only be exercised through human agents. The instructions for his commands are in written form. Agents must ascertain two issues: are the instructions from God? (Authenticity). What do the instructions say? (Interpretation). He then adds “because religion, as doctrine and belief, must rely on human agency for its mundane existence, one runs the risk that those human agents will either render it entirely subjectively determined or render it rigid and inflexible. In either case, one risks that the Divine will be made subservient to human comprehension and human will”. Another author, Bernard G. Weiss, says “Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as *humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law - the human *fiqh* - that must be normative for society”. For Weiss, there is an essentially unbridgeable gap that stretches

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82 For now. More on Quran will be discussed later.
83 Quran is regarded to be a higher source of Sharia than Sunna, so the discussion about the divinity of Quran applies, naturally, to Sunna too.
85 ibid 34.
between human reason and the law of God. Hallaq, too, acknowledges the epistemological problem of Sharia. He argues that law builds upon theology; that is, it builds upon Quran and Sunna which are established theologically. But in response to the apparent problem of how the gap between theology and reason can be bridged he acknowledge the shortcomings in this issue arguing that “knowledge of the law in Islam is what was seen as a happy synthesis between human reason and the divine word”. The aim here is to problematize the supposed present link between the divine and the mundane, thus, the divinity of Sharia. While aware that this divinity is perceived to be the ‘crown jewel’ of Sharia, this perception, it must be stressed, and as will be discussed throughout this research, is one of its main problems. It is the source of the relentless pursuit of certainty in Sharia and, thus, the main cause of what has come to be known as hiyal (ruses) in fiqh when certain law conflicts with pressing practicalities. It is the cause of what Coulson called the ‘conflict’ between the strict doctrine of Sharia and the realities of life, which, he argues, is most evident in the case of riba. In short, it is the reason for the lack of reason in many aspects of Sharia. Yet, and perhaps because of this high regard among Muslims, the divinity of Sharia became a taboo for Muslim writers, traditionalist and modernists/reformists all the same. The divinity of Sharia was not a matter of dispute among most scholars and thinkers of Islamic jurisprudence; they seem to agree that there is a domain for Sharia which is based purely on the divine sources, and thus itself a divine domain. This domain was beyond change, it is the equivalent of nature for natural law or the sovereign for positive law, only better for this is sanctioned by the will of God. The disagreement, however, was on the nature of this domain, what it provides for people (values, general principles, part of the law, etc.), and how does it provide this.

Take for example Qaradawi (and Kamali who makes similar arguments). He argues that Sharia can be divided into two parts; one is based on the hermetic verses of the Quran and the Sunna, and this is the small part. The second part is based on the opinions of the jurists which are

87 ibid 37.
88 Hallaq, Shari’ā: Theory, Practice, Transformations 79.
89 ibid 83.
90 Coulson, Conflicts and Tensions in Islamic Jurisprudence 69.
deduced from the revealed sources, and this is the large part. His allusion is that the latter part being the bigger one is not divine and can be changed using the correct methods of *ijtihad* to respond to the changing circumstances of people.\(^{91}\) By this argument, he maintains the flexibility and viability of Sharia, while at the same time keeping a smaller part (so it would have little effect) out of the reach of change, i.e. divine. And although by the token of this argument, Sharia is only partly divine, divinity becomes the prominent hallmark of Sharia as a whole. But this argument lacks the answer to the simple question: who decides what belongs to each part? This is of course without going into the more complex issues of the fallibility of human understanding even for the hermetic revelation. Arguments like ‘what is known of religion by necessity’ (*ma’lūm min al-ḍīn bi al-ḍarūra*) are sometimes used by Qaradawi and others who follow the same line of argumentation in response to the question of authority.\(^{92}\) It is a reference to what is argued to be ‘undisputed’ religious facts. But one can easily see that these are contentious arguments that would regenerate the original question.

Turabi, likewise, stresses on the distinction between Sharia and *tashriʿ*. He describes all the human effort in finding law from the revealed sources as belonging to *tashriʿ*, thus, keeping Sharia out of human meddling, but he gives no detailed account of what Sharia is or how what he calls *hawadi* (guidance) of Sharia can be determined.\(^{93}\) Many Muslim authors follow the same line of argument in dichotomizing Sharia into changeable and unchangeable. They distinguish parts of the revealed sources as hermetic; assign them different names and functions, and then raise them beyond human reach. In the words of Hallaq who studied the contributions of many of these writers, this idea is “what Rahman calls the import of revelation, what Soroush called the essence of the law, and what Ashmawi dubbed as God’s pure Sharia”,\(^{94}\) a “familiar thesis that the Sharia is divisible into essential and accidental attributes, a typology that is distinctly Aristotelian”.\(^{95}\)

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\(^{91}\) Qaradāwī, *Madkhal Li Dirasat Al-Shari‘a Al-Islamiyyah* 22.

\(^{92}\) ibid 210–221.


\(^{95}\) ibid 520.
With the mention of Hallaq to Aristotle, it is apt to say that this ‘typology’ is indeed not exclusive to modern thinkers of Islam. The Islamic philosopher Ibn Rushd (Averroes, d. 595/1198) a devout Aristotelian, in his book ‘Fasl al-Maqal’ argues that Sharia cannot contradict what is established by ‘burhan’ (evidence, proof), and that if a contradiction is thought to occur, the revealed text can be reinterpreted in accordance to ‘truth’, limited only by the rules of metaphoric use of language. He argues, and this is the case in point, that this margin of different interpretations does not include what he called ‘Mabadi’ al-Sharia’ (principles of Sharia), which he explains to be the things that all possible methods of knowledge will lead to, so that the knowledge of the particular matter is possible for everyone; and he gives the existence of God, the prophesies, and the Hereafter as examples for this ‘undisputed axiomatic’ knowledge.

Ibn Rushd is readily mixing theology with Sharia here in his attempt to anchor Sharia on theology. In negating any contradiction between Sharia on the one hand, and ḥikma (philosophy) and the use of logic on the other, an indication of his conviction that Sharia can be logically established, he was relying on a long tradition of Islamic philosophy that tried to prove theology by logical inferences. Regardless of the contentious axiomatic nature of Ibn Rushd’s ‘principles of Sharia’, it does not help in the argument for Sharia’s divinity, simply because the fact that there are irreconcilably different ideas of what counts as divine, hermetic, or a priori in Sharia contradicts the very idea of an axiom. The insistence, therefore, on the divinity of Sharia in spite of its unsubstantiated arguments, can be understood as being driven by a need for absolutism. According to Hallaq “certainty was a juristic desideratum, at least insofar as the legal sources...were concerned”.

97 ibid 108.
98 Most notable is the philosophical novel ‘hay Ibn Yagzan’, by Ibn Sina (Avicenna) and Ibn Tufayl.
99 In addition to the fact that an axiom will not be exclusive to Muslims.
100 Hallaq, Shari’a : Theory, Practice, Transformations 81.
Divinity from nature:
This need for absolutism was not unique for Islamic law, it was a need for law in general. This was illustrated by A. P. D’Entreves who, in making his case for natural law; argues that the most constant feature of Natural Law was “The assertion of the possibility of testing the validity of all laws by referring them to an ultimate measure, to an ideal law which can be known and appraised with an even greater measure of certainty than all existing legislation. Natural law is the outcome of man’s quest for an absolute standard of justice”. 101 Any legal system, according to this argument, needs an ultimate source to prevent an ad infinitum ascendance in search for a higher reference; and as Sharia is a religious law, it is endowed by THE ultimate reference, the Book of God.

The quest for an ultimate source of law is part of a continuing debate in the philosophy of law which is beyond the scope of this research; but a distinction must be made in this regard between say, a natural law, and a divine law, namely Sharia. Natural law would depend on people’s understanding of nature or ethics, therefore, the understanding of law can change when the understanding of its source changes, in spite of its perceived absolute nature. People have been and perhaps will always be in quest of some ultimate measure of right and wrong, and law is arguably influenced by this idea. 102 In this sense, and since people’s ideas about right and wrong can change in time, the law that is influenced by them, will accordingly change; and this phenomenon happens regardless of the bewilderment it might cause for the people. In the words of D’Entreves “history had indeed been the stumbling block of all natural law theories. Lawyers, philosophers and theologians had tried in vain to account for the apparent indifference of historical development to any pattern of right or wrong”. 103 But the problem of a divine law like Sharia is that it will stand defiant in the face of any historical change; divinity is simply immunity from change. This is why modern Muslims are perplexed about Quranic verses that, apparently, permit slavery or command the amputation of the hand of a thief. This seems

101 AP D’Entrèves, Natural Law : An Introduction to Legal Philosophy (Hutchinson 1951) 95.
102 “The content of law is a moral one. Law is not only a measure of action. It is a pronouncement on its value”, ibid 80.
103 ibid 74.
like a self-imposed predicament; an ultimate source of law need not be divine, and a divine text need not be an ultimate source of law. Nor could a divine text be the source of a divine law for divinity is non-transferable through a human agent.

It must be admitted, however, that the divinity of Sharia is not perceived in the naïve sense of a jurist looking in the Quran and simply producing a legal opinion claiming it to be the will of Allah. One way in which Sharia is said to be divine is through a sophisticated methodology by which rulings can be deduced from the revealed sources without, the presumption is, being influenced by the jurist’s caprice. In other words, the system of deducing rulings from the divine texts is sufficiently sophisticated to rule out any chance of human fallibility having any effect on the understanding of the true divine will.\(^\text{104}\)

The divinity of Sharia, moreover, does not rely solely on the mere technical aspects of a highly complicated methodology of textual hermeneutics; it also has hints of natural law concepts that are supposedly immune from the fallibilities of human-designed systems. Relying solely on the divine text will not suffice to produce a comprehensive body of law that is viable for all times and places, and while filling the lacunae has been dependent on the methodology of Islamic jurisprudence, the sense of the rulings produced being of diluted divinity seems to be present. The evidence for this is the use of natural law concepts that assume for the human/jurist a divine endowment which enables him to distinguish right from wrong without reference to revealed sources. This will reinforce the notion of divinity for Sharia even when some of its rulings are made with hardly any reference to the texts.

An example of such natural law concepts can be found in the \textit{Mu'tazila's}\(^\text{105}\) idea of nature. The \textit{Mu'tazila} say that God cannot do evil and thus nature is good. God has endowed humans with the ability to distinguish between \textit{husn} and \textit{qubh} (good and evil) using only human reason. This provides people with an authoritative source of law when there appears to be a lacuna in the law and the texts seem to be silent on the matter in question. People can readily embark on a

\(^{104}\) Detailed discussion of the sources of Sharia will follow in later chapters.

\(^{105}\) An Islamic School of theology.
rational contemplation of what is good and what is evil and produce law on this ground with the conviction that it will reflect the will of God.\textsuperscript{106}

Another example can be found in the Ash'arite school of theology. According to the Ash'arites, God is omnipotent, thus, cannot be constrained by any external notion of good or evil; what God commands is good and what He forbids is evil.\textsuperscript{107} In this sense, people don’t have the capacity to rationally deduce God’s will from nature, and the only source for normative judgments is revelation.\textsuperscript{108} Yet, some notion of an innate human capacity to find the path of God can be found in this school of thought, particularly, the concept of fitra (natural disposition).\textsuperscript{109}

The word fitra appeared in the Quran in the verse “So direct your face toward the religion, inclining to truth. [Adhere to] the fitrah of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of the people do not know”.\textsuperscript{110} The interpretations of fitra have varied, but a narrower meaning can be seen when taken in the context of the hadith of the Prophet who says: “every child is born according to the fitra. Only his parents make him a Jew, a Christian, or a Zoroastrian”.\textsuperscript{111} Using the context of this hadith to understand the meaning of fitra in the verse, some scholars put fitra to be a natural disposition that, if well preserved, will guide the person to the truth which is Islam.\textsuperscript{112} This is similar to the concept of humans having the capacity to rationally distinguish between good and evil that is found in natural law. This particular conception of fitra was more popular among modern Islamic thinkers and reformers\textsuperscript{113} for it provides ample bases for the use of reason in Sharia, when the need for reason is much greater than ever before in Islam. Under the pressures of modernity and the recurring need to find legal opinions of Sharia (fatwa) about different matters that face Muslim communities, it was increasingly clear that the

\textsuperscript{106} For a detailed analysis of this subject see: Anver M Emon, \textit{Islamic Natural Law Theories} (Oxford University Press 2010) 25–31.

\textsuperscript{107} Frank Griffel, ‘Harmony Of Natural Law and Sharia’ in Abbas Amanat and Frank Griffel (eds), \textit{Shari’a : Islamic law in the contemporary context} (Stanford University Press 2007) 44. See also Emon 31–37.

\textsuperscript{108} Griffel 45.

\textsuperscript{109} ibid 38–61.

\textsuperscript{110} Quran 30:30

\textsuperscript{111} ibid 44.

\textsuperscript{112} Qurṭūbi.30:30

\textsuperscript{113} Scholars like Mohammad Abdu, Saiyyd Qutb, and al-Mawdudi. See Griffel 47–61.
revealed text does not cover everything. Muslim jurists found that fatwas were relying increasingly more on reason and less on revelation, and although there was always effort to link any fatwa to revelation, this link was becoming weaker as issues became more complex and detached from traditional fiqh of pre-modern Islam.

In light of this, it can be understood that some divine sanction was needed for the use of reason in order to maintain Sharia’s divinity. This is not a departure from the earlier argument that most modern jurists see Sharia as composed of two parts, and that the larger part was the domain for ijtihad and change. But the jurists who make these distinctions or devise a number of general principles for Sharia claiming them to be axioms upon which there shall be no disagreement, need some form of authority to make these grand assumptions. This is not to say that the jurist will justify his arguments about Sharia by his endowment with a pure fitra; it is to say, however, that the principle of making essential propositions about Sharia, which seem to be based on logic and intuition more than on revelation, is possible because of the ability of human reason to distinguish between right and wrong and to lead humans to Allah.

This connection between reason and divinity can be found in the writings of the Egyptian scholar and theologian, Mohammad Abdu (d. 1905). Abdu argues that it is possible for intelligent people to establish the ‘principles of justice’ by the use of reason; however, the community will not respond to their arguments just because they are sound. Abdu argues that men are one in “the need to submit to a higher power”, this seemed like a reference to the need for divinity. In other words, since people will not submit to judgments of reason made by fellow, albeit more juristically versed, people, then there is a need for people with a divine endowment, i.e. Prophets, for whom people will readily respond due to a natural tendency towards the divine. According to Griffel, “the tendency of every community not to submit to rules made by itself makes Sharia a necessity”. This reading of Abdu, although disputed by some, can be sustained by Abdu’s idea on prophecy where he argues that Prophets who come with divine signs “invest the mind like a citadel that finds no option but to surrender...To

115 ibid 91.
116 Griffel 49.
117 Malcom Kerr. See endnote 54 in ibid 201.
submit to them is more like a necessity than a studious option of will”.\(^{118}\) This seems to suggest that at least one of the reasons for sending Prophets, was to give divine authority to what could have, otherwise, been known by mere reason. It then follows logically that when there are no Prophets present, the use of reason can suffice in distinguishing between right and wrong, lacking only in social endorsement.

### Conclusion

In light of the above discussion, one can understand the eagerness of Muslim scholars – and even public - throughout the history of Islam for the attribution of divinity to Sharia, not only as an affirmation of its divine sources but also as part of a collective zeal for a supreme religious identity. The distinction, in the sense of supremacy, of Islam to other cultures and religions is an essential part of the Muslim conscious; and Sharia is an essential component of this distinction. Sharia is not just a legal system or a code of worship and ethics; it is an integral part of Muslims sense of identity and culture. And since Sharia is readily compared to legal systems from other religions and cultures; and since law was in many ways a measure of civility and progress; a divine Sharia would give immediate prominence for the Islamic civilization and way of life. The divinity of Sharia is a matter of pride as well as of legal authority, and while this divinity as a source of authority can, in theory, be critically analysed and rationally discussed, it remains difficult to do this in practice for it is difficult to separate the rational aspect from the emotional in the Muslim conscious. This difficulty is further sustained by the obscurity of the concept of Sharia in the Muslim conception. Sharia envelopes – in its loose use – everything that is part of the ‘Islamic way’; lacking in the process a clear definition. Sharia, moreover, recently became an emblem for the umma (Muslim community) where Muslims identify themselves as the ‘umma of Sharia’. All this makes it difficult to make major changes in Sharia in modern time regardless

\(^{118}\) ‘Abduh 92.
of the sensibility of these changes. This sense of certitude and fixity is not only in what is considered divine in Sharia for that is by definition beyond change; but it is found even in the parts of Sharia where it is possible to practice *ijtihad*, where this change will cause Sharia to lose its distinction. This is possibly the case in Islamic finance; for if its distinguishing features are changed in such a way that it becomes like conventional finance, it will lose its Islamic identity, that is, it will be just ‘finance’. In this case, and while part of the resistance to change in Sharia will be driven by a genuine defence for the values it promulgates, it is important to consider that part of it can be driven by prejudice. That is why it is important, when studying the impact of Sharia on the livelihood of Muslims, to be acutely aware of the effects the obscurity of the concept of Sharia might have and how best to address it.
Chapter two

The Concept of Certainty in *Usul al-fiqh*

The great predicament for Sharia scholars and, in particular, scholars of *usul al-fiqh* (usulis), is that Sharia is meant to be timeless, viable for eternity, since, in Islam, Muhammad is the last of the Prophets of God; “*Muhammad is not the father of [any] one of your men, but [he is] the Messenger of Allah and last of the Prophets*” (Quran 33:40); yet, it is constrained by what is believed to be certainly authentic revealed text and a jurisprudence methodology that produces law which certainly reflects the will of God from these texts. The law is developed through a complex method of hermeneutics of revealed texts – the Quran and Sunna – which were transmitted to later generations of the Muslim community with high degrees of authenticity via *tawatur*; a theory of scholarly consensus that is divinely immune from error; and a complex system of analogy to expand the law where issues that don’t seem to be addressed by the revealed texts or consensus have some commonalities with ones that do.

The methodology is logically developed to ensure that the will of God is found with the highest degree of certainty, however, it is epistemologically oriented so that its focus is essentially on authenticity and authority rather than equity. By making sure that the will of God is found with certainty, and knowing that God is just, the law will surely be just and equitable. This makes the methodology essentially formalistic with little consideration paid to the substance of the law. True, the substance of the traditions of the Prophet (hadith) are checked against some conditions to be used as a measure of checking authenticity.\(^\text{119}\) Ibn al-Qaiyym (d. 1350) mentions a number of rules by which one can reject a unit hadith (*āḥād*, where the chain of transmission has a single person at each stage, as oppose to concurrent transmission, *tawatur*), for example: inconsistency with common sense; being of language or talk not befitting a

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\(^{119}\) Zysow 41. On this Al-Shafi'i says that one can tell whether the hadith “is true or false if the transmitter relates what cannot possibly be the case, or what is contradicted by information that is better authenticated and is more indicative of the truth”. See: Muhammad ibn Idris Shāfi‘i, *Al-Imām Muḥammad Ibn Idris Al-Shafi‘i‘ī’s Al-Risāla Fi Usūl Al-Fiqh = Treatise on the Foundations of Islamic Jurisprudence* (Majid Khaddür ed, Islamic Texts Society 2008) 252.
Prophet; being contradictory to hermetic Quran; and so on.\textsuperscript{120} This rational filter, however, frequently fails to capture even the most absurd of traditions.

Take for example the hadith narrated in Bukhari (regarded the highest corpus of hadiths in terms of authenticity) about a man called Ma‘iz who came to the Prophet to confess that he committed adultery (\textit{zina}) and wanted to be purified. The penalty he was facing was death by stoning if he persisted with his confession. The Prophet was trying to avoid applying this severe punishment and kept avoiding Ma‘iz who confessed four times. The Prophet asked him if he just kissed or looked and Ma‘iz said no. Eventually the Prophet asked him if he had sexual intercourse with her using, according to al-Bukhari, what is considered an obscene word “a-niktaha?”\textsuperscript{121} and Ma‘iz said yes. Only then the Prophet ordered that he should be stoned to death. Other versions of the hadith narrate a longer conversation where the Prophet thought Ma‘iz was mad or drunk and asked him “did that thing of yours enter that thing of hers?” “like a kohl stick disappears into the kohl container and the bucket into the well?”\textsuperscript{122} It is clear that the certainty of the authenticity of this hadith which stems from its trusted transmission outweighed the absurdity of the vulgar language attributed to the Prophet here. True, there is the argument that the Prophet was trying to rule out any possible miscomprehension to Ma‘iz’s confession in order to avoid the penalty, but how far does the absurdity have to go before the hadith is rejected as unauthentic despite its ‘reliable’ transmission? It is difficult to take the argument that the Prophet was being a careful judge at face value; his ‘kohl’ and ‘bucket’ metaphors seemed quite clear. further, it seems that the trust put in the sources and the methodology of \textit{usul} in general is too great to be negated by any apparent absurdity in the texts.

There seem to be no clear bounds to the certainty proclaimed in the \textit{usul} system. Whatever is in the revealed texts, considered a consensus of the community, or deduced by analogy is

\textsuperscript{120} This was mentioned by the editors of the Arabic version of al-Shafi‘i’s Risala, see notes in: Muhammad ibn Idris Shafi‘i, \textit{Al-Risala} (al-Sheikh Zuhair Shafiq al-Kubbi ed, Dar al-Kitab al-Arabi 2004) 266. For more on this see: Mohammad Hashim Kamali, \textit{Principles of Islamic Jurisprudence} (Islamic Texts Society 2003) 91–92.
\textsuperscript{122} ibid.
certainly authentic or certainly valid, hence, timeless and unchangeable, which brings us to the predicament mentioned above. The possibility of a comprehensive system of law that is of timeless validity and, at the same time, static or very rigid is difficult to imagine. This is true even in modern legal theory; according to Fredrick Coudert “when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing moral ideas, which like all other ideas are constantly progressing”. Consider the example of the punishment by stoning mentioned above. It is difficult to see how any community would find it morally acceptable to punish adultery, be it the terrible offence that it is, by stoning the perpetrators to death. Some would argue, perhaps rightly so, that the will of God supersedes any human sensibilities; but the problem is how to be absolutely sure that this is indeed the will of God.

This predicament can be elucidated further when considering how a law is made primarily on the basis of having satisfied the methodology of usul, and then every effort is immediately made to suspend its application. Remaining with the example of adultery (zina), the punishment of stoning is not mentioned in the Quran since the Quran only talks about flogging for adulterers. However, the stoning is based on a number of hadiths one of which is mentioned above. The hadith is not of the highest standard of authenticity, that is, it is a unit hadith, not a mutawatir. The authenticity of the unit hadith as a certain source of law is not a matter of agreement among the Muslim usul schools, the majority of which, classify it as probable. Yet, and in spite of this, the punishment by stoning stands as a valid law in mainstream Islam until today. At the same time, every effort is made according to the traditions of Sharia to suspend the exercise of the law. Firstly, the act must be witnessed by four upright Muslim men (‘udūl), and secondly, they must testify that they saw at the same time his private parts in her private parts like a ‘bucket in the well’. These conditions seem virtually impossible to satisfy; yet, it is made further difficult. If someone accuses another of fornication and could not prove it, that is, could not get at least three more men to testify to the same effect, he is

124 Quran 24: 2  
125 See: Zysow 22–34.
then liable to eighty flogs and his testimony is thenceforth invalidated; a strong deterrent against making false accusations but no less deterrent against making truthful testimonies as well. Furthermore, there is a tradition in Sharia called ‘talqin al-sariq’ (prompting the thief) where the judge dictates to the accused what to say to deny his charge. This is found in the literature about hadd al-sariqa (limit of theft) were the punishment is amputation of the hand; the qadi asks the accused ‘did you steal? Say no’. This was actually attributed to the Prophet where he was brought a man accused of stealing and he asked him: “did you steal? I don’t think you stole”. On another occasion, the act was attributed to the caliph Omar when he was brought a man accused of stealing; he asked him “did you steal? Say no”, the man said no, and he let him go.

Why would any community set up a law that seems, even to them, to be disproportionately harsh and then make every effort to avoid exercising it? Why not set up a law where the punishment is regarded as proportionate so, even as every community prefers prevention to cure, they will apply the punishment when necessary? If the law is designed in such a way that the punishment is extremely severe but is very unlikely to be applied, it will not serve as a deterrent. It is true that this attitude reflects a degree of mercifulness, still, one cannot escape the sense of contradiction or evasiveness in the system.

The problem is, of course, not confined to the extreme cases of hudūd. It is apparent in more subtle, but of wider consequences, issues like finance. The definition and prohibition of riba, and the introduction of alternative transactions like Murâbaha, Mushâraka, and the like, is basically using the terminology and concepts of the Arab tradesmen in the seventh century to

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126 Quran 24: 4
127 Sayyid NV3 Sabiq, Fiqh Al-Sunnah, vol 2 (al-Fath li al-f lam al-’arabi 1990) vol 2. 592
128 ibid.
129 According to a recent study by Valeri Wright, “if there was 100% certainty of being apprehended for committing a crime, few people would do so. But since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially reduced. Clearly, enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions”. See: Valerie Wright, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment (Sentencing Project 2010) 2 <http://www.sentencingproject.org/doc/Deterrence Briefing .pdf>.>
be applied in the financial industry of the twenty-first century. The reason for this is not confidence in the efficiency of seventh-century financial ways and its timeless validity; it is, rather, confidence in seventh-century law and its timeless validity. More particularly, it is the belief in the authenticity of the revealed texts and the efficiency of the usul methodology in finding the divine law. And as with the case of the ḥudūd, we either find little compliance with the law combined with little, if any, sanction, or we find the use of legal alternatives that are, in practice, only symbolically different from the illegal ones. ¹³⁰

The reason behind this predicament is not ambiguous. Muslim jurists cannot change the law because they don’t think they are the ones who made it in the first place. According to Dennis Lloyd, “This elementary feeling that the law is in some way rooted in religion, and can appeal to a divine or semi-divine sanction for its validity, clearly accounts to a considerable degree for that aura of authority which law is able to command”. ¹³¹ The duty of the jurists is only to apply the law and they try to apply it as little as possible in the case of ḥudud. The famous hadith of the Prophet Mohammad says “avert the ḥudūd punishments with doubts” is evidence that there is nothing that can be done with regards to changing the law; we can only try to avoid exercising it. There are a few questions that stem from this predicament. The first question is: how usul methodology is seen to sustain certainty? In other words, what makes the Muslim jurists certain that their methods reflect the will of God? This will be discussed in the next chapters. The second question is about the concept of certainty in the context of usul al-fiqh. The third question is why does the law have to be certain? Why not settle for a probable will of God? The first two are about the epistemology of law, while the third is about the justification for it. We shall deal with the latter first.

¹³⁰ Maxime Rodinson, Islam and Capitalism (Brian Pearce ed, Penguin) 65–70. Rodinson puts a question similar to the one mentioned above; he asks “why, then, did medieval Muslim society provide itself with ideological precepts that conflicted with its practice?...why was it that rules were set up which it became necessary to get round, at once or almost at once?” ibid 77.
Justifying the quest for certainty:

It is important here to start by problematizing the issue of justifying certainty because most of the usulis seem to presuppose the justification and only a few sought to address it. Under the belief that Sharia covers all aspects of a Muslim’s life, and that every action a person takes is either commanded by God, prohibited, or permitted, it is understandable that Muslims will exert every effort to find the will of God with the highest accuracy; but does this have to be absolute certainty? Why not settle for the highest probability possible? The notion here is to the unchangeable nature of the usul methodology and its concomitant timelessness. If the usul are highly probable then there is proportionately little chance of them, and hence the law made from them, being changed; but if they are absolutely certain, then there is no chance of them or the law made from them being changed; and the difference between the two cases is not trivial.

It should not be contentious to rule out any mundane justification for the insistence on the certainty of the law. It is quite sensible that any legal or regulatory system will benefit, indeed need, the flexibility of change in order to perpetuate its validity. Certainty that results in stagnation and rigidity is not sought; it can only be an imposition which people have to accept. Furthermore, probability is not strange to the Islamic law. In fact, most of the fiqh is recognized by most Muslim legal theorists to be based on probable knowledge (zann). Certainty is mostly confined to the sources (usul) for what seems to be an assumption that it can be transited to the law it produces or at least give it validity, that is, certainty of the obligation to work with what is probable as some usulis argue. According to Zysow “for the formalist

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132 Like Shatibi, more on this below
133 This is a reduction to the traditional scheme of five ahkam (rulings): wajib, Sunna, mubah, makruh, haram. See: Zysow 63. n70 and 182
134 With the exception of the Zahiris, see: ibid 30. See also Qaradawi’s argument in chapter one above: Qaradāwī, Madkhāl Li Dirāsāt al-Shārī’ā al-Islāmiyyā 22.
135 ʻAbd al-Malik ibn ʻAbd Allāh Juwaynī, Kitāb al-Talkhīs fī usūl al-fiqh (ʻAbd Allāh Jawlam Nibālī, Shubbayr Āhmad ʻUmarī and Muḥammad ibn al-Tayyib Bāqillānī eds, Maktabat Dār al-Bāz 1996) 107. Al-Juwaynī argues that certainty was required only for the obligation, that is, God has certainly obligated us to do what we think he wants us to do. In other words, once we exerted our efforts to know what God’s commands are, we are then obligated – with certainty – to comply with that probable knowledge. See also on this: Muhammad ibn Bahādur Zarkashī, al-Bahr al-muhīt fī usūl al-fiqh (ʻAbd al-Qādir ʻAbd Allāh. ʻĀnī and ‘Umar Sulaymān. Ashqar eds, al-Ṭab‘ah, Wizārat al-Aqwāf wa-al-Shu‘ūn al-Islāmiyyah 1992) 123–125.
jurists who accept probability in law, and they are the majority]...the results of his practice are only probable, but their validity is ensured by the fact that the framework within which he practices is known with certainty”. But the mere establishment of the obligation to accept probable law, in other words, validity, does not justify the quest for certainty in the sources. It is a logical conclusion when probability in the law is inevitable. It will not be overly presumptive to assume that this quest for certainty is driven, at least partly, by the assumption that certain sources consolidate probable sources and legal opinions; in other words, certainty is transitive. But this only tells us that the acceptance of probable knowledge in the law was concessive and the craving for certainty was always present but suppressed by the difficulty of attaining it. It is a concrete fact that most fiqh or Islamic law is uncertain; evidence for this, besides the fact that most of it is based on unit hadith and analogy which are considered by most schools to be probable sources, is that it is rife with conflicting legal opinions that are all deduced from the same sources using the same methodology. So if the usul system is not successfully transiting its certainty to the law, why seek a certain usul system in the first place? In other words, if the legal opinions based on certain sources and those based on probable sources are of equal validity, what virtue is there, from a legal perspective, in having certain sources? For example, the Quran says that riba is prohibited but gives no details; the unit hadiths give details of what transactions and commodities are usurious (rabawi). The law is, thus, based on the hadiths since it is just as valid despite being of probable authenticity, unlike the certainly authentic Quran. This perhaps implies that the Quranic certainty is made jurisprudentially redundant.

To summarize the problem discussed above it can be put in the following manner: seeking certainty to establish Islamic law faces many epistemological hurdles and does not prevent probability from the law. At the same time, the claim of certainty renders the law

136 Zysow 3.
137 Ibrāhīm ibn Mūsā Shāṭibī, al-Muwāfaqāt fi usūl al-sharī‘ah (Adnan Darwish ed, Dar al-Kitab al’arabi 2006). This is called al-ta’ arud bain al-adilla (conflicting evidence), which is solved by tarjeeh (preference); see for example: ala’ al-Din Al-Samarqandi, Mizan Al-Usul Fi Nata’ij Al-Uqul (Dar al-Kutub al-ilmiyya 2004) 171,301.
138 In the words of Bernard Weiss, “Thanks to a carefully argued probabilism, the law did not need to be certain in order to be authoritative. Probable law could have an authority equal to that of certain law”, Weiss 111.
139 (2:278)
unchangeable, which adds extra difficulty since the law must be ever valid. So the question is: what is the justification for the quest for certainty in the sources of the law?

**Ibn Hazm’s justification:**

Ibn Hazm (d. 456/1064), the master of the ẓahiri school, was extremely brief in denouncing rulings based upon probable knowledge (ẓann). He said “it is not permitted to rule upon ẓann at all for Allah says ‘And they have thereof no knowledge. They follow not except assumption, and indeed, assumption avails not against the truth at all.’ And for the saying of the Prophet peace be upon him ‘beware of ẓann, for ẓann is the most untruthful of speech’.”

It seems that Ibn Hazm is contented with the ostensible prohibition of deducing ʿāhkam based upon ẓann from Quran and Sunna. This, of course, was too brief an argument for a contentious matter like the one in question. Evidence for this is the fact that the editor of the book, the Egyptian scholar Ahmad Muhammad Shaker, made a long note to rebut Ibn Hazm’s argument. But a simpler logical objection to his arguments could be that he is using Quran and Sunna to justify the quest for certainty in Quran and Sunna, which causes a circular argument. Ibn Hazm did, however, provide a more detailed discussion of the issue of ẓann when he discussed the unit tradition (ḥadīth al-āḥād). He was contending the argument of other usulis, that unit tradition is epistemologically only probable but obligatory nonetheless. His argument is that nothing can be obligatory if it was not certain; saying otherwise is tantamount to quote Allah almighty without knowledge and to rule on religion with ẓann, which Allah forbade us from doing. It means that Sharia is not preserved (mahfūza), and could be changed (tabdīl) and unrecognizably mixed with lies; how then can Islam be complete? Ibn Hazm seems to be reasoning that since God told us that His religion is complete and that He demands of us only what we are capable of doing, then it must be the case that the sources available to us to achieve this, that is, to obey Him and follow His word, are authentic and true. Ibn Hazm, it seems, is using the necessity of his argument as a proof of its truth. He seems to say that since the unit hadith is the foundation of most of the law, then it must be authentic; otherwise, the law will collapse and what God

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141 ʻAlī ibn Aḥmad Ibn Ḥazm, al-Iḥkām fi usūl al-ahkām (Matba‘at al-Sa‘ādah 1926) vol 1. 126
said about preserving religion would be falsified, which is impossible. Ibn Hazm uses this argument to raise the probable to certainty, while most usulis are contented with validating probable knowledge as a source of law; in either case, it is a manifestation of a juristic desideratum. But all this is more on how to deal with probability in the sources rather than justification of certainty; it is seeing probability as the problem, never certainty. And even if we consider Ibn Hazm’s denunciation of żan as a commendation, thus justification, of certainty (yaqīn), Ibn Hazm remains among the minority in not accepting żan as a source of law.

Shatibi’s justification:
Another author who dealt with the issue of justifying certainty was Abu Ishaq Shatibi (d. 790/1388). Shatibi, unlike most other authors on usul al-fiqh, sought to assert the imperativeness of certainty, and he embarked on this on the first sentence of his book, al-Muwafaqāt, saying that usul al-fiqh in religion are certain (qaṭīyya) not probable (laẓannīyya); evidence for this is that it is rooted in the principles of Sharia (kulliyyat al-Sharia), and what is such, is certain. żann, according to Shatibi, cannot be related to kulliyyat al-Sharia, only to the particulars; for if it was part of the kulliyyat it can, then, be related also to the origin (ʾasl) of Sharia. Shatibi explained what he means by kulliyyat as the darūriyyāt (necessities), haqīyyāt (needs), and tahsīniyyāt (improvements), a classification of mundane goals (maqāsid) of Sharia. Also, he argues, if żann is accepted in ʾasl of Sharia then doubt is accepted, where Sharia should be undoubted, and it would be acceptable to change Sharia whereas God promised to preserve it. Further, if żann was accepted in usul al-fiqh, it would then be possible to accept it in usul-al-Din (principles of religion), because the relation of usul al-fiqh to the origin of Sharia is the same as the relation of usul al-Din to it; and the preservation of both is a preservation of religion which is part of the necessities (darūriyyāt) of Sharia. The origin (ʾasl) has to be certain because if it was probable it is susceptible to change and this, by way of induction, cannot be

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144 See n20 above. See also Al-Samarqandi 252.
145 Shātibī 17.
146 The editors, Muhammad al-Iskandarani and Adnan Darwish, explain what Shatibi means by origin (ʾasl) of Sharia as ‘theology’, ibid.
147 ibid 18.
allowed to be a principle in religion. And since God has completed religion and promised the preservation of dhikr (devotional acts or supplications), this mentioned preservation must be that of usul since we know by experience that mistakes were made in probable traditions and the understanding of some revealed texts, therefore, usul must be certain. Furthermore, and as usul are the laws upon which the effecting of adilla (literary: evidence, means basically probable law) is based, it then follows that they must be stronger (epistemologically), hence, certain. In general terms, what is probable does not, by general agreement (iṣṭilāḥ), form principles (usul) and this is sufficient to cast aside the probable from usul completely.\textsuperscript{148}

The first thing to note about Shatibi’s arguments here is the obscurity of his terminology. One of his objections to having probable knowledge in usul was that it entails ẓann to be allowed in ‘asl al-Sharia; it is not clear what he means by this. The editors’ note that what is meant was theology,\textsuperscript{149} but he makes a second objection to the matter by saying it would allow ẓann in usul-al-Dīn. It is well known that it is usul al-Dīn that is theology, so either the editors got it wrong or Shatibi is making a redundant argument. And to add to the confusion he mentions in another section of the book the preservation of the necessities of Sharia: life, religion, intellect, wealth, and lineage; to be usul al-Dīn (principles of religion), qawa‘id al-Sharia (foundations of Sharia), and kullīyyāt al-milla (general principles of the community).\textsuperscript{150} This seems like a prose bordering on tautology rather than a proper description or classification. On another section he calls, yet again, the preservation of the three categories of darūrīyya, Hajīyya, and taḥṣīnīyya, which he coined as kullīyyāt al-Sharia before, as the origin of origins of Sharia (‘asl usūlihā), which must be certain.\textsuperscript{151}

There seem to be two reasons Shatibi gives for why usul al-fiqh must be of certain knowledge. The first is preventive; this is to say that since usul al-fiqh, usul al-Dīn (theology) and kullīyyāt al-Sharia (the three major purposes of Sharia according to Shatibi’s categorization) all share the same evidence (adilla), then, if we allow ẓann to enter into usul al-fiqh we allow it, thus, into

\textsuperscript{148} ibid 19.
\textsuperscript{149} ibid 17.
\textsuperscript{150} ibid 213.
\textsuperscript{151} ibid 227.
the other two; which is not possible because God promised to preserve *kulliyat al-Sharia* and there is agreement (*ittifāq*) that theology is based on certain knowledge. In other words, the common sources that religion relies on are Quran, Sunna, Ijma’, and Qiyas; therefore, if any, or all, of these sources are not certain, then knowledge of religion is not certain. Certainty in theology is beyond the scope of this research but as it is inconceivable for Muslims to treat theology with anything less than epistemological certainty, and as it shares the same sources as *usul al-fiqh*, it becomes understandable why the certainty of *usul al-fiqh* is held with such high regard. But this argument treats certainty of *usul al-fiqh* as a consequence of its sharing sources with theology, not necessarily as a legal requirement. We are trying to answer the question: why is there demand for certainty in Islamic law? Shatibi’s argument seems to answer the question: why is there certainty in Islamic law?

The second reason given by Shatibi is rational. He argues that principles upon which other particulars (law, for example) depend, must be certain. His argument that the general agreement (*iṣṭilāh*) is sufficient to rule out probable knowledge from *usul*, seems to be a hasty intuition not a well-thought idea; as is his presumption about the agreement (*iṣṭilāh*) on the issue and the validity of this agreement should it exist. It seems to follow an intuition that any human construct needs a solid foundation to ensure its stability. But the persistent problem that distinguishes the concept of *usul* is that it seeks absolute certainty for, apparently, theological reasons, and this leads to *usul* being unchangeable while trying to simultaneously maintain timeless validity.

One can find resemblance for Shatibi’s arguments in state constitutions. Constitutions represent the general principles that a nation adheres to. The law is derived from these general principles to regulate the details of life. This is similar to Shatibi’s idea about *kulliyat al-Sharia* and the derivative *fiqh* but with an essential difference. Positive constitutions are amendable; they require certain conditions and procedures to be amended but they are amendable nonetheless. The *usul* are not. *Usul* methodology is unamendable and must be forever valid. True, most legal theorists in Islam accept the need for change and they argue that *ijtihad* in
what falls outside the realm of the four sources is supposed to cover for this need; but as was discussed in chapter one, there is no clear demarcation between fiqh and Sharia, or what is changeable and what is not. Furthermore, and staying with the comparison with constitutions made above, even some of the solid principles of Islam may need to be amended supposing long enough time is allowed. The justification, therefore, for the rejection of any changes from taking place anytime in present or future ought to be absolutely solid. Of course, the theological justification that the will of God must be obeyed is sufficient for the believer, but the challenge of how to be absolutely sure of the accuracy of finding the will of God, considering the disagreement among the scholars even in the most fundamental issues of religion, remains unsolved. The different epistemological difficulties did not, however, seem to get the usulis to concede to the unattainability of certainty in usul nor to fetter them from striving for it using different methods and concepts.

**Justification for the quest for Certainty in Western legal theory:**

As discussed above, justifying the quest for certainty in Islamic legal theory, while vague and inadequate, can be said to float around two main ideas: 1. God’s prohibition of following żann according to Ibn Hazm’s arguments; and 2. the binding of the sources of usul to theology according to Shatibi’s arguments. This connection to theology raises the certainty of usul to the absolute, rendering jurisprudence absolutely rigid and non-adaptive.

Certainty in Western legal theory, by contrast, is sought for its stabilizing effect on the law. This may be similar to the effects it has on Islamic law, but the difference seems to lie in the

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152 Like Qaradawi’s argument mentioned in chapter one above.

153 Certainty in Western legal theory is a legal certainty; that is, it refers to the certainty of what the law says on a particular case. Certainty in Islamic jurisprudence, by contrast, is epistemic certainty; that is, it refers to the certainty about the source of the law; in other words, being able to successfully attribute the law to a divine source. Certainty in Western jurisprudence is concerned with avoiding arbitrariness in the law regardless of its source (it could be precedent, statute, or other). Islamic jurisprudence is less concerned about the law being silent on a particular case; it is, however, concerned that whatever law is made anew, must be rooted in the revealed text or the Muslims consensus. Despite these differences between the two systems, certainty in the law results in a state of fixity for both, which leads to a potential conflict between certainty and the need for change in the law. This potential conflict will be the focus of this section.
awareness among the Western legal theorists of the problems of excessive stability. This is
evident in the concomitance between certainty and justice in Western jurisprudence as two
counter-balancing concepts. Coudert puts it thus,

There is in all modern states today a general conflict between certainty in the law and concrete
justice in its application to particular cases; in other words, between the effort to have a general rule
everywhere equally applicable to all cases at all times and the effort to reach what may seem to be
concrete right dealing between the parties at bar upon the particular facts in each case. 154

He then adds,

The truth is, that the courts are constantly oscillating between a desire for certainty on the one hand
and a desire for flexibility and conformity to present social standards upon the other. It is impossible
that in a progressive society the law should be absolutely certain; it is equally impossible that the
courts should render decisions conforming to the prevailing notions of equity without thereby causing
a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their
application to new and unforeseen questions.155

This readily applies to the penalty of stoning to death for adultery. It is an extremely harsh
punishment justified by the certainty of the law. But despite the similarities, the
justification for certainty seems different between the two legal theories in some respects.
The divinity of Islamic law is the bases for its quest for certainty; in this sense, certainty in
Islamic law is principally concerned with finding the true will of God; how this law affects
the wellbeing of people comes as an inferior objective. This way, if there seems to be a
conflict between what is thought to be the will of God and any apparent benefit to society,
the former prevails. Apologists, then, provide the necessary argument that there is no real
conflict between the will of God and the well-being of society, indeed there cannot be any,
and what seems to be good for society, when in conflict with God’s will, is in fact a
disguised harm. In the context of certainty, a protest against God’s law is not sought; what
is sought is the questioning of the divinity or validity of this law, is it really what God wants?

154 Coudert 1.
155 ibid 10.
For there can be laws, says Gustav Radbruch, “that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them”.156

The justification for certainty in Western legal theory is consistent with its nature; that is, it is secular and pragmatic. Its main objective is the wellbeing of society; in this sense, when material benefits are in conflict with morality, in legal context, justice, however this conflict is settled, it will be settled by a timely societal debate. And as this debate is ongoing, there will not be a final settlement; in other words, society can always change the balance between certainty and justice or morality as it sees fit to its circumstances. In the words of Paul Neuhaus, “the conflict between legal certainty and justice (equity) will never come to an end. In different countries and at different times, the one or the other of these twin objectives of the law will dominate; there is no permanent solution. Especially neither goal can replace the other”.157

The problem in Islamic jurisprudence is not the imposition of law and norm upon society by an elite group, for this is a universal practice, it is, rather, the dogmatic assertion of the superiority of the past. This religious nostalgia has roots in Islamic text. It is narrated that the Prophet Mohammad says “the best of my people are my generation, and then the one that follows, and then the one that follows”. In this respect, Muslims will view the nation as similar to an organic being that decays in time. This sense of being inferior to the past reinforces the notion of certainty in Islamic law and hinders debate and revision. Unless this tradition changes, certainty in the law will accumulate and what was once a contemporary debatable matter, becomes, with the passing of time, a certain, unchangeable law; owing only to its position in history. Righteousness seems to be embedded in history, evident in the praise for ‘al-salaf al-ṣāliḥ’ (the good predecessors), while ‘bid’ā’ (innovation) is bad and dangerous. Certainty that springs from such conception will develop excessive stability, and

conflict between the static law and the changing societies is only a matter of time. There is no patent remedy for this, asserts Courdet,

“It is due to changed social conditions and the conflict of new ideas with old ones, which is now at an acute stage. If you want to know the ideas that dominate a particular age, you must examine its jurisprudence. To make the law certain on subjects as to which the community itself is most uncertain, is a task that never has yet and never will be accomplished. If the Hindoo laws are unchanged and unchangeable, it is because the Hindoo himself has not changed and does not wish to change his opinions and ideas nor the actions which flow from them. When we reach that stage of development the question may become academic”. 158

In a situation of conflict like this, Western jurisprudence has the license to change the law if deemed necessary. Changing what has been established and respected in the past is a controversial business even in secular law; but it remains mundane and hence changeable nonetheless. Islamic jurisprudence faces more controversy since it does not only owe stability to the past, it also owes an aura of divinity due to better proximity to the time of revelation. Furthermore, Courdet’s argument confirms that certainty in Western legal theory is not only in conflict with justice, it is in conflict with the need to adapt the law to the new needs of ever-changing societies. True, on occasions of social and economic stability, certainty might be good for business as during the times before the two World Wars in Europe according to Paul Neuhaus. But after the political, economic, and social changes brought about by two world wars, he argues, “the idea of the completeness of existing legal orders was destroyed and numerous gaps were revealed by confrontation with a world which was undergoing drastic changes”. 159

Islamic legal theory, by contrast, does not treat certainty as a stabilizing force to law and order in society, albeit it has this effect on it; it, rather, treats certainty as a manifestation of the divinity of the law. This is the difficulty that faces Islamic finance. It is one thing to argue for the absoluteness or the eternal validity of general principles like justice; it is quite another to argue for the eternal validity of an ancient detailed body of law like Islamic financial law. The domain

158 Coudert 17.
159 Neuhaus 798.
for change in Islamic financial law is marginal due to the certainty that shields its historical
development. A margin that may hardly be sufficient to address the radical changes in modern
financial industry compared to that of the seventh century. And to add to the difficulty, justice,
seen to be manifested in the prohibition of riba for example, is seen to be in the same front as
certainty of the law, both being in conflict with issues of modernity and functionality.

But a final judgment on the validity of Islamic financial law is not required here. What is
required is to show how the justification for certainty in law can impact the development of this
law. A rational justification will yield a flexible theory of law which has better chances of validity
in different times and places. A certainty, on the other hand, that finds justification in theology
will produce a legal system that is rigid and extremely slow to adapt.  

The concept of certainty in Usul al-fiqh:

As with the case of the concept of Sharia discussed in chapter one, the concept of certainty or
yaqīn is riddled with conflicting terminology and confusing definitions. In the Quran, the word
‘yaqīn ’ connotes different but related meanings. On some occasions, it means certainty,  
while in some other occasions it means death,  
and it is not difficult to see the connection being the certainty of death. But because yaqīn  appears in the Quran associated with different words and in different contexts, it bore different meanings; albeit all are forms of knowledge in
different degrees; meaning that yaqīn  is not always an absolute certainty.  
In fact, the word

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160 Lloyd says “A narrow minded and rigid legal profession may fail to come to terms with the values of the society in which it lives, especially where that society is in a transitional state with substantial currents of social and economic changes gradually transforming a more traditional community”, Lloyd of Hampstead Baron, 1915- 134..  
On rationality in the law see: ibid 52.  
161 Quran 4:157; 27:22; 102:5 to mention but a few.  
162 Quran 15: 99; 74:47  
żann in the Quran, aside from its common interpretation as probable, is sometimes interpreted as yaqīn (certain). The lexicons (maʿājim) give a more precise meaning for yaqīn as the antonym of doubt (shakk). The linguist al-Jurjani defines yaqīn as: the belief that something is such and could not be otherwise, that it corresponds to reality, and is impossible to change. This definition reflects to a great degree the concept of certainty in usul al-fiqh, but there is the suspicion that it might have its origins in usul al-fiqh or theology, which means that the idiom was constructed in the domain of usul and then fed back into the lexicons instead of the other way round. The Quran, however, is less precise with regards to its overall use of yaqīn and, thus, more flexible. So, in this case the lexicons were influenced by particular interpretations of yaqīn in Quran; the more precise ones, which are also the more rigid when applied in a legal context.

It is useful to look at the concept of yaqīn at the wider context of usul epistemology, in particular, the writings of Ghazali.

Abu Hamid Ghazali (d. 505/1111):

Human cognition (idrāk), according to Ghazali, is two kinds: cognition of unitary entities or concepts like ‘world’ or ‘old’; then cognition of the relationship between two or more unitary entities or concepts, like ‘the world is old’ or ‘the world is emergent’. Only the latter can be made a statement where the description of ‘true’ or ‘false’ could apply. The first kind is called taṣawwur ‘conception’ or maʿrifā ‘cognisance’; the second is called taṣdiq ‘belief’ or ʿilm ‘knowledge’. Conception or maʿrifā is two kinds: primary, which requires no process of thinking, that is, its meaning is effortlessly present in the mind, an axiom. The second is maṭlūb

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164 See for example: Ṭabarî.2:46
165 See for example: Muḥammad ibn Yaʿqūb Fīrūzābādī, Al-Qāmūs Al-Muhīṭ (Nasr Abu al-Wafā Hūrinī ed, Bulāq) yaqīn.
167 Ghazzālī, al-Mustaṣfā min ʿilm al-usūl 22.
(required) which points to something holistic and unexplained and, thus, requires explaining by *al-hadd* (definition). Likewise, for *ilm* ‘knowledge’ where there is primary – axiomatic - knowledge and required knowledge that can be explained – as true or false - by *burhan* (proof).\(^{168}\)

Ghazali then goes on to define ‘definition’ (*hadd al-hadd*). He argued that everything has four ontological states; the first is its actual reality, the second is the conception of this reality in the mind which is called *'ilm* (knowledge); the third is the assignment of a particular sound to represent the vocal form of this conception; and the fourth is the assignment of a visually recognizable symbol to represent the written form for the word.\(^{169}\) In this sense, Ghazali gives three kinds of definitions: a synonym definition (*al-hadd al-lafzi*) where something is defined by giving an alternative word that might be clearer to the listener; a descriptive definition (*al-hadd al-rasmi*) where something is described by its characteristics; and a real definition (*al-hadd al-ḥaqīqī*) where something is defined by its exclusive characteristics that are not shared by anything else.\(^{170}\) This typology entails that there can be many synonym and descriptive definitions for one word (thing) but only one ‘real’ definition.\(^{171}\)

Ghazali, being versed in Greek philosophy, is laying the epistemological foundations for *usul al-fiqh*. Conscious, perhaps, of the pervasive disagreements on such a delicate subject, he seems to be trying to limit the undesired effects of *ikhtilaf* (disagreement) by founding a solid logical platform for *usul al-fiqh* whereby, any *usuli* who uses this platform will come to similar, if not identical, results. The other purpose of this effort will be to make sure that the results arrived at are accurate and reflect the true will of God. This is where the importance of concepts like *al-hadd* (definition), *'ilm* (knowledge), *burhan* (proof), and *yaqīn* or *qaṭ* (certainty) come to the fore. For deciding on the truth or falsehood on any statement or law claiming to reflect the will of God is impossible without the proper use of these concepts. Yet, Ghazali was well aware of

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\(^{168}\) ibid 23–24.
\(^{169}\) ibid 36.
\(^{170}\) ibid 25.
\(^{171}\) ibid 43.
the difficulties surrounding his objectives. He abstained a number of times from giving absolute definitions of difficult concepts like 'aql (mind)\textsuperscript{172} or 'ilm (knowledge).\textsuperscript{173}

Admitting to the difficulty in defining the word 'ilm for it is a word that is shared by multiple meanings, Ghazali resorted to explaining 'ilm by showing what it does NOT mean. 'ilm is not shakk (doubt) nor zann (probability) because they lack assertiveness unlike 'ilm which must be assertive and must not tolerate indecision or hesitancy.\textsuperscript{174} 'ilm is also distinct from jahl (ignorance) for jahl is related to the unknown while 'ilm corresponds to the known. 'ilm is also different from iʿtiqād (belief) in that belief is a dogmatic assertion that does not necessarily reflect reality. It is a result of being exposed only to a particular doctrine. It is a circumstantial conviction that, in relation to reality, is equal to ignorance, for if one believes that Zaid was in the house, one would maintain his belief even if Zaid leaves the house, unlike the knower whose ‘knowledge’ is a constant reflection of reality. Iʿtiqād is like a knot on the heart,\textsuperscript{175} while 'ilm is the untying of the knot, a revelation.\textsuperscript{176}

Yaqīn according to Ghazali, in terms of feeling comfortable towards a particular issue as being true, has three states. The first state is where one is certain about something and in addition, one is certain about his certainty. What he means by this double certainty is that one’s certainty on some issue is immune from doubt regardless of any evidence that testifies contrary to one’s certain conviction. An example for this state of certainty is the logical axioms like three being less than six, and one person can’t be in two places at the same time. The second state, which might help further explain the first by comparison, is one’s sureness of something where one does not imagine the contrary of his conviction, and if one is made aware of the contrary argument or information it will be difficult for one to listen and accept this contrariety. But if one received persistent contrary arguments and it came from a knowledgeable trust-worthy source like a Prophet, one may reconsider his position on the issue. This state of certainty is the

\textsuperscript{172} ibid 37.
\textsuperscript{173} ibid 40.
\textsuperscript{174} ibid.
\textsuperscript{175} The word knot is ('uqda) in Arabic. It shares the same root as Iʿtiqād; an indication to the fact that Iʿtiqād or belief is a tie upon the heart.
\textsuperscript{176} ibid 40–41.
certainty of most common Muslims, Christians and Jews in their religious beliefs or their theological schools. They have accepted the school and the evidence on which it was established by the simple trust of their childhood which was consolidated as they grew up. The third state is where one believes something and feels comfortable towards it. If one is made aware of a counter argument to what he believed, he would not impulsively reject it; this is called ẓann and it is found in many degrees. If one hears something from a reliable source, he would feel comfortable to regarding it as true; and as more trustable people confirm what the first told him he will feel more confident about it. His confidence will grow further if a qarīna (external evidence) is added, like the paleness of one’s face as a testimony to some horrifying news, and so on until this ẓann becomes ‘ilm (knowledge) when the testimony of people becomes sufficiently concurrent (tawatur).\(^{177}\)

Many people, contends Ghazali, consider the third state as certainty, and most people consider the second state as certainty, whereas, it is only the first type, according to Ghazali, that provides true yaqīn.\(^{178}\)

After explaining the three ‘states of mind’ (ahwāl al-nafs), Ghazali introduces his typology of certainty which corresponds to the first and second states of mind in his aforementioned explanation. There are seven types of knowledge which Ghazali presents as follows:\(^{179}\)

1. **Al-awwalīyyāt (a priori knowledge):** this is the knowledge that relies only on the mind and does not require perception or experience, like one’s knowledge of his own existence and two is more than one and so on.

2. **Al-mushāhadāt al-bātina (introspection):** this does not require perception nor is it based on reason, like one’s knowledge of himself being hungry, thirsty, or afraid and so on. This kind of knowledge can happen to children and animals unlike the previous Awwalīyyāt.

\(^{177}\) ibid 59–60.

\(^{178}\) ibid 60–61. Ghazali prepared the scene here for qiyas (syllogism) by arguing that any postulates made from the first state of certainty will produce certain conclusions.

\(^{179}\) ibid 61–65.
3. *Al-maḥṣūsāt al-zāhira* (perception): like the knowledge that snow is white or the moon is round. But this knowledge is fallible.\(^{180}\)

4. *Al-tajrībiyyāt* (experience): which can be expressed sometimes as recurrent customs (*iṯṭirād al-ʿādāt*) like the judgment that fire burns and bread nourishes. Knowledge from experience, therefore, is certain to one who experiences it; and people differ in this knowledge because they differ in their experiences. This is different from sensible knowledge in that sensible knowledge can make a judgment about a single experience but the generalization of this judgment to all similar cases is a rational judgment that is based on the recurrence of the sensible experience. This shows causality and produces certainty.

5. *Al-mutawātirāt* (concurrent testimony): like our knowledge of the existence of Makkah and al-Shafiʿī. This is not sensible knowledge; it is rational knowledge where hearing is the tool. Certainty by testimony requires the concurrence of testimony a sufficient number of times; but this number is not fixed, it should be sufficient to increase probability to the level of certainty, and this should happen without the person realizing when his ẓann has turned into certainty.

6. *Al-wahmīyyāt* (imaginaries): like the idea that an existing thing must occupy space or the idea that beyond the universe there is no emptiness nor fullness. For emptiness is meaningless and proved wrong with evidence, and fullness must be finite, also proved by evidence. These ideas are testified for by *fitra* (intuition). But *fitra* is not infallible; so, the error in *wahmīyyāt* can only be revealed by evidence of the mind, and still, the truth of the matter will not be assured.\(^{181}\)

7. *Al-Mashhūrāt* (popular convictions): these are widely held opinions like the idea that lying is bad and thanking the benefactor is good. These ideas could be true or false, so they cannot be used as postulates in *burhan* (proof), and to fathom the idea, consider

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\(^{180}\) Ghazali here talks only about vision and gives examples of why it can be deceiving, but it is safe to assume he considers the five senses in the same manner.

\(^{181}\) Ghazali’s arguments here are unclear. He is trying to argue, it seems, that imagination is a source of knowledge, albeit an unreliable one that needs to be checked by reason at all times. He repeatedly said that this is a complex issue upon which many have gone astray, alluding to the sceptics who denied certain knowledge; therefore, he argues, a thorough discussion of this issue was not possible there, in the context of usul-al-*fiqh*. ibid 63–64.
the statement ‘lying is bad’ by your intuition and imagine that you did not socialize with anyone, you were not exposed to any culture; then try to doubt the idea; it will not be impossible.

These seven types represent Ghazali’s typology of madārik al-yaqīn (sources of certainty) of which only the first five produce certainty while the last two only yield ẓann.

Despite Ghazali’s extended discussion of al-ḥadd (definition) and its importance in knowledge and, presumably, legal issues too since the book is a jurisprudence book, he did not provide a concise definition for yaqīn.\textsuperscript{182} He opted, rather, to explain it, first, by explaining how it feels, and second, by showing where it comes from, that is, its sources. Yet, it remains unclear what Ghazali exactly means when he speaks of certainty, particularly, from a jurisprudential point of view. He considers something as certain if it comes from particular sources and triggers a particular feeling. This should have been made clearer by the distinction Ghazali makes from other sources and the description of other feelings that do not constitute certainty. But on close inspection, these distinctions seem vague and thus, the idea of certainty itself becomes vague and unclear. For example, when he talks about perception, he mentions explicitly that it is fallible; “vision can be deceiving for a subject being too far or too close to the eye or the eye being weak”\textsuperscript{183} he says. Yet, he still classifies perception as one of the sources of certainty that can be used as premises of burhan. Also, he argues that experience (tajribīyyāt) can be a source of certainty when repeated a sufficient number of times; likewise, for testimony (mutāwatirāt). The number of repeated experience or testimony is not specific, so the only evidence for certainty is one’s feeling of certainty. In other words, the experience happens the first time and provides ẓann only (that a particular action is the cause/effect of another, for example); then the experience is repeated and the probability becomes stronger until at some point, that cannot be determined, the person is absolutely sure of the proposition, that is, becomes certain. This means that there is no definite evidence for certainty in Ghazali’s theory except personal intuition; one’s own conviction of the truth of some proposition sustained by the

\textsuperscript{182} Recall his abstention from giving concise definitions to difficult concepts like ‘aql (mind), ibid 37.
\textsuperscript{183} ibid 61.
experience that this strong conviction is seldom wrong. But is this good enough for Ghazali? Will he be satisfied by certainty that is *seldom* wrong rather than *never* wrong? Ghazali himself does not think that the personal intuition is a reliable indicator of certainty, only he expresses the idea differently. For instance, he mentions that “not everything testified for by *fitra* is necessarily true”,¹⁸⁴ and in response to the expected question of how to distinguish between the true *fitra* and untrue *fitra*, he acknowledged that this is a dilemma (*warta*) where many people have gone astray and he cannot dwell on it.¹⁸⁵ Similarly, he argues that *mashhūrāt* (popular or famous convictions) cannot be a source of certainty. He illustrates his point by the two statements: justice is good and lying is bad; the truth of these statements is accepted by a person because of their acceptance in his culture where he grew up; they become seeded in him from an early age and his conviction of their truth grows with time and repetition. This is, then, like the *fitra* just mentioned, a personal conviction or intuition, but unlike experience and concurrent testimony, they do not provide certainty, how then, do we make the distinction between the two feelings? According to Ghazali, if you offer the statement: justice is good, to someone who was not exposed to community and culture, he may doubt the truth of this statement; but if you offer him the statement: two is more than one, he will not doubt it; and again, Ghazali acknowledges that this is a difficult subject that should be avoided.¹⁸⁶

There are a number of problems with Ghazali’s arguments. The first problem is that the distinctions in his typology are not clear. He builds certainty upon a combination of source and feeling (state of mind). He shows three kinds of certainty feelings of which only one is a true feeling of certainty and he acknowledges that the majority of people confuse between the three. He also shows seven kinds of certainty sources of which only five are sources of true certainty and, again, people easily confuse between the sources that give a sense of certainty to a true proposition and those that give a sense of certainty to a false proposition. The question, naturally, becomes: how do we make the distinctions so that we do not fall into the false sense of certainty? Ghazali argues that a true sense of certainty will not be shaken even if testimony

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¹⁸⁴ ibid 63.
¹⁸⁵ ibid.
¹⁸⁶ ibid 64–65.
was made from reliable sources to the contrary (he did not mention the hypothetical case of experience or perception being contrary to a proposition); whereas, in the case of the strong conviction (but not certainty) which he calls *ʾitiqād jazm*, one’s convictions can be changed under persistent arguments from reliable sources. The problem with this argument is, the person who is certain about some proposition is certain only because he is not aware of any convincing contrary arguments; otherwise, he would not be certain. To practically make Ghazali’s distinction, one needs to be made aware of all the possible arguments contrary to his own before deciding whether this is a true sense of certainty or not, which is an impossible scenario. Similarly, there is no practical way to distinguish between the right sources of certainty and the wrong ones. For example, how can someone living in antiquity and who is convinced that the earth is the centre of the universe tell whether his conviction is based on a logical axiom, a concurrent testimony, imagination, or a popular conviction? If we take Ghazali’s suggestion and ask this person to imagine himself in a pure state where he is not influenced by culture, will he then be able to make this sort of distinction? Probably not. In fact, Ghazali’s classification of morals as a cultural issue is an assumption for which he gave no evidence. For someone who is not aware of any convincing arguments against the proposition that justice is good, this proposition could just as well be a logical axiom. The proposition that the sun goes around the earth could be based on perception just as well as testimony and popular convictions. Once there is more than one source for a proposition, it is not necessarily possible to be able to distinguish between them, hence, one is unable on these bases to tell whether something is certain or not.

The second problem about certainty being based on intuition or feeling is that it renders certainty subjective; ‘my certainty does not have to be your certainty’. But in Islamic jurisprudence, things work differently. Muslims are *told* what is certain and they are obliged to believe in the certainty of some things. It is not about feeling certain about a proposition, it is rather about accepting the certainty of a proposition. According to Ghazali’s theory, to be certain about some testimony attributed to the Prophet Muhammad, one should receive that testimony from numerous different sources many times until he feels certain that this testimony is indeed from the Prophet. But in reality, when a Muslim reads or hears for the first
time a Quranic verse or Hadith attributed to the Prophet, he is required to accept it at once as authentic because some scholar who lived centuries ago said he received this testimony by *tawatur* and is thus certain of its authenticity. The individual in question may be in doubt, but he must follow the certainty of another individual who is revered by the Muslim community. Ghazali was right in recognizing certainty as a subjective feeling, but he was wrong in claiming that certainty, on these bases, can be the epistemological platform for *usul al-fiqh*.

There is a third problem in Ghazali’s theory which was mentioned briefly in the discussion above. Ghazali’s concept of certainty is obscure, for he classifies some sources of knowledge as sources of certainty, yet he acknowledges that these sources do not always give certain knowledge. He classifies perception as a source of certain knowledge, but he admits that perception is fallible. Similarly, he admits that experience and testimony are subjective. The only sources that give absolute certainty for Ghazali are the logical axioms (*awwalīyyāt*) and introspection which have no jurisprudential significance. This forces the question: what is the nature of certainty Ghazali is striving for? And recalling the question asked above, will he be satisfied with a degree of certainty that is seldom wrong rather than never wrong?

In his book ‘*Miʿyar al-ʿilm*’ which he refers to many times in *al-Mustasfa* as being more thorough in discussing epistemology, Ghazali is no less obscure and offers nothing lucid or solid to understand certainty, except by involving postulates of faith, which renders epistemological certainty obsolete. He argues that certainty is to know that something is ‘as such’ and cannot be otherwise; even if told otherwise by a trustable person or by testimony from a Prophet, you should doubt the person or the prophecy but never the conviction that something is ‘as such’. Doubting this under any circumstances means that it was not known with certainty. Further, Ghazali argues that certain conclusions cannot contradict each other, like a concurrent testimony of the existence of Makkah and another concurrent testimony of its non-existence. There will be a mistake in the premises; for it is easy for people to confuse certain premises with probable ones. What is interesting in Ghazali’s argument, is that he thinks people can even

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187 ibid 61.
consider a certain premise to be a probable one, not just the reverse. This can only happen when the mind deviates from the pure fitra by following the ideas of dogmatic philosophers and their corrupt doctrines (sceptics). One doubts certainties (yaqīnīyyat) when his (self) finds comfort (taʾnas al-nafs) in those deviant ideas. Similarly, it is possible to consider something that is probable as certain merely because it was repeated to the ears to the state of familiarity and submission (izʿān). Here, Ghazali regresses on what he said before and takes us back to square one. What this argument says is that, under the wrong influence, one can consider something that is probable to be certain, or something that is certain to be probable; this leaves Ghazali’s concept of yaqin in a very uncertain position. Further, he acknowledges that achieving the degree of certainty he describes is a difficult task, and that it can only be achieved by a long and patient training and practice. The longer one engages in thinking with pure rationale and the more he purifies his mind from perception and imagination, he becomes more capable of achieving absolute certainty in knowledge.\(^{189}\) At this stage, it will be difficult to explain to anyone how you are certain about something, you can only guide a person to the same path that you took so he can be in the same mental state as you are and then he can feel the certainty you feel. If he cannot do this, it is better not to share your experience with him, for ‘the bosoms of freemen are the tombs of secrets’.\(^{190}\)

This last line of argumentation is revealing because it shows that Ghazali’s concept of certainty is not truly based on pure logic and rational thinking; there is, apparently, an element of Sufism involved. It is no secret that Ghazali is a devout sufi who thinks that pious Muslims can receive divine knowledge, and are, thus, capable of having certain knowledge. But he never, intentionally, made his case, when discussing the epistemology of usul al-fiqh, from a sufi’s stance. He understands that this is an exclusive club, and if he involves Sufism into the realm of fiqh, he will jeopardise the universal subjection of Muslims to fiqh. If certain knowledge is exclusive to a group of Muslims, why would the fiqh that is based on this knowledge, be binding

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\(^{189}\) ibid.

\(^{190}\) ibid 237.
to everyone? Why should someone abide by a law that is made from probable, or even doubtful, sources to him, but certain to someone else?

Scepticism is a very old concept and Ghazali was well aware of the difficulties of avoiding it in epistemology and striving for absolute certainty without resorting, as in the Platonic philosophy, to metaphysics. A quote from Ghazali’s autobiography reveals his scepticism in epistemology and how he thinks people can gain certain knowledge. When he thought about true knowledge he decided that it can only come from either perception or reason;¹⁹¹ and after serious contemplation, he realized that perception is fallible,¹⁹² which left him with only reason as a source for certain knowledge. But then he realized that his dreams made him doubt even his mind for he could not tell with certainty what is real and what is dream or imagination.¹⁹³ Then he says: “when I had this thought, I tried to find a solution but could not, for a solution had to be based on evidence and evidence needed a priori knowledge; if no postulates were possible, providing evidence was impossible also, so this illness became chronic. It lasted for about two months during which I was in a state of scepticism, but not a self-imposed one, until Allah Almighty cured me of this illness and I could trust reason and the necessities of mind again, with safeness and certainty. And this was not by putting together evidence or logic, rather, it was by light cast in my chest by Allah Almighty, and that light is the key to most knowledge”.¹⁹⁴

We can summarise our discussion of Ghazali’s concept of yaqīn in a few points:

- Despite his occasional inconsistency, Ghazali’s concept of certain knowledge can be shown to be the knowledge that can never be doubted even in the face of the strongest possible sources testifying contrary to it; doubt will always be on the contrary argument not the certain knowledge. Nor can this certain knowledge change in time regardless of

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¹⁹² ibid 28–29.
¹⁹³ ibid 30.
¹⁹⁴ ibid 31.
how much time passes, it is eternally certain. An example for this is the knowledge that three is more than two.

- Having raised the bar so high with this definition of certainty, Ghazali was unable to show how, in the context of jurisprudence, this certainty can be achieved. The knowledge useful in *usul* is likely to be from perception, testimony, and experience, all of which cannot achieve the required certainty. The axioms are too abstract and can hardly be of direct application in *usul al-fiqh*.

- His ideas taken as a whole, Ghazali is a sceptic. He doubts the ability of the mind to distinguish reality from illusion and so even the axioms are not certain in this light. However, he believes that certain knowledge can be obtained by divine enlightenment. This argument, having no bearing in the context of jurisprudence, was not mentioned in his *Mustasfa*, but in his autobiography and was alluded to in *Miʿyar al-ʿilm*.

Before concluding this section, it remains important to show why this study has focused on Ghazali’s concept of certainty and will consider it, to some degree, representative of Islamic jurisprudence concept of *yaqīn*.

Certainty, as an epistemological issue, falls, within the Islamic circles, in the domain of *kalām* (philosophy). Therefore, to speak about epistemic certainty in *usul al-fiqh*, one must be competent in both *kalam* and *usul al-fiqh*; and before Ghazali, only very few can claim that stature. In general, Ghazali is one of a few scholars who wrote on *usul al-fiqh* with a philosophical bent; and his writings in epistemology in the context of *usul* have influenced many *usulis* after him, sometimes copying him word for word.\(^\text{195}\) Ghazali, according to Ibn Khaldun, was one of the four pillars of *usul al-fiqh* written by theologians or people of *kalām*.\(^\text{196}\) Further, most of what is written about certainty in *usul al-fiqh* did not differ much from what Ghazali wrote, only Ghazali, being well equipped with philosophical knowledge, was the most comprehensive and thorough in his epistemology compared to the others. It remains

\(^{195}\) See for example: Ibn Qudāmah al-Maqdisī, where his introduction on epistemology is an abridgment of Ghazali’s.

\(^{196}\) The other three being Abu al-Maʿali Abdul Malik al-Juwaini (Ghazali’s mentor); qadi Abdul Gabbar; and Abu al-Husain al-Basri. See: Abd al-Rahmān ibn Muḥammad Ibn Khaldūn, ‘Muqaddimah’ 361.
important, nevertheless, to look briefly at other works on epistemic certainty from the literature of *usul al-fiqh*. This will not change our understanding of certainty in *usul al-fiqh*, which we got from Ghazali, but it might shed light on how much of a problem the *usulis* thought the issue of certainty was.

**Imam al-Haramain Abdulmalik al-Juwaini (d. 478 A.H.):**  
Al-Juwaini rejects limiting knowledge to perception or reason, and argues that all knowledge is necessary knowledge (*ḍarūrī*).\(^{197}\) This contains knowledge from the mind only, like *a priori* knowledge, knowledge from testimony only, and knowledge from a combination of the two.\(^{198}\) He rejects the ranking of different types of knowledge (like *a priori* knowledge better than perception, perception better than testimony, etc.). As all knowledge is necessary, it cannot be ranked; the sources of knowledge can differ in their fallibility, but once they yield knowledge, it cannot be ranked.\(^{199}\) Al-Juwaini seems to be playing on terminology here. He only gives the name ‘knowledge’ to what qualifies as certain knowledge to him. In this sense, all knowledge is necessary; which seems to be his idea of certain knowledge. There is, he argues, axiom knowledge where the mind attacks a particular idea without thinking. Then one can use these axioms as premises and combine these premises to get new knowledge, only this time much thinking is involved, but it still is necessary knowledge.\(^{200}\) What is missing from al-Juwaini’s arguments is the notion of fallibilism and how to distinguish between certain knowledge and uncertain knowledge. He does not talk about *ẓann*, nor does he explain his concept of certainty *vis-a-vis* probable knowledge. He rejected the classification of the sources of knowledge made by other *usulis* but did not give his own view on these sources and the type of knowledge they give. He talks about how miracles are testaments to the veracity of a Prophet, and how this can be the basis for the trueness of the Quran and Sunna; getting us into the issue of the sources of *usul al-fiqh* and their validity, without providing a clear idea of the epistemological bases for his *usul*.\(^{201}\) In order for us to classify Quran, Sunna, or Ijma’ as certain, we need to thoroughly

\(^{198}\) ibid 29.  
\(^{199}\) ibid 28.  
\(^{200}\) ibid 30.  
\(^{201}\) ibid 32–37.
understand, this being a field of law, what is meant by ‘certain’ and what legal consequences will there be upon that understanding. All this is lacking in the work of al-Juwaini.

Fakhr al-Deen al-Razi (d. 606 A.H.):

Similar to al-Juwaini, certainty was not central to al-Razi’s epistemology which he discussed briefly in his introduction. Al-Razi provided a typology for knowledge where he gave a breakdown of the types of knowledge and their sources. If a mind’s judgment on a subject, he says, was: assertive, identical to the subject, and justified by the senses, the knowledge is perception or introspection. If the justification was the process of thinking, then knowledge is axioms or reason. If the justification is a combination of mind and senses: a combination of mind and hearing is concurrent testimony, while a combination of the mind with the other senses is experience. If the knowledge is not justified, it is imitation (taqlīd). If the judgement is assertive but not identical to the subject, it is ignorance (jahl). If it was not assertive and the hesitation was between two propositions with equal probability, it is doubt (shakk). If one proposition was more probable it is żann, and the less probable is illusion (wahm). Al-Razi is, however, conscious with regards to certainty when he talks about ‘author intention’. He says that language is a human construct where semantics are not of absolute certainty, therefore, the understanding of any text can only be probable. More on this will be discussed later; but what this shows in the present context, is an awareness on al-Razi’s part of the intricate issues regarding certainty in usul al-fiqh and the difficulty surrounding it.

Most of the usulis preferred, in their discussion of epistemology, to discuss knowledge (‘ilm) not certainty (yaqīn). The usulis who belong to the kalām school usually presented their epistemology as an introduction to their usul work, which seldom diverted from the classic typology of knowledge where it was divided into different types according to its sources. The

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203 Whether ‘knowledge’ and ‘certainty’ are two different concepts is a matter still unresolved. According to Stanford Encyclopedia of philosophy “Although some philosophers have thought that there is no difference between knowledge and certainty, it has become increasingly common to distinguish them. On this conception, then, certainty is either the highest form of knowledge or is the only epistemic property superior to knowledge”. See: Baron Reed, ‘Certainty’ <https://plato.stanford.edu/archives/win2011/entries/certainty/>.
description of certainty could be found in the midst of this typology.\textsuperscript{204} Other usulis did not find it necessary to write whole chapters on epistemology and only discussed it in the chapters of akhbār which dealt with testimony where the main discussion is about the certainty of tawatur and the probability of āḥād hadith.\textsuperscript{205}

It is proper at this point to recall what exactly we are looking for in the literature of usul al-fiqh, in order to make more sense of our claim of its absence. It was mentioned in the beginning of this chapter that the sources of Sharia are thought to show, with certainty, the true will of God. This might have resulted in the rigidity of Sharia since the will of God cannot be amended under any circumstances. It is not clear, though, whether it was indeed the epistemic certainty of the sources that made Sharia unamendable, or it was the conception of a divine law that made the usulis claim certainty for its sources in spite of the great difficulty in proving it epistemologically. It was clear, however, from the examples shown that the law’s impunity from change had adverse effects while no solid justification for it was found. We are, therefore, looking for a clear understanding of the concept of certainty in usul al-fiqh, which can help us understand this predicament of Sharia; and judging by the discussion in this chapter, it is perhaps clear that the concept of certainty in the usul literature is consistent with, and perhaps even causative to, this predicament. There is a strong and persistent sense of absolutism about the concept of certainty in usul; unlike the modern trends on epistemic certainty, which are more modest in the face of scepticism and can be contented with “the highest form of knowledge”\textsuperscript{206} as a definition. In usul, certainty is not relative and has no tolerance for change.

Certainty and probability, according to Zysow, were the fundamental categories with which Muslims approached every question of law.\textsuperscript{207} Yet, the concept of certainty as an epistemological foundation for usul al-fiqh was mostly ignored by the main works of usul. The


\textsuperscript{206} See n200.

\textsuperscript{207} Zysow 1.
meaning of certainty seems to be taken for granted. Even when usulis who were philosophically competent like Ghazali and, to a lesser extent, al-Juwaini, did write about the concept of certainty, and despite their acknowledgement of the epistemic difficulties in achieving it, absolute certainty was their epistemological choice for usul al-fiqh. The outcome is a Sharia system which has some degree of flexibility in its branches (furu’) and is absolutely rigid in its sources (usul).
Chapter Three

Certainty in the Quran

The Quran in Islam is the word of Allah revealed to the Prophet Muhammad between 609-632 A.D. As the divine word, the Quran became, especially after the Prophet died, the ultimate connection of Muslims to Allah. It represents the embodiment of Allah’s eternal message to humanity. There are, however, some essential aspects regarding the Quran that are not entirely clear in spite of its centrality in Islam. One aspect is the theological labyrinth regarding the nature of the Quran: is the Quran the creation of Allah or is it his speech, hence, a manifestation of a divine characteristic? Was it revealed to Muhammad in its literal Arabic form or was it revealed as divine inspiration and expressed in human language by Muhammad? Did Allah speak in sound? Is a translated Quran a divine Quran? And so on. Another aspect is the function of Quran in Islam. Quran is thought to have many roles in a Muslim’s life beside ritual recitation. It is thought to be the ultimate reference in history, language, science, ethics, and most importantly, law. And while the legal epistemology aspect of the Quran will be the focus of this chapter, it is important to note that the conception of revelation can, and often does, cause confusion. For example, and with regards to the function of Quran, a distinction between prohibition and dissuasion or between an imperative and a recommendation remains difficult not only semantically, but sometimes due to the confluence of the sphere of ethics with that of law in the Quran. The implications of this obscurity are more salient in matters of law where Muslims attach great demand for certainty with regards to God’s will.

As far as Quranic certainty is concerned, both concepts of nature and function of Quran are influential. The concept of Quran as a divine lingual revelation entailed that its authenticity is one of letters, syllables and vocals. Had Quran been conceived, for example, as a divine inspiration for the Prophet with the language being only human, the authenticity of its letter
would have been of less importance as is the case in hadith. The divinization of Quran’s letter entailed the arduous job of demonstrating the certainty of each character in the *mushaf* as being perfectly transmitted from the mouth of the Prophet, and thus authentic. Arguments were made to demonstrate that the written form of Quran was perfectly preserved through a process of writing, collecting, editing, and collating what the Prophet has uttered as Quran. Further arguments were made to demonstrate that an oral form of Quran was preserved through the method of concurrent testimony (*tawatur*) where every Quranic vocal uttered by the Prophet was delivered perfectly along the generations of Muslims.

Combining this with a conception of Quran being a source of law, we have a legal text enshrined in eternity. And when the certainty extends to hermeneutics, the law becomes absolute, with evident implications in crime and punishment, family, finance and others. Certainty does not only rigidify law by the ossification of its text, the very idea of a successful perfect authentication process coupled with the claim for perfect deciphering of God’s will legitimizes legal absolutism. Absolute law sits well with the idea of the absolute God who does not change nor fault, and thus the Muslim jurists find themselves facing the enigma of trying to harmonize between an ancient rigid law and an ever-changing social life where each seem to pay no regards to the other.

Analysing the Quranic law, therefore, requires the analysis of all the arguments underpinning its certainty. This means carefully scrutinizing the history of Quran in both its written and oral forms and the historical and logical arguments made by the usulis to ascertain its authenticity. Similarly, an examination of the arguments for perfect hermeneutics is required with regards to semantics and context. Finally, the chapter will look at how Quranic certainty affected the development of a Quranic law of finance.

Recalling Khalid Abu Elfadl’s observations from chapter one, there are two issues that must be ascertained regarding the Quran: authenticity, are the instructions from God? And interpretation, what do the instructions say? As for the latter, it has been the tradition of the

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208 See n84 in chapter one.
pre-modern usulis to discuss linguistic issues like semantics, abrogation and the role of context in understanding God’s intention. Authenticity, on the other hand, has been based, in the literature of jurisprudence, almost solely on testimony particularly on concurrent testimony (tawatur). This tradition had a salient problem as it completely neglects the written Quran as a form of transmission on the basis, perhaps, that it had little role in the transmission of Quran. This argument, however, has recently been challenged with the renovated interest in Quranic manuscripts, an interest aided by new discoveries of manuscripts and new methods and technologies to study them more accurately. Studying certainty in Quran, therefore, can be categorized as follows: 1. Authenticity (written and oral Quran (testimony)); 2. Interpretation (semantics and context).

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209 See for example Keith E Small, *Textual Criticism and Qur’ân Manuscripts* (Lexington Books 2011) 144,150.
210 ibid 4.
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Authenticity of the Quran

Written form:

The fact that certainty of the Quran has been based in the usul literature mainly on the oral tradition with conspicuous neglect of any role of written manuscripts in substantiating the certainty of Quran is peculiar. It is well documented that the Prophet, every time he received a revelation of the Quran, had instructed his companions to write it down.\(^\text{211}\) This attests to his recognition of the importance of having a written form of the Quran alongside the, then, more traditional oral version. Furthermore, when fears were raised of losing the Quran due to the death of the reciters (\textit{qurra'}) in battle, the companions sought to collect the written Quran, which was then written fragmentally on leaves, animal shoulders, and other primitive materials; these were collected and kept in the house of Hafṣa, the Prophet's wife.\(^\text{212}\) A similar effort was done during the reign of Uthman (23-35 A.H./644-656 A.D.) when, again, fears were raised of losing the Quran this time due to the growing variation in reading the Quran which threatened, according to the companions, its uniformity. Once again, they turned to the written record of the Quran, with the aid of what was memorized by the companions, in order to codify the Quran.\(^\text{213}\) Uthman (d.35/656) then ordered copies of his master Quran to be sent around the caliphate and all other versions to be destroyed;\(^\text{214}\) which again emphasizes the reliance on the written Quran in preserving the revelation and hence ensuring its authenticity. The question, thus, naturally becomes: why was the authenticity of Quran, in the rare instances in which it was mentioned by the usulis, based mainly on the oral tradition with no regards to its written manuscripts? Why was the story of the collection of the Quran (\textit{qiṣṣat jam' al-Quran})


\(^{212}\) ibid 53.

\(^{213}\) ibid 66.

\(^{214}\) ibid 88.
confined to the field of history (ṣīra) and had no bearing on usul al-fiqh where it could have, perhaps, substantiated the authenticity of the Quran?

Referring to Quranic manuscripts might have been counter-productive for the usulis in the rare – discussion of the authenticity of the Quran. Until the time of Ibn Mujāhid (d.324/935), there was a great degree of flexibility in the reading of the Quran which was due to the flexible orthography then, before diacritical marks were developed in the Arabic script limiting the possibility of variation. Before the tenth/fourth century, according to Small, “the text was simply not in a state containing the degree of precision required to record and transmit one precise reading system, much less numerous systems...The growth represented by the development of the eight eventual versions of each of the Ten recitation systems occurred when the script was developed enough to contain and preserve a precise recitation of the text”.215 This – the fourth century – is the time when usul al-fiqh began in earnest.216 For the usuli trying to establish the perfect authenticity of Quran, to rely on a written text which, in terms of a developed precise form is still in its infancy, will not seem conducive. Even if the usuli had a complete, diacritically marked, manuscript of the Quran, he will face a question of authority; for a manuscript to be used as a document that proves the authenticity of Quran, it will have to be an authoritative copy, like the original Uthmanic master or at least one of its recognized copies. This draws attention to another problem. The trace of authoritative manuscripts of the Quran, ones that belongs to great companions like the four caliphs or Ibn Mas‘ud, seems to have been lost very early.217 It was reported that Imam Malik (d. 179/795) was asked about the master Uthmanic copy and he replied “zahab (gone)”.218 Further, al-Sijistani (d. 316/929) and al-Dani (d. 444/1053), the most notable scholars on the history of the written Quran, did not refer to authoritative Quranic manuscripts but relied mainly on oral traditions from formative sources who claim to have seen an authoritative copy or to have met

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215 Small 154.
217 Small 167.
an authoritative figure, a companion or the Prophet himself. They used oral traditions to tell
the history of the Quranic manuscripts. Similarly, the historian Ibn al-Nadim (d. 384?) mentions
that he saw a number of Quranic manuscripts all their scribes claim them to be that of the
Prophet’s companion Ibn Mas’ud; not two of them were in agreement.

There are two kinds of manuscripts that can be studied when discussing the authenticity of the
Quran: extant manuscripts, that is, all manuscripts that are physically in existence and available
for study; and manuscripts that are mentioned in the literature but are not available for
physical examination. The first type is interesting in that it provides physical material that can
be examined with modern technology to get reliable results. The problem with this type is that
it is very rare – particularly the old ones – and thus, is difficult to tell from them the complete
history of the Quran. The second type is interesting because it contains a great number of
variations that allows, when analysed objectively, for a narrative about the history of the Quran
different from the conventional one which presents the Quran as a sealed, ahistorical text.

The problem with this type however, is that it relies on historical reports (testimony). This is not
to discredit testimony as a source of historical knowledge (which will be discussed later), but it
acknowledges that in the process of studying these manuscripts, the sphere of uncertainty
becomes two-fold: the non-extant manuscripts and the reports about them.

**Extant manuscripts:**

The study of extant Quranic manuscripts could not attest to the certain authenticity of the
current Quran for lack of an authoritative copy as well as lack of copies that are plenty enough
and old enough to corroborate in testimony for this objective. It is safe to say that the
question of authenticity comes top among the interests of studying Quranic manuscripts, being

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219 For example: al-Dani refers to the Uthmanic master through a chain of transmission of four people, the fourth
claiming to have seen the manuscripts. See: Úthman ibn Saïd or Dānī, *Kitāb al-muqni‘ fi rasm masähif al-amsār
ma’a kitāb al-niqat* (Otto Pretzl ed, Matba‘at al-Dawlah (Deutsche Morgenländische Gesellschaft -in kommission
bei FA Brockhaus) 1932) 15.


221 Small 6.

the most controversial (in comparison to, say, palaeography). In light of this fact, every manuscript ranks in importance according to the information it can provide with regards to authenticity, hence the importance of age and authority; but most importantly, conformity to the current Quran. For, it takes a single non-conforming manuscript, other measures being equal, to cause doubt regardless of how many conforming manuscripts there are.

An authoritative manuscript must, in the case of Quran, be an old manuscript.\(^{223}\) For, a relatively recent manuscript, even if perfectly dated and attributed to a known owner, will itself face the question of authenticity, how can we be certain it conforms to the Quran of the Prophet? The older the manuscript, the closer it is in time to its original source, and the less uncertain it is. And although we cannot eliminate uncertainty entirely by the mere age of the manuscript, age seems to be the best measure of authoritativeness. If a manuscript is dated back to the first century, particularly to the time of the Prophet, the manuscript is likely to be a companion’s property,\(^{224}\) the best measure of authoritativeness at our disposal. There is, of course, the chance that a manuscript maybe old but not authoritative in the sense that it belongs to someone not recognized historically as an authority in Quran, but when it is not possible to accurately attribute a manuscript to an owner, we have to rely on age as a measure of authoritativeness. This is founded on the great importance usually given to first-century Quranic manuscripts,\(^{225}\) particularly, the recent University of Birmingham Quranic Manuscript which is thought to be contemporary to the Prophet making it likely to belong to a companion of the Prophet, hence, authoritative.\(^{226}\)

\(^{223}\) Small defines authoritative text-form as: a form of text that acquired a degree of local geographic consensual authority. Small 7.


\(^{225}\) According to Sadeghi and Goudarzi, the Šanʿā’ 1 “is at present [the Birmingham discovery was not made yet] the most important document for the history of the Quran. As the only known extant copy from a textual tradition beside the standard Uthmanic one, it has the greatest potential of any known manuscript to shed light on the early history of the scripture”. Behnam Sadeghi and Mohsen Goudarzi, ‘Šanʿā’ 1 and the Origins of the Qurʾān’ (2012) 87 i-ii (2 Der Islam 1, 1 <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=ich&AN=ICHA457070&site=eds-live>.

\(^{226}\) For more on the attention this manuscript received see: ‘Birmingham Qur’an Manuscript Dated among Oldest in the World - University of Birmingham’ <https://www.birmingham.ac.uk/research/impact/original/quran-
It has already been established that extant manuscripts do not constitute a source of perfect authenticity for the standard version of the Quran, which is the main objective of our discussion; however, this should not terminate the discussion since extant manuscripts might play an opposite role as mentioned above; that is, to question the authenticity of the standard Quran should there be variation between them, and there is plenty.²²⁷ But before discussing the implications of these variants, it is apt to restate the objective of this discussion in the context of the research.

The fact that what Allah commands must be considered absolute law which cannot be changed and must be obeyed by all believers is not disputed here; what is a matter of dispute is how to be sure that a command or law is certainly Allah’s word. The argument here, and throughout this research, is that there is some form of correlation between uncertainty and changeability of the law; the more certain a law is (certainty here being authentic divinity), the less changeable it is, and absolute certainty means absolute rigidity. So, what can extant Quranic manuscripts, in this context, tell us about the highest source of law in Islam, the Quran?

On the issue of authenticity of the Quran, extant manuscripts are a double-edged sword. On the one hand, they attest to the standard Quran for being very similar to it. According to Deroche “[t]he evidence they [manuscripts] provide, when confronted with the accounts transmitted by the Islamic tradition about the writing down of the Quran, confirms that these reports contain without doubt a historical core and ... that a text compatible with the canonical version was transmitted”.²²⁸ Similar arguments are made in the Encyclopaedia of the Quran that, with the exception of few peculiarities, “most of the manuscripts currently known are very close to the canonical text”.²²⁹ Furthermore, Small argues that “[t]he variants that can be observed in extant manuscripts are relatively minor revolving around a consonantal text that

²²⁷ For variants in Quranic manuscripts see: Small 31–105. See also: Alphonse Mingana, _Leaves from three ancient Qurâns possibly pre-‘Othmânic with a list of their variants_ (Alphonse Mingana and Agnes Smith Lewis eds, CUP 1914).


even at the time of the earliest manuscripts, shows a remarkable degree of fixation”. Extant manuscripts, according to these arguments, provide strong support to the standard Quran. On the other hand, extant manuscripts, do have some variants from the standard Quran; and although these variants are described as ‘minor’ or somewhat insignificant, they are sufficient in disrupting the argument for perfect transmission. Extant manuscripts provide people who argue for perfect transmission of the Quran with a dilemma. If they accept the manuscripts, they greatly improve the evidence for the authenticity of the standard Quran by the scientific material evidence the manuscripts represent, rather than relying solely on the debatable oral transmission. But this, on the other hand, means accepting the variants in these manuscripts as well, surrendering in the process the claim for perfect transmission and opening the door for doubt to be cast on the divine text. The choice taken by the main voices in the Muslim world was to stick to the method of oral transmission as the sole method for transmitting the Quran reliably, while cherry-picking from the extant manuscripts what supports the traditional claim.

When extant manuscripts are used as evidence for or against the authenticity of standard Quran they give inconclusive results; the manuscripts are scarce and the dating methods are still mostly uncertain or unprecise although rapidly improving. This, however, should not be seen as evidence for the superiority of oral transmission let alone its independent sufficiency. The fact that the Prophet explicitly ordered his companions to write down the Quran as he dictated it to them is proof that the written form of Quran is not, as some have tried to argue, a redundant method of preservation and transmission. Therefore, contradictions between oral Quran and written Quran cannot simply be disregarded in favour of oral Quran. Nor can the variants and discrepancies of extant Quranic manuscripts be dismissed as negligible.

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230 Small 173.
233 Mohammad Ghazali, see n231 above.
in relation to the certainty of perfect transmission. Arguments that variants in Quranic manuscripts are scribal mistakes and not different Quran, only reinforces uncertainty.

Traditional accounts of Quranic manuscripts:

The most important Quranic manuscript in history is the Uthmanic Quran or what is known as *al-Muṣḥaf al-Imām*. According to the traditional literature, this is the standard manuscript that was written as the result of a collection process carried out by a committee appointed by Uthman. Copies were then made and distributed around the caliphate, but neither the master nor the copies survived, and they seem to have been lost very early on. It is the general view among Muslims today, however, that the contents of the Uthmanic Quran were orally and perfectly transmitted to the present, vouching for the authenticity of the current Quran. Yet, the literature speaks about Quranic manuscripts that have considerable variation from the Uthmanic consonantal text, far greater, in fact, than what is found in extant manuscripts. The most famous non-Uthmanic, non-extant manuscript is the Ibn Masʿud manuscript. The importance of Ibn Masʿud’s manuscript is that the variation it contains from the Uthmanic consonantal text goes beyond the minor. Accepted traditions tell that Ibn Masʿud denied that *al-Fatiha* (The Opener) which is considered *ummul Kitāb* ‘The Mother of the Book’ and the *Muʿawwizatān* (verses of refuge) are part of the Quran, and that he used to scratch them off his muṣḥafs (codices). Al-Suyūṭī called this issue a ‘problem’ (*mushkil*) and this is apparently for two reasons. One is that the sources telling this are, in the Muslims view, reliable, namely, al-Bukhari. The second is that Ibn Masʿud is such an authority in Quran that it is very difficult for anyone to doubt his competency or to simply ignore his views regarding the Quran. Evidence for this is an anecdote about the second caliph Umar who was angry when he heard that someone was dictating the Quran from his memory (another evidence for the importance of writing the Quran), but when he knew it was Ibn Masʿud he said, “if one person has the merit to do that it is Ibn Masʿud”.

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234 See n216 above.
235 Small 124.
237 Abū Dāʾūd Sulaymān ibn al-Ashʿath al-Sijistānī 310,315.
settled. Many scholars have tried to interpret his actions and opinions while others dismissed the traditions as untrue despite them being in Bukhari (considered the most authentic book after the Quran). But the problem remained in the Muslim collective conscious as traces for the ceaseless quest for Ibn Mas’ud’s manuscripts are found throughout history.

There is further evidence in the literature for variants in Quranic manuscripts for which whole chapters were written to account for. But the fact that there are or were manuscripts with variants is not contested, the contention lies in how these variants are explained with reference to a consonantal text that became dominant and fixed very early on. There is a number of different responses to these variants in the literature. One is to reject the truth of the reports and this can be problematic if they come from a reliable source as in the case of Ibn Mas’ud mentioned above. Another response is to interpret the arguments of the companion (it is usually a companion’s manuscript or a presumed manuscript based on oral accounts; in other words, when a companion recites the Quran in a certain way it is presumed that this is how it is written in his muṣḥaf). Some scholars who could not reject the accuracy of the accounts about Ibn Mas’ud resorted to interpreting his position; for example, by saying that his exclusion of al-Fātiḥa from his muṣḥaf was not a denial that it was Quran, rather, he thought that writing the Quran was essentially to preserve it from being forgotten, and al-Fātiḥa could not be forgotten because it was the most recited sūra in Quran, thus he did not write it in his codex. This interpretation is evidently weak since many sūras in Quran are much shorter and equally easy to remember. A third response is to attribute the variants to scribes’ mistakes. But scribes’ mistakes are presumably possible in the consonantal text as well. In fact, it was reported that Aisha, the Prophet’s wife, when asked about a verse that seemed to be grammatically incorrect - in the standard text - said it was a scribe’s mistake. And the

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238 Suyūṭī 172–173.  
239 Examples for this are Ibn al-Nadim, see n217 and the analysis of Alba Fedli of the San‘ā manuscripts in: Déroche, ‘Qur’ans of the Umayyads : A First Overview’ 53.  
240 See for example: Dānī 108–131.  
241 Blau, cited in Small 175.  
243 Suyūṭī 173.  
245 Dānī vols 126-127.
argument that the consonantal text is preserved by tawatur will then generate the more pressing question: how did this tawatur elude the house of the Prophet himself?

A last resort response is abrogation. Variants in the manuscripts of authoritative companions are simply said to have been abrogated by the last version, the Uthmanic one, thus, are rendered invalid. The variants reported in the Shi'a literature mostly speak about the supremacy of Ali and the Prophet’s descendants; an argument evidently driven by ideological motives and, therefore, rejected by most Muslims even Shi'a.

These are responses that reject the variants found in non-Uthmanic manuscripts. Accepted variants, however, constitute what is known as Qira’āt (readings); which will be discussed later.

Our attention should now be on a short examination of the history of the written Quran. As our objective is to examine the basis of the proclaimed certainty of the sources, namely, the Quran, it will be apt to look in some detail at the process of writing the Quran and identify areas of uncertainty.

The process of writing, collecting, and transmitting the Quran:

The sources on this subject are unfortunately scarce, particularly from the period of Makkah. But, and although this may somewhat impede the enquiry into the lurking uncertainties in the process of writing the Quran, the lack of historical reports is doubtlessly a greater impediment to the argument for certainty regarding the writing of the Quran. The available historical reports, scarce as they are, and notwithstanding being reported by people presumably believers in the certainty of the Quran, still don’t make a solid case for certainty as will be shown below.

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246 Suyūṭī 167. Interestingly, he mentions abrogation and the consensus of the companions. We will look at consensus later.
Writing the Quran in the early days of Islam:

A conspicuous area of uncertainty for the written Quran is the early Makkan days. The Prophet could not write himself and he would not have thought, in any case, about writing the first revelations he received; for it, surely, took him some time before he could comprehend the idea of being a Prophet. It is safe to assume, therefore, that he did not immediately ask someone to write the first revelations he received. It is, thus, safe also to assume that he relied on his memory to memorize these first revelations until he started calling his close family and friends to the new religion and perhaps then dictated to some of them, who could write, these early revelations from memory. He must have been worried, with the continuing revelation, that he might forget some of it and resorted, thus, to dictate it to his companions. It is possible that he did forget some Quran as 2:106 indicates; and as indicated in a report from Bukhari where the Prophet heard someone reciting the Quran and he said “Allah give him mercy! He reminded me of verses so and so from surah so and so which I forgot”. It must be the case, nevertheless and according to the traditions, that writing the Quran started in Makkah, possibly the early years. The famous report about the conversion of Umar (in the sixth year of the advent of Islam) where he read verses of the Quran which were written on paper or parchment that he found with his Muslim sister, is a testimony to this effect. But writing the Quran during that time must have been a difficult and dangerous task. It is reported that the Prophet started, secretly, calling close family and friends to Islam for three years before going public. When he declared his message, he and his few, vulnerable followers were persecuted by

248 This is in line with the general Muslim view although it remains debatable among orientalist, see: ibid 11–16. and also among the Muslims, see: Qurṭubī v 29:48.
249 It is reported that he was horrified when he received the first revelation and went, shaking, to his wife asking her to cover him. See: Suyūtī vol 1. 51, see also: Nöldeke 76.
250 ibid 239.
252 Nöldeke 42,44,239.
253 Ḥamid ibn ʻAlī Ibn Ḥajar al-ʻAsqalānī, Fatḥ al-bārī sharh Sahīḥ al-Bukhārī (Muḥammad ibn Ismāʻīl Bukhārī and others eds, Dār al-Salām) number 5038. This incident took place in Madina but it acknowledges the possibility of the Prophet forgetting some of the Quran. See also: Burton 129.
254 Muḥammad Ibn Saʻd, al-Tabaqāt al-kubrā (1957) vol 3. 269
the people of *Quraish* and many Muslims had to keep their Islam secret. Any possession of written Quran would put one in danger of persecution. This is in addition to the fact that few of the Prophet’s followers could write and writing material was scarce and expensive. It is difficult to imagine how, under these conditions, which lasted for thirteen years, the process of writing the Quran could have been flawless.

*Writing materials, preservation and transportation of the written Quran:*

There are indicators of limited spread of literacy in pre-Islamic Western Arabia. According to Peter Stein, the writing materials used were (in order of wide usage): rocks and stones; wood; and pottery. According to Islamic sources, when Zaid was asked to collect the Quran, he traced it in *riqa*’ (parchments), ‘*usub* (palm-leaf stalks), *likhāf* (splinters of limestone), and the breasts of men. Other sources also mention *adīm* (leather), *qiṣṭās* (papyrus), *aktāf* and *adlā*’ (shoulder bones and ribs of camels). Palm-leaf stalks (‘*usub*’) and bones were the most easily accessible among the genuinely Arabic writing materials. By contrast, leather and parchment required an extended production process. It is possible to discern from these, seemingly concurring, reports that the Quran, whole or part, was written fragmentally on all these types of materials. The material used is probably dependent on circumstance. The Prophet gets a revelation and asks for a scribe; the available scribe comes with whatever writing material he had at hand at the time. There were difficulties, however. Writing on wood was by inscription which was laborious, almost impossible, with lengthy text. The use of ink and parchments was expensive; and although the Prophet had wealthy companions from the early days who could perhaps provide this material (there are

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256 ibid 257.

257 Abū Dā‘ūd Sulaymān ibn al-Ash’ath al-Sijistānī 54.

258 Stein 260.

extant parchment manuscripts which date to that period), the fact that other, more difficult, writing material was used is evidence that better writing material was not always available. The difficulty in writing the Quran must have been much greater during the Makkan period. For example, surat al-Anām (chapter six, The Cattle) is a long Makkan sūrah which runs twenty-two pages in the modern standard muṣḥaf (muṣḥaf al-Madīna). It is reported that this long sūrah was revealed in one batch (jumlah) and not piecemeal as the case for other long sūrah s.260 According to Ibn Abbas, it was revealed in one night and the Prophet called the scribes who wrote it all on that night.261 In a community where literacy was extremely limited to the extent that no surviving document preceding the Quran exists today, it is difficult to imagine how, especially in the hostile Makkan environment, this sūrah was written. The amount of writing material that was required at one night was not a common finding in these circumstances, nor, one could assume, was the skill, speed, and accuracy of the scribes. Another difficulty must have been the preservation of the writing material. Considering the nature of the writing material and the volume of the Quran, every scribe must have had big piles of bones, parchments, stalks and the like, which he had to provide safe storage for. Again, this would have been a greater problem in Makkah. These primitive materials had to endure, while being mostly hidden, the harsh environment of the desert, while the primitive script had to remain legible. All this had to be done while the materials remain accessible. It must be remembered that these materials were fetched when a new revelation that belonged to an existing sūrah (piecemeal revelation) was to be written; or at least when the companions wanted to revise and study the Quran from them; after all, that was the main purpose of writing the Quran. Another issue with regards to writing materials of the Quran, is the question of how these materials where transported from Makkah to Madinah during the Hijra. It is known that the Hijra from Makkah to Madinah was opposed by Quraish and Muslims had to travel in secret,262 even the Prophet and Abu Bakr were pursued but managed to arrive at Madinah safely. The written Makkan Quran must have been a large amount of cargo even when considering that it

261 ibid. 
was distributed among the scribes and companions; considering the bulky nature of the writing material. Transporting this cargo safely and in secret would have been an immense task when we remember that many companions had to leave all their belongings behind either to avoid attention or in exchange of liberty to travel.\textsuperscript{263} In such circumstances one can assume that people, in order to travel light, will only carry with them parchments or paper of Quran, if they carry any Quran at all; the bones and wood would have had to be left behind. And as we established that the former material was scarce and thus less used, we can assume that the majority of the written Makkah Quran was not transported to Madinah.\textsuperscript{264}

\textbf{Dictation and editing\textsuperscript{265} of the Quran:}

The scarce reports about this crucial process in the writing of the Quran give a patchy picture which we can only attempt to complete by inference. The hypothetical process is as follows.

The Prophet receives a revelation; he calls for a scribe to write it down.\textsuperscript{266} Sometimes the scribe is present when the revelation comes.\textsuperscript{267} The scribe must come with his writing materials which might differ from time to time or from one scribe to another. The Prophet dictates to him the Quran and the scribe writes it down. The Prophet asks the scribe to read back what he wrote,\textsuperscript{268} which seems to be his only checking mechanism since he, according to general Muslim conviction, cannot read. After checking in this manner, the Prophet tells the scribe/s to write the revealed verses with \textit{sūrah} so and so, or with the \textit{sūrah} that mentions subject so and so.\textsuperscript{269} This is what the reports tell about the process and there is evidently a number of issues at hand which need to be examined.

\textsuperscript{263} The story of the companion Suhaib; see: ‘Abd al-Malik Ibn Hishām, \textit{al-Sīrah al-nabawīyah} (Tāhā ‘Abd al-Ra‘ūf Sa‘d ed, Dār al-Jīl) vol 2. 87
\textsuperscript{265} Only the editing during the Prophet’s life is discussed here, editing after his death will be discussed with the discussion about the collection of the Quran.
\textsuperscript{266} ibid. numbers 4592-95
\textsuperscript{267} Sulaymān ibn Ahmad Tābārānī, \textit{Fath al-bādi’ sharh Sāḥīḥ al-Bukhārī}. Number 4990.
\textsuperscript{268} ibid. numbers 4888, 4889
\textsuperscript{269} Muhammad ‘Izzah Darwazah, \textit{al-Tafsīr al-ḥdqīth : tartīb al-suwar ḥqsab al-nuzūl} (Dār al-Gharb al-Islāmī 2001) vol 1. 78
First, given the primitive nature of the writing skills and materials at the time, the legibility of the text might have been undermined. There is material evidence now in the shape of extant manuscripts that date to the first century which shows the defectiveness of the text, partly because of the materials and partly also due to the absence of diacritical marks.\(^{270}\) It is possible that the scribe who wrote the text might read it differently if he comes back to it after a while. It is, therefore, more likely that a different person will read it differently from what was actually dictated, even if the writing was error-free. There is, furthermore, strong evidence that the current Quran contains scribal mistakes.\(^{271}\) Same words have been spelt differently in different parts of the Quran; for example ‘Ibrahîm’ (Abraham) is spelt in chapter two ‘al-Baqara’ without the letter ‘ya’ (i), whereas, it is spelt with the ‘ya’ in the rest of the \textit{Mushaf}.\(^{272}\) This seems to be a result of the way different scribes spelt the word; and when the final Uthmanic version was prepared, the committee, perhaps, did not wish to change what was quite likely a simple variation on how scribes spelt the word and preferred to keep, out of reverence to the original copies, the variant spellings without change.\(^{273}\) More serious, possible, scribal mistakes are ones where grammatical errors were made, and there are a number of these in the Quran.\(^{274}\) The significance in this latter case is that the words are pronounced as they are written, that is, if it is indeed a mistake, pronounced erroneously; whereas in the former case the word is pronounced without regards to the variant spelling, (‘Ibrahîm’ in both cases).\(^{275}\) A whole body of apologetic literature, hence, emerged to justify the possible errors claiming them to be more subtle and sublime than the presumed correct words, and thus, even stronger evidence, of the divinity of the Quran.\(^{276}\)

\(^{270}\) For example: the San‘â and the Birmingham manuscripts
\(^{272}\) Dâni 98. More on the spelling issues on: Ibn al-Khatib 71–90.
\(^{273}\) Ibn Khaldûn 330. Similar case did occur for a supposedly abrogated verse which the scribe chose not to omit upon his own discretion. See: Darwazah vol 1. 78
\(^{274}\) Ibn al-Khatib 41–45.
\(^{275}\) There is an exception in one of the less known readings of the Quran where it is read ‘Abraham’.
There is also the case of forgery. It is reported that ʿabdullah Ibn Abi al-Sarḥ, one of the Prophet’s scribes (one of his first in Makkah), had doubts about Mohammad’s prophecy and sometimes wrote things differently from what the Prophet dictated to him. Later he renounced Islam and fled to Makkah as the Prophet issued a death sentence against him. He was later pardoned by the Prophet for the intercession of Uthman and accepted Islam again. A slightly different report tells the same story but with an anonymous scribe who, when interred, was ejected by the earth, as a sign of God’s indignation. It is not clear whether these are two different, but very similar, incidents; or the same incident wrongly reported after being sensationalized and cleared from the indictment of a companion. It is not even clear on what bases can we trust the other scribes on what they have written. The mere fact of being a companion in the loose sense seems, at least, questionable after the actions of Ibn Abi al-Sarḥ. It is known that Muʿāwiya, a controversial figure who is accused of usurping power and ending the ‘guided caliphate’ to establish the Ummaiyyad’s dynasty, was among the Prophet’s scribes. Thus, it is evident that the process of recording the revelation in writing suffered from defective Arabic script, defective writing materials, limited literacy and writing skills, and the questionable trustworthiness of some scribes.

Second, it is known that most sūrahs of the Quran were revealed piecemeal, that is, different verses were revealed at different times and a number of sūrahs were being revealed in the same duration. This is why the Prophet had to specify to his scribes to which sūrah a particular revelation belonged, and the scribes had to do the editing to organize the Quran in the right manner. The probable scenario, therefore, is that when a scribe answers the Prophet’s call to

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277 Ṭabarî v 6:93.
278 Qurtubî v 6:93.
279 Abū Dāʿūd Sulaymān ibn al-Ash’ath al-Sijistānī 38.
280 The story of Ibn Abi al-Sarḥ is embarrassing for Muslim scholars and historians because he died a Muslim and is considered a companion of the Prophet. Some have abstained from mentioning what he did with the Quran and simply said that he used to write for the Prophet and was deceived into sin by the devil ‘azallahu al-shaitan’; see: Ibn Hajar al-ʿAsqalānī, al-Isābah fi tamyiz al-sahābah vol 4. 95. The story about changing the Quran, however, was conveniently attributed to a Christian who became a Muslim and wrote Quran for the Prophet. He changed what was dictated to him, then returned to Christianity and told people that ‘Muhammad knows only what I wrote for him’. This unknown person was the one ejected by the earth. See: Ibn Hajar al-ʿAsqalānī, Fath al-bārī sharh Sahih al-Bukhārī. 3617.
write some revelation, he comes with any writing material – fresh or used – because it is likely he would not know what surah the new revelation belongs to unless the Prophet tells him beforehand. It could also be the case that the scribe available is not the same scribe who has the written material for the surah to which the new revelation belongs. These complications, and possible others mean that the scribe writes the revelation in the writing material available to him at the time without regard to organization. Editing the revelation by putting the new verses in their respective surahs must have been done at a later time, possibly at home where a scribe would, perhaps, bundle the material that contains a particular surah together. This could be a collection of wood, parchment, and paper all put together as a single surah. But there is further complication. If one surah was recorded in different occasions by different scribes the material that contains the whole surah would be dispersed among a number of scribes; and if the surah was to be organized properly, the scribes should have come together with their material containing the surah in question and made the required edition which would mean either making more copies or redistributing the written material among themselves; a process of which there is no record at all. In fact, there is no record of any systematic copying of the written Quran during the life of the Prophet. There are some reports that personal copies of some Quran were made but those were for personal use and do not collectively constitute a comprehensive record of the Quran.282 This means that some, perhaps most, of the written Quran was reserved on a single copy; in which case if a copy was damaged or lost, that Quran will be forever lost from the written records (oral record of Quran will be discussed later).

Third, and in relation to the editing process, some surahs of the Quran are partly Makkan and partly Madinian. This means that the time span for the revelation of a single surah could measure in years. And although the methodology of defining which surah is Makkan and which is Madinian is obscure and contentious among scholars, it is considered a fact that many surahs were revealed partly in Makkah and partly in Madinah. The distinction is sometimes straightforward, like surah al-Nahl (The Bee, chapter 16) where it is claimed to be Makkan from its beginning to verse forty, then Madanian to the end.283 Other surahs, however, are more

282 As mentioned above about a piece of written Quran found with Umar’s sister, or the mushaf of Ibn Mas‘ud. See also: Jābiri 215.
283 Suyūṭī 29.
complex in their mixture. For example, Suyūṭī says that *sūrah Ḥūd* (chapter 11) is Makkan except for verse 12, verse 17, and verse 114 out of a total of 123 verses. The latter verse has a stronger case of being revealed in Madinah because a *sahīḥ* hadith, which relates it to Madinah, is narrated as its occasion; and there are many other examples of *sūrah*s where an exceptional Madinian verse or two is found amidst a whole Makkan *sūrah*. For the Quran to be thus organized, it needed a complex level of editing by the standards of that time. There had to be a clear and organized record of all the written Quran: which *sūrah*s were written on what material and where were they kept. So that when a verse is revealed in Madinah but belongs to a Makkan *sūrah*, the scribe can easily fetch the right record, which could be more than twenty years old, and then put the verse in its right position. And since sometimes the verses are placed in the middle of the *sūrah*, not simply added to the end of it, the scribe would have to find space on the stone, wood, or parchment where the new verse should go. Considering the nature of these materials, this might not be possible, so the scribe, perhaps, writes the new verse on new material but makes reference to its position in the *sūrah*, perhaps by a numbering system or re-writing the previous or following verse, and then bundles the new material with the rest that contains the *sūrah*. This cannot be the only possible scenario of how the Quran was edited during the life of the Prophet, and it is very likely that some editing depended on memory. But it is difficult, in light of the above discussion, to imagine any scenario that is much improved, considering the historical circumstances, to the degree that perfect editing was possible. In the words of Burton “The circumstances in which the task was first taken up were such in which loss of Quran materials is very easily conceivable, yet the task is presented as having been executed with such supererogatory care that the promulgated text was projected as having been beyond doubt complete”.287

284 ibid 28.
285 ibid 27–33.
286 Zaid commented that he remembers an addition to verse 3:95 the Prophet dictated to him, saying “I know the position where it is added by the crack on that tablet (of bone). See: Ibn Kathīr, *al-Bidāyah wa-al-nihāyah* vol 5. 301
287 Burton 230.
The collection of the Quran

Shortly after the Prophet died, his first deputy and caliph, Abubakr, embarked on a mission of collecting the Quran and he chose Zaid Ibn Thabit for this mission. The well-known reports attribute this action to the advice of Umar who feared that parts of the Quran could be lost with the death of the reciters in battle. And although this justification has been disputed on different, sometimes opposing, grounds,288 it seems generally accepted that every collection of the Quran was driven by the objective of some sense of preservation and a fear of loss. This shows that the first generation of Muslims, including the Prophet himself, did not rely on divine preservation of the Quran but exerted their efforts to preserve it and make sure it does not get lost or changed. This human effort, no matter how earnest and well-performed, entails uncertainty. Any attempt to divinize the process by referring to verses of the Quran (15:9) is question-begging; and using the hadith will be using a weaker source in aid of a stronger one. The insistence of the Prophet to have a written record of the Quran and of his companions to preserve this record is a testimony to the uncertainty of the transmission of the Quran, not its certain perfection.

Zaid, when asked to collect the Quran by Abubakr and Umar, raised an important point, which was also raised by Abubakr before him; how could he do something the Prophet did not do when alive?289 This question was important for the companions because they were always conscious of innovation (bidʿa) or introducing something in religion which is not sanctioned by Allah. But there is a deeper historical significance to the question, and it goes back to the time of the Prophet. It seems difficult with the myriad evidences available to doubt the importance the Prophet put on the Quran; indeed, the Quran speaks of its own essentiality to the Muslims on many occasions.290 It seems, therefore, odd that the Prophet did not supervise a comprehensive process of editing and preserving the Quran when he was alive; a process that would have rendered the posthumous collection unnecessary. The very act of collection embeds uncertainty as it means bringing together what was otherwise scattered or dispersed. One would think that the Prophet, particularly after settling in Madinah, would have asked his

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288 Nöldeke 252–255.
289 Abū Dāʾūd Sulaymān ibn al-Ashʿath al-Ṣijistānī 52.
290 For example: 17:9; 17:82; 17:88; 59:21
most trustful companions to be in charge of regular revision of the written Quran with the
Prophet’s presence as insurance against mistakes. They would have had a proper registry and
storage where the Quran can be organized, and proper editing could be made when new
revelation comes. If not any of this, one would think the Prophet would have, at least, ordered
his companions explicitly to collect and edit the Quran in a certain manner when he was on his
death bed, but this was not the case either.²⁹¹ The explanation to this problem given by Islamic
discourse is that the Prophet was always expecting new revelation, or abrogation, and the only
confirmation of the end of revelation was the death of the Prophet;²⁹² but this does not answer
the issues raised above. The hypothesis of Burton that the Prophet was the one who organized
the Quran in its current shape before he died, relies on pure speculation. It goes against the
available historical evidences and provides none of its own; it relies basically on filling the
vacuum left by a notable, but unanswered, question.
An alternative, perhaps better grounded, explanation can shed light on the certainty of the
process of collecting the Quran and it is related to the nature of the Quran. It is possible that
the Quran was not intended to be a composed, unit book, muṣḥaf, but rather, a series of
individual articles/chapters. The fact is, every sūrah in the Quran is an independent, self-
contained entity. In this sense, the Quran is not a book; it is a generic name given to the
revelation received by the Prophet on different times and occasions to address different issues.
Grouping these articles in one book is a convenient editorial work that facilitates access to the
entirety of the revelation in the manner we are familiar with in today’s authorship and writing.
The muṣḥaf is not the Quran and it bears no divine authority. If this was indeed the case, then it
becomes understandable why the Prophet was not worried about the collection of the Quran.
The Quran was available in individual possessions and memories and was being passed around
in the same manner. The Prophet asked his companions to write it down, memorise it if they
could, and organize its individual chapters; that was all which was needed as a necessity. The
collection of these articles together was not a necessity, but a logical outcome driven by mere
convenience. The collection of the Quran in the muṣḥaf was inevitable just as was the

²⁹¹ Contrary to Schwally’s argument (Noldeke 239), the Prophet did not die suddenly. See: Ibn Hishām 212–224.
²⁹² Suyūṭī 126. Ibn al-Khatib 36.
development of the Arabic script with the introduction of the diacritical marks, both facilitated the reading of the Quran, but neither was an essential part of it.

The uncertainty in the process of collecting the Quran can be explained by the suggested fact that the Quran was not meant to be collected in the first place. This confirms that the process of writing and editing the Quran was not done with an eventual collection in mind, which explains the many uncertainties and short-comings which associated the process in the manner discussed above. This argument could be extended using the same line of reasoning to examine how the concept of revelation (maḥūm al-wahy), namely, whether the wording of the Quran belongs to Allah or to Muhammad, might have affected the certainty of the Quranic text in any way, but this needs a separate study.²⁹³ What needs to be stressed here is that the ambiguous nature of the concept of revelation has, in turn, obscured the arguments upon which the Quran is considered perfectly complete and authentic. In other words, one of the reasons behind the uncertainties surrounding the text of the Quran is the uncertainty about its nature; how is it related to the divine and what is its function in the mundane.

Zaid described his work saying, “I traced the Quran in riqa’ (parchments), ‘usub (palm-leaf stalks), likhāf (splinters of limestone), and the breasts of men.”²⁹⁴ This is a strong indication that the Quran was not preserved independently in written or oral form, where one form only acts as a back-up to the other. It was preserved, rather, in the combination of the two where parts of the Quran were only found in oral form, other parts in written form, and perhaps other parts in both forms. Zaid’s condition for accepting anything as Quran was to have two witnesses testifying to the verses being Quran. There is a debate whether Zaid was collecting only written material and therefore the witnesses will testify that they saw this particular written material (parchment, wood, etc.) being written from the dictation of the Prophet. Or, that the collection was a combination of oral and written form, in which case the witnesses will testify that they...

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²⁹³ Al-Suyuti mentions three opinions: 1. The Quran is from Allah word and meaning; 2. Gabriel revealed the meanings to Muhammad and Muhammad expressed them in Arabic; 3. Allah revealed the meanings to Gabriel who expressed them in Arabic to Muhammad. See: Suyūṭī 96. See also: Nöldeke 25. For a comprehensive treatment of the subject see: al-Quran Kalam Allah (Quran is the Word of Allah), Ahmad ibn ‘Abd al-Ḥālim ibn Taymīyah, Majmū’ Al-Fatāwā (Musṭafā ‘Abd al-Qādir ‘Atā ed, Dār al-Kutub al-‘Ilmīyah) vol 12.

²⁹⁴ Stein 260.
saw the Quran written by the dictation of the Prophet or heard it from him directly.\textsuperscript{295} Having two witnesses in addition to the scribe to testify to the authenticity of a written Quran seems extremely difficult for it means having three people, who can read and write, present for every revelation that was written. This is inconceivable for the reasons discussed above about the difficulty and uncertainty of the writing process of the Quran. Having two people to testify that they heard Quran from the Prophet is more conceivable, and thus, the more probable scenario; but it relies on memory to achieve perfect transmission where an error in a single syllable is unacceptable. Here again, achieving this level of transmission for a text as lengthy as the Quran relying only on memory seems inconceivable.

Zaid, after collecting what he found of the Quran, realized that he was missing two verses; he looked for them and eventually found them only with a companion called Khuzaimah. There was no second witness to satisfy Zaid’s condition but it happened that Khuzaima’s testimony was sufficient.\textsuperscript{296} This is related to an anecdote about Khuzaimah testifying in favour of the Prophet for something he did not actually witness, he justified this by saying he believed the Prophet in getting revelation from Heaven, so he will readily testify to the Prophet’s veracity in any case, thus, the Prophet made his testimony the equivalent of two.\textsuperscript{297} This seems to be a fabricated anecdote inspired by a similar one about Abu Bakr vouching for the Prophet’s veracity about his trip to Jerusalem (\textit{Isrā’}) in a single night using almost the exact words.\textsuperscript{298} A fabrication to justify the violation of the two witnesses test. It is difficult to conceive that the one man who had the missing verses of the Quran happened to be the one whose testimony equals that of two men, conveniently satisfying the condition for accepted Quran. Further, the story about Khuzaima is historically confused. In one report he is Khuzaima Ibn Thabit and he testifies to the verses (9:128-129) for Zaid’s first collection for Abu Bakr.\textsuperscript{299} Another report gives the same name and verses but for the second collection for Uthman.\textsuperscript{300} A third report hesitates

\textsuperscript{295} Suyūṭī 128–129.
\textsuperscript{296} Ibid
\textsuperscript{297} Ibn Sa`d vol 4.379
\textsuperscript{298} Ibn Kathīr, \textit{Tafsīr al-Qur'ān al-‘azīm} vol 3. 9.
\textsuperscript{299} Abū Dā`ūd Sulaymān ibn al-Ash’ath al-Ṣijistānī 54.
\textsuperscript{300} ibid 62. Zaid was not mentioned in this report; Khuzaima told Uthman about the missing verses and Uthman said that he testifies to second him. Interestingly, Uthman asked Khuzaima where he thought the verses should be
on the name, Khuzaima or Abi Khuzaima, and gives a different verse (33:23). Furthermore, the testimony of two does not qualify as concurrent testimony (tawatur) which is a necessary condition for authentic Quran. Therefore, even if some other person came to second Khuzaima’s testimony for the two verses, it does not reach tawatur. In fact, accepting Quran upon the testimony of two, according to Zaid’s condition, falls short of being concurrent (mutawatir), which makes Zaid’s method incapable of achieving the status of tawatur. All this shows the uncertainty about the reports and, should the reports be considered, the uncertainty of the process of the collection itself.

Another problem about the collection of the Quran lies in Zaid’s method. Zaid called upon anyone who had any Quran in his/her possession to come forward with it and then they looked for two witnesses to testify as mentioned above. The problem is that, even supposing the sufficiency of this test (it is not sufficient), it vouched only for the authenticity of the Quran that is found; it does not account for any Quran that is missing. It was designed to make sure that the Quran was authentic but could not confirm that the Quran was complete. In the words of Burton “Zaid’s test was negative”. There are numerous reports about Quran that was forgotten, eaten by chicken, abrogated, or lost some other way. Sometimes the claimed Quran is known but could not be accepted for not being concurrently testified for; like the verses mentioned by Umar about the stoning of the adulterers. Other times it is not known; like the claim that the sūrah Ahzab (chapter 33) was longer than al-Baqarah (chapter 2, the longest in the Quran) but most of it was lifted. These reports might not be all accurate in their detail; but considering their number and the fact that they go against the views of mainstream Islam regarding a perfect Quranic text, they must have historical substance. If Zaid’s

\[\text{\footnotesize\textsuperscript{301}}\] \textit{ibid} 89. See also: Ibn Hajar al-‘Asqalānī, \textit{Fath al-bārī sharh Sāhīh al-Bukhārī} numbers 4986 and 4989 where he mentions Abi Khuzaima and verses 9:128-129 for Zaid’s first collection for Abu Bakr; and number 4988 where he mentions Khuzaima and verse 33:23 for Zaid’s second collection for Uthman. He mentions the confusion around the name in 4679. See also: Nöldeke 248.

\[\text{\footnotesize\textsuperscript{302}}\] Burton 129.


\[\text{\footnotesize\textsuperscript{304}}\] Suyūṭī vol 2. 52-56

\[\text{\footnotesize\textsuperscript{305}}\] \textit{ibid}. 55; \textit{ibid} 1. 129

\[\text{\footnotesize\textsuperscript{306}}\] \textit{ibid} 2. 53
collection of the Quran, argues Montgomery Watt, “was dependant on chance writings and human memories, parts may easily have been forgotten”. Zaid, therefore, could not account for some of these verses or sūrahs of the Quran using his negative method, nor can Muslims be sure that his testimony-of-two test is sufficient in authenticating the Quran with zero-error accuracy.

Zaid copied down the Quran he found in suhuf (leaves, sing. Sahifah), and gave it to Abu Bakr. It remained in Abu Bakr’s possession until his death, where it went into the possession of the second caliph Umar. After Umar’s death, it went to his daughter, the Prophet’s widow, Hafṣah. This inconsistent chain of possessing the suhuf requires attention. If the suhuf were a property of the state it should have gone from Umar to Uthman, the third caliph. If it was a personal property as Noldeke suggested, it should have gone from Abu Bakr to Aisha, his daughter and also the Prophet’s widow. These suhuf are of great importance; as most reports agree that when Uthman decided to collect the Quran, he mainly just made copies of them. If these suhuf where the property of the state, then the objective of the collection would have been to make a formal muṣḥaf for the entire Muslim community. If, however, the suhuf where for personal use, then there is no confirmation that it contained the entire Quran (even one that was available), nor that it was free from personal notes or prayers that was not Quranic. The collection that was done by the caliph Uthman is the most notable in the Muslim literature for being the final edition that produced the Quran we still have today. But there are many issues concerning the significance and accuracy of the Uthmanic muṣḥaf. It is reported that the objective of Uthman’s collection was to unite the Muslim community on one reading of the Quran after differences between Muslims on how to read the it reached alarming levels. Burton argues that Uthman collated the Quran rather than collected it. The word jama’ can mean collect, but when used in ‘jama’ al-nās ‘alā qira’ā waḥida’, it means united people on one

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308 Nöldeke 252–256. Noldeke argues that the most reliable reports on this issue are the ones about Uthman getting the suhuf from Hafṣa; so, he worked backwards to discern that Hafṣa inherited them from Umar as private property, and that Abu Bakr’s involvement is historically incorrect.
310 ibid 132.
311 Burton 139.
reading of the Quran. It is known, however, that there are ten readings of the Quran that are all considered authentic and valid; which raises the question about the objective of Uthman or the success in his objective, hence the question about significance.

Uthman appointed a committee of four people headed by Zaid to make copies of the Quran from the suhuf of Hafṣah; he then sent the copies to the main cities of the caliphate and ordered the adherence to these master copies and the destruction of any others. This is how we have the Quran today from the written records. If Zaid only copied the suhuf of Hafsah, then the discussion of accuracy would be confined to the accuracy of the copying process where the chances of perfection are better while errors are still possible; and the focus should go back to that first collection, with account of any possible damage or loss during the decade between Abu Bakr and Uthman.

There are reports that some editing was done by the committee in the organization as well as the content of the Quran. Some argue that the first collection contained many different readings or versions and when the committee came to write the master copy, they wrote it in the dialect of Quraish which suggest that some editing of the content did take place. If the changed Quran was authentic it means the current Quran is incomplete or changed. If it was not authentic it means the first collection was flawed and makes the second collection without a reliable written reference. Either way, it raises serious questions about the certain authenticity of the Quran in the manner purported by the usulis.

The notable example of this uncertainty regarding the work of the committee is the issue of the basmalah (short for the phrase: In the name of God, the most Gracious, the most merciful) which is found at the beginning of every sūrah except one. There is an unsettled debate on whether the basmalah is part of the Quran or not (just a separator between sūrahs). The fact that it is still undecided whether part of the muṣḥaf belongs to the Quran or not, collides directly with the proclaimed certainty of the Quran. It is argued in mainstream Islam that the Quran is certain in its entirety; all its verses, characters, order and organization is sanctioned beyond doubt by Allah via the Prophet; how does this claim stand along with the fact that

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312 Abū Dā’ūd Sulaymān ibn al-Ash’ath al-Šijistānī 89.
313 Ghazzālī, al-Mustasfā min ‘ilm al-usūl 133–137.
314 Al-Baqillānī in Suyūtī 134.
the basmalah, which is written a hundred and fourteen times in the muṣḥaf, is not known for sure to be Quran (except for one occurrence)? The question here is not about which of the different opinions about the basmalah is right or even more plausible; the very fact that there is a debate on it entails uncertainty. What is important to note about the issue of the basmalah is that the claim for certainty in the Quran is made in spite of the undeniable debate about it. This conspicuously contradictory discourse draws attention to the religious desideratum driving it. Further, the mandate given by Uthman to Zaid’s committee is not clear. Could they change something from the ṣuḥuf of Hafsa? Did the ṣuḥuf contain the order of the sūrah or did the committee make this organization themselves? What if there was a contradiction between the Quran they knew orally and what they read in the ṣuḥuf, which one yields to the other? There are no clear answers to most of the questions regarding the details of the work of the committee, but the available reports draw some picture about their work. For example, and with regards to the issue of the basmalah, it is reported that Uthman was asked by Ibn Abbas about why they – Uthman and his committee – have juxtaposed between sūrah Anfal and sūrah Bara‘a without the separating basmalah. Uthman thought the two sūrahs were similar in the subject they address so he thought they were the same sūrah. He, therefore, joined them without the basmalah. \[315\] According to this report, Uthman and his committee could decide on the order and organization of the sūrahs, they could decide on where a sūrah begins or ends, as well as whether to write or omit the basmalah which may or may not be Quran. All this is done based on common sense if not simple intuition; like the consideration of the subject of the sūrahs or their time of revelation. Further, the objection of Ibn Abbas indicates that the process was known to be a human effort (ijtihād), thus, objectionable and open to criticism. In fact, Uthman himself did not think the work of the committee was perfect. It is reported that he said, when brought the muṣḥaf after the committee finished their work, he sees errors in the manuscript but the Arabs will put it right when they read it. \[316\] Apparently, it was too revered for the Arab Muslims to change as the numerous reports about mistakes in the muṣḥaf show. \[317\]

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\[315\] ibid 1. 132; Abū Dā‘ūd Sulaymān ibn al-Ash‘ath al-Sijistānī 114.
\[316\] ibid 120.
\[317\] ibid 120–131. Ibn al-Khatib 41–44.
One of these reports tells that Ali commented on a scribal mistake in the *muṣḥaf*, and when asked why not change it he said “the Quran is not to be changed now”.\textsuperscript{318}

There are other reports about further editing that took place after Uthman such as the addition of the letter A (*alif*) by Ubaidillah Ibn Ziad (d. 67).\textsuperscript{319} But the most notable post-Uthmanic edition of the Quran is reported to have been done by al-Hajjāj Ibn Yūsuf (d.95).\textsuperscript{320} It is not clear whether the changes made by al-Hajjāj had any oral Quranic roots, or he relied basically on his sharp linguistic sense; but the conspicuous question is why, since he found the liberty to change some words in the Quran, did he not change the ‘errors’ that still remain in the *muṣḥaf* till today? There is no answer to this problem, and we can follow the traditionalists and completely reject those reports about al-Hajjāj’s editing of the Quran,\textsuperscript{321} or we can suppose that further editing took place after al-Hajjāj; editing that went unreported but traces of which are present in the Quran today.

To recap; the written Quran has gone through many stages in history before it reached us, and the historical evidence about its writing and transmission diminish as we go back in time. This means that the foundations upon which the history of the written Quran is built are the weakest in terms of evidence. All the later editions and collections of the written Quran – for which there are some reports – are dependent on the earlier writing process, for which the evidence is extremely scarce. It must be stressed, however, that mainstream Islamic discourse, although not accepting the idea that the history of the written Quran does not entail a certainly authentic text, did not make their claims for the certainty of the Quran mainly on its written record. Rather, most usulis base it on the theory of *tawatur*, a form of concurrent testimony that assures of perfect transmission.

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\textsuperscript{318} Ta’bari v 56:29.

\textsuperscript{319} Abū Dā‘ūd Sulaymān ibn al-Ash`ath al-Sijistānī 271. Also see a whole chapter dedicated to the variation between Uthman’s master Quran and the copies made from it and sent to other cities (*amsar*), 144-158

\textsuperscript{320} ibid 272. Ibn al-Khatīb 50–52.

\textsuperscript{321} Abū Dā‘ūd Sulaymān ibn al-Ash`ath al-Sijistānī 175 note 140. Similarly, many of the reports that allude to uncertainty regarding the Quran are rejected upon different grounds; sometimes, simply, upon the question-begging argument that the reports causes uncertainty in the Quran. See notes on 120-131. Notes and comments are made by Mohammad Ibn Abduh.
Oral transmission via concurrent testimony (tawatur):

The second method of transmission for the Quran beside the written form is the oral form where there is unanimity among the usulis that the Quran is transmitted orally through the ages in a concurrent manner that guarantees absolute authenticity. To establish this certainty, the usulis defined tawatur as an infallible method of transmission for any report or testimony and asserted that Quran is indeed transmitted by tawatur.

Definition and conditions of tawatur:

The concept of tawatur is shaped around the idea of certain knowledge by testimony. The examples usually given by the usulis of a mutawatir knowledge are the knowledge of the existence of Makkah or that there was someone called al-Shafi‘i.322 This is borrowed from the philosophical tradition which emphasised the importance of testimony to know about distant lands and past events.323 There is, however, a significant difference between the treatment of testimony in philosophy and the treatment of tawatur in usul al-fiqh. In the former case, the philosophers used what is known with high degree of certainty, the existence of Athens for example, to make the case for its epistemic source, which is testimony (for someone who hasn’t been to Athens).324 But since the Quran is the subject of enquiry, it cannot be used to prove the reliability of tawatur if the usulis are to avoid a circular argument. Even if tawatur is proved to be a source of certain knowledge independent of the Quran, proving that Quran is mutawatir remains a challenge. For in order to know whether Quran is mutawatir the usulis

322 Ghazzālī, al-Mustasfā min ‘ilm al-usūl 62.
323 Mentioned in a video for a lecture by Suheil Laher discussing his Harvard PhD, see: Dr Suheil Laher, ‘Twisted Threads: Concept of Tawatur (Perpetuation) in Islamic Thought - YouTube’ <https://www.youtube.com/watch?v=baJrRsI1cuo>. Last seen: 12/08/2016
324 According to Adler Jonathan, “There will be certain historical truths like that Caesar was assassinated, that serve as Wittgensteinian ‘hinge’ or groundless propositions which are exempt from doubt. They are to be default-accepted for those who participate in these historical inquiries, serving to confirm a historical chain’s accuracy, rather than conversely. But they need not be taken for granted in other contexts of inquiry”, Jonathan Adler, ‘Epistemological Problems of Testimony’ <https://plato.stanford.edu/archives/win2017/entries/testimony-episprob/>.
need to identify what constitutes *tawatur* besides its production of knowledge (to avoid question-begging). *Tawatur* is defined by al-Qarafi as “the report of something sensible by a group of people whom experience precludes from acting in concert”\(^{325}\), and by al-Sarakhsi as the report “transmitted by a group of people whom one cannot imagine their collusion on account of the greatness of their number and the distances of their habitations”.\(^{326}\) Many similar definitions are given by the usulis without significant difference.\(^{327}\) The main idea that seems to capture the essence of the numerous definitions of *tawatur* is, according to Ibn Taymiyyah, a report (khabar) that imparts knowledge.\(^{328}\) And although marks of question-begging the argument for *tawatur* are already evident in Ibn Taymiyya’s remark, they become clearer in the analysis of the conditions for *tawatur* set by the usulis.

According to Ghazali, there are four conditions for *tawatur*:\(^{329}\)

1. The report must be based on knowledge not on probability (zann);
2. The report must be of necessary sense-knowledge;
3. The number of reporters must be sufficient that they could not collude on lying;
4. These conditions must be met at each stage of the transmission.

These conditions are more or less echoed by most usulis with little variation.\(^{330}\) Conditions 1 and 2 are mainly concerned with the nature of the reporter’s knowledge. If the reporter was uncertain about his report or if he was reporting a mere opinion the report would not count as *mutawatir*. Condition 4 simply ensures the consistent strength of the report from its origin to its destination. The main feature of *tawatur* which distinguishes it from the unit report (*ahād*) and prevents it from over-relying on the veracity of the reporters is the *number* of reporters –

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\(^{325}\) Zysow 9.

\(^{326}\) ibid 12.


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condition 3. The very word *tawatur* implies recurrence of the report such that, it is assumed, it is consolidated by the sheer number of its reporters.

In order to decide, therefore, whether a report is *mutawatir*, we should be able to check whether or not it meets these conditions. Conditions 1 and 2 cannot be checked objectively since they rely on the word of the reporter. However, even if we accept the word of the reporter, checking condition 3 is problematic as most usulis agree that the number of reporters sufficient to render a report *mutawatir* cannot be determined; the only determinate for the number is the sufficiency for imparting knowledge. It is by having necessary knowledge that we know the complete number of reporters was met, argues Ghazali, and not by meeting a certain number do we infer that we have knowledge. The circularity of this argument may have seemed less stark for the usulis when considering the example of knowledge of distant lands. One cannot tell precisely how or when he became certain that there is a country called Egypt which he did not visit. But because he knows with certainty that it exists, he infers that the number of reports which he received about Egypt is so great with no realistic probability of collusion or chance that it must produce knowledge; in usul terminology, the report about Egypt is *mutawatir*. This line of argument cannot, however, be followed for the case of the Quran as it is argued repeatedly that Quran is certainly authentic because it is *mutawatir*.

*Tawatur* is one of the three conditions for accepting something as authentic Quran and there are numerous reports about verses or variants that did not feature in the *muṣḥaf* because they were reported by a single companion. If we accept the usulis’ claim that we know Quran is authentic because it is *mutawatir* rather than we know it is *mutawatir* because it is authentic, then condition three for *tawatur* cannot be checked and the argument that any report is certain by *tawatur* will be invalid. We cannot deduce knowledge from *tawatur* when *tawatur* is still not confirmed and it cannot be objectively confirmed when it requires an unknown number

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332 Ghazzālī, *al-Mustasfa min ʿilm al-usūl* 175.
333 Conformity to the Uthmanic consonantal text; correctness of its Arabic; and sound transmission, for earlier periods. See: Makki Ibn Abi Talib, *Al-ʻIbanah ʿan Maʾani Al-Qiraʾ at* (Books-Publisher 2001) 150. Later periods however, scholars became adamant on *tawatur*, sound transmission was not enough.
334 See n303 above.
of reporters. The usulis wanted to prove that tawatur proves certain knowledge; what they argued for instead was that certain knowledge proves tawatur.

Another problem with tawatur is the usulis’ concept of the knowledge it produces and the concept of knowledge in general. Overlooking the blatant circularity for a moment, the conditions set by the usulis for tawatur requires us to be able to identify the occurrence of knowledge (ḥuṣūl al-ʿilm) which requires a clear idea of what knowledge actually is. But the usulis – featuring no better than modern epistemologists335 – don’t have a clear definition for knowledge, yet some of them insist that it should not be confused with the psychological feeling of content towards a proposition (sukūn al-nafs).336 Epistemologists consider ‘psychological certainty’ to be one of three kinds of certainty where it is distinguished from epistemic certainty.337 Psychological certainty is not epistemic and it does not necessarily convey truth, but personal dogma many a time. The usulis, while seemed to be aware of this distinction by their reference to the less certain sukūn al-nafs, did not provide a thorough description of their required epistemic certainty, ʿilm or yaqīn. It was only Ghazali who offered such a study with a serious attempt to identify epistemic certainty and how it differs from other forms of belief.338 This was addressed in detail in chapter two to the conclusion that Ghazali was inconsistent and inconclusive in his attempt to set out a solid epistemological framework for usul al-fiqh. This was attested for by Ghazali’s admission in his autobiography to his abandonment for epistemic certainty.339

Does tawatur impart certainty?

The usulis attempt to equalize between tawatur and testimony that gives us knowledge of distant lands and past events is problematic at best. Knowledge which one just finds in himself,

335 Since the ‘Gettier problems’ which refuted the definition of knowledge as ‘true justified belief’, there has been no agreement on the definition of knowledge. See: Matthias Steup, ‘The Analysis of Knowledge’, Stanford Encyclopedia of Philosophy (2008).
336 Jassās 55.
337 Reed.
338 Bernard Weiss 85.
339 See the discussion of Ghazali’s arguments on certainty in chapter two above.
according to the usulis concept, is more of an ontological phenomenon than it is a conclusion of any process of enquiry. Testimony can only explain knowledge’s existence, but it cannot be a process for checking it. Therefore, using tawatur to prove the authenticity of Quran is problematic because, like knowledge, it could not be normatively defined. Any definition of tawatur that conditions the imparting of knowledge or the impossibility of colluding on a lie is question-begging since it embeds the conclusion into the premise. This does not imply that tawatur does not impart certainty, it only states that tawatur cannot be used to prove the authenticity of Quran. It can explain its authenticity, however, if Quran was known otherwise. If Quran was psychologically certain in the mind of someone, it is possible to explain his conviction by tawatur. If, however, we wanted to convince a sceptic about the certainty of Quran, telling him it is mutawatir will not necessarily work. This subjective nature of tawatur helps explain why it is a source of knowledge exclusive to Muslims only. Even among Muslims, there is the suspicion that Quran sits in the grey area between knowledge and belief. In the words of Hobbs “for no man is a witness to him that already believeth, and therefore needs no witness; but to them that deny or doubt or have not heard it”. Subjective knowledge, therefore, is not conducive to organized religion. One finds in the writings of the usulis a hint of enforced knowledge particularly in principles of theology and law. For example, al-Baqillani made a long argument to assert that the existence of Muhammad and the authenticity of Quran were both proven by tawatur and thus enjoy the same degree of certainty. One, therefore, is necessitated (muḍṭṭarrun) to know the truth of the Quran once he hears the reports of reporters from the Prophet. In other words, every Muslim should know that Quran is authentic because it is mutawatir. The subjectivity of certainty seems to be an alien concept in the arguments of usulis like al-Baqillani. He pays no attention to the fact

340 Weiss argues “We are presented with a knowledge which is simply there, which we simply "find" within ourselves, without really being shown how the knowledge got there. The "conditions of tawatur" do not really explain this. Hence the theory seems to be locked into an essentially subjectivist stance. Knowledge is, of course, a subjective state; we do "find" it within ourselves; but if some sort of objective underpinnings cannot be pointed out it ceases to be knowledge”, ibid 96.
341 This is considering that its authenticity is not discussed in the usul, but rather, according to Zysow (referring to Ibn Hazm), in theology. See: Zysow 8.
342 CAJ Coady, ‘Testimony a Philosophical Study’ 30.
343 Bāqillānī 101.
344 ibid 102.
that many people did not know that Muhammad existed, some knew but with different
degrees of probability, just as some uninformed people or children today do not know, or can
easily doubt, the existence of Australia. But to apply this concept to religion implies that people
will be at liberty to deny the authenticity of Quran, which will jeopardise the current structure
of Islam. Alternatively, the authenticity of Quran could be established on faith alone. This,
however, going against the nature of how human convictions are generally formed, was not
the methodology in theology where the bigger question of the existence of God was treated.
Some form of demonstration (burhan) is always needed, and difficulties arise when burhan is
required for absolute certainty.
A sense of juristic, and even theological, desideratum can already be detected in al-Baqillani’s
argument. But he makes it evidently clear further in his defence of the Quran. He argues that if
we accept that some changes did take place in Quran, then it would be possible that most of it
was changed and only less than a tenth of it remains. He then goes on to say how this entails
the possibility that the main features of Islam in law and worship could all be different (read:
lost); this is delivered in a tone that meant to demonstrate the absurdity, if not impossibility, of
the suggested scenario.
Ibn Taymiyyah, while more vigilant to the problem of the subjectivity of knowledge than al-
Baqillani, was just as adamant in seeing the absolute certainty of Quran as a sine qua non to its
function in Islam. He argued that tawatur is defined only by its ability to impart knowledge.
Having knowledge could be due to the great number of reporters, their religious credentials, or
due to supporting evidence (qarā’īn) that accompany the report; or it could be due to some of
these reasons and not the others. In short, knowledge according to Ibn Taymiyyah is not
constrained in its causes to the number of reporters. Ibn Taymiyyah, realizing that this
indeterminacy in the concept of tawatur renders it a ‘subjective stance’, sought to resolve the
problem by dividing tawatur into two kinds: generic (‘ām) and specific (khāss). Scholars who
specialize in hadith or fiqh have received via tawatur knowledge that is not known to the
laymen. Knowledge in general could happen to some people and not others. Therefore,

345 See the quote from Weiss in n340.
346 ibid 105.
347 N325 above.
whosoever has knowledge, is obliged to believe and practice accordingly; and whosoever does not have that knowledge, has to submit to the people of consensus (ahl-ul Ijma’) who agreed on the reports’ truth. The Muslim community (ummah) is preserved by Allah from consenting on error, and this consensus is brought about by the religious concession of non-scholars to the scholars.  

Ibn Taymiyyah essentially acknowledges that the idea that every Muslim equally receives reports from the Prophet by tawatur is false, hence, their knowledge about Islam will not be the same either. This, however, does not mean that Muslims differ in their religious obligations as they differ in their religious knowledge. Religious obligations for the less informed are grounded, according to Ibn Taymiyyah, in another source of usul al-fiqh, which is Ijma’. But it is important to note that Ibn Taymiyyah discusses tawatur in his discussion of hadith not Quran. His argument that gaps in tawatur can be filled by Ijma’ is directed towards hadith where he was trying to give the corpus of hadith – which is not mutawatir – a stronger degree of authenticity. Quran is beyond doubt and there seems to be no discussion of its authenticity by the usulis in general. It is repeatedly asserted that Quran is absolutely certain because it is mutawatir, but discussion of tawatur, in addition to being relatively brief, is confined to the section on akhbār (reports) which is mainly concerned with the hadith not Quran. This leaves an important question unanswered: where is the discussion about the certain authenticity of Quran? It is not in usul al-fiqh as we just mentioned, nor is it in usul al-dīn (theology) which focuses on the nature of Quran (a created being or a divine word, etc.). To simply assert that it is mutawatir is not sufficient since the case for tawatur is inconclusive once it is devoid of its circular definition as knowledge.

Further, there is a problem with the concept of tawatur being generally perceived as multiple independent chains of transmission which start with first witnesses and reach the receiver giving him immediate knowledge stemming from their multiplicity and independence. The

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348 Ibn Taymiyyah. 48-51
349 Volume 18 of the Ibn Taymiyah’s Fatawa series is on hadith only.
350 Zysow argues: “That the authenticity of the Quran is not treated in the usul texts is, however, not surprising, for the controversies about the Quran were, as Ibn Hazm notes, the province of the theologian” Zysow 8. But among the controversies discussed by theologians, there is no mention of authenticity. It is evidence that authenticity was not seen as a controversy in the first place.
problem with the transmission via multiple chains of reporters is that they can only be checked – for the receiver – from the final interface. Generally speaking, a network of a hundred reporters that make up ten chains of transmission – ten reporters each – will deliver the report to the receiver via ten reporters only, ninety will be unknown to him. The ten supposedly independent and veracious reporters may be enough to make him certain of the truth of the report, but he is in no position to check the independence and veracity beyond his interface of ten. Dependency in one or more chains may have occurred at some stage in the transmission making the probability of delivering a false report higher. The same can be said about the veracity of reporters. The problem is not in the idea that transmitting a report via multiple independent channels by veracious people merits certainty of the report; the problem only lies in the difficulty for the subject who receives the report to check that these conditions have indeed been met. The same logic applies to written material. A historical book published in modern times is likely the work of an editor who used historical manuscripts for the book as well as the required historical analysis and cross-checks. His sources may be many and independent making him confident of the historicity of the publication; but the ordinary reader depends almost entirely on his confidence on the editor or the publisher. In short, any report which is being transmitted from the distant past or is impossible to check all its stages of transmission is vulnerable to its dependence on its final stage to convey certainty to the receiver.

Another problem with tawatur is its evident historical and contemporary failures. Tawatur, even for the usulis, is an unbiased method for transmitting testimony. It delivers knowledge to hearers regardless of their background or faith. In this sense, tawatur should assure non-Muslims, who are exposed to the same sources of information as Muslims, of the truth of the Quran, which is evidently not the case. Similarly, non-Christians, Muslims in particular, who are exposed to the same sources of information as Christians should know/believe that Jesus was crucified since Christians have this information ostensibly by tawatur; but Muslims deny it. The usulis argue that the tawatur of reports that Jesus was crucified is only putative; but their

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351 For more on corroborative reports see: Coady 211–223.
352 ibid; the diagrams given by Coady offer a better understanding of this analysis.
justification for this claim is again circular. Al-Jaṣṣāṣ argues that since the Quran, which is proven authentic with true evidence, affirms that Jesus was not crucified, then we know that the reports about his crucifixion are not mutawatir.\textsuperscript{353} He ignored that he used Quran, which relies for authenticity on tawatur, to make the case for tawatur. Ghazali was slightly more subtle but equally unconvincing when he argued that the people who reported seeing Jesus being crucified where deluded because the likeness of Jesus was put on someone else who was crucified. Ghazali then responded to the possibility of this kind of delusion undermining any report or knowledge; he argued that this was only possible in the time of miracles which is now gone.\textsuperscript{354}

Other examples of tawatur failure where given by al-Juwaini who tried to respond to them. His first example was the disagreement of reports about how the Prophet performed his pilgrimage (hajj). This disagreement is clearly problematic since the Prophet performed the hajj among thousands of Muslims who were mostly following him to learn the rituals; how is it, then, that this remarkably witnessed event was reported in disagreement? Al-juwaini’s response was to argue that both – reported – ways of hajj were valid. This of course was beside the point; and he seems to realize this when he remarked that we should not doubt the necessities because of delusions. The second example was the miracle of the cleft of the moon. This was supposed to be seen by many people in the planet and, being such a miraculous phenomenon, to be reported so widely that most, if not all, people will know about it and it would be recorded in history as an unforgettable event. None of this actually happened and al-Juwaini argued that it could be because it happened at night when most people were sleeping, and he alternatively dismissed the event as an optical delusion. Again, he remarked that what is necessary should not be doubted by delusion. The final example he gave was the different reports on how the second calling for prayer (iqāmah) was done. This was done five times a day to call for the prayer which most Muslims performed together with the Prophet. How can there be two different reports about this extremely regular call? In fact, the call for prayer is more regularly performed and heard by Muslims than any part of the Quran (less al-fātiha perhaps) as

\textsuperscript{353} Jassās 42–45.
\textsuperscript{354} Ghazzāli, al-Mustasfā min ‘ilm al-usūl 180–181.
different verses of the Quran are read in prayer, and only in three prayers a day is Quran read aloud. The same words, on the other hand, are said for iqāmah five times a day making it extremely likely to be well known by heart and thus, accurately reported. Al-Juwaini’s response to this was that the iqāmah was a trivial matter in religion and so the companions did not pay it much attention or care.355

It should not be contentious that al-Juwaini’s responses to the problems he raised only affirm the doubts about the reliability of tawatur rather than dismiss them. His apologetic remarks that some knowledge is necessary and should not be doubted is echoed by other usulis.356 It only reveals an appeal to authority and lack of objective analysis.

Is Quran mutawatir? The problem of Qira’at

Variation in the reports of how the Quran was read by the Prophet Muhammad naturally raises doubt about the authenticity of some, or all, of the reports about the Quran itself. It is natural to assume that some of the variants reported are only mistakes that occurred during transmission, and not necessarily all said by the Prophet. In response to this possible doubt the ‘Science of Readings’ (‘ilm al-qira’at) was developed in the Muslim discourse about the Quran. The cornerstone of this science is a hadith that was narrated in many versions about the Quran being revealed in seven letters ‘sabʿat aḥruf’. The report tells that Umar Ibn al-Khaṭṭāb heard Hishām Ibn Hakīm recite part of Quran in a way different than what he learned from the Prophet. Umar took Hisham to the Prophet to enquire which reading was correct and the Prophet told them that both were correct, that the Quran was revealed in ‘Seven Letters’ (sabʿat aḥruf), and they should read as they could.357 Other versions of the hadith tell that the Prophet was given the Quran in one letter, but he asked for more to make it easier for his community, so he was eventually given seven letters.358

356 Râzî, Al-Mahsul Fi ‘ilm Al-Usul vol 4. 230, 258
357 Talib 146–147.
358 ibid 188.
The concept of the seven letters is a mystery in Islam; there is no clear idea about what they mean. Suyūṭī enumerates thirty-five different opinions on their meaning. But the context of the hadith indicates that the differences on how the Quran is read are attributed to the multitude of its ahruf; emphasis being on multiplicity rather than ahruf, thus neutralizing its ambiguity. In fact, even the specificity of the number seven is made pointless since the nature of what is numbered is not known. This explains the debate on whether all the valid readings of the Quran are only one of the ahruf as argued by al-Tabari, or some of the ahruf as argued by Makki Ibn Abi Talib. It seems from the different arguments that, in any case, all existing Quran does not exhaust all seven ahruf. This makes it possible to accommodate Quran that was soundly transmitted but not canonized, as authentic but invalid, that is, abrogated by the Ijma’ on the consonantal text and the final revision (al-’arda al-akhīrah).

The historical accounts of the development of qira’āt differ slightly in the Muslim literature, but the common theme can be summarized as follows:

When the companions realized that they read the Quran differently, they consulted the Prophet who assured them of the legitimacy of their different readings and that the Quran was revealed in seven ‘letters’. Thenceforth, the companions did not fault each other on their different readings. Some of them travelled to different cities ‘amsār’ and taught the people in these cities to read the Quran in their way (reading). The people of different cities, thus, read the Quran differently according to their teaching companion. Uthman decided to make an official copy of the Quran because he feared that the variation in Quran could grow out of control and the Quran could be lost. The Uthmanic master Quran lacked diacritical marks and thus was still readable in different ways. The people of the cities, when receiving their copies of the official Quran, read it in the way that conformed to the consonantal text as well as to their specific reading. The parts of their reading that did not conform to the consonantal text were dropped. This perhaps reduced the number of variants between amsār readings, but it did

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359 Suyūṭī vol 1. 172-183
360 Taḥbīr vol 1. 50-51
361 Taḥbīr 144.
362 ibid 135.
363 ibid 164.
364 Mostly from ibid 145–149.
not unify them on one reading. The differences were still great and Uthman’s attempt to unify Muslims on one Quran seems to have failed; so, some scholars attempted to ‘choose’ a few readings upon which the Muslim community could finally agree. Ibn Mujāhid wrote his book ‘Kitāb al-Sab’a fi al-Qira’āt’ (The book of Seven in Readings) on which he seems to select the seven most prominent readers in amsār who enjoyed the ijma of the local community of readers.\footnote{Shady Hekmat Nasser, The Transmission of the Variant Readings of the Qur’ān: The Problem of Tawātur and the Emergence of Shawādhdh (Brill 2013) 54.} Makki, after Ibn Mujāhid, devised three conditions only by which is Quran accepted as valid.\footnote{Talib 150.} Ibn al-Jazari, based on the conditions set by Makki, added three readings to Ibn Mujāhid’s seven bringing the total number of valid Quranic readings to ten.\footnote{Nasser 127. See also the arguments of Ibn al-Jazari regarding this addition: Muḥammad ibn Muḥammad Ibn al-Jazārī, al-Nashr fi al-qira’āt al-‘ashar (‘Alī Muḥammad Dābbā ed, Dār al-Kutub al-‘Ilmiyyah) 54.} Scholars later added four readings that did not have the same status as the ten but were considered authentic Quran nevertheless; they were called shādhdhah ‘anomalous’.\footnote{Nasser 118.}

**Historical inconsistencies of qira’āt:**

The historical accounts of qira’āt start with the hadith of the seven letters and historically develop thenceforth. However, as the traditional claim is that the qira’āt are all said by the Prophet, it is fair to assume that there is much more history for it, and that this history should be directly integrated into the history of Quran in general; that is – without being exhaustive -, revelation, dictation, writing, collecting, and collating. No reports of such history are available, which leaves the concept vulnerable in many respects; this is analysed in what follows.

First, it is not clear, assuming that all the different qira’āt were revealed to the Prophet, whether he said the verse with all its different variants to his companions in one occasion or in different occasions. There is no report of him reading the Quran in different ways except by inferring this from the documentation of the qira’āt. In other words, there is no body of reports where companions mention that they heard the same verse of Quran in different ways from
the Prophet. It is not even reported that the Prophet read the same verses differently in his prayers. There is no historical context for the documentation of qiraʿāt; it is usually claimed by every reader to have learned his reading from someone in a chain that goes back to a companion and that the companion naturally learned it from the Prophet. But unlike legal matters ‘fiqh’, there is no historical setting where this learning took place and no mention of any enquiry about why they are receiving the Quran in different forms. It is possible that the Prophet only revealed a different reading of Quran to legitimize what would have otherwise been a mistake by a companion. This would explain the hadith of the seven letters. But, in any case, the problem is that we have a huge number of variants in the Quran (thousands) that are all attributed to the Prophet, either said or legitimized by him, all existing in a historical vacuum. That is, it is not known when, where, in what occasion, or in who’s presence the variants of the Quran were given by the Prophet. Something extremely odd considering the status of Quran and the importance of its absolute authenticity for Muslims.

Second, some sources claim that the qiraʾāt only started to be revealed in Madinah. This is probably due to the fact that Hishām Ibn Hakīm who was mentioned by Umar in the hadith of the seven letters only became a Muslim in the day Makkah was conquered by the Prophet, i.e. 8 A.H. What seems to be inexplicable is how the Quran was read in different versions by the companions for more than twenty one years without someone realizing the variants in readings before then. Even if variants started to be revealed and propagated by the Prophet after Hijra, it took eight years for someone, Umar in this case, to realize these variants and enquire the Prophet about them. It is unrealistic to assume that the variants only began to be revealed in the last two or three years of the Prophet’s life (so as to be historically consistent with the hadith of Umar) for how would thousands of Quranic variants be revealed by the Prophet and

369 The method of Ibn Mujahid was to show the teachers of his seven readers as part of his biography of them, teachers ending up with a companion. Then he shows how his own reading links to the chosen reader; this completes the chain between him, Ibn Mujahid, and the companion. The link to the Prophet is assumed. For example: Nafi was taught by al-a raj who was taught by the companions Abu Huraira and Ibn ‘abbas. Ibn Mujahid was taught by A. Rahman Ibn Abdus who was taught by Hafs al-Azdi who was taught by Ismail Ibn Ja’far who was taught by Nafi. This is one chain of many between Ibn Mujahid and a companion through one of the seven readers. See: Ibn Mujahid, Kitab Al-Sab’ a Fi Al-Qiraʾat (Dar al-Ma’arif 2010) 54,55,88.


371 ibid 50.
learned by the companions in this short period, when a single reading of the Quran was revealed in twenty-three years? In fact, even if we ignore the hadith of Umar and assume that the variants were revealed from the beginning, the huge number of them makes it difficult to imagine how they could all be learned by the companions without causing serious confusion. It is similarly odd that the Prophet did not mention anything about the multiple versions of Quran to his companions until they started faulting each other’s readings and came to him for an explanation. One could argue that some earlier enquiries did take place but went unreported; but it is extremely unlikely that someone of the stature of Umar will be among the last to know about the multiple versions of the Quran. In other words, if the variants in Quran were known early on but the reports about them did not reach us, Umar should have known about them from the beginning, and the incident between him and Hisham would not have taken place.

Third, it is known that the Prophet was keen on the writing of the Quran immediately after he receives a revelation, yet, it has not been reported that the Prophet dictated to his scribes the Quran in different readings. We can safely assume, if we follow the traditional discourse on the history of the Quran, that the Prophet was consistent with regards to the dictation of Quran. This means that he either dictated all different readings of Quran to his scribes to be written down, or he only dictated one reading and left the others undocumented; it is unlikely that he dictated some readings. The former case seems unrealistic considering the vast number of variants and the difficulty of recording even a single version of Quran which was discussed above; in addition to the lack of evidence in extant manuscripts. The latter case raises more questions. Writing a single version will give it immediate preference over the others which would have been a well-known preference, for which there is no historical evidence. It is also theologically problematic, for how could God’s words be unequally valued? One could argue that all the readings were contained in the primitive text that was flexible due to its lack of diacritical marking. This, however, would entail the literacy of the Prophet, which is not acceptable in mainstream Islam. More problematically, it would increase the doubt over the historicity of qira’āt, for it seems more logical that the qira’āt conformed to the primitive text than that the primitive text incidentally contained all the qira’āt.

372 This only applies to non-consonantal variants
Fourth, all the reports about Zaid’s collection of the Quran during Abu Bakr’s caliphate bear no mention of qira’āt. Zaid talks about his multiple commissions to write and collect the Quran where he had to settle for two witnesses to accept Quran and had, in one occasion, to take Quran from one companion only.\footnote{373} Zaid had difficulties finding a single version of Quran; if he was looking for countless versions, his difficulties would have proportionately multiplied and would have, thus, been reported. Further, the justification given for Uthman’s commission for a master Quran was that the Muslims of Syria and those of Iraq have quarrelled over their differences on reading the Quran and this could lead Muslims to differ over their book like the Jews and Christians.\footnote{374} This entails that the greater number of Muslims in these regions (a small number would not cause concern) were completely oblivious to the concept of qira’āt. These quarrels happened around the year 25 A.H.,\footnote{375} which is seventeen years after the hadith of qira’āt; one would expect that at least the news of the existence of multiple readings of the Quran would have been known to Muslims if not the actual qira’āt themselves. The people who quarrelled over Quran were allegedly students of Ubai and Ibn Mas‘ūd;\footnote{376} both companions feature in the hadith of the seven letters\footnote{377} and, thus, their students would be expected to know about the seven letters of Quran. Furthermore, when Uthman decided to unify the Quran in one form to prevent these quarrels, he never mentions the seven letters. When he commissioned the committee, he told them, in case they disagreed on the language of Quran, to write it in the dialect ‘lisān’ of Quraish.\footnote{378} His terminology does not support the idea of a perverse concept of qira’āt. This might seem like a trivial point, but it adds to the growing suspicion that the concept of multiple divine readings of the Quran which were all to be revered and preserved with the same attention, was not present in the early decades of Islam. The key to understanding the phenomenon of qira’āt in Quran is to acknowledge that Quran does not have multiple versions (readings) that constitute the divine revelation;\footnote{379} Quran,

\footnote{373} See previous section on written Quran
\footnote{374} Talib 159–161.
\footnote{375} Suyūṭī 169. Suyūṭi dates the collection generally.
\footnote{376} Tābarī 49.
\footnote{377} ibid 35–38.
\footnote{378} Talib 162.
\footnote{379} According to Nasser “al-Tabari objected to many readings which became canonical and divine few years after his death. Early Muslim scholars did not look at the variant readings of the Quran as divine revelation. They
rather, is a text constituent of a number of independent chapters which used to have some degree of flexibility in its wording.\footnote{An allusion to this meaning was made by Nöldeke 545.} One of the versions of the seven letters hadith mentions that one could read Quran with different synonyms as long as one does not change the meaning; just like saying ‘hallumma’ or ‘taʿāl’ which both mean ‘come’ in the imperative.\footnote{Tabari 41.} This means that the Prophet himself could have read the Quran, intentionally or not, in slightly different ways where he changes a letter or a word. If we give more weight in the concept of revelation to meaning rather than wording, it becomes understandable how the Prophet could say the same verse with slight difference in the expressions; this licence could have been extended to the companions as well.\footnote{Ibid.} This will explain the variants of some companions’ Qurans like Ibn Masʿūd and Ubai. If we assume that these variants were very rare during the time of the Prophet, and were only due to flexibility in the text rather than divine versions which must be known and propagated to all Muslims, we can then understand why Umar only realized it in 8 A.H. If we consider Quran in its right context, that is, a seventh century text in a primitive milieu, then the potential sources of variation are plenty: scribes’ mistakes; illegible script; bad copying; bad memory; misreading or mishearing; and possible others. These variants would naturally accumulate in time, and be concentrated in amsār where there, away from the main Islamic centres of Makkah and Madinah, would be shortages in resources for learning the Quran whether manuscripts or companions. This will explain the quarrel between the Syrians and Iraqis which lead to the commission of Uthman’s master copy (al-muşaf al-imām).

Uthman must have been aware of the few variations in Quran that existed since the time of the Prophet as would have been other high-ranking companions and the caliphs before him. These variants where mostly tolerated, but the quarrel between the people of amsār perhaps worried Uthman, as it did Huzayfa who told him about it, that they might have grown too many, and that it might be wise to write a consonantal text that would provide a frame – a limit – for variation in Quran so that it would not grow ceaselessly. From then on, all variants that existed or developed had to conform to the consonantal text. The variants that did not conform to it

attributed the Quranic variants to human origins; either to the reader’s ijtihad in interpreting the consonantal outline of the Quran or simply to an error in transmission.” Nasser 77.
did not survive to become canonized Quran but remained as troubling historical Quranic anomalies for which a body of apologetic literature was developed.\textsuperscript{383} The consonantal text still could not unify the reading of Quran, so scholars tried to number the canonical readings giving Muslims seven, ten, or at most, fourteen readings accepted as authentic Quran. This limitation survives until today although the reading of the ‘Hafs ‘an ‘asim’ became dominant in recent times.\textsuperscript{384}

**Tawatur of qira’āt:**

There is no contention that the Quran we have today is the fruit of a selection process carried, not by the Prophet, but mostly by Ibn Mujāhid in the fourth Islamic century. The completion of the ten was made by Ibn al-Jazarī in the eighth century. The selection criteria were also a matter of opinion (*ijtihad*). According to Nasser, Ibn Mujāhid chose the readers whom he thought were the most prominent and enjoyed the *ljma*‘ of the community of readers in the main cities of Islam,\textsuperscript{385} namely, Makkah, Madinah, Damascus, Basrah, and Kufa; and because Kufa had more than one prominent reader he chose three readers bringing the total to seven.\textsuperscript{386}

Until that time, qira’āt were authenticated by *ljma*‘ rather than tawatur. They were regarded as a form of Sunnah not hadith; Sunnah depended for authenticity on local *ljma*‘ that was presumably inherited from the previous generations back to the Prophet.\textsuperscript{387} But the prominence of the Hadith school since the time of Shafi‘i gave more appeal to the method of *isnad* (reports transmission). A combination made by al-Tabari between *ljma*‘ and *isnad* paved the way, according to Noldeke, to the development of the concept of tawatur\textsuperscript{388} which, being a method for obtaining certainty, was used for Quran. Al-Tabari himself, however, did not argue that qira’āt were *mutawatir*. Nor did prominent qira’āt scholars like Ibn al-Arabi, al-

\textsuperscript{383} See n234, 236, and 273 above.
\textsuperscript{384} Bell 49.
\textsuperscript{385} Nasser 54.
\textsuperscript{386} ibid 59.
\textsuperscript{387} ibid 52.
\textsuperscript{388} Nöldeke 571. This was sophisticated later by people of kalam
Zamakhshari, Ibn Atiyyah, Abu Hatim al-Sijistani, Makki al-Qaysi and others who held the view that the canonical readings were the result of the ijtihad and interpretations of the readers themselves and are not of divine nature. The need for *tawatur* in *qiraʾāt* comes, according to Nasser, from the fact that, being the primary source of law, the Quran’s authenticity must not be questionable or doubted. In other words, Quran must be divine and its divinity must be absolutely certain; hence the claim for *tawatur*.

We have already discussed the flaws in the concept and methodology of *tawatur*, all of which affect *qiraʾāt* directly. But *qiraʾāt* suffer further from not being *mutawatir* even in the eyes of scholars who advocate the putative epistemic power of *tawatur*. This seems to indicate that a distinction between Quran and *qiraʾāt* is possible, since no scholar in mainstream Islam argued that Quran was not *mutawatir*. Nasser called this distinction a ‘dilemma’ as he seems not to have found a convincing argument in the literature about *qiraʾāt* or Quran to resolve it. A possible understanding of the distinction is that what is meant by the *mutawatir* Quran is the consonantal text, while the *qiraʾāt* are not *mutawatir*. How the consonantal Quran can be *mutawatir* will still be contentious, but suppose the suggestion is accepted hypothetically, it will only give us a certain number of probable individual readings. In other words, arguing for the *tawatur* of a distinct consonantal Quran only affirms the uncertainty of the individual *qiraʾāt*. We will have a probable divine word and a probable source for God’s law. This is perhaps why later literature on *qiraʾāt* was adamant on the *tawatur* of each of the *qiraʾāt*. Absolute fixity, authenticity, and divinity are the dominant features of Quran today; a far cry from the flexibility of earlier times.

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389 Nasser 112.
390 ibid 110.
391 ibid 109.
392 Suyūtī 82.
Certainty in interpreting the Quran

Ambiguity of language

The unknown origins of language

Bernard G. Weiss identified five principal positions in the pre-modern Muslim thinking about the origin of language: 1. the naturalist theory, which attributes the origins of language to a natural affinity between expression and the natural things they signify; 2. The conventionalist theory, which says that language is an arbitrary choice of names made by a social convention; 3. The revaluationist theory, which says that language was revealed to man by God; 4. The revaluationist-conventionalist theory, which says that God revealed the necessary part of language to make collaboration possible among people who, thereafter, made up the rest; 5. The non-committal (waqf) theory, which regards conventionalist and revaluationist as equal possibilities. 393

The upshot of the usulis various positions on the origin of language is one of uncertainty; in Ghazali’s words, it is “rajm al-zann” which is casting uncertain opinions on the matter. 394 This is no different from the position of modern linguistics, which is still debating the issue; both positions being affected by a persistent lack of evidence. 395 The Muslims’ uncertainty, however, was not confined to lack of scientific evidence but of textual evidence as well. The only Quranic...

394 Ghazzālī, al-Mustasfā min ’ilm al-usūl 289. See also: Juwaynī, Al-Burhan Fi Usul al-fiqh 44. Al-Samarqandi 24. . 395 According to Andrew Carstairs-McCarthy, the Linguistic Society of Paris, at its foundation in 1866 “chose to emphasise its seriousness as a scholarly body by including in its statutes a ban on the presentation of any papers concerning the origin of language. Most linguists still support this ban, in the sense that they believe that any inquiry into the origin of language must inevitably be so speculative as to be worthless.” McCarthy, however, disagrees. A Carstairs-McCarthy, ‘Origins of Language’ in M Aronoff and J Ress-Miller (eds), The Handbook of Linguistics (Blackwell Publishers Ltd 2003) 2.
verse which the revaluationists rely on is a short statement: “and He taught Adam all the names”,\textsuperscript{396} this could only serve as a speculative allusion to language but not concrete evidence.\textsuperscript{397} And although the position of the revaluationists might have been strengthened by Genesis which is more lucid about the heavenly origins of language,\textsuperscript{398} yet, the position of many usulis and Muslim linguists remained one of hesitancy and uncertainty.\textsuperscript{399} Uncertainty about the origins of language had indirect implications on hermeneutics. It is indirect because in the absence of other factors the origin of language alone is not sufficient in rendering the author intent certainly clear. If language was revealed by God it will still have to be transmitted perfectly to all human generations before using its divinity as basis for any hermeneutical activity. If language was a human construct then it is inherently error-prone, hence, uncertain.

The origin of language has indirect effects on hermeneutics, however, because it strengthens or weakens, depending on one’s position, the claim for understanding author’s intent. A language revealed by God is a perfect method of communication, therefore, the process of communication: source – medium – destination, will put the onus of perfect communication of meaning on the destination, the hearer, as God is a perfect speaker and language is a perfect medium. If language was wholly or partially human, then even a perfect receiver cannot guarantee perfect communication of meaning.

**Uncertain transmission of meanings of words:**

Another problem with language according to the usulis is the uncertain transmission of the meanings of words. A non-contemporary exegetist needs to be sure that the Arabic of his time is the same as that of the time of revelation, that is, words have kept the same meaning through time. For example, the word *kalb* (dog) must refer in all ages to the same animal. This

\textsuperscript{396} Quran 2:31
\textsuperscript{397} Juwaynī, *Al-Burhan Fi Usul al-fiqh* 44. Al-Samarqandi 25.
\textsuperscript{398} “Out of the ground the LORD God formed every beast of the field and every bird of the sky, and brought them to the man to see what he would call them; and whatever the man called a living creature, that was its name. The man gave names to all the cattle, and to the birds of the sky, and to every beast of the field, but for Adam there was not found a helper suitable for him.” Genesis: 19-20
consistency is guaranteed, according to some usulis, by *tawatur*\(^ {400}\). Meanings of common words are just too widely used and spread that a radical change in meaning (dog then is cat now) is very unlikely. But the problem of inconsistent meaning does not lie mainly with the original meaning of the word, it lies, rather, with the *use* of the word (*istiʿmal*).\(^ {401}\) The word *kalb* might have initially been used to refer to beast, but its use changed in time to be confined to a particular animal. It is narrated that the Prophet used the word *kalb* where the animal in question was a lion.\(^ {402}\) If the word *kalb* was *used* today to refer to a lion it will be misleading if not downright wrong. If the hadith of the Prophet, along with any other similar references about the word *kalb* which we can assume to be few, failed to reach us then the *use* of the word *kalb* to refer to lion would not have been correct in Arabic in any degree despite the matching, but disconnected, origin. This means that every time we find the word *kalb* in any text we will understand (dog) while it is possible that the author intended (lion).

The usulis realized this ambiguity in language caused by the unrestricted *istiʿmal* (use) of expressions; that is, we cannot be sure that the meanings were transmitted to us without distortion. For al-Razi, the claim of *tawatur* of the meanings is unfounded, for scholars have disagreed even on the most common words in Islam like Allah, *salah* (prayer), and *zakah* (alms); other expressions, therefore, have weaker claims for *tawatur* of meaning, he argues.\(^ {403}\) This readily applies to Shariah. When Allah says in the Quran that *riba* is *haram* (forbidden), how can we be absolutely sure that the word *riba* used in the time of revelation corresponds to what it means today? Same question applies to the word *haram* and all the expressions of the imperative and prohibition. This undermines the certainty of discovering author intent in legal hermeneutics, something realized not just by Muslim jurists. Gerald L. Bruns argues that hermeneutics “can emerge only in a space that is logically anarchic, what Gadamer calls a place of “open indeterminacy” where the thing is suddenly otherwise than we thought...The law, like most subjects (justice, the good life, politics, philosophy, the right decision, *Hamlet*, whatever

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\(^ {400}\) Weiss 62.

\(^ {401}\) Zysow 110.

\(^ {402}\) Tabarānī. number: 1060

\(^ {403}\) Rāzī, *Al-Mahsul Fi ʿilm Al-Usul* 204–205.
makes us think, or anyway think twice), belongs to this place; that is, it is always contested, always in question.”

Types of ambiguity in an expression

In his theory of semantics, Ghazali divides expressions, in their relation to meanings, into four types: a) synonyms (*mutarādīфа*), where different expressions give the same meaning; b) different (*mutabāiyna*), where different expressions mean different things (and this is most of language according to Ghazali); c) collaborative (*mutawāṭi‘a*), where one expression refers to things that are different in number but have the same meaning like ‘man’ which refers to Zaid and ‘amru and Khalid; d) equivocal (*mushtaraka*), where one expression refers to different things like the word ‘ʿain’ which refers to ‘eye’, ‘scale’, and the place on earth where water springs.

With the exception of the *mutabāiyna* type, all these types of expression are ambiguous and, thus, further typologies were derived by usulis to the possible ambiguities that can occur in an expression. Al-Razi gives five types of ambiguity that can shadow the intended meaning of an expression: a) an equivocal expression (*mushtarak*) which is the same as the one mentioned by Ghazali; b) a shift (*naql*) of the meaning of an expression by way of custom or Sharia (to mean something different than what it originally meant in language); c) a figurative expression (*majāz*); d) ellipsis (*iḍmār*); and e) specialization of a general expression. He elaborates on this typology arguing that, if the possibility of equivocation and shifting is omitted, then the expression has only one literal meaning; if the possibility of figurativeness and ellipsis is omitted, the expression has only one intended meaning; and if the possibility of specialization is omitted, the expression includes all that falls under its intended meaning; and this should make the expression unambiguous, according to al-Razi.

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405 Ghazzālī, *al-Mustaṣfā min ʿilm al-usūl* 47.
406 Rāzī, *Al-Mahsul Fi ʿilm Al-Usul* 351. See also: Zarkashī vol 1. 57
Further from the ambiguities that occur in a single expression, ambiguity can occur in an extended expression as in texts, speech, discourse, etc., for example, abrogation; omission; disposition; contradiction of reason or Sharia and so on. But the more critical ambiguity from a legal perspective is the ambiguity in prohibition and imperative expressions. The most common form of the imperative, ifʾal (do), has, according to al-Zarkashi, more than thirty different uses besides obligation, for example: recommending; guiding; permitting; warning; etc.; the only way to distinguish between these uses is context. Similarly, al-Zarkashi lists fourteen different uses for the prohibition form la tafʿal (don’t do), like requesting; supplicating; warning; etc., where a distinction between them needs contextual evidence. In short, expressions do not have the capacity to convey divine commands or prohibitions, that is, divine law, without the aid of context.

This undermines the concept of a kalam qaṭʾi al-dalāla (hermetic text) which is meant to assure the certain divinity of parts of the law. Many usulis don’t think the Quran contains hermetic text or contains very little (ʾizzat al-nuṣūṣ). Even the usulis who argue for the abundance of nuṣūṣ admit the need of context for most text to qualify as naṣṣ. Context will be discussed below, but it is important here to stress that linguistic expressions are indecisive in matters of law because of their unavoidable ambiguity. “The mujtahid is stymied in the presence of an ambiguous expression and may not attempt to formulate the law” argues Weiss, “[l]iteral meanings considered apart from the context all have an equal chance of being the intended meaning”. A statement like the verse ‘la taʾkulū al-riba’ (don’t eat riba) remains ambiguous in terms of prohibiting riba until further evidence shows whether ‘don’t’ is prohibitive or not and what exactly is meant by riba. This applies to the whole of Sharia.

408 Shātibī.
409 Zarkashi v.2 356-363.
410 ibid 428-429.
411 Weiss 109.
412 Juwaynī, Al-Burhan Fi Usul al-fiqh 151.
413 ibid
414 Weiss 98.
Deciphering the speaker’s intent using context: 415

The most important tool used among the exegetists to disambiguate the expression is context. A typology of two kinds of context is usually used: a) linguistic context (siyāq al-maqāl); b) context of situation (siyāq al-maqażm). 416 Both types of context are equally capable of disambiguating an expression, however, the use of context cannot always disambiguate expressions to the level of certainty. According to Ghazali, different kinds of contextual evidence (qaraʾin, sing. qarīna) could have been given by the companions, having witnessed the Prophet and understood the divine intention from him, to the following generations of Muslims so that they too can understand the divine intention from the texts. 417 These qaraʾin, regardless of their type, could yield, in relation to the divine intention, necessary knowledge or zann according to Ghazali. 418 It is not clear, however, how to distinguish between the two outcomes.

The usulis more or less agree that expressions are either nass (certain, non-probable), zāhir (more than one meaning is possible with one more probable than others), or mujmal (ambiguous) where different meanings are equally possible, 419 with differences between the usulis on the proportion of language/Quran that belongs to each type. 420 They agree further, as mentioned above, that ambiguous expressions can be disambiguated with the aid of context. But the usulis, in spite of the many and different typologies they constructed in semantics and context, have not paid similar heed to typify context in terms of the certainty it yields to understand an expression and decipher an author’s intent. For example, if one says: “I saw a lion in battle”, one can be fairly certain that ‘lion’ refers to a brave man – context (in this case linguistic, qarina) being ‘battle’ –; the possibility of there being a real animal lion in battle is quite remote but not entirely impossible. However, if the statement was: “Zaid was a lion in

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415 Not all usulis used the word siyāq (context) when discussing the disambiguation of expression; but some of the subjects they did discuss like qaraʾin can fall under the rubric of ‘context’. Other usulis spoke directly about the importance of siyāq. See: Zarkashi 54. Muhammad ibn Abī Bakr Ibn Qayyim al-Jawzīyah, ‘Bada i-Al-Fawaʾid’ vol 4 <http://shamela.ws/browse.php/book-12003#page-777>, p. 9.
417 Ghazzālī, al-Mustasfā min ʾilm al-usūl 295.
418 ibid 296.
419 ibid 294.
420 Juwaynī, Al-Burhan Fi Usul al-qiḥ 150–156.
“battle” one becomes more certain – absolutely certain in the common-sense world – of the metaphorical use of the word ‘lion’. This disparity in the degree of certainty produced by context is not typologically structured by the usulis in a similar manner to that of *akhbār* (oral reports) where the hadith is classified strictly according to the degree of authenticity. True, examining the certainty of authenticity is far less complicated than finding the real intention of an author with demonstrable certainty as the latter has a metaphysical dimension, but the problem remains unresolved.

The problem can be reiterated as follows: the interpreter, in his quest to find Allah’s intention from what He says in the Quran in order to promulgate the divine law, is impeded by the ambiguity of language. The interpreter uses, mostly, the Quranic context to understand exactly what Allah wants. This understanding, however, cannot be uniform in terms of certainty; it is inescapably disparate. The classification given by the usulis (certain, probable, ambiguous) is for general expressions, and the use of context is supposed to elevate the expression in the direction of certainty so the ambiguous becomes probable or certain, and the probable becomes more probable or certain. However, there is no normative classification for the post-context understanding of the expressions/text. The understanding is improved by the context, but the question is: how much improved?\footnote{An example of how context might change the epistemic status is given by the school of Aḥnāf which argues that if a general expression (‘ām) is particularized – became *khāṣṣ*, it becomes semantically probable (ẓannī). See: Muhammad Abū Zahrah, *Abū Ḥanīfah : hayatuḥu wa-‘asruh - ārā’uḥu wa-fiqhuḥ* (Maktabat ‘Abd ALlāMh Wahbah 1946) 243–250.}

The importance of this classification stems from the direct correlation between epistemic certainty of the text and the changeability of the law.\footnote{Discussed in detail in chapter two.} This classification relates to the basic epistemic dichotomy made by the usulis where cognition is either certain or probable (*yaqīn* or *ẓann*). This concept is evident in the slightly more elaborate classification of expressions into certain, probable, ambiguous. It seems, however, that using context to disambiguate expressions in the text does not change this structure nor does it normatively classify the text according to the basic dichotomy. The usulis seem to treat the post-context text on a case by case bases where classifying the text as being certain or probable is totally subjective. This relaxed attitude towards hermeneutical certainty stands in sharp contrast to the complex
system of classification of text according to the certainty of its authentication process. Every
text is given a precise classification and every classification is defined and conditioned.
Hermeneutics, like authentication, springs in a quest for certainty in understanding Allah’s will,
but it falls short of having its outcome methodologically classified. The basis upon which an
expression is classified pre-context as certain, probable, or ambiguous is the knowledge of the
original meaning and use of it in common Arabic. In the linguistic milieu common to most
usulis, any Arabic speaker can give an uncontentious classification of a common expression. In
other words, the literal meaning of a commonly used decontextualized expression can easily be
classified as certain, probable, or ambiguous in relation to that expression. The use of context,
however, notwithstanding its disambiguating effect on expressions, moves the single
expression from the particularity of a single word carrying a more or less direct lexical meaning,
into the more complex sphere of comprehension. So, while the interpreter’s understanding for
an expression is improved by context, his basis for classifying this understanding as certain
becomes less objective.

An example will help clarify the idea. In the verse “O you who have believed, indeed, intoxicants,
gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but
defilement from the work of Satan, so avoid it that you may be successful”, 423 the word
ijtanibūh (avoid) can be classified as ambiguous in its prohibitive sense as it could mean total
prohibition or mere dissuasion to the use of intoxicants. This classification of the expression
‘ijtanibūh’ as ambiguous is straightforward and is made on the basis of common knowledge of
Arabic; in other words, it is certainly ambiguous. Most interpreters used the mentioning of
‘work of Satan’ as context to consider ijtānibūh as a prohibition. This understanding will either
be certain or probable, but the classification in either case will not be made normatively, an
element of subjectivity will be involved. Admittedly, even the classification of the
decontextualized expression is not wholly objective, however, asserting a difference between
the two cases should not be contentious. Context improves our understanding of an ambiguous
expression, but it also distorts the normativity of classifying this understanding on the scale of
certainty.

423 Quran 5:90
To understand the importance of the normative classification of the interpretation process or product, we need only to consider the debate among the usulis and exegetists on what in Quran is *muḥkam* (hermetic) and what is *mutashabih* (intricate). Juwaini gives a simple definition for them: *muḥkam* is what has a known meaning, and *mutashabih* is what has an obscured meaning and the intention of its speaker is not known; and there is further a myriad of definitions which do not essentially differ from Juwaini’s. The general usulis rule is that a *muḥkam* Quranic text produces absolute law. Being in Quran means it is certainly authentic, and being unambiguous means knowing Allah’s will with certainty; this equals absolute law which cannot be changed under any circumstances. The only way for an interpreter to assert the unambiguity of a Quranic text without falling into the trap of his own subjectivity, is to be able to normatively classify the meaning of a text as certain or ambiguous. Such a system is evidently lacking in *usul al-fiqh*, hence, claims for absolute law justified by context-driven certainty in understanding the will of Allah must be rigorously revised.

### 3

**Effects on finance law**

**Authenticity of the Quran:**

The law of Islamic finance, like the rest of Sharia, relies most on Quran for its divinity and general guiding ethos but relies on it least for its content and details. One can find many verses in the Quran that can be indirectly related to what is today known as finance, these will

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424 ibid 155.
425 Tabari, 3:7
426 See chapter 1 for discussion on the proportion of Sharia taken from the Quran.
be in the form of ethical traits like honesty, kindness, fairness, etc. But there are a few verses that deal directly with finance, these are the verses that prohibit riba, and they will be the focus of our enquiry on the effects of certainty in Quran on Islamic finance.

We have concluded in our above discussion of the authenticity of Quran that the claims for absolute certainty regarding its authenticity are unfounded; the most we can say is that it is highly probable. The question here is: how does this affect the law of Islamic finance if at all? One obvious effect is that anything that relies on Quran as a source cannot exceed it in terms of certainty. Sharia, therefore, can be highly probable at best, in relation to it being the intended law of Allah. Once the seal of certainty around the Quran is broken, the whole of Sharia becomes open for question and criticism; and while this could be theologically troublesome, it is jurisprudentially healthy as it allows for adaptation and extended relevance. It helps overcome all the constraints that are external to human reason. This does not require proving particular verses as being unauthentic, it only requires the atmosphere of openness and the allowing of constructive scepticism which is provided by breaking the seal of certainty.

A more direct effect of the disproving of the certain authenticity of Quran on finance is not evident. The verses that mention riba fall outside the controversial areas in Quran like variants in manuscripts and different Qira’at.\textsuperscript{427} Therefore, nothing with regards to riba and Islamic finance in general can be overturned on the basis of unauthentic or less authentic Quran unless the whole of Quran is questioned, in which case the whole of Sharia is questioned. Yet, it is important to stress that the concept of an absolutely authentic Quran, universally believed among Muslims, provides the backbone for every claim of absolute law in Islam, and the prohibition of riba falls under this category. Therefore, it is essential for the analysis of Islamic financial law, that we analysed certainty, not merely as a characteristic of some verses, but rather, as a concept underpinning the law’s most distinguishing trait, its divinity.

\textsuperscript{427} A note worth making here is that the word riba is written in Arabic as لبأ, but the Uthmanic rasm of Quran, which is the standard scripture today, has the word riba written sometimes as لبأ, with the addition of the ئ syllable. This according to one scholar quoted by al-Tabari is to distinguish riba كأ from زنا which means adultery, the difference being on the dotting which was absent in the Uthmanic mushaf. This means that the two words have exactly the same rasm (script). This confusion was avoided by the context where the expression appeared, however, the question of whether this sort of mix up could have happened in other areas of the text with legal implications is one worth noting.
Absolute certainty for an authentic Quran does not only endow Quranic law with legitimized rigidity, but it also legitimises the very idea of epistemic absoluteness. It confirms its possibility, and thus, rationalises the quest for it not only in authenticity but in all aspects of religion. It becomes presumably possible to demonstrate with certainty, the existence of God, the veracity of His Prophets, the authenticity of His books – since at least one of them is certainly authentic, it is possible that they all are – and thus, the divinity of His law. Certainty becomes an achievable goal and hence, a commendable juristic objective. Therefore, by questioning the claim of certainty at its highest level, the authenticity of Quran, it becomes possible to question any claim for absoluteness in law, here, financial law.

**Interpretation of the verses of riba:**

The prohibition of riba stands on the back of four verses (or set of verses) in the Quran. In the order of their revelation they are the following:

a. “And whatever you give for riba to increase within the wealth of people will not increase with Allah. But what you give in zakah, desiring the countenance of Allah - those are the multipliers.” 30:39

b. “For wrongdoing on the part of the Jews, We made unlawful for them [certain] good foods which had been lawful to them, and for their averting from the way of Allah many [people]; And [for] their taking of riba while they had been forbidden from it, and their consuming of the people’s wealth unjustly. And we have prepared for the disbelievers among them a painful punishment.” 4:160-161

c. “O you who have believed, do not consume riba, doubled and multiplied, but fear Allah that you may be successful” 3:130

d. “Those who consume riba cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “selling is [just] like riba.” But Allah has permitted selling and has forbidden riba. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in riba] - those are the companions of the Fire; they will abide eternally therein. Allah destroys riba and gives increase for charities. And Allah does not like every sinning disbeliever. Indeed, those who believe and do righteous deeds and establish prayer and give zakah will have their reward with their Lord, and there will be no fear concerning them, nor will they grieve. O you who have believed, fear Allah and give up what remains [due to you] of riba, if you should be believers. And if you do not, then be informed of a war [against you] from Allah and His
Messenger. But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged. And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew.” 2:275-280

Our concern here is to examine the degree of certainty by which the prohibition of riba, as it is understood in mainstream Islam today, can be supported by the above verses. In other words, we are trying to see whether what the verses say with certainty and what the law of Islamic finance says give an exact match. It is apt to start by looking at the literal and semantic meaning of the word riba.

The root r+b+ long vowel (a, o, i), from which the word riba is derived, refers to ziyadah ‘increase’. Etymologically, it could share the same Semitic origin with the Hebrew word ribbit, also used to refer to usury in the Old Testament. Literally, riba is not ambiguous as it does not share the same word for unrelated meanings like the word ‘bank’ in English or ‘ʿain’ in Arabic; ambiguity, however, comes from the use ‘istiʿmal’ of the word. Fazlur Rahman lists six uses for the root r+b+ (a, o, i) in Quran: to grow (22:5); to increase (2:276; 30:39); to rise (23:50; 2:265); to swell (13:17); to nurture, to raise (17:24; 26:18); and augmentation, increase in power (69:10; 16:92). This variance in meanings, albeit sharing a common original meaning, makes riba ambiguous relative to each particular use. Context, therefore, is used to point the reader to the intended meaning. Let us consider the verses above in turn.

Verse (a): the words ‘wealth’ and ‘zakāh’ (alms) are contextual evidence ‘qarāʾin’ that riba here is money related. However, this verse only speaks of the preference of zakāh, which is a charitable giving, to riba which is some form of money given with expectation of some return, it does not prohibit riba. It is argued that this Mekkan verse was a prologue to the prohibition of riba; a method in Quran for gradually prohibiting practices which were prevalent in society.431

428 Ibn Manzūr riba. ʿUj
429 Lewis N Dembitz Executive Committee of the Editorial Board. and Joseph Jacobs, ‘USURY’ <http://www.jewishencyclopedia.com/articles/14615-usury>, last seen 03/10/16


431 ibid; see also: Ahmad Ali Abdullah, Dhurub Al-Riba Wa Mumarasatuhu (Dar Jamīʿat Ifriqiya li-Itibaʿah wal-nashr 1998) 15.
But riba in this verse does not resemble the usurious practice that was generally considered as unethical and prohibited by religions. Riba here was referring to wealth which was given to others, sometimes as gifts, not in a charitable manner but with some expected future gain.\textsuperscript{432} This verse, therefore, is not, according to some scholars, and cannot be, used as a Quranic prohibition of usury or interest.\textsuperscript{433}

Verse (b): the reference to the prohibition of riba to the Jews and the mention of “consuming of the people's wealth unjustly” is sufficient context to point riba in the direction of a form of unethical money transaction practiced by the Jews. As no elaboration was given, the verse tacitly implies that riba was known and presumably practiced by the Arab community. The verse, however, does not give a detailed description of the practice nor does it explicitly prohibit it. It only tells of the prohibition to the Jews.

Verse (c): riba here is contextualised slightly less lucidly than in other verses by the words ‘consume’ and ‘doubled and multiplied’. The general context of the verses around it, siyāq, is not lucid either, with a brief mentioning of charitable giving, infāq, four verses later. Yet, it remains the most pertinent meaning relative to any possible other. Here, we have a ‘do not’, la, expression standing as a potential prohibition. But the weak context around and within the verse makes it difficult to decide with certainty whether the ‘la’ expression is prohibitive or merely dissuading. Further, the implication of ‘doubled and multiplied’ (adʿafan mudāʿafa) is not clear. Does it confine the ruling on riba – prohibition or otherwise – to excess (over capital) that reaches a hundred percent or more, or is it merely an expression to denote excessiveness? This ambiguity stands behind the debate about the distinction between riba and faʿida (usury and interest) that has been ongoing in Islam, Christianity, and Judaism for centuries.\textsuperscript{434}

Verses (d): these five verses are the cornerstone for the prohibition of riba in Islam. The description of being beaten to insanity by Satan is meant to give a graphical condemnation to those who consume riba, giving a strong indication of prohibition but still not explicit. The use of the expression harrama (forbade), however, is an explicit prohibition as the word haram is unambiguous in its prohibiting notion. Further evidence for this prohibition are found in the

\textsuperscript{432} Taḫārī.30:39
\textsuperscript{433} This is the conclusion of Rahman’s arguments. See also: Abdullah 16.
\textsuperscript{434} ibid 4–10.
threat of entering hellfire and more emphatically in the threat of war against Allah and his messenger. This puts the prohibition of riba beyond any doubt.

As for its meaning, an allusion to what could be a description of riba is found in the distinction Allah makes between riba and selling. This distinction is made in response to the Arabs’ claim that selling and riba-making are the same as both involve surplus value. To explain this, the exegetists explain the Arabs’ practice that was called riba at the time of jahiliyyah (ignorance, before Islam). When one is indebted to another (possibly a deferred payment for a sale) and the debt is due, the debtor could be offered another deferment in exchange for an increase in payment. The Arabs argue that this is a surplus over the original value of what is being exchanged, hence, like selling, only the surplus value is put after the transaction is made while in selling it is put beforehand. Allah made it clear that they are not the same and that He prohibited riba and allowed selling. This elaboration relies on historical accounts and is only alluded to by the Quran, so, even if it gives a concrete definition of riba, which it does not, it will not be a purely Quranic definition.

Another comparison is made between riba and sadaqāt (alms) and it is made in three of the four occasions where riba is mentioned in Quran. This comparison gives context to understand riba as being some form of giving to the people in need, only in riba a return with surplus value is expected or conditioned whereas sadaqa is a charitable giving with no return from the recipient, only reward from Allah is hoped for. Moreover, the notion of ṭūṣu amwālikum (your principal or capital) is further evidence that riba is an increase over an original valuable. Similarly, the notion of postponing for someone in hardship until a time of ease is evidence that riba is a form of lending to someone in need. It is difficult, considering this context, to understand riba as being completely independent of the needy nature of the receiver of the loan. In modern terms, postponement until a time of ease for a multi-billion petroleum company would not seem virtuous even if it was in financial difficulty.

Contextualising riba should not be selective. Riba got the notion of being an increase over a loan only from context, therefore, the context that ties riba to the exploitation of the needy should not be ignored in favour of the notion of a universal surplus paid in exchange for time.

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435 See: Tābarī. 2:275;
This violates the context and surrenders the clear objective of preventing exploitation and profiteering.

In summary, riba in Quran is an ambiguous expression. Context directed the understanding of riba towards a certainly prohibited, but ambiguous form of lending to someone in need. The universal prohibition of surplus value in exchange for time which defines riba in fiqh and Islamic financial law today seems to be an excerpt only from what the Quran says about riba. It ignores the circumstances of the loan, the nature of the borrower, and the objectives of the prohibition, all indicated in the Quranic verses. While its prohibition in Quran is certain, a clear definition of riba cannot be proclaimed. Therefore, the rigidity of the definition of riba in fiqh cannot be attributed to a hermetic Quran. What the Quran tells us about riba remains, as the nature of the Quranic discourse entails, broad and legally inconclusive.
Chapter Four

Certainty in other sources

1

Certainty in Sunna

The term ‘Sunna’ has evolved in time from a generic term referring to the traditions and practices of a community, to a more concise term referring to the traditions and practices of the Prophet Muhammad, a development attributed mostly to Shafi’i. However, remnants of the original concept of Sunna can still be found in usul al-fiqh in the form of the law of the people of the book (shar’ man qablana), the legal opinions of the companions (qawl al-ṣaḥābī), and the consensus of the scholars or the community (ijma’). This had implications on the law as inherited ‘traditions’ were no longer the main source of law in Islam, but only traditions from the Prophet had that legal status along with the Quran.

For law to be derived from Sunna, the usulis had to overcome the obstacle of their unanimous position that the authenticity of Sunna is only probable and does not share the degree of absolute certainty they assign to Quran. Their argument is that, despite its probable authenticity, Sunna remains a valid source of law, and to ignore a probable hadith in a matter of law would be imprudent and flies against the face of hikma (wisdom). This complicates the issue of certainty in the sphere of Sunna; for the Sunnaic law is, overall, not less rigid than the Quranic law. In fact, Sunnaic law does not yield to Quranic law when they are in conflict despite

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437 Schacht, ibid, p. 94
438 Zysow 25.
the undisputed superior authenticity of the Quran. So, where does the Sunna get this degree of legal certainty? Or, to phrase it differently, on what basis is the rigidity of the Sunnaic law justified? This chapter will discuss these questions, but first, it is important to determine where and how certainty is claimed in Sunna.

For the jurists to extract a legal opinion from Sunna, and as was discussed in the case of Quran, they need to assert that: a) the text is authentic; b) they understand its meaning; c) it is valid, that is, not abrogated or circumstantial; d) it is a legal ruling, not a mere ethical recommendation. The certainty of law positively correlates with the certainty of these issues. However, and since the Sunna is only probably authentic, the jurists had the added task of demonstrating that the probable authenticity of the Sunna does not invalidate its legal authority albeit its legal authority relies on some degree of authenticity.

**Validity of a probably authentic Sunna:**

It is agreed among scholars that Sunna in the form of the recorded sayings and actions of the Prophet are not *mutawatir*, that is, it is transmitted through a chain of persons less than the number of *tawatur* required to yield certainty. Solitary hadith (*khabar al-wāhid, ḥadīth al-āḥād*) therefore, does not yield certainty and has probable authenticity at best. Sunna, however, remains legally valid and the usulis provided two types of arguments to demonstrate this validity; arguments from reason (*ʿaql*) and arguments from traditions (*naql*) which include Quran, Sunna and *ijma*.

The arguments from reason, mostly taken by Hanafis and *Muʿtazila*, state that if a hadith is reported solitarily from the Prophet and decrees a rule to Muslims, and as the obedience of the Prophet leads to Heaven and disobedience leads to Hellfire, it is only prudent to abide by the

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440 The argument that solitary reports are valid despite being only probable is the position of the majority of usulis from all schools. See for example: Ghazzālī, *al-Mustasfā min ʿilm al-usūl* 187–190. Al-Samarqandi 250.
hadith so long as it is more likely to be authentic than not.\textsuperscript{441} As the case where we are told some action is harmful and we could not qualify this warning with certainty, we are, nonetheless, obliged to take the cautious route by not doing the action.\textsuperscript{442}

The main arguments for the validity of Sunna, however, came from traditions where the work of Shafi'\textasciiacute;i was most influential. Later works by the usulis were elaborations on Shafi'\textasciiacute;i's efforts where they organized the evidence to fit the classical usuli's structure (Quran, Sunna, Ijma'), but the substance of the arguments remains the same.\textsuperscript{443} Shafi'\textasciiacute;i provided numerous examples where the Prophet sends single men to deliver messages to people or teach them Islam. He sends a single messenger expecting him to be believed by the people he is sent to. For example, when the qibla (direction) for prayer changed from Jerusalem to Makkah, a man called out at a group of people praying towards Jerusalem that the direction for prayer has been changed to Makkah, and they immediately changed their direction towards Makkah.\textsuperscript{444} Similarly, he tells of the case where Quran was revealed to prohibit alcohol (khamr) and the Prophet's messenger went around Madinah informing people of the new prohibition, people immediately spilt the khamr they were drinking.\textsuperscript{445} This tradition of sending and accepting solitary messages was continued by the companions.\textsuperscript{446} And although the usul literature is rich with polemics on this issue, where counter-examples are given to show that the Prophet and his companions did not simply accept the word of a single person and demanded some form of confirmation,\textsuperscript{447} Shafi'\textasciiacute;i's argument prevailed and the solitary hadith was given legal authority.

Shafi'\textasciiacute;i's arguments need further qualification, however, for to simply say that we can believe and act upon the report of others even when we are not absolutely certain of its truth, seems

\textsuperscript{441} Comments made by al-Farra', see: Brown, 'Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Had\textasciiacute;ths in Early Sunnism' 280.
\textsuperscript{442} Al-Samarqandi 254.
\textsuperscript{443} The dominant view is that Shafi'\textasciiacute;i is the founder of usul al-fiqh; see for example: Daniel W Brown, \textit{Rethinking Tradition in Modern Islamic Thought} (Cambridge University Press 1996) 7. For a different view see Hallaq, 'Was Al-Shafi'\textasciiacute;i the Master Architect of Islamic Jurisprudence?'
\textsuperscript{444} Shafi'\textasciiacute;i, \textit{Al-Risala} 270.
\textsuperscript{445} ibid 271.
\textsuperscript{446} The circularity in the argument of accepting solitary hadith using evidence from solitary hadiths is overcome by arguing that the evidence, although solitary in text, are corroborated in meaning (tawatur m\textasciiacute;a nawi), see: R\textasciiacute; zi, \textit{Al-Mahsul Fi 'ilm Al-Usul} vol 4. 376 Al-Samarqandi 264.
\textsuperscript{447} Ghazz\textasciiacute;li, \textit{al-Mustas\textasciiacute;f\textasciiacute;a min 'ilm al-us\textasciiacute;\textasciiacute;l} 196. Al-Samarqandi 264–265.
to be a statement of the obvious. In this sense, proving the epistemic reliability of the testimony of others by showing historical examples where the Prophet and his companions accepted and used solitary reports, is similarly pointless. But the problem Shafi’i and the usulis were tackling was, apparently, to determine whether solitary reports were acceptable in matters of religion, in particular, matters of law. This explains the distinction made between usul (roots) and furu’ (branches, i.e. positive law) where solitary reports are only accepted in the latter. It makes the arguments from reason obsolete as it does not deal exclusively with the particular problem of religious epistemology but make the case for testimony in general. The remaining support, therefore, for the validity of solitary reports are the historical precedents from the Prophet and his companions.

But the problem goes deeper and needs to be better formulated. How do the usulis know that the actions of the Prophet and his companions were a sanctioning of solitary reports as a source of law and not just a natural response to testimony regardless of the nature of the matter being reported? In other words, rather than to argue that the acceptance of the Prophet and his companions for solitary reports in matters of religion justifies their use as a source of law, we could argue that this acceptance only negates the distinction of religious matters with regards to testimony. But if there is no difference between accepting testimony in daily matters and in matters of Sharia, why would the usulis take the trouble of making that distinction and then try to prove that testimony can still be accepted in matters of Sharia? Why create a problem then solve it?

To understand this, we must consider the possibility that the usulis, particularly since Shafi’i, were influenced by the certainty of the Quran. The perceived certainty of the Quran gave the Quranic law a great degree of certainty. Muslims were anxious about not finding the true paths to, and the true will of, Allah, and Quran, perceived as demonstrably certain, legitimized the quest for certainty for it was considered an achievable goal.\textsuperscript{448} But the Quranic law was quite limited and did not provide society with a comprehensive body of law. More sources were needed, and before the prevalence of the Prophet’s Sunna with Shafi’i, a mixture of ijtihad and

\textsuperscript{448} This was discussed in chapters 1 and 3.
Ijma’ of local communities provided the main sources for law.\textsuperscript{449} These sources, however, had not the divine sanctioning nor the certainty of the Quran, and, thus, inject uncertainty in Sharia and the true path to Allah. Shafi’i, therefore, resorted to the closest source to the Quran, the Sunna of the Prophet. Shafi’i assured us of the divinity of Sunna by giving evidence from the Quran and Sunna that the Prophet does not “speak of [his own] inclination. It is not but a revelation revealed”.\textsuperscript{450} He still had to solve the problem of authenticity before Sunna can be a divine source of law, but could not vouch for Sunna being authentic as by his time forgery was already rife and there was agreement that it could not be used without serious scrutiny,\textsuperscript{451} thus, it would not reach certain authenticity. So, Shafi’i argued instead for the validity of hadith if it reached the level of żann (more than 50% probability).\textsuperscript{452} By combining divinity and certain validity, Sunna was the best additional source of Sharia because it was vast and diverse, and with the use of qiyas, the jurists were supposedly able to cover the occasional lacunae.

The evidence given by Shafi’i in support for hadith do not seem substantively different from the evidence used by epistemologists to assert the reliability of testimony, but Shafi’i wants different results from them. Testimony, according to epistemologists, is very reliable and indeed indispensable as a source of human knowledge.\textsuperscript{453} Yet, and as the case with other sources of knowledge, it remains fallible and must not be taken for granted, which is, according to Coady, actually how people receive testimony. He argues that “the reception of testimony is normally unreflective but is not thereby uncritical”.\textsuperscript{454} This concept is not candidly rejected by usulis, but its application is mostly superficial. Usulis claim for hadith all the merits of testimony, that is, its reliability as the source behind most people’s beliefs and the validity for their actions. On the other hand, they deny testimony’s shortcomings in hadith without

\textsuperscript{449} Schacht, The Origins of Muhammadan Jurisprudence 21–58.
\textsuperscript{450} Quran 53:4
\textsuperscript{453} See also: David Hume, ‘An Enquiry Concerning Human Understanding’ 84. Coady 9.
\textsuperscript{454} ibid 47.
showing how the reliability of hadith can be demonstrated differently to that of normal testimony. This can be illustrated further by a few examples.

First, testimony can sometimes be checked, and actions taken based upon it can be reversible. Someone can ask a stranger in the street for directions and, believing him, take the route he described. In the event these directions were wrong (whether he was intentionally deceiving or simply mistaken is irrelevant here), the lost enquirer can return to his initial position or ask again, this time with more attention to who he asks and the information he receives. The same can be said about testimony regarding the day’s weather or stock prices. Hadith, however, is testimony about past events which cannot be checked from their original source nor can the actions (namely legislation) made on its account be reversed or changed if the original basis on which the testimony was accepted did not change. Again, this is different in normal testimony. Testimony is accepted in the casual daily interactions of people as well as in formal settings like science and law, but there is no dogmatic attachment to its validity. The advancement of science is in many respects a correction of historical misconceptions: people have believed since ancient times that the earth is the centre of the universe, but when new evidence were found, new conceptions were adopted. Similarly, a retrial is possible for a legal case should new evidence appear.⁴⁵⁵ Validity of hadith, however, cannot be rejected so long as its authenticity is considered probable by the scholars. Any exogenous evidence, that is, evidence external to the framework of hadith criticism, namely isnad, will have no effect on its validity.⁴⁵⁶ This explains the absurdity of some conceptions held by many Muslims today like the idea that Earth is static or that Epilepsy is caused by the devil. Effects on the law are graver. Slavery and child marriage are permitted in Sharia on the basis of hadiths (and Quran in some cases); this not only goes against universal modern values, but also against what many modern Muslim thinkers consider as the core Islamic principles of human rights.⁴⁵⁷ To reconcile between seemingly contradicting

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⁴⁵⁷ Rashid Ghannushi, ‘Huqq Al-Insan Fi Al-Islam’ <http://www.aljazeera.net/home/Getpage/6c87b8ad-70ec-47d5-b7c4-3aa56fb899e2/bc6e45e8-d5fc-4c41-9a2d-10537d0af028>. last seen 07/04/2017

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texts or a text with a general principle, the usulis use a number of different methods such as the particularization of a general principle. The main objective of these methods is to make sure that no text, Quran or hadith, is made obsolete for contradicting another text or going against reason or common sense. The uncertain authenticity in hadith is, thus, completely mitigated by an impenetrable validity which consolidates the Sunnaic law to the level of rigidity similar to that of Quranic law.

Second, the validity of testimony as basis for action is proportional to the context of the testimony and the action to be taken. If a student tells his colleague that their revision session in college is cancelled the colleague may just take his word for it. If the testimony, however, was that an exam was cancelled, it is likely that the colleague will seek some verification before deciding not to go. Believing the word of others does not always depend on their supposed veracity, the gravity of what is being reported affects the level of credulity. Hadith, on the other hand, has a uniform methodology to check authenticity; disparity in the contents of hadiths does not entail variance in the authentication methods. A brief look at one of the major books of hadith will provide ample evidence for this. The musnad of Ahmad b. Hanbal relates from the narration of Abu Huraira that the Prophet said “should one of you put on his shoes let him start with the right one, and the left when taking them off; and if one’s shoe is torn up, let him not walk on a single shoe, either take off the pair or walk on them both”. Another hadith says “if a fly falls into the drink of one of you, he should dip it, for one of its wings has the disease and the other has the cure”. A third hadith says “Imams (leaders) should be from Quraish”.

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458 This is what is called tarjīḥ in the case of ta’arud al-adillah ‘contradiction of evidence’. For example see: Ghazzālī, al-Mustasfā min ‘ilm al-usūl 585–598.
459 The concept of distinguishing between a ‘high know’ and a ‘low know’ is referred to in: Steup, ‘Epistemology’.
460 Oddly, the concept of proportionality between methods of authentication and potential implication of hadiths is not alien to scholars of hadith. It is a known practice among them to use more rigorous methods when authenticating hadiths of aḥkām (law) as oppose to the more lenient methods used in matters of mawā’iz (preaching). See: Ahmad ibn ‘Ali Khatīb al-Baghdādi, al-Kīfāyah fi ‘ilm al-riwāyah (Ahmad ‘Umar Hāshim ed, Dār al-Kitāb al-‘Arabi 1985) 162.
461 Ahmad ibn Muḥammad ibn Hanbal, Musnad al-imām Ahmad ibn Ḥanbal (Muḥammad Salīm Ibrāhīm Samārah and Samīr Ṭāḥā Majdhūb eds, al-Maktab al-Islāmī). No.8136
462 ibid. no.11666
463 ibid. no.17690
greatly as the first hadith only teaches how to wear one’s shoes; the second can have considerable health implications; and the third draws serious limitations on the political system of Muslims. Despite the evident disparity in their potential outcomes, Ahmad b. Hanbal used the same methodology to check the authenticity of these hadiths, and since they have the same degree of authenticity, that is, they are all probable, they are thereby legally authoritative. Even if we suppose that the methodology used to critique hadith authenticity is the best possible, which it is not, in other words, if hadith criticism is uniformly adjusted to the highest level, satisfying thereby the required level of authentication for the important issues and being over-critical to the trivial ones, the problem is still not resolved. The contention here is about the validity given to hadiths that fall short of perfect authenticity; why are disparate issues in hadiths given equal legal validity only on the basis of equal levels of authenticity? There is no danger in validating a rule that tells a Muslim how to wear his shoe based on a probable hadith; the danger lies, however, in considering the measure of authenticity as sufficient in validating any law (system of government for example), irrespective of its legal magnitude. More so when the authenticity justifying such validation is only probable.

Third, believing the word of others is essentially a subjective stance. The fact that all people accept testimony habitually and without extensive examination only indicates that they are economizing their time and effort by not being needlessly sceptical. It does not imply, however, that they are under any obligation to accept it. As absurd as the suggestion might be, it is more or less what is required in the case of Sunna. A hadith is, in essence, a testimony about what the Prophet said or did. Believing this testimony should be a personal position that relies entirely on the hearer. But hadith is a testimony that has been authenticated, i.e. believed to be true, by scholars of hadith, and the rest of the Muslim community can only submit to their assessment. In other words, most of the law that governs the whole Muslim community is based upon the faith of a few scholars on the truth of the testimony of a few others. On its own, this might not be a problem, since it is possible to have social norms or law based on similar grounds. These normative systems, however, do not rely solely on the

\[464\text{ Steup, ‘The Analysis of Knowledge’ 46.}\]
historicity for their validity; other factors play a role in determining law, not least its functionality. For this reason, even if some lawyers doubt the historicity of a certain document or testimony on which the law is based, they could still accept or challenge the law on the basis of more objective measures such as functionality or benefit to society. The subjectivity regarding testimony’s authenticity is neutralized by considering the validity of the law from different angles. Sunnaic law, on the other hand, is validated basically on authenticity; paying little regards to the subjective nature of this measurement. Furthermore, using the methodology of hadith criticism does not significantly objectify the authentication process since it depends mostly on the personal appraisal of the report deliverer made by the receiver. In other words, testimony about what the Prophet said depends essentially on testimony about the veracity and competence of the people who transmitted it. The methodology which is supposed to mitigate the subjectivity of the authentication process is, in itself, built upon the personal opinions of the people involved.

In light of the above examples, the paradox of the usulis position regarding the validity of hadith has become evident. The argument from reason is simply stating the reasonability of believing the word of others in the absence of strong reasons not to. In this, it differs not from normal testimony. The argument from traditions, on the other hand, suffers from begging the question as it justifies testimony using evidences from testimony. The usulis argue that traditions about the Prophet’s acceptance of testimony are certain on the basis of testimony that is concurrent in substance rather than form or letter, sometimes referred to as tawatur ma’nawi. The vague concept of tawatur ma’nawi falls under the suspicion of being used to conveniently provide certainty when it is jurisprudentially necessary.

But the argument from tradition has more pressing problems. Firstly, it only provides as evidence incidents when the Prophet or his companions used or accepted solitary testimony,

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which can be countered by other incidents where they acted sceptically. The debate on which incidents overrule the others or how to reconcile between them is not easily settled in favour of either.\textsuperscript{469} Even when the acceptance of testimony is preferred, the debatable nature of the matter should undermine the universal validity given to solitary hadith. For, according to the usulis rules, \textit{fiqh of furu’} can be based on probable sources, but the validity of solitary hadith belongs to usul, for which only certain evidence can be used.\textsuperscript{470} Secondly, hadith must be identified in relation to testimony. If hadith is indeed a form of testimony, the evidence given by the usulis to support its validity are redundant since the matter is uncontentious in the first place. At the same time, the usulis need to demonstrate how the shortcomings of testimony are circumvented in hadith, in other words, they need to explain their selectivity with regards to methodology. If, on the other hand, hadith is not a form of testimony – a questionable proposition in its own right – then the usulis need to identify it in an epistemological framework. Furthermore, they will need to provide evidence to support it as a unique source of knowledge. Using the evidence of historical incidents, in addition to being countered by other incidents as mentioned above, will only drag hadith back to the sphere of normal testimony. The usulis don’t have evidence to distinguish hadith epistemologically from testimony, nor have they arguments to explain why they consider hadith immune from the epistemological problems of testimony.

**Using authenticity as basis for validity:**

The relationship between the authenticity of hadith and its validity is a complicated one. In theory, authenticity causes hadith to be legally valid, but the relation is not correlative. Hadith authenticity varies continuously in a spectrum that ranges between false and authentic, while validity has a binary variability: valid/invalid. Once a hadith passes the 50\% mark in authenticity it triggers its status to change from invalid to valid.\textsuperscript{471} This status remains constant while the authenticity keeps varying. Portraying the relationship between authenticity and validity in hadith as being in the form of probable-valid or improbable-invalid would be a misleading

\textsuperscript{469} An example of this debate can be found in: Āmiddī vol 2. 33-71
\textsuperscript{470} Al-Samarqandi 255–258.
\textsuperscript{471} Wael B. Hallaq, ‘The Authenticity of Prophetic Hadīth: A Pseudo-Problem’ 81.
simplification because it would miss the crucial point where the work of hadith scholars seems to continue on authenticity even when hadith is already considered legally valid. The question, therefore, becomes: what virtue is there in pursuing the authentication process further to the point of making the hadith valid? True, the study of hadith has grown to become an independent field of study rather than part of the study of law. But the tremendous efforts made by hadith scholars to authenticate reports about the Prophet to the highest degree possible would seem of little value if we take away hadith’s contribution to Sharia. The efforts made for authentication, in other words, seem disproportionate to the requirements of the law, while the law seems to be the main raison d’etre for the science of hadith.

Wael Hallaq, one of the few who addressed this problem, argues that the scholarly output concerned with the authenticity of hadith is pointless and that we need not squander our efforts critiquing authenticity when the scholars of hadith and the usulis alike acknowledge that hadith is only probable. The gist of Hallaq’s arguments seems to lie in his distinction between, on the one hand, the concept of ʿamal or the praxis aspect of the Prophet’s traditions, which is the central interest of the traditionists, and on the other hand, epistemological certainty, which is the central interest of the usulis. Conflating the two, created a ‘pseudo problem’ where Orientalist have needlessly focused their efforts on studying the works of the traditionists in an epistemological context.

It is important to distinguish, however, between the concept of epistemic or literal certainty like that of Descartes and that of historical reliability or the ‘common-sense’ certainty of

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473 According to Brown, the fact that ʿāḥād hadiths “were both essential to and compelling in the elaboration of Islamic law” was “a project deemed worthy and necessary by rationalists and Partisans of Hadith alike.” Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Ḥadīths in Early Sunnism’ 268.

Thomas Reid, according to Jonathan Brown. He argues that Hallaq’s work is misleading because “[i]t might lead us into thinking that the epistemological probability with which Muslim scholars viewed ḍhād hadiths meant that they believed that these hadiths were only "probably" true in our conventional sense of the word, and that they harboured effective doubts about the reliability of these hadiths”. Brown is essentially arguing that the terminology in the literature of hadith (and possibly usul too) is not hermetically concise. The words ‘yaqīn, qat’, ilm’ all mean knowledge or certainty, but the semantics must be carefully distinguished. In this sense, what is probable in the epistemic sense can be certain in the historical, ‘daily life’ sense. This historical certainty was sufficient for matters of law and it found its way even in matters of theology which is pronounced by most usulis as a domain only for evidence that are epistemologically certain. This makes epistemic certainty an intellectual luxury that had no practical use or influence. Hadith, therefore, although epistemologically probable, is historically certain in the eyes of hadith scholars, according to Brown’s arguments. This helps explain, he argues, the universal validation of hadiths, even those that did not acquire the required soundness.

But the obsolescence of the concept of epistemic certainty makes Brown’s rebuttal of Hallaq miss the point. If “that superior level of certainty simply does not exist for men” as Brown rightly notes from the writings of the Muslim scholars, then surely the hadith scholars were striving for the achievable historical certainty; therefore, when they say that hadith is sound ‘sahīḥ’, it is not a proclamation nor a negation of its historical certainty, it is simply an acknowledgement of its reliability as a source of knowledge about Islam. That is not to say, that they did not believe the hadiths to be true, it is only to say that this belief was not declared

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475 Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism’ 262.
476 ibid
477 This is known in epistemology as contextualism. See ch.7 in Nagel 87–101.
478 Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism’ (n 145) n 34.
479 ibid. 285
480 ibid. 269
481 Abu Rayyah citing Nawawi, Abū Rayyah 281. and others in 287. See also: Zysow 23. “Sahih hadith should not be confused with certain hadith. Clear evidence that sahih is not to be taken in the sense of authentic is its frequent use in the elative”
in their methodology. In other words, their use of terminology is not arbitrary. What they conspicuously declared is the soundness or weakness of hadith; a terminology that deliberately avoids the trap of epistemology and is more geared towards the practical uses of hadith.

To reiterate the problem in plainer terms, it can be presented as follows. Muslims who espouse Islam as a way of life will look to the Prophet as the ultimate exemplar for a life that truly adheres to the principles of Islam. The reports about the Prophet, thus, became significant in Islam as they depict a near-complete picture of the Prophet’s life, from the details of how to lie down for sleep to the rules of war and government. Naturally, scholars needed to check the truth of these reports as mistakes and fabrications were always expected and taking place. A system was developed to meet this very objective: to check the truth of the reports about the Prophet to the best possible degree in order for Muslims to find guidance in their lives. To this end, epistemic certainty was not required as it was unattainable. And although many scholars believed that a sahih hadith yields the historical certainty that Brown described, the fact remains that most hadith scholars did not claim any sort of certainty to their methodology. A sahih hadith is a hadith that meets the objective, that is, it can be used as a source of guidance to how the Prophet lived and what he taught. Against this background, we can better understand the problem at hand: why did the usulis and hadith scholars accept the conspicuous mismatch between the hadith authenticity which is measured in an infinitely gradable scale and the validity of hadith which is dichotomized into valid/invalid when validity is clearly subject to gradated authenticity? How can we appeal against the validity of a hadith that has high implications on Muslim communities while its probability is at the lower end of the scale of zann? How can Muslims change a Sunnaic law if its validity, under the pressures of changing times and circumstances, proves problematic while its soundness remains the same?

A constructive analysis of Sunna and its role in Islam must critically analyse the two main constituents of its methodology, soundness and validity, and it must start with soundness as it

482 The position of later Zahiris, see ibid 32. It is also one of the confusingly contradictory opinions of Ahmad b. Hanbal; see Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism' 272–273.
483 Abū Rayyah 277.
is a prerequisite for validity. For what is the point in examining hadiths that have no role in shaping the ideas and practices in Islam? In this light, we can credit the efforts of many Orientalists since the problem they discussed about hadiths, contrary to Hallaq’s argument, is a real one. It is fair to assume that their critique of hadiths is directed, as it should, towards its proclaimed soundness and validity. It is to challenge the concept of hadith being a reliable depiction of the life of the Prophet, and hence, a source of knowledge and law in Islam. It is difficult to perceive the likes of Goldziher, missing this basic concept. Nonetheless, in order to understand the dynamics of Sunnaic law, we need, further to examining the authenticity of hadith to which much effort has been put, to examine its curious relation to the legal validity it engenders.

Firstly, the binary division of validity is not arbitrary. Methodologically, authenticity is also binary: saḥīḥ / daʿīf. Admittedly, there are many divisions identified under each of these two main types with different degrees of authenticity, but the criteria upon which hadith authenticity is classified makes it possible to rank hadiths in a continuum with no taxonomy able to capture the variety in their authenticity. A hadith might be better corroborated, or its chain of transmission might contain people more revered or it might have any other measure by which the notion of ‘sounder’ (aṣaḥḥa) can be assigned. To structure hadiths in a methodological framework, a limited but defined taxonomy was needed, thus, hadith was either sound or weak, hence, the corresponding valid/invalid classification.

\[\text{\textsuperscript{484}}\text{Hallaq maintains that Goldziher did not understand the usulis position regarding hadith. He argues “I for one do not believe that Goldziher, for instance, would have raised such a fuss over the reliability of the hadith as a historical source had he understood the traditional scholars to acknowledge that the hadith’s veracity cannot be known apodictically and that its authenticity can be asserted only in probabilistic terms”, Wael B. Hallaq, “The Authenticity of Prophetic Hadith: A Pseudo-Problem” 81.}\]

\[\text{\textsuperscript{485}}\text{A third category of ‘hasan’ (fair) was arguably introduced by al-Tirmithi but it did not gain popular usage as the original two categories. See Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism’ 278. n89. Ibn al-Salah shared the opinion of the trio categorization but Ibn Kathir argued that this categorization was superficial. See, ‘Uthmān ibn ‘Abd al-Rahmān Ibn al-Salāh, \textit{Mugaddamat Ibn Al-Salāh Fi ‘Uloom Al-Hadith} (1972) 7. Ismā‘īl ibn ‘Umar Ibn Kathīr, \textit{Ikhtisār ‘Ulūm Al-Hadith}, aw, al-Bā‘ith al-hathīth ilā ma‘rifat ‘Ulūm Al-Hadith} \textit{Aḥmad Muḥammad Shākir} and, ‘Uthmān ibn ‘Abd al-Rahmān Ibn al-Salāh eds, [s.n] 1936) 6.}\]

\[\text{\textsuperscript{486}}\text{For more on the different types of Sahih and Da‘if see Ibn al-Salāh 6. For a more critical analysis on the subject see: Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism’ 275.}\]
Secondly, this binary classification came at a cost. For had the taxonomy been more divisible, where the *sahih* classification is divided into a greater number of gradated classes of authenticity, then a corresponding criteria for validation might have been possible where matters of low Sharia implications can be validated by lower grades of authenticity and vice versa. But a ubiquitous validation was in order as a result of an over-reductive classification of authenticity. Even the introduction of the *hasan* classification did not help since its difference from *sahih* was vague and thus did not annex any validation license of its own.

Thirdly, a possible explanation for why the hadith scholars used a reductive dichotomy in their authentication methodology is that they were mostly setting the conditions for accepting hadith very high it could hardly be improved. Al-Bukhari allegedly, selected 4000 hadiths from a collection of 300,000.\(^{487}\) Any hadith that passes through their highly refined filters was considered worthy of validation. This presumption eliminates, supposedly, the need to further divide *sahih* into many sub-divisions because the lowest ranking *sahih* will still be authentic enough to be valid. The requirements of *sahih*, however, are considerably lower than those of al-Bukhari. This explains why the *sahih* of al-Bukhari, which are considered the most authentic\(^{488}\) as he had the most rigorous conditions for accepting a hadith to his book, are only as legally valid as the qualitatively inferior collections like those of Abu Dauud or Ahmad b. Hanbal. In other words, the clear preference of some hadiths to others and some collections to others in authenticity did not reflect strongly on legal matters.

To further clarify our problematization of the relation between authenticity and validity, we can draw on H. L. A. Hart’s concept of ‘secondary rules’, in particular, the ‘rule of recognition’ and the ‘rule of change’\(^{489}\). According to Hart, the ‘rule of recognition’ “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”\(^{490}\) Put simply, it is the rule by which we validate a primary rule. The ‘rule of change’, on the other hand,

\(^{487}\) Ibn al-Salāh 10.
\(^{488}\) ibid 9.
empowers an individual or body of persons to introduce new primary rules or to eliminate old ones.\textsuperscript{491} Using Hart’s system, the soundness of hadith belongs to the rules of recognition in Sunnaic law or Sharia in general. A rule or a law (\textit{fiqh}) based on a hadith will be ‘recognized’ as a rule or a law, i.e. validated, if it is sound (\textit{sahīḥ}). Moreover, soundness is the only, hence ultimate, rule of recognition for hadith.\textsuperscript{492} This means that a rule based on a \textit{sahīḥ} hadith cannot be invalidated by reason, consensus (parliament), or any other means of legislation. It has been argued that a hadith will not be accepted if it conflicts with language, certain historical facts, reason and common-sense, etc.\textsuperscript{493} But these considerations, to stay with the Hartian system, are subordinates to the conditions relating to \textit{sanad}. In other words, form (\textit{sanad}) is supreme to substance (\textit{matn}), and even in its subordination, \textit{matn} is only paid lip service.\textsuperscript{494}

Improvements to the system were always possible. Scholars of hadith could have given more weight to the substance of hadith, for example by giving reason primacy over \textit{sanad} or at least parity with it. Similarly, the usulis could have introduced more rules for validating a hadith instead of being solely dependent on soundness. An obvious choice will also be the use of reason to measure the viability of a hadith as a source of law for a particular circumstance and the ability to change the rule accordingly. For example, the Prophet is reported to have prohibited the long-distance travel of women without a \textit{mahram} (unmarriageable kin). As has been argued by some modern scholars, the reasons for this prohibition (safety reasons) are absent in modern times, therefore, the validity of this hadith can be overturned to allow women to travel freely as long as it is safe to do so.\textsuperscript{495} In this case, reason is given primacy over soundness of hadith, thus, its validity, recognized for being circumstantial, is reversed allowing

\textsuperscript{491} Ibid 95.
\textsuperscript{492} For Hart’s concept of ‘ultimate rule of recognition’ see: ibid 105.
\textsuperscript{493} Khatib al-Baghdadi 472. Yusuf Qaradawi, Kayfa Nata’amal Mu’a Al-Sunnah Al-Nabawiyah: Ma’alim Wa-Dawabibit (Dar al-Shuruq 2000) 100. These arguments were very brief if not superficial in the writings of hadith scholars. Their main attention was always on \textit{sanad} not \textit{matn}. For example, see Ibn al-Salah’s arguments regarding \\textit{Munkar, Mu’allal, mawdu’, and da’if}; he is mainly concerned with the problems in transmission not content. See: Ibn al-Salāḥ 20,37,42,47. Similarly see the comments made by Ahmad Shakir, the editor of Ibn Kathir’s book on the subject where he introduces, citing al-Hakim, 10 types of \textit{ilal} (problems) all related to \textit{sanad}. See: Ibn Kathir 60–70. Criticism of \textit{matn} is usually only advocated by scholars from other fields or modern scholars like Qaradawi above.
\textsuperscript{494} See n487 above and Abū Rayyah 285–294.
\textsuperscript{495} Qaradawī 149.
for a change of rule. And to respond to the problems that might come up from giving total primacy for reason over soundness, a proportionate relation between authenticity and validity can be useful. If a report from the Prophet implies a rule, then the implications of this rule on the Muslim society must be weighed against the rules for its recognition. High implication rules must pass rigorous tests for validity: high authenticity, solid reasoning, social utility, etc.\textsuperscript{496}

But the way in which the usulis and the scholars of hadith have designed their methodologies is explicable in light of the quest to divinize Sunnaic law. Change and divinity do not go together in Islamic theology. Changing the taxonomy of hadith to accommodate more grades of authenticity allowing, thereby, more flexibility in validating or invalidating a particular rule will lead to a lesser number of hadith being legally valid or enjoying the same degree of rigidity. This is evidenced by the fact that in some cases even weak hadiths were made legally valid to fill certain lacunae.\textsuperscript{497} The implications of fiddling with the relationship between authenticity and validity of hadith were unacceptable in the usulis project for a divine Sharia. A greatly reduced corpus of hadith, which will result from a strengthening of its authentication methods, will greatly reduce the size of source material which underlies the divine nature of Sharia since the lacunae must then be filled with human legislation. Similarly, a corpus of hadith with a less rigid validity, will result in an occasional change in Sharia which again will undermine its divinity (Allah does not change His mind) as well as its legal certainty.

It is fair to say that at least most of the work of hadith scholars was a genuine attempt to find the true reports about the Prophet of Islam. Some were rigorous in their methods, while others gave priority to quantity over quality, thus, amassing larger collections but with less recognition for authenticity. It was the usulis, however, who, driven perhaps by a juristic desideratum, issued a universal validity to the \textit{sahīh}. Of course, the fact that this license given by Shafi‘i predates the major works of hadith, underscores the argument that scholars of hadith always had \textit{fiqh} in mind while collecting hadith. This may have jeopardized the objectivity of their

\textsuperscript{496} Ibn Khaldun made similar argument regarding the hadith “rulers should be from Quraish”. He said this was because at the time of the Prophet Quraish were the strongest and most capable tribe to rule, but if circumstances change, the rule should change too. Cited in ibid 150.

\textsuperscript{497} Brown, ‘Did the Prophet Say It or Not? The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism’ 276.
approach. But it was down to the usulis and jurists to decide how to use this raw material in the field of law and they used it indiscriminately.

Legal authority of Sunna:

What has been discussed so far is the arguments of the usulis on using hadith and Sunna as the basis for 'amal (praxis), but we still need to discuss the validity of Sunna as law. Before a hadith can be legally binding for Muslims in all times and places, and as can be deduced from the different discussions of the usulis regarding the legality of Sunna, it must be examined with regards to a few points. First, it must be shown to be intended as law, that is, the Prophet must have intended the Sunna as a binding rule not a recommendation or a permission. Second, it must be absolute, that is, it must not be circumstantially valid for a particular person/s, time, or place and thus, inapplicable otherwise. Third, it must be a revelation not the ijtihad of the Prophet. These points can be discussed in more detail.

Is hadith intended as law?

With regards to whether an imperative form (ṣīghat al-amr) implies a binding rule, a recommendation or a permission, the usulis treat the Sunna in the same light as the Quran. The details of how the usulis found it very difficult to distinguish between a binding or non-binding imperative/prohibition without contextual evidence can be found in the previous chapter. The semantics, however, were confined to the verbal Sunna (al-Sunna al-Qawlīyyah), and thus, the usulis needed to consider the implications of the Prophet’s actions (al-Sunna al-fi‘īyyah) and approvals (al-Sunna al-Taqrīrīyyah). If the Prophet, for example, performs a ritual in a certain way, does that become a binding form for Muslims? The answer will depend on a number of issues, as will the categorization of any Prophetic action as wājib, mandūb, or mubāh (obligatory, recommended, permitted). For example, his action might be accompanied by some evidence pointing the action towards one of the categories above; his action could be an elaboration (bayān) to an established rule (the details of performing a prayer); they might be

498 The distinctions between fiqh, Sharia, and law were discussed in chapter one.
actions exclusive to him and prohibited to the rest of Muslims like his nine marriages and his extended fasting; and so on. None of these issues can be settled with certainty nor is there agreement among the usulis on the categorizations or their measures. The conclusion from this is that nothing from what the Prophet said or did can be certainly binding to all Muslims except with the aid of external evidences. The surety provided by the evidences to make the saying or action of the Prophet a binding rule is seldom objective, and the most effective surety used by the jurists is *ijma*'.

**Circumstantial or absolute validity?**

There is, also, the possibility that when the Prophet order or prohibits something, that this order or prohibition is circumstantial, and hence, is not a universally binding rule. Many of the invalidations of hadiths are conveniently categorized by the usulis as abrogation. An example of this is the hadith where the Prophet prohibited the storing of sacrificial meat over three days, but when he knew later that people were having difficulty he explained that he only prohibited it because at the time there were nomads passing by Madinah and he wanted the people of Madinah to provide for them. The problem with the claim of abrogation, although convenient in terms of legal certainty, is that it nullifies the original ruling even if the causal circumstance recurs. There are instances, however, where circumstantial ruling is not claimed to be abrogated. For example, the Prophet is reported to have permitted kissing one’s wife during fasting for an older man, while he dissuaded a younger from the same act. This resulted in the act being permitted by some jurists and prohibited by others. Another example is that the Prophet is reported to have prohibited the writing of his sayings except for Quran but in a different hadith he allowed Abdullah b. Amr to write whatever he hears from

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499 For arguments on this topic see: Jasșăs vo1 3 216; Zarkashi vo4 4. 168; Âmidî vo1 1. 228.
500 Shâfi’î, Al-Risala 177.
502 See the notes of Ibn al-Qayyim, ibid. For a detailed take on the differences between scholars on this see the notes of al-Nawawi on hadith number 62 in: Muslim ibn al-Hajjāj Al-Qushayri and Yahyā ibn Sharaf Nawawī, *Sharḥ Sahih Muslim* (Khalil Al-Mees ed, 1st edn, Dar al-Qalam 1987). Muslim did not narrate this particular hadith where the Prophet gives different rulings to two people but the discussions there mention the distinction between an old man and a youth.
him as he says nothing but truth. Scholars reconciled this by arguing that the exception was to avoid confusion with the Quran. And there are many other examples of the same nature; the question, however, is this: is there an objective method by which we can certainly assert that a Prophetic ruling is circumstantial or absolute? Here again the usulis seem reliant on context; and the contextualization of these hadiths is not usually a simple inference. This is why we find such disagreement among scholars regarding these problematic hadith. Furthermore, we cannot be certain that some of the absolute Sunnaic law which is not considered problematic was necessarily not circumstantial. The details of the circumstances of many hadiths are not known and the possibility that the ruling of the hadith is not absolute cannot be excluded.

Revelation or ijtihad?

Unlike the issue of circumstantial ruling which did not seem to trouble the usulis much, they paid considerable attention to the problem of how to distinguish between what the Prophet says by way of revelation and his own opinion (ijtihad). The importance of the matter comes from the indubitability of revelation as a certain source of law, as oppose to the ijtihad of the Prophet, on which their positions varied, but is mostly considered not binding. The most famous example of Prophetic ijtihad is the story where he saw the people in Madinah pollinating date palms and objected to the practice. When they stopped their pollination, the harvest was ruined and when they asked him about it, he explained that he only provided his opinion and that they know better their worldly affairs. A similar story is reported about the position he chose to camp for the Badr battle. A companion enquired him whether this position was a revelation or that is his military opinion; and when the Prophet told him it was only his opinion, the companion asserted that that was no place to camp and suggested a better

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503 ibid. number 3641. But the next two hadiths tell of the Prophet’s prohibition of writing his sayings except for Quran. Numbers 3642, 3643.
504 ibid
506 Abū Rayyah 44. Āmidī 228.
507 Abū Rayyah 44. Qaradāwī 146. Ibn Taymīyah vol 18. 12.
position to which the Prophet agreed.\(^{508}\) These and other similar reports, however, are sometimes said to be regarding only worldly affairs and thus, could not be used to evidence the fallibility of the Prophet’s sayings in matters of religion.\(^{509}\) Nonetheless, the majority of usulis agree that the Prophet did make ijtihad in matters of religion too when there is no revelation regarding the matter in question.\(^{510}\) Furthermore, it is even possible that he sometimes made mistakes in his ijtihad in religious matters but, and this is where the concessions stop, his mistakes will not pass uncorrected by revelation. Many examples are given in this regard. In the battle of *Badr* he decided to take ransom for the captives, but Quran was revealed to inform him that he should have killed the captives instead of taking ransoms.\(^{511}\) The usulis, under the pressure of historical evidences, admitted that the Prophet used his own opinion without the aid of revelation in matters of religion and that sometimes his ijtihad was religiously incorrect, but what evidence do they have that every Prophetic ijtihad is, by the end of the Prophet’s life, divinely sanctioned either by silent approval or by revealed corrections? Their only argument is the theological premise that the Prophet had delivered his message complete or that he had ‘isma from making mistakes in his divine message. This moves the issue, if we are to avoid a circular argument,\(^{512}\) from a demonstrated argument onto theology. Another questionable supposition is with regards to the rigidification of the Prophet’s ijtihad after his death. We know that the companions had liberty in questioning his ijtihad and he approved of this. Why can’t the Muslims after his death decide that Prophetic ijtihad is not binding and thus Sunnaic law can be changed? The general position of the usulis is that a binding Sunna, if sound, is binding absolutely, that is, it cannot lose validity for lacking Quranic eternal divinity. But a modern intellectual movement, with premodern roots, in South East Asia, *Ahli al-Quran*, argued that

\(^{508}\) Abū Rayyah 44.

\(^{509}\) The concept of ‘isma (infallibility) of Prophets in matters of religion is thoroughly discussed in usulis literature, see for example: Zarkashi vol 4. 170-175.

\(^{510}\) For example, the Prophet is reported to have said that Makkah was made forbidden by Allah and that its trees must not be cut. His uncle al-Abbas intervened saying “except the *Idhkhir* O Prophet of Allah! We use it for building our houses” and the Prophet said, “except the *Idhkhir*”. The fact that the Prophet said this was a prohibition by Allah shows it is a matter of religion, and the fact that he accepted the interjection of his uncle shows that he had discretion on the prohibition. See: Abū al-Nasr 139.

\(^{511}\) ibid 146. And other examples in 145-155.

\(^{512}\) Referring to ijma or Sunna to support the premise of the complete message will be a circular argument.
Sunna was not to be used as a source of law in Islam.\(^{513}\) Their justification included the concern over the unreliable authenticity of hadith, but it also had considerations for the questionable legal nature of hadith. This stems from the argument that portrays Muhammad as having a dual persona: Prophet and human, the former is infallible and whatever he said as a Prophet is divine, while the latter is fallible and his sayings and actions as a human are not religiously binding.\(^{514}\) The problem with this argument though, is that it does not give clear guidance on how to distinguish between what is Prophetic and what is human. The attempt by some to use a second dichotomy of ‘religious affairs and worldly affairs’\(^{515}\) would render the first dichotomy of the Prophet’s persona useless. In both cases, the need for an objective method to distinguish between the two poles of the dichotomy, Prophet/human or religious/worldly is not met.

To sum up, hadith, after being made synonymous to Sunna, was too unreliable authentically to be considered certain. But it was quantitatively indispensable for the ubiquitous requirements of Sharia. Similarly, the sacredness of hadith was qualitatively indispensable for the divinity of Sharia. Thus, the usulis devised their arguments, in order to be able to benefit from the massive legal resource of hadith, around its validity. By avoiding the difficulties of an epistemological classification of ‘true’ or ‘certain’, and by resorting to the more affordable classification of *sāḥīḥ* /*daʿīf*, they managed to validate a considerable amount of Prophetic traditions to complement and substantiate Quran. Together they provided Sharia with *naṣṣ*, divine words, that constitute the underlying platform for Islam as a whole. Shifting their arguments, however, from epistemology to validity, the usulis could only provide debatable evidence and the sense of their juristic desideratum was more evident. Shafi’i managed to bridge, to some degree, the divinity gap between Quran and Sunna by his arguments that Sunna is a second form of revelation, but the authenticity gap was too large to bridge, engendering in the process weaker arguments for its inclusion with the Quran as a source of Sharia. And under the pressures of modernity and the increasingly questionable validity of Sunna, its resilience could, perhaps, be

\(^{513}\) Brown, *Rethinking Tradition in Modern Islamic Thought* 64–67.

\(^{514}\) ibid 62.

\(^{515}\) ibid
mainly explained by its sheer vastness; for, as noted by Daniel Brown, what would be left of Islam without the Sunna?\footnote{ibid 64}

2

Certainty in Ijmaʿ

With Ijmaʿ, usul al-fiqh departs from the divine sources of law to a form of consensus legislation; that is, from what Allah or his Prophet says to Muslims, to what the Muslim community itself establishes as law, with divine sanctioning to their consensus. This complicates the issue of certainty in Ijmaʿ further in comparison to Quran and Hadith. It is known that every rule or law in Islam must have some basis, some origin that makes it Islamic and justifies its religious character. The authority (hujjiyya) of Quran is based mainly on theology; it is dependent on one’s faith on the veracity of the Prophet.\footnote{Ghazzāli, al-Mustaṣfā min ʿilm al-usūl 131.} If one believes that Muhammad was indeed sent by God then one will believe what Muhammad says about God, namely, that the Quran is His word. The Sunnah follows easily since the Quran says in numerous occasions that Muslims should follow the instructions and guidance of the Prophet, in addition to the fact that the Prophet is the one who gave us the Quran in the first place. But with Ijmaʿ, the question of authority is not as straightforward. It must be demonstrated and demonstrated with certainty. Then there is the issue of epistemic certainty. In the case of Quran, epistemic certainty was the combination of certain authenticity and certain meaning. In hadith, the usulis did not rely on authenticity as it was unattainable, but they argued for the
certain validity instead. Why, then, shall Muslims consider Ijma’ as a source of certain knowledge of God’s will?

While the two issues concerning certainty of Ijma’, authority and epistemology, are different, they are treated in the literature of usul and to some extent the modern works, without distinction. The reason for this is perhaps that the material used to answer the problems is the same. For example, the hadith “my community does not agree upon an error” is used as basis for both authority and epistemology in Ijma’.\textsuperscript{518} There seems to be a silent presumption that if Ijma’ is authoritative it must follow that it conveys a true message and vice versa. But we know that this is not the case since Quran is authoritative, but its ambiguous verses do not necessarily convey the true will of Allah. Similarly, an abrogated (mansūkh) text is not authoritative even if considered authentic and precise in meaning. Nevertheless, and regardless of the reasons for the lack of distinction between Ijma’ ‘s authoritativeness and epistemological capacity, the arguments made for each case suffer from considerable problems as well as persistent disagreements between the usulis. This degree of disagreements in matters of Ijma’, in sharp contrast to the high degree of agreement regarding authenticity of Quran and validity of Sunnah, does not sit well with the absolute certainty the usulis usually assign to Ijma’, something that alludes perhaps to the juristic desideratum that inflicts Islamic legal philosophy throughout.

**Authoritativeness of Ijma’:**

As is usually the case, the authority of Ijma’ as a source of law, is based on the higher sources, Quran and Sunnah, and on reason (‘aqîl), with differences among the usulis on which sources offer the most reliable bases for authority. This has been troubling for the usulis as there is no clear text nor an argument from reason that explicitly gives Ijma’ its authority. The debates among the usulis about this problem are well documented and need not be repeated here.\textsuperscript{519}

\textsuperscript{518} Ijma is authoritative because the Prophet endorsed it by this hadith (and others with similar meaning). It is epistemologically certain by virtue of its immunity from error. ibid 221.

But the very fact that it is a strongly debatable issue is something to be noted when considering the certainty of Ijma’s authoritativeness.

Many of the major works on usul do not find the text used to support Ijma’s authoritativeness to be conclusive, yet, the position of Ijma as a certain source of Sharia remains unshaken. It was narrated that Shafi’i was struck with the question of what is the evidence for Ijma’s authority from Quran. He remained in his house reading the Quran many times until he came up with the verse 4:115 “And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers - We will give him what he has taken and drive him into Hell, and evil it is as a destination”. The connection of the verse to Ijma, however, is evidently weak that even Shafi’i’s followers did not accept it. Nor did some usulis accept the hadith “my community will not agree upon an error” as it was not semantically explicit nor authentically certain, and the rule of the usulis was that usul must be based on certain text. Juwaini, for example, had no trouble in dismissing the textual and logical evidence for Ijma in a few paragraphs but he still sought to authorize Ijma because it was “Sharia’s main pillar and reliance”. His argument is that Ijma’s authoritativeness is based on common experience (ada). It is customary impossible that the whole of the community’s scholars agree on anything that is a matter of opinion (nazar), therefore, if we find them agreeing on something, it must be based upon a certain text which did not reach us. This follows the usulis’ argument that every Ijma must be based on text and it is possible that we will know the Ijma but not the underlying text. Insisting on knowing the text makes Ijma redundant.

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520 Shafi’i did not mention the hadith “my community…” at all; Juwaini rejected all texts for ijma; Ghazali rejected the Quranic verse but accepted the hadith and all that collectively supported ijma. n512.
521 ibid 120. Another version of the anecdote can be found in the commentary of Khalid al-Sab’ al-ilmi and Zuhair Shafiq al-Kubbi on footnote 2 Shafi’i, Al-Risala 268.
522 Juwaini and Ghazali the notable examples, refer to n433 above. See also: Zysow 120
523 This hadith is considered weak (da ifj), see the commentary of Nawawi on Muslim, number 1920
524 Juwaynī, Al-Burhan Fi Usul al-fiqh 262. Āmidī 221.
525 Juwaynī, Al-Burhan Fi Usul al-fiqh 263.
This argument is simply saying that the authority of Ijma’ is based on its function as a medium for delivering lost texts. In other words, Ijma’’s authoritativeness is transited from the authority of the unknown text the content of which is made known to us via Ijma’. But the reliance of Ijma’ on a text, known or not, is a contentious issue in usul, meaning that Juwaini’s arguments can only be valid for those who take the position of conditioning Ijma’ on text. For those who do not share that opinion, however, those who argue that Ijma’ is authorized as a mechanism to sanction human opinion when there is consensus on that opinion, the hadith mentioned above was their strongest evidence.

The fact that this hadith was āḥād, thus, uncertain, brought about the contentious issue of circularity in the arguments about Ijma’’s authoritativeness. The problem is that Ijma’ cannot be based on an āḥād hadith as this will be basing an usul source on an uncertain text, which is not allowed in usul. Those who use the hadith as basis argue that it is widely accepted, but this, according to Juwaini who rejected the argument, is resorting back to Ijma’, hence, the argument is circular.

The circularity problem:
The gist of this problem is the following:

- The main textual source which gives Ijma’ authority is the hadith.
- The hadith is āḥād which is authentically uncertain but nonetheless valid.
- The validity of āḥād hadiths is based on Ijma’.

Some orientalists used this problem to refute the arguments for Ijma’’s authority. Snouck Hurgronje argues that “[o]nly the infallible community can explain the Sunna and Quran accurately; it is then completely idle to claim to establish the infallibility of the community by the authority of the Quran and the Sunna”. George F. Hourani derives a similar conclusion.

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527 For a discussion on this see: Al-Samarqandi 326–330.
528 Juwaynî, Al-Burhan Fi Usul al-fiqh 262.
529 This is based on the fact that the hadith “my community…” is the most accepted as evidence for ijma’’s authority. But even if the Quranic evidences were considered, the interpretation of the verses in a way that qualifies them as evidences requires, as noted by Snouck Hurgronje, some form of agreement. See n532 below.
from two premises: any basis for the authority of an infallible consensus must be based on textual evidence; and, no such basis, which can be considered authentic, can be found. He therefore concludes that Ijma’ has no sound basis in Islam.531 Hourani’s syllogism does not refer directly to a circularity problem, but his rejection of the existence of a sound textual evidence alludes to the claim that either, there is no consensus on the soundness of the available evidence (if Hourani is not referring to the consensus of scholars on the soundness/unsoundness of the text, he will be making this assessment upon his own judgment, which is unlikely); or, that there is consensus but using it will be question-begging. In each case the need to refer to consensus exists, which proves Hurgronje’s point.

But Hourani was correct in pointing out that some usulis were aware of the circularity problem, and thus, tried to make their arguments around it as we mentioned in Juwaini’s defence of Ijma”’s authority.532 His disciple, Ghazali, followed him at first in arguing that Ijma’ was based on common experience,533 but then, in his later Mustasfa, argued that the hadith about the community also supports Ijma’.534 And although the hadith was āḥād, the meaning was mutawatir (tawatur ma’nawi). This was picked up by some orientalists who defended the position of the usulis regarding the circularity problem. Zysow argues that it was in fact tawatur which is paramount as the underlying concept of Islamic law, not Ijma’ as was argued by other orientalists.535 These arguments were shared by Wael Hallaq who asserts that the justification of Ijma”’s authority was based on three concepts utilized by usulis. These were: tawatur ma’nawi, induction, and the originally theological concept of custom.536

The main defence against the circularity problem was to remove Ijma’ in its strict sense from the possible bases for Ijma”’s authority. But Ijma’ is such a fluid concept that it might be lurking in its own bases without appearing in its candid form. In order to understand the concept and functions of Ijma’ in essence, it is imperative to look beyond the formal definitions given by the

531 George F. Hourani 225.
532 See also: Al-Samarqandi 328.
533 Zysow 120.
534 Ghazzālī, al-Mustaṣfā min ʿilm al-usūl 221.
535 Zysow 155.
536 Hallaq, ‘On the Authoritativeness of Sunni Consensus’ 449.
usulis, and analyse Ijmaʾ in a historical framework rather than be confined to a purely legal one. Only in this way can we better understand the trait which orientalists, Zysow included, assign to Ijmaʾ, namely that it is not productive but merely declaratory. Coulson gives an insightful analysis. He argues:

The great bulk of the law had originated in customary practice and in scholars’ reasoning, that its precise identification with the terms of the divine will was artificial, and that the classical theory of the four usul was the culmination of a process of growth extending over two centuries, yet traditional Islamic belief holds that the four usul had been exclusively operative from the beginning. The elaboration of the law is seen by Islamic orthodoxy as a process of scholastic endeavour completely independent of historical or sociological influences. Once discovered, therefore, the law could not be subject to historical exegesis, in the sense that its terms could be regarded as applicable only to the particular circumstances of society at a given point in time. Moreover, the law was of necessity basically immutable, for Muhammad was the last of the Prophets, and after his death there could be no further communication of the divine will to man. Law therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct, such knowledge can only be attained through divine revelation and acts are good or evil exclusively because God has attributed this quality to them.538

A briefer description was given by Hurgronje who says:

Much of what became law in this first disturbed period, was attributed to decisions of the Prophet by later traditions. On many important points, however, this was not possible, but nevertheless the relevant decisions were felt by the community to be as irrevocable as those which they were able to derive from Allah and His Messenger. Here too, practice came before theory, common-sense before system.539

There is further evidence which support the argument that Ijmaʾ, contrary to Zysow’s objection,540 is indeed a form of general agreement given divine character. Firstly, many usulis only accept as Ijmaʾ issues which enjoy wide acceptance in the Muslim community where

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537 Zysow 117.
540 Zysow 156.
change is inconceivable. Such issues must have certain basis, so if no certain text can be found, Ijma’ is used. This makes Ijma’ an official status of certainty which is assigned to an existing norm. In other words, Ijma’ is subject to law rather than law being subject to Ijma’.

Secondly, Ijma’ seems to have been effective only during the first generations of Islam, namely, the generation of companions. This supports the idea that Ijma’ is only declaratory not productive. It is hardly the case that later generations could produce a legal opinion on a wholly novel matter and have the character of divine Ijma’ that was enjoyed by that of earlier generations. This, in turn, supports the idea that Ijma’ was used to sanction widely accepted concepts and practices which could not otherwise be sanctioned, i.e., where no certain text could be found. Thirdly, there are conspicuous commonalities between Ijma’ and tawatur.

Ostensibly, tawatur is the process whereby a report is transmitted via multiple chains of transmission where the possibility of colluding on a lie is omitted. This is made to differ from Ijma’ where Ijma’ is the consensus of scholars on a legal opinion. In essence, however, both are manifestations of opinions and practices the change of which (because of a possible error for example) seems inconceivable due to their overwhelming acceptance among the Muslim community. The perception of certain authenticity of Quran, for example, is manifested in the concept of tawatur. It is a method designed to justify an existing dogma. It all comes down to epistemology eventually. Ijma’ is basically the knowledge that a particular opinion is accepted by the great majority and/or the knowledge that there is no objection to this opinion. This knowledge is only available, in the historical context from which the usulis are looking at Ijma’, via reports coming mainly from the past. Similarly, and bearing in mind the subjective nature of tawatur, any report considered mutawatir by a single scholar or a few, will not produce certain

541 The extreme take on this is the exclusion of ijma to what is known of religion by necessity (ma’īm min aldīn bi al-ḍarūrah), like the daily prayers and fasting. In this opinion, the usulis are only endowing Ijma’ with what is already certain in Islam just to preserve its status as a certain source. This view of ijma makes it in essence redundant. ‘Abd al-Rāziq 92.
542 This is slightly less extreme where Ijma’ fills the gap of certain text. A fitting example is the definition of loans riba for which there is no text, but it enjoys a great deal of certainty in fiqh. This can be explained by Ijma’.
543 This according to Hourani, was the view of Shafi’i, Ahmad b. Hanbal, and Ibn Taymiyyah. See: George F. Hourani 194,208. It was also the opinion of the Zahiris; for a discussion of the topic see: ‘Abd al-Rāziq 42–46. Zysow 130.
544 For a brief discussion on the comparison between Ijma’ and tawatur see: Knut S Vikor, Between God and the Sultan: An Historical Introduction to Islamic Law (Hurst) 77 (n11),81. And a brief mention of Ghazali’s favourable comparison in Zysow 121. Noldeke argues that al-Tabari furnished for the concept of tawatur by combining between the concepts of Ijma’ and naql (oral transmission), Nöldeke 571.
law. It is only when there is at least a majority of scholars who acknowledge the *tawatur* of the report, that it can be used as basis for certainty.

If we consider *ijma* and *tawatur* in their strict definitions, as Zysow did, we will see that the usulis avoided the circularity problem and resorted to base *ijma* on other, apparently different, bases. But the circularity still exists in subtlety, and we are justified in looking beyond how *ijma* is portrayed by the usulis in order to have a better understanding of it. Zysow would have been justified in drawing a distinction between *ijma* and other forms of agreement if the usulis had made such a distinction in practice. But the usulis have always used *ijma* as a rubric for general agreements and majority opinions in all matters of religion. In fact, many usulis were persistently sceptic about the possibility of knowing the occurrence of *ijma* save that of the companions. Zysow contested some orientalists’ views for which we can find origins in usul literature. He rejected Gibb’s view which describes *ijma* as underlying the whole structure of Islamic law by giving validity to Quranic authenticity and traditions. But this view was shared by Juwaini as mentioned above. Juwaini realized that *ijma* in its essential nature was the main pillar supporting Sharia as a whole. This is why he rejected the textual evidence and founded *ijma* on reason.

To sum up the circularity problem we can say, any social conduct, to become a norm and supposing it was not enforced upon society, implies the acceptance of that society to that conduct or its underlying concept. There is reason to suspect that *ijma* is a juristic formalization of socio-religious norms, therefore, any attempt to demonstrate its authoritativeness by what could resemble a social norm or consensus will inescapably produce a circular argument. How, then, does the circularity problem affect *ijma* and the law? If we accept from the discussion above that *ijma* actually follows the law rather than precedes it, then the normality of the law should not be affected by the weakness of *ijma*’s authoritativeness. The certainty of the law, however, will be weakened as it was completely reliant on the authority of *ijma*. It is the

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545 Zysow 156–157.
546 ʻAbd al-Rāziq 13–24.
547 Zysow 113.
548 This was echoed by Ghazali, Ghazzālī, *al-Mustasfā min īlm al-usūl* 223.
common view of many orientalists that Ijma’ is a mechanism to divinize a law that could not be divinized otherwise.\textsuperscript{549} It fills the gap left by the Prophet after he passed away. The underlying normality of the law of the seventh century would not have necessarily meant the absolute rigidity of that law to the end of time. Norms, and hence laws, change as societies change, but the perceived divinity of Sharia does not accept change since it will imply a change to God’s will, and Ijma’ acted as the divining tool of Sharia. Therefore, it was essential for the usulis to demonstrate its authoritativeness; but they could not do this with rigor, perhaps because Ijma’ was ultimately the product of their juristic, and more broadly, religious desideratum.

**The viability of Ijma’:**

Uncertainty of Ijma’ is not exclusive to the question of authoritativeness; it engulfs every aspect of it making it so obscure that any claim of Ijma’, supposing it is not to be considered in the generic sense of widely held opinions, will be questionable. If there is no clear idea of what Ijma’ is and how it can be achieved, what, then, will be the bases of any claim of it taking place? To show the difficulty regarding the determination of Ijma’, consider the following points where the usulis have strong disagreements about Ijma’:

- **Is Ijma’ possible?** The most notable denier of Ijma’ was Ibrahîm al-Naẓẓam who denies the very possibility of Ijma’ taking place, for reasons such as the location of scholars in places far from each other they could not know the rule in order to have a judgment on it; or that if Ijma’ was based on certain text, the text would have been known to all, but if it was based on probable evidence the rule would be an opinion and that is impossible to be unanimously agreed. This total denial however was a sectorial minority’s opinion and so did not find support.\textsuperscript{550}

- **Is it possible to know the occurrence of Ijma’?** Supposing that Ijma’ is possible, the usulis could not agree whether it was possible to know if it took place. It was famously


\textsuperscript{550} ‘Abd al-Râziq 10–13. Some scholars have tried to interpret al-Nazzam’s views to show that he did not deny ijma.
reported that Ahmad b. Hanbal said that whoever claims Ijmaʿ is a liar, for how does he know that people did not disagree? Considering the stature of Ibn Hanbal, this troubled the usulis as it amounted to a denial of Ijmaʿ.\footnote{ibid 13–17. Zysow 129–130.}

- Whose opinion should be considered for Ijmaʿ? Is it everyone in the Muslim umma including laymen (al-ʿāmma) or just the scholars? Supposing it is only the scholars, is it the Ijmaʿ of the usulis or the jurists? Will specialists, like linguists or scientists have to be considered too? How is the qualification of any of the above determined? Who decides who qualifies as a scholar? All these issues are open-ended with no clear and agreed answers for them;\footnote{ʻAbd al-Rāziq 50. Ghazzālī, al-Mustasfā min ʿilm al-usūl 228–240.} and if some answer was dominant due to the agreement it enjoys, using this agreement as basis for accepting this answer will flag up the issue of circularity. Further problems are noted regarding the matter of qualification. Some scholars sought to reconcile between opposing opinions by arguing that there is an Ijmaʿ of scholars only which yields probable law. But the Ijmaʿ that yields certain law is the Ijmaʿ of everyone in the umma. Examples of this are the five daily prayers and the obligatory fasting of Ramadan.\footnote{ibid 228.} But how did the laymen contribute to this Ijmaʿ? It is not possible that they were all asked to contribute their opinion, nor could this be by their silent consent as the validity of it is contentious among the usulis, not to mention the impossible task of knowing even their silence.\footnote{ibid 73–80. Zysow 125–131.}

- Is Ijmaʿ restricted to time or place? The restriction of Ijmaʿ to a particular place is most notably found in Malik’s argument who considered Ijmaʿ to be that of the people of Madinah (Ijmaʿ ahl al-Madinah). Malik argued that the people of Madinah inherited the legacy of the Prophet’s way of life, which represent religion in its perfect form, in their social norms. Although this argument brings Ijmaʿ closer to its natural origin of extant social norms, Malik was alone among other schools in making this argument.\footnote{ʻAbd al-Rāziq 69–70.}

Similarly, Ahmad b. Hanbal was alone in arguing that for Ijmaʿ to happen, the age of the
scholars making the Ijma’ must become extinct (inqrāḍ al-ʿaṣr). Ahmad was understandably trying to resolve serious difficulties in the concept of Ijma’. For example, if a scholar who participated on a consensus of an opinion changed his mind, will he be breaking the Ijma’? Those who argue that he will, have a very technical idea of Ijma’. They see it as an event that, once occurred, will alter the course of law beyond reversibility. An opinion under consideration by scholars becomes absolute divine law the instant it satisfies the conditions of Ijma’. In that sense, it is not possible for a scholar, even one who was part of the Ijma’ in question, to change his mind once Ijma’ occurred. Ahmad was trying to circumvent the absurdity of this notion of Ijma’ by making it more realistic in its viability just as Malik was trying to do with regards to the geographical restrictions that make Ijma’ truer to its objectives.

- If there was only one scholar in the umma, would his opinion be Ijma’? Would the opinion of two, if they are the only scholars, be Ijma’? Is there a specific number of scholars to agree on an issue before Ijma’ can be said to occur? Some usulis argued that the number of scholars to agree on an opinion must reach that of tawatur before it can be considered Ijma’. But the number for tawatur is undetermined; the only evidence the usulis had for the satisfaction of the required number of tawatur was the actual occurrence of knowledge. It is not clear, perhaps even to the usulis who made this argument, how this can be applied in the case of Ijma’. How can the usulis determine whether the number of scholars in the Ummah at some point in time is sufficient to render Ijma’ on an opinion? Furthermore, some usulis argued that the report about an Ijma’ that occurred in the past or in another place must be mutawatir. In other words, if the report about an Ijma’ was transmitted via a solitary chain it will not be valid for Ijma’, it must be a certain report, i.e. delivered via tawatur. This, of course, will only be a report about people’s claim of Ijma’ rather than about the actual occurrence of Ijma’.

For those, however, who do not consider tawatur necessary not for the number of scholars nor for the report about an Ijma’, Ijma’ can be determined by the consensus of

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558 ‘Abd al-Rāziq 73.
a small, probably unknown, number of scholars, and our knowledge of such consensus can be transmitted via uncertain reports. Still, Ijma’ should yield certain law.

The above points are not exhaustive, but they show the degree of uncertainty regarding the constituting elements of Ijma’. Yet, the fiqh is rife with legal issues where reference to Ijma’ is made as the certain basis. The fact that many of these issues are also areas of disagreement among the scholars, where some argue they stand on Ijma’ and others argue they don’t, only adds to the difficulties of Ijma’. It is now clear that, notwithstanding the majority’s acceptance of Ijma’ as a certain source of law, there is mostly disagreement and uncertainty regarding its details. This being the case, any claim for Ijma’ will lack sound justification.

**Ijma’ as convention:**

If we reject, as the above discussion suggests, the arguments made by the usulis in defence of Ijam’s authoritativeness; and if we accept the idea that Ijma’ is a mechanism developed in later generations to give divine authority to some religious rules, the question that naturally arises is: what are the rules that need divine authority, for which Ijma’ is used, more than others? The example that many usulis use to show Ijma’ at work is the five daily prayers. These prayers have the details of their form mentioned in many hadiths, but the hadiths are āḥād (solitary). This should mean that, notwithstanding their validity, they are of probable authenticity. But this is not accepted in the matter of prayers; they are absolutely certain, and their certainty is based on Ijma’. So, the question can be reiterated as: why is Ijma’ used to assert some practices that have probable text about them, and not others, or all? Why is Ijma’ used to assure Muslims, for instance, of the number of raqāt (units) in each prayer,559 and not for the position of the hands during a prayer, when both are based on āḥād hadiths? Clearly, the claim of certainty, for which Ijma’ was used, needed qualification and not every juristic matter would qualify.

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559 ibid 95.
A quick glance at some of the literature on ‘Conventions’ or ‘legal conventionalism’ might help us understand how some religious matters qualify for Ijma’. David Lewis in his influential book ‘Convention: A Philosophical Study’ defines a convention as:

A regularity \( R \) in the behaviour of members of a population \( P \) when they are agents in a recurrent situation \( S \) is a convention if and only if it is true that, and it is common knowledge in \( P \) that, in almost any instance of \( S \) among members of \( P \),

1. almost everyone conforms to \( R \);
2. almost everyone expects almost everyone else to conform to \( R \);
3. almost everyone has approximately the same preferences regarding all possible combinations of actions;
4. almost everyone prefers that any one more conform to \( R \), on condition that almost everyone conforms to \( R \);
5. almost everyone would prefer that any one more conform to \( R' \), on condition that almost everyone conforms to \( R' \),

where \( R' \) is some possible regularity in the behaviour of member of \( P \) in \( S \), such that almost no one in almost any instance of \( S \) among members of \( P \) could conform both to \( R \) and to \( R' \).\(^\text{560}\)

If we consider the regularity \( R \) to be the number of raqʿāt in a prayer, the recurrent situation \( S \) to be the prayer, and the population \( P \) to be the Muslim community, we can easily see that (1), (2), and (4) fit the definition. (3) and (5) are based on the assumption that there is a number of alternatives from which the convention was arbitrarily chosen. This is obvious in some of the classical examples of convention in the modern sense like driving on the right or left of the road, but it is not quite fitting in the case of Ijma’ since it is very unlikely that the number of raqʿāt was an arbitrary matter. But we should not be deterred by the dissimilarity on this occasion as more similarities are found in the

discussion of legal conventions, in addition to the fact that there is no agreement that
the notion of arbitrariness is a necessary characteristic of legal conventions.\textsuperscript{561}

Further resemblance can be drawn from Lewis’s answer to the questions: How do
conventions arise? And why do people conform to conventions? To the former Lewis
argues: “agents initially select some equilibrium either by chance, agreement, or intrinsic
salience. The equilibrium gradually becomes more salient through precedent, until it
eventually becomes a convention”.\textsuperscript{562} To the latter question Lewis argues that “a pre-
existing convention is so overwhelmingly salient that agents expect one another to abide
by it, an expectation that furnishes reason to conform”.\textsuperscript{563} We can apply this to the Ijma’
of prohibiting the fat of swine. The Quran specifically prohibited its meat\textsuperscript{564} but the fat is
said to be prohibited by Ijma’ as there is no explicit text for that.\textsuperscript{565} A possible scenario is
that some companion/s considered the issue in some occasion and decided, perhaps by
his own analogical reasoning, not to use the fat. This was followed by other companions
as they thought it was the right action. This can be considered as an agreement and/or a
salient point\textsuperscript{566} which formed an equilibrium. Anyone who comes against the same
question of whether the fat of the swine was prohibited or not will not find explicit text
but now that there is a precedent he or she will find a nascent Ijma’ and, between the
choice of conformity or non-conformity, he or she will be inclined to conform. This
solidifies the prohibition further, furnishing the ground for yet more conformity, and so
on, according to Lewis’s arguments, until the prohibition becomes a practice, a socio-
legal convention. The jurists who consider the matter in later times will find an
overwhelming conformity to the prohibition, but they will have no idea how it came into

\textsuperscript{561} Andrei Marmor, \textit{Legal Conventionalism} (Oxford University Press 2001) 517
\texttt{<https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edsoso&AN=oso.9780198299080.0
03.0006&site=eds-live>}.  
\textsuperscript{563} Ibid.  
\textsuperscript{564} 2:173,  
\textsuperscript{565} ‘Abd al-Rāziq 21.  
\textsuperscript{566} According to Lewis, “A convention is salient (it is a focal point) if it “stands out” from the other choices. A
candidate convention might acquire salience through precedent, explicit agreement, or its own intrinsic properties.
Rescorla. ibid
being as there is no text. It is understandable, then, that they will think that this prohibition stands on very strong, although unknown to them, evidence and decide thereby to claim consensus as the bases of the prohibition.

This hypothetical scenario can be supported by the notion of Historicism in conventions. According to Marmor, “[e]ven if there are relatively well-definable needs that a social practice is there to solve, as in the case of legal precedent, the practice which is actually constituted by conventions is normally underdetermined by those external needs. The practice's development, and its emergent grammar, is largely determined by historical contingencies”.\textsuperscript{567} From this, we can consider the idea that the roots of Ijma’ are found not in the aptitude of the legal opinion or a missing text but rather, on a historical circumstance that may or may not be related to a missing text. We have seen that Ijma’ is mostly referred to the past, particularly to the generation of the companions, and considering the rife uncertainties regarding the concept of Ijma’, it is clearly difficult to use it at any present moment. Only when some practice has already become prevalent in society, i.e. becomes a convention, can Ijma’ be used as a declaratory tool to sanction this practice as law.\textsuperscript{568} This is somewhat echoed by Noel B. Reynolds and Thomas J. Lowery who argued that “[c]ustomary practices, ... are based on a historically evolving tradition the conventional character of which need not be consciously reflected in the community”.\textsuperscript{569} This differs from what they call ‘social conventions’ in that the latter is a consciously adopted conduct but both fall under ‘legal conventions’.

However, while the above arguments might help shed light on the nature of Ijma’ from a socio-legal perspective, they still do not explain the certainty of Ijma’. Why must Ijma’ be absolutely certain as a divine law? The best explanation for this comes from considering the aspects of Islam for which Ijma’ is the main justification. We have already mentioned Juwaini’s comment on the primacy of Ijma’ above; he was followed by Ghazali who, in response to the possibility that someone could have disputed the reports about Ijma’ but reports about this dispute did

\textsuperscript{567} Marmor 528.
\textsuperscript{568} To this effect, Siltala argues that “Conventions are expressive of collective intentionality, i.e. common acceptance or recognition in a community to the effect that certain social phenomena are endowed with legal significance or, alternatively, there exist mutual expectations to the said effect in the community” Siltala 165.
\textsuperscript{569} Quted in ibid 179.
not reach us, argued that it is impossible according to customary experience as Ijmaʿ is “the greatest among religion’s principals”\(^{570}\) (al-Ijmāʿ aʿẓam usūl al-dīn), therefore, should there be a dispute, it would have become known to all. The notion of Ijmaʿ as being ‘the greatest among the usul of religion’ is echoed by many usulis for what they know about its centrality in giving basis to essential aspects in religion.\(^{571}\) Orientalists have also noted this trait of Ijmaʿ. Hamilton Gibb wrote:

Indeed, on a strict logical analysis, it is obvious that Ijmaʿ underlies the whole imposing structure and alone gives it final validity. For it is Ijmaʿ in the first place which guarantees the authenticity of the text of the Koran and of the Traditions. It is Ijmaʿ which determines how the words of these texts are to be pronounced and what they mean and in what direction they are to be applied.\(^{572}\)

Similar arguments were made by Anderson and Coulson:

It is the paramount criterion of legal authority inasmuch as it is the Ijmaʿ alone which, in the ultimate analysis, guarantees the authenticity of the Quran and the hadiths as records of the divine revelation, the validity of the method of qiyas and, in short, the whole structure of the legal theory.\(^{573}\)

Considering Ijmaʿ in this light, it becomes clear that the certainty of Islam rests in great degree on the certainty of Ijmaʿ. If Ijmaʿ was to be considered probable, the whole structure of certainty in Islam will be undermined if not completely collapse.

**Structure of usul al-fiqh: circularity problem revisited:**

\(^{570}\) Ghazzālī, al-Mustasfā min ʿilm al-usūl 223.

\(^{571}\) In addition to Juwaini and Ghazali already mentioned, there is also: Āmidī vol 1. 316; Tāj al-Dīn ʿAbd al-Wahhāb ibn ʿAlī Subkī, Rafʿ Al-Hajib ʿan Mukhtasar B. Al-Hajib, vol 2 (Adil Ahmad Abdul Mawjud ed, 1 NV-4,’alam al-Kutub 1999) vol 2. 163;

\(^{572}\) Zysow 113.

\(^{573}\) ibid.
Having analysed the certainty in the main usul, Quran, hadith, and Ijma’, we can now consider the complete structure of these usul and how they are connected together to form the system of Islamic law. For something to qualify as a source in this system, it must first be authoritative, that is, there must be a justification for why this source or principal has any authority to tell us what Allah wants. Second, its content must be endowed with certainty. This ensures the rigidity, and thus divinity, of Sharia. The system is structured to start with Quran, and while the authority of Quran is considered a matter of theology and thus it is not discussed in usul al-fiqh, once its Authoritativeness is premised, Quran then becomes the main authorizer for hadith and Ijma’ in a hierarchical system where hadith then also authorizes Ijma’ and other sources. However, and as will be shown below, there are feedback loops where the authorized contributes to the qualifications of the authorizer, namely, we find Ijma’ involved in some elements that constitute part of Quran and hadith qualifications as certain sources for Sharia like tawatur of qira’āt and validity of hadith. This structure can be shown in the following.

1. Quran is the first and primary source of Sharia.
   1.1. Quran is authorized in theology not in usul al-fiqh.
       1.1.1. Even theology is sometimes referred to consensus. Ibn Hazm, for example, says: “There is no disagreement among the sects belonging to Islam, the Ahl al-Sunna, the Mu’tazila, the Murji’a, and the Zaydiyya as to the obligation of accepting the Quran nor as to the fact that the Quran is that very same one which is recited among us.”

1.2. Quran is a collection of different qira’āt (versions). The number of qira’āt was not known in the beginning but scholars then canonized a selected seven then ten, all said to be authentic.
       1.2.1. Until the time of Ibn Mujahid, qira’āt were authenticated by Ijma’ not tawatur.
       1.2.2. Ibn Mujahid chose his seven readers according to the Ijma’ of the reciters.
       1.2.3. The legitimacy of the concept of qira’āt is based on hadith.

1.3. The authenticity of Quran is based on an oral transmission of concurrent reports (tawatur).

574 ibid 8.
575 See ch.3 above
576 Nasser 51.
577 ibid 54. Nöldeke 568.
578 The hadith of the seven letters, chapter 3.
1.3.1. There are traces of the concept of Ijma` in tawatur. Ibn Taymiyya argues that tawatur could be established among groups of experts who are entitled to judge the validity and authenticity of the reports related to their specialized field.\textsuperscript{579}

1.3.2. Al-Tabari was the one, according to Noldeke, who introduced the idea of tawatur by combining between Ijma` and transmission (naql).\textsuperscript{580}

1.4. In addition to the oral transmission, Quran is also said to be authenticated by the transmission of its written transcripts. All written transcripts are said to be authentic copies of a master copy, \textit{al-Mushaf al-Imam}, made under the auspices of Uthman.

1.4.1. The legitimacy and accuracy of the master Uthmanic copy is said to be guaranteed by Ijma`.\textsuperscript{581}

1.5. The certainty of Quran is complemented, in addition to authenticity, by accurate interpretation of Allah’s will.

1.5.1. Some usulis argue that the semantics of language are known by Ijma`.\textsuperscript{582}

1.5.2. According to Zysow, and with regards to uncertainty in the interpretation of legal text, Ijma` is “the only way out of a paralyzing “hesitation.””\textsuperscript{583}

2. Hadith is the second principal source in \textit{usul al-fiqh}.

2.1. Hadith is authorized by Quran where numerous verses command Muslims to obey and follow the Prophet Muhammad. Ijma`, being part of the qualification of Quran, is thereby part of the authorization of hadith.

2.2. Hadith is only probable in terms of authenticity, but it is regarded as legally valid if it is sound.

2.2.1. The legitimacy of this validity is based on Ijma`.

2.3. The soundness of hadith depends on a number of conditions, among which is the uprightness of the reporter.

2.3.1. All hadiths must be reported on its first stage by a companion.

2.3.1.1. All companions are considered upright by Ijma`.\textsuperscript{584}

3. Ijma` is the third principal of \textit{usul al-fiqh}.

3.1. The authoritativeness of Ijma` is said by some usulis to be based on Quran.

3.1.1. Quran is reliant on Ijma` in many respects as shown above.

3.2. Some usulis authorize Ijma` on hadith.

3.2.1. Hadith is reliant on Ijma` as shown above.

3.3. Some usulis authorized Ijma` on custom, induction, or tawatur of content.

\textsuperscript{579} Nasser 75.
\textsuperscript{580} Nöldeke 571.
\textsuperscript{581} Talib 135.
\textsuperscript{582} See the discussion of the transmission of meaning in chapter 3 above.
\textsuperscript{583} Zysow 154.
\textsuperscript{584} Juwayni, \textit{Al-Burhan Fi Usul al-fiqh} 241–242.
3.3.1. It has been shown that traces of Ijma’ – in its abstract notion – can be found in the methods of custom and tawatur of content.\textsuperscript{585}  
3.4. There are great differences among the usulis regarding most aspects of Ijma’. This affected much of what is considered Ijma’ in the existing law, and impeded, almost to the degree of paralysis, the possibility of using Ijma’ to generate law anew.  
3.4.1. Any break through this impasse will need the consensus of the scholars, raising the dilemma of making Ijma’ self-legitimating.

The above structure – and the illustrative diagram in figure 1 – elucidates the circularity problem in usul al-fiqh beyond the objections made by some usulis and orientalists mentioned before. The circularity, however, is not the sole problem of the usul system as it is a legal dilemma that can be found even in positive law theory. Luhmann and Teubner argue that the modern law is a self-referential, self-constituting, self-defining, self-regulating, self-legitimating, and self-justifying phenomenon.\textsuperscript{586} The circularity problem, according to R. Siltala, “strikes with equal force any consistent account of legal positivism, if the validity of law is justified by reference to the criteria found in that legal system itself”.\textsuperscript{587} Like a man who gets out of a swamp by pulling himself from his own hair.\textsuperscript{588} But the circularity or self-referential dilemma is not inexplicable in positive law systems as, by its nature, it is deprived of external sources of legitimacy and so can only turn inwards. This is not the case with Sharia. Sharia is clearly referred to God as its source of legitimacy, so why did the usulis fall into the trap of circularity? The quest for certainty is a likely cause for this.

It has been shown before that certainty in Sharia is required to ensure its divinity, for a probable Sharia will not have the sufficient force to yield absolute law, and the law, according to the usulis, must be absolute if it is indeed divine. The usulis, however, could not sustainably justify certainty on theological grounds as this will throw the matter back in a vicious circle.\textsuperscript{589} Certainty had to be justified by mundane methods: logic, reason, and historical evidence, putting Sharia back in equity with positive legal systems. This dilemma seems insoluble, for, according to Siltala “a system of would-be knowledge in which epistemic uncertainty is ruled

\textsuperscript{585} See the section on ‘the circularity problem’ page 167 above.  
\textsuperscript{586} Quoted in Siltala 172.  
\textsuperscript{587} ibid.  
\textsuperscript{588} ibid.  
\textsuperscript{589} Theology itself lacks certainty.
out by means of the postulated infallibility of some scientific or, say, religious authority may well fulfil the terms of systemic closure and inner consistency. The status of the ultimate premises of such a system of knowledge or values cannot be effectively questioned without falling victim to the two-horned dilemma of a vicious circle or endless regress (or both).”

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<i>590 ibid 173.</i>
The Effects of Certainty in Classical *Usul al-fiqh* on Islamic Financial Law

It is possible, now that we have analysed all the sources of certainty in Islamic jurisprudence, to take a more holistic view of how Islamic financial law has been affected by the certainty in these sources. However, and since the texts related to Islamic finance are vast, we can only represent this effect by a sample of the law; most pertinently, the laws on riba. This will be done by looking at the hadiths and *Ijma* on the main event of Islamic finance, the prohibition of riba, and the main derivatives of this prohibition that had the most impact on Islamic finance. The analysis will require the recalling of the constituents of certainty in hadith and *Ijma* including authenticity, meaning, context, legality, etc. We will also look at any claim for *Ijma* and the bases for that claim.

It was shown in the previous chapter that the Quran explicitly prohibited riba but did not give a defined description of it. The problem of understanding what exactly is riba, is almost as old as the prohibition itself. It is known that the verses prohibiting riba were among the very last to be revealed to the Prophet and it seems that the Prophet died while the issue was not entirely comprehended by the companions. It was narrated that Umar wished that the Prophet had
clarified three things for them before he died, riba was one of them.591 Yet the jurists still managed to draw up a concept of riba based on the available hadiths and claims of Ijma’, the effects of which affected modern Islamic finance. The most conspicuous manifestation of this effect is the identification of banks interest as riba.

**Is bank’s interest riba?**

Identifying banks’ interest as riba is one of the most certain rules in Islamic finance as well as the most influential. There has always been a minority opinion that did not accept the equality of the two concepts, but this opinion never succeeded in preventing the prohibition of interest from being the most important feature of Islamic finance.592 It is, therefore, odd, to say the least, that the evidence the jurists used to demonstrate this equality is far less certain than the law they produce.

It is known that there are two types of riba: riba al-nasī’ā and riba al-fadl. The former is described as the increase of value given in exchange of deferring repayments of a loan or of a purchase if the increase was a condition in the contract. The latter is the exchange of the same commodity but by different quantity or quality.593 The jurists have always debated the strict prohibition of riba al-fadl but the nasī’ā was, for them, certainly prohibited.594 Yet, one finds a myriad of hadiths about riba al-fadl but very little text, if any, on the description of riba al-nasī’ā, which is the one considered to resemble banks’ interest. Qaradawi, in a book written solely for this problem, argues that the primary source for identifying riba (as interest) is the Quran, which speaks, in the context of prohibiting riba, of permitting the repentant to have his ‘capital’, indicating that riba is an increase over the capital. He acknowledges that the saying

591 Muslim ibn al-Hajjāj Al-Qushayrī and Nawawī (n 160). number 3032
592 A known scholar who did not share the idea of equating interest to riba is Fazlur Rahman Malik. See ch3. Above. More on this below.
593 This is not a formal definition but more of a description. This is the method used by Abdullah: to identify riba by describing it, because a definition always turns problematic. See his descriptions which resemble the one above in: Abdullah 27–33. More on this below.
594 This was briefly mentioned by Qaradawi, see: Yūsuf Qaradāwī, Fawa’id Al-Bunuk Hiya Al-Riba Al-Haram (5th edn, Maktabat Wahba 2001) 9.
“any loan that begets benefit is riba” is not sound as a hadith and cannot be used to define riba. But besides these arguments Qaradawi offers little to demonstrate how interest is the same as riba from a juristic perspective. He followed some of the scholars, who were interpreting the riba verses in the Quran, in referring to historical reports that described the concept of riba as an ancient practice known among the Arabs, i.e. a condition of increase in return for delaying payment. The jurists, however, accepted this description as a historical fact and this fact, in turn, as a certain law, without further qualification. In other words, it was not presented in an usuli framework, they simply said that this is the riba that was practiced by the Arabs in jāhiliyyah. This cannot be accepted, according to the usulis standards, as a certain source of law. Similarly, the description deduced from the Quran cannot be the basis for the prohibition of interest. The scholars acknowledge that not all increase over an original value is riba. It is narrated that the Prophet returned in some occasions what he borrowed in excess, teaching his companions that “the best among you are those who are better in repaying their loans”. Not to mention that selling itself involves an increase over capital, and although the Quran explicitly made a distinction between selling and riba, it did not give any details about how they are different. It is, therefore, not possible to extract a clear description of riba from the Quran, nor is there hadith that describes this loans riba; what, then, is the basis of the perception of riba al-nasī’a? Some have argued that it is based on Ijma’, but we have seen that it is impossible to demonstrate Ijma’ with certainty. True, there seems to be an agreement among the noted scholars on the form of riba al-jāhiliyyah, which was prohibited by the Quran, but, in a context of certainty, an apparent absence of disagreement which is based mainly on historical reports (not hadiths) is not Ijma’. moreover, even when accepting the description of riba al-jāhiliyyah as founded, it still does not qualify as a prohibition of interest.

Qaradawi, aware of the difficulty above, argued that interest was prohibited, in addition to the Quran, by the Ijma’ of all fiqh councils that convened to discuss interest since 1965 and, thus,

595 ibid 53–55.
596 ibid; Abdullah 34–39.
597 Qaradawi, Fawa’id Al-Bunuk Hiya Al-Riba Al-Haram 54.
598 Abdullah 30.
599 ibid 60.
dissuaded any scholar from breaking this Ijma’. 600 He later acknowledged that an Ijma’ can be abrogated by Ijma’ if it was based on ijtihad, but there is no new Ijma’, he argued, and for this current Ijma’ to be abrogated, a new Ijma’ by all these organizations should be established. 601 The problem with this argument is that, as is always the problem with the claim of Ijma’, there never was an Ijma’ in the matter of interest in the first place. There has always been a number of scholars who did not see interest as riba including ones from al-Azhar, the alma mater of Qaradawi, namely, the grand mufti of Egypt in addition to prominent figures like Muhammad Abdu and Mahmud Shaltut, both Grand Imams of al-Azhar. 602 It is a sign of confusion if not contradiction to acknowledge the right to contribute a new ijtihad in the matter while, with the same breath, prohibiting, or at best strongly dissuading, people from breaking an existing Ijma’. Qaradawi’s whole book was a vehement condemnation, sometimes almost amounting to accusations, to those who tried to give different views on interest. This ‘kicking away the ladder’ attitude raises questions about the authenticity of the claims of Ijma’ and underscores the suspicion that the argument of Ijma’ is only used as tool to sanction a prevalent opinion and prevent change.

The problem can be summarised as follows:

1. Riba was explicitly prohibited in the Quran but it did not clearly define it.
2. Descriptions of what riba is were given by scholars later on. These descriptions relied on a conventional conception about what was practiced in pre-Islamic times (jāhilīyyah).
3. By induction from these practices, a rule was developed to prohibit any form of conditional deferred increase when exchanges of valuables take place. (with few exceptions).
4. This universalization of the concept of riba affected the way banks interests were viewed in modern times, leading to its prohibition in mainstream Islamic finance.

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600 Qaradawi, Fawa’id Al-Bunuk Hiya Al-Riba Al-Haram 79.
601 ibid.
602 The Mufti is Muhammad Sayyid Tantawi, ibid 86. Qaradawi discusses the fatwa of Shaltut in: ibid 110.
It remains to assert that none of the events or developments that led up to the prohibition of interest can lay claim to certainty. Yet, the rigidity by which interest is forbidden is disturbed only by the stratagems used by Islamic financial institutions under the pressures of the market. In addition to this, the identity of Islamic finance remains strongly defined by the prohibition of interest.

Who is a murābi (usurer)?

The condemnation of riba in the Quran is put squarely on the lender not the borrower. The one who ‘devours riba’ is the one who benefits from the increase put over the capital, i.e. the lender. Similarly, the description of *riba al-jāhiliyyah* given by scholars seems to allude to the lender as the culprit in the demeaned act while the borrower is more of a victim. However, and as the definition of riba was broadened by the jurists beyond its Quranic context, identifying the guilty parties in the riba transaction was extended to include, besides the lender, everyone involved in the transaction. This was based on the hadith “Allah has cursed the one who consumes Riba, the one who gives it, the one who records it and the witnesses. They are all the same in guilt”. The language of this hadith is quite severe as it uses the threat of curse from Allah to the partakers in a riba transaction. The problem, however, is that this hadith seems to belong to a wider group of usul sources, other than the Quran, that work to broaden and extend the Quranic prohibitions making the rules stricter as well as to cement their legal form. This is clear in the case of using *Ijmaʿ* to prohibit the swine fat in addition to the Quranic

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603 The scope of this study does not allow for a detailed discussion of Islamic nominal contracts which are used as an alternative to interest-based banking. It is, however, the position of this study that these contracts – such as Murābahah, Mushāraka, and Muḍāraba – are used as stratagems (*hiyal*) to circumvent the prohibition of interest. See for a discussion of this problem: Haider Ala Hamoudi, ‘Jurisprudential Schizophrenia: On Form and Function in Islamic Finance [Article]’ 605 612 <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edshol&AN=hein.journals.cjil7.33&site=eds-live>. For a general discussion of Islamic nominal contracts see: Mahmoud Amin Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge University Press 2006) 64–80.

604 Some of the arguments by Muslim scholars raise the suspicion that the adamant prohibition to interest has identity roots, that is, it is explained by the desire to maintain a distinct Islamic ideology for finance. Hints of this are found in Qaradawi’s arguments. See ibid 40,118,134.

605 Muslim ibn al-Hajjāj Al-Qushayrī and Yahyā ibn Sharaf Nawawi, *Sharḥ Sahīh Muslim* (Khalil Al-Mees ed, 1st edn, Dar al-Qalam 1987). number 1598
prohibition of its meat;\(^606\) using hadith to prohibit selling alcohol in addition to the Quranic prohibition of its drinking;\(^607\) and similar other cases. This phenomenon seems to broaden the scope of the moral injunctions of the Quran onto a dry and abstract law that is more detached from the original moral context which served as its rationale. This phenomenon can be explained as a precautionary measure whereby the Quranic injunction is the core prohibition in a multi-layered law. Other sources are used to expand the law in wider, outer, layers as added lines of prevention to protect people from falling into the core prohibition. This concept has grounds in fiqh. It is narrated that the Prophet said

That which is lawful is clear and that which is unlawful is clear and between the two of them are doubtful [or ambiguous] matters about which not many people are knowledgeable. Thus, he who avoids these doubtful matters certainly clears himself in regard to his religion and his honor. But he who falls into the doubtful matters falls into that which is unlawful like the shepherd who pastures around a sanctuary, all but grazing therein.\(^608\)

In line with this juristic attitude, Imam Malik is known to have developed the concept of ‘blocking the means’ (sadd al-dharāʾi’) whereby the means that lead to a prohibited thing are themselves prohibited despite not being essentially illicit.\(^609\) In such a multi-layered prohibition, the certainty tends to weaken as one moves from the core outwards. In the case of riba, the prohibition of riba in Quran becomes weaker when it is extended by hadith to include the borrower and witnesses. This is due to moving from the mutawatir Quran to the solitary hadith. The certainty is further weakened as the prohibition extends further using Ijmaʿ (undemonstrated) to include every conditioned increase over an original valuable in exchange of time. To locate the prohibition of banks’ interest in this schematic one needs to add at least another layer where, according to Qaradawi, there is Ijmaʿ in prohibiting interest for its correspondence to riba al-jāhilīyyah.\(^610\) Little effort is required to show that the absolute

\(^{606}\) See n563 above  
\(^{607}\) ibn Hajar al-ʿAsqalānī, Fath al-bārī sharh Sahīh al-Bukhārī number 1978  
\(^{608}\) ibid number 1946  
\(^{609}\) Wahbah Mustafā NV3 Zuhaylī, Usul al-fiqh Al-Islami, vol 2 (Dar al-Fikr 1986) vol 2. 873  
\(^{610}\) Qaradāwī, Fawaʾid Al-Bunuk Hiya Al-Riba Al-Haram 79.
prohibition of any involvement in transactions containing interest will lie at a considerable
distance from the Quranic prohibition of riba; it enjoys no juxtaposition to the core in the multi-
layered law. Yet, it is the Quranic verses that are always cited as the main evidence for the
prohibition of interest and all its derivatives. The claim of association to Quran gives these
prohibitions the certainty of Quranic law.

**Riba al-Faḍl:**

Also known as *riba al-Buyūʿ,* is any excess in quality or quantity when the same article is being
exchanged.\(^{611}\) It has little impact on today’s Islamic finance, but it serves as a good example of
the problems in the law theory.

The famous hadith narrated from the Prophet about this riba is "Gold for gold, silver for silver,
wheat for wheat, barley for barley, dates for dates, and salt for salt - like for like, equal for
equal, and hand-to-hand; if the commodities differ, then you may sell as you wish, provided
that the exchange is hand-to-hand."\(^{612}\) This hadith was narrated in many slightly different
versions all establishing the same idea: excess in the exchange of the same article is riba. The
rationale of the transaction appears in one of the versions when the companion Bilal exchanges
a quantity of bad dates with a smaller quantity of good dates, the Prophet told him this was
riba and he should sell the bad dates then buy good dates with the money.\(^{613}\) From this
context, it seems that the rationale from the prohibition is to avoid potential unfairness in the
exchange, a form of gharar. The implied assumption is that the measurement of dates, which
used the handful as a unit (*mudd* and *saʿ*), is less accurate than the measurement of money,
which at that time was coinage (gold, silver, etc.). Moreover, it was perhaps easier to determine
the value of dates with money than with a different quality of dates. However, and since this
valuation is simply a declaration of price, the exchange of different quality articles can take
place according to their monetary prices without having to exchange actual currency.

\(^{611}\) Abdullah 71.
\(^{612}\) Muslim ibn al-Hajjāj Al-Qushayrī and Nawawī (n 182). number 2978
\(^{613}\) ibid number 1594
The idea from the hadith, assuming its authenticity, seems to be that the Prophet only wanted his community to be extra careful in their commercial transactions and avoid, as much as it is possible, injustices among them. Otherwise, the notion of exchanging the same quality and quantity of the same article at the same time would be nonsensical. The jurists however, consistent with their legal methodology, formulated the law with little regards to the objective of hadith and extended its effects using qiyas to include other commodities that were not among the six mentioned in the hadith whenever they found a common cause. Yet, they had difficulties in forming an absolute and consistent law. For one, there are contradicting texts where some prohibit *riba al-faḍl* as we saw, and some others allow it. The famous example for this is the sound hadith “there is no riba except in *nasī'a*” for which much debate has taken place to circumvent the contradiction. Similarly, the hadiths prohibit the exchange of the *ribawi* commodities, even when different, unless it was hand to hand, i.e. immediate exchange. But it seems the conventional practice in the market was different, and the text, thus had to be circumvented. Therefore, some scholars claimed there was *Ijma'* on the permissibility of exchanging different *ribawi* commodities in excess and with deferred payment. Once again, it is not, nor could it possibly be, clear how this *Ijma'* was known. Other examples include hadiths regarding the permissibility of exchanging animals in excess and with deferred payments, with no clear explanation of the bases of this exception to animals, which are a form of wealth too.

Conclusion

There is evidently little proportionality between the degree of legal certainty enjoyed by the main aspects of Islamic finance and the corresponding epistemic certainty of the sources on

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615 Ibn ʿAsqalānī, *Fath al-bārī sharḥ Sāḥīḥ al-Bukhārī* number 2069; ibid. number 1596.

616 See for example, Abdullah 68–70.

617 ibid 78

618 ibid 74
which they are based. The Quran is usually described (it describes itself) as a book of guidance (hidāya). In this regard, it is not usually explicit in its prohibitions, and ordinances are mostly inferred. Yet, even when the prohibitions are explicit as in the case of riba, there are not enough details to form a comprehensive body of law. The hadith is then used to complement for this purpose. But the hadith lacks, even in the eyes of the usulis, the certainty required for the divine law to be concrete and unsusceptible to change. This is the role for Ijma’, to give divine sanction to juristic law. The problem with this methodology, of which an attempt of illustration was made in the analysis in this chapter, is that none of the arguments made by the usulis to demonstrate the soundness of hadith, the validity of a sound hadith, or any of the different aspects of Ijma’ can stand rigorous scrutiny. In this light, the certainty that seems to buttress issues like the prohibition of interest in modern finance becomes questionable.

The prohibition of interest in particular seems interesting because, on the one hand, there is no textual description of the loans riba; the only source for defining it is the conventional pre-Islamic practice that was reported by some scholars. It seems to have been at some stage a matter so well known it did not require questioning. But transiting this assumed knowledge to the modern day (i.e. to say that the question of what riba is, is absurd because we know how the Arabs practiced riba in jahiliyyah) is unjustified. On the other hand, the assertion that interest is the same as riba is based, at least according to Qaradawi who is a leading figure in the propagation of the legal foundation behind Islamic finance, on the Ijma’ of modern fiqh councils and institutions. It must be stressed here that many scholars have argued against the presumed equalization of interest and riba; what authority, then, do these councils have to propagate their decisions as a binding Ijma’?

Furthermore, the disproportionality in certainty is also found in other aspects of the law like the indictment as murabi to the one who pays riba and those who witness and write the contract. This is an expansion of the law based on hadith but serious questions about its validity in modern times are raised. There are other aspects of Islamic finance affected by hadith and Ijma’ with similar problems of disproportionate certainty which were not discussed here for want of

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space. Gharar for example is mainly based on hadiths that prohibit selling what one does not have, fish in the sea, birds in the sky, etc. The usulis used these hadiths to formulate the general principle of the prohibition of gharar. A combination of the prohibition of riba, gharar and maysir (gambling) resulted in the prohibition of whole industries like insurance and financial derivatives, with little success in developing Islamic alternatives that are distinct in form and substance. With an expense of this magnitude, it is essential to critically review the bases of these laws and try to formulate a new framework for legal analysis where the objectives of the revelation are given more weight.
Chapter 5
Modern attempts to reform Islamic legal theory

Is there a need to reform?

The subtitle above is presented as a question to assert the fact that Sharia’s need for reform is not a foregone conclusion to Muslims. The word ‘reform’ is translated into Arabic as ‘iṣlāḥ’ to connote reparation, which, in turn, implies fault or brokenness. The concept of reformation, along with the terminology now used, seems to be a modern import from the Christian Reformation. The concept of ‘iṣlāḥ’ is associated with the 19th century movement of Gamal al-Din al-Afghani – who is reported to have admired the work of Martin Luther –, Muhammad Abdu, and Rashid Rida.620 The problematic nature of the term is evident in the preference of many Muslim intellectuals for the term ‘tajdīd’ (renewal). Tajdīd, in addition to having origins in Prophetic traditions,621 avoids the negative connotation of faultiness and instead subtly implies lack of progress or dynamism. In either case, the focus of where Islam needs ‘action’ has mostly been in Sharia or, to be more precise, in fiqh even when the call for reform or tajdīd is generally used in relation to Islam.

The fact that the reform movement is a modern one, points to a link between modernity and the need to reform.622 It is undeniable that modernity, particularly after the industrial revolution, has greatly changed the course of humanity in many aspects, social sciences as well

620 For an analysis on the works of these thinkers see: Albert Hourani, Arabic Thought in the Liberal Age 1798–1939 (Cambridge University Press 1983) [https://www.cambridge.org/core/books/arabic-thought-in-the-liberal-age-17981939/7A4EC7064730DD272E74D76237EED2DE].
621 ‘Azīmābādī. number 4291.
as sciences. But as the main engine of modernity lies mostly outside the lands of Islam, traditional forms of Islam persevered longer and better than could the Christian traditions which bore the main waves of assault from modernity. Nonetheless, and with the invasion of Muslim lands by the colonial powers and furthermore by the phenomenon of Globalization, Muslims were exposed to the debates about religion and its place in the new era of human civilization. They became aware of the changes taking place with regards to politics, law, economics, and even values.

Muslims believe that Islam is a way of life and life became very different with modernity. Muslims now lived under the political system of the nation-state and its concomitant state law which in turn formed the framework for all social life, a role that was played by Sharia before then. Muslims, like Christians before them, had to find a way to reconcile between science and their traditional understanding of scripture. Furthermore, they had to resolve issues like slavery, the status of women, freedom of speech and faith, crime and punishment, human rights, and many other issues where religion and modernity seem, at least ostensibly, to be in conflict. It is possible to argue that Sharia needs to change some of its rules regarding government or economics in response to the considerable change that occurred in the institutions of these domains under modernity. In this domain, the traditional school would claim, the notion of ijtihad is relevant and sufficient. Muslims can use the same law theory, usul al-fiqh, to make minor changes or additions to regulate societal affairs under the new structures. It becomes, however, more complicated when it comes to issues of morality. It is important to emphasise here that the Sharia is a moralistic law in the first place. Values sit at the heart of Sharia and they form the substance of God’s message to humanity. Therefore, any attempt to change the values framework is a move beyond the periphery into the core of Sharia. This cannot be labelled as tajdīd. This is an admission that we got it wrong all along, hence, reform is more pertinent and duly needed. When someone calls for the preclusion of polygamy she is not practising tajdīd, she is fixing a fault in Sharia. A fault attributed to the effects of a male-dominated society where revelation was interpreted through its masculine lens. The law was wrong from the beginning and modernity only made it possible to change the lens of interpretation. According to this argument, a distinction between tajdīd and islāḥ is
important and Sharia is evidently in need for both. The problem with this argument, however, is that it entails an endorsement of modernity’s values and institutions. Conversely, commitment to traditional Sharia entails a rejection of modernity in some degree, and this apparent relativeness of morality is inevitably reflected in the debate about Sharia reform. In other words, if reforming Sharia as a law was dependent on a particular moral stance, it will only move it from serving one dogma onto serving another.

Wael Hallaq, who is a strong critic of modernity and the modern nation-state, is adamant that Sharia has been distorted, not reformed, by modernity.\(^{623}\) On the other hand, we find a plethora of literature, as will be discussed below, exposing aspects of Sharia which they think is unethical according to their espoused modern standards. Apologists writings on how to reinterpret the text on women, slavery, and hudud are vast and growing. Identifying a certain action on moral grounds is, in many instances, relative to a number of different factors; culture and time being the most obvious. Therefore, when assessing Sharia as a system of law, one should try and avoid the relativity trap.

A less subjective ground for assessment can be the changeability of Sharia. Regardless of where one stands with regards to Sharia, it is undeniable that it will need some degree of flexibility in order to allow for adaptation and revision. The mechanism of how this can be done is a technical issue that can be decided objectively. Muslims will want different outcomes from Sharia depending on how they see the world in terms of right and wrong, good and bad. But at least they can agree that a system of law that is efficient in producing or changing law when needed is always desirable. If we consider the question of whether or not Sharia is in need of reform in this light, it will be easier to answer in the affirmative. There is no contention that the whole legal theory in Islam is riddled with polemics, debates, and disagreements, thus, it will be desirous to find a system that can settle differences efficiently in order to produce law. This on its own will merit the call for reforming Sharia. But efficiency and adaptability are more pressing

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issues that require reform in Sharia. We have seen in the previous chapters that the arguments made by the usulis to prevent change are questionable at best and the rigidity they caused have only maintained a superficial form of law where the ethical substance of the law have, in many cases, been tarnished if not lost. And for a system that is essentially ethical, this is a change for the worse. Reform, therefore, is required.

How to reform Sharia?

What can/should be reformed?
To generate law, jurists need the sources, Quran and Sunna, and the tools to derive law from these sources, like qiyas (Ijma’ sits in a curious position between the two). The complete process is *ijtihad*. Accordingly, calls for reform have differed with regards to the two aspects of *ijtihad*, being inversely correlated to certainty, that is, the more certain, the less exposure to reform, meaning, less changeable. Naturally, then, *soft* reformers only target the tools (*qiyas, istishâb, istihsân, maṣlaḥa*, etc.) The *hard* reformers further target the sources, namely the Sunna, as Quran’s authenticity is beyond the realm of *ijtihad*. A common target for reform among all scholars is hermeneutics, which suffices for the hard reformers as it renders the issue of Quranic authenticity obsolete. They can provide different readings of the verses to get different laws or dismiss the legal validity of the verse completely by arguing that it is temporally bound. For the Sunna, however, and as it is authentically only probable, both authenticity and interpretation fall within the domain of reform.

Furthermore, reformers tend to focus on a particular aspect of Sharia that forms a general theme for their arguments. For some, it is hermeneutics,\(^{624}\) for others, it is *maṣlaḥa* (utility),\(^ {625}\) and a fashionable theme now is *maqāṣid* (objectives).\(^ {626}\) But these distinctions are not strictly applicable as reformers sometimes, and in spite of their particular focus, broaden their

\(^{624}\) Like Shahrur and M. Abu al-Gasim Haj Hamad, see below.

\(^{625}\) Like Abdul Wahab Khallaf and Muhammad Rashid Rida, see: ibid 508–512 for an analysis of their works.

arguments to include different aspects of Sharia. For the purposes of this research, however, reform will be considered according to how it relates to the concept of certainty. In this regard, we can distinguish two groups of reform arguments: one is the argument that Sharia contains certain/absolute law and the objective of the reform is to structure a system capable of finding this law from revelation. This group can also be described as textualists since text provides the framework of their legal theory. The other group argues that Sharia only gives us absolute values not laws and the reform objective in this case will be to objectively identify these absolute values and to formulate the methodology to derive law from them.

In our discussion of the reform attempts to Sharia, we will try to keep our analysis of the applied aspect of the arguments, that is, how the suggested reform will produce practical changes of the law, focused on Islamic finance. Unfortunately, much of the discussion provided by the reformers is confined to the abstract and provide little, if any, discussion of the practical implications on the law. Moreover, and while finance is a very pertinent topic when it comes to Sharia reform, other topics such as family law, penal law or politics are also hotly debated and have taken some of the attention of some reformers, which might imply a slight variation on our discussion of the law.

**First line of argument for reform: Sharia has absolute law, how to find it:**

**The traditionalist school:**
This school is mainly formed by the conservative reformers who do not think Sharia is in need of reform in the sense that entails considerable change from classical Sharia. They rather espouse for tajdid where Sharia is mostly concerned with novel issues and the change of established classical fiqh is seldom considered.

A more elaborate idea about this group and how it differs from others is given by Qaradawi who identifies himself with a middle current (tayyār wasaṭī) of Islam. According to him, this

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current takes a centre ground between what he called al-Zāhiriyya al-judud (New Zahirists) and al-Muʿattila al-judud (New Suspenders). The former group abide strictly to the letter of the text and do not consider the context nor objective when they interpret the text and extract law from it. The latter school suspend the text in its specificity and claim, according to Qaradawi, to consider Sharia in its spirit and objectives claiming religion to be essence rather than form. They are ignorant of Sharia, presumptuous about their knowledge of it, and they are followers of the West. Both schools are wrong, he asserts, and truth lies in moderation.\footnote{Yūsuf Qaradāwī, Dirāsah fi fiqh maqāsīd al-shariʿah : bayna al-maqāsīd al-kullīyah wa-al-nusūs al-juzʿīyah (Dār al-Shurūq 2006) 39–42.} The Wasatiyya school adheres to the text but understands that there is always reason and wisdom (ḥikma) that underlies any legal text.\footnote{ibid 137} The main contention of the school is that there can be no contradiction, even if it appeared otherwise, between a certain text and a certain utility (maṣlaḥa).\footnote{ibid 140} If the text was authentically and semantically certain, it is impossible that it will contradict a certain utility; if it seems to be so, then we either misunderstood the text, or the maṣlaḥa is not really beneficial for Muslims.

The most notable problem in Qaradawi’s arguments is, once again, the relativeness of the classification. Qaradawi posits his school in the middle while in our discussion of reform he belongs more to the traditional schools. Despite the fact that he wrote extensively on issues of Sharia’s validity in modern times, he was not included in Hallaq’s discussion of the topic in two books.\footnote{Hallaq, A History of Islamic Legal Theories : An Introduction to Sunnī Usūl Al-Fiqh (n 197) 207–254. and Hallaq, Shariʿa : Theory, Practice, Transformations (n 194) 500–542.} This omission cannot be explained by the stature of Qaradawi as a scholar for he is too influential to be omitted, but perhaps by the limited relevance of his ideas to the topic of modifying Sharia. Nevertheless, it remains important to consider the contribution of this school for, while they offer little in the attempts to ‘modernize’ Sharia, they remain influential in critiquing these attempts while offering a vision for tajdīd instead.

Furthermore, it is important to note that, while Qaradawi distinguished his school from the other two ‘extremes’, his position is not precisely central between them and it is clear that he
sits further away from the ‘liberals’ whom he calls New Mu’attila, and much closer to the traditional school. Evidence for this can be found in the nature of differences he sees between his school and the others. In the case of his critique of the New Zahirīyya, the issues are more particular and superficial when compared to the issues in his critique of the New Mu’attila which are more methodological or, when he takes particular examples, more significant. For example, he criticizes the New Zahirīyya for:

a. Their prohibition of photography and television.
b. Their insistence that the zakat al-fiṭr (almsgiving after Ramadan) must be in grains not the cash equivalent.
c. Their exemption of trade money from zakat.
d. Their argument that modern paper money does not share the value characteristic of gold and silver, therefore, no zakat is due on it, nor does riba apply to it. 

The first two points are clearly trivial. And while the second two are more significant, they remain particulars and do not address issues of theory and system. Qaradawi then offered his critique to the other school on the following points:

a. Evading the hermetic texts while holding up the ambiguous. Here he discusses issues like the prohibition of alcohol, the debate on riba, and the sceptical position of this school on Sunna.
b. Contradicting the pillars of Islam and hudud in the name of maṣlaḥa.

The point from presenting Qaradawi’s arguments above is to show that in comparison to his contentions against the New Zahirīyya, his contentions against the New Mu’attila are more fundamental and consequential to Sharia. The Islam of the latter school will look much more different if not repugnant in the eyes of Qaradawi than the Islam of the former, submitting he disagrees with both. In any case, Qaradawi’s identification of his school as a middle ground between two extremes is no identification at all. No school will identify itself as extreme and the problem of relativity will render this method of identification futile. Qaradawi represents an

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632 ibid 65–77.
633 ibid 117-124
extreme position for both the other schools, only the directions differ. Nor would his attempt to offer a narrative elaborating the ideas of his school feature any better in giving a concise identity to it so long as this narrative is merely an emphasis on the idea of wasat (middle). He claims that his school believes in balance and moderation. It combines particular texts and holistic objectives, where it does not dogmatically follow the letter of the texts nor dismiss it completely. All the rules of Sharia, according to this school, are cause-driven and consistent with wisdom (hikma) and all its causes are directed towards the welfare (maṣlaḥa) of people.\textsuperscript{634} These arguments offer little in explaining how this school differ from classical schools of Sharia, how it can make Sharia better adapt to changing circumstances, and how the issue of certainty, for that matter, is considered. According to Qaradawi’s vision, the wasaṭīyya school offers nothing significantly different from classical Sharia. His assertions on texts, reason, causes, maṣlaḥa, and the dichotomy of changeable and unchangeable is the same as that of classical usul.\textsuperscript{635} The examples he gives to show how his school will deal with practical issues do not show departure of classical fiqh but rather a process of changing choices between the existing legal opinions on a particular matter. Even when he made some debateable fatwas on allowing mortgages for Muslim communities in the West under some conditions and allowing the women to take off head scarfs in some situations, he made the fatwas under the principle of ḍarūra,\textsuperscript{636} which means that, even when there is evident need for change, it remains an exception that does not necessitate a change in law or methodology. The classical methodology is equipped to deal with these novel issues by the principles of ḍarūra, maṣlaḥa, and the like. As a result of this vision, wasaṭīyya school suffers from the same classical problems of deciding who can, and how to, differentiate between the certain/unchangeable and uncertain/changeable in Sharia. It remains a matter of opinion and their proclaimed central

\textsuperscript{634} ibid 137
\textsuperscript{635} He gives a brief argument about the changeable and unchangeable in Sharia in his book: Yūsuf Qaradāwī, Al-Fiqh Al-Islami Bayn Al-Asala Wa Al-Tajdid (Maktabat Wahbah 1999) 83–86.
position is merely the result of differing in their opinion from others who use the same methodology.

For example, it is known that Umar, after his armies conquered Iraq, did not distribute its land among the soldiers as decreed by the Quranic injunction “and know that whatever thing you gain, a fifth of it is for Allah and for the Apostle and for the near of kin and the orphans and the needy and the wayfarer, if you believe in Allah and what We revealed to Our Servant”.

Qaradawi argues that Umar did not suspend the Quranic injunction, as the liberals argue, because he realized that the injunction was circumstantial and was no longer applicable. Rather, argues Qaradawi, Umar realized that the verse is a general rule that can be particularized, therefore he made it applicable only to ‘mobile’ booty instead of land. But Qaradawi rejected this same rationale when it was used by the ‘seculars’ who argue that the prohibition of riba in Quran did not apply to banks interest and that it was only the riba in the form that was practiced before Islam which is prohibited. In both cases the verses were understood to be referring to a particular prohibition which was not to be generalized without evidence. Umar did not offer evidence except his consideration of the maṣlaḥa of the Muslims, whereas the argument for limiting the scope of riba was substantiated by a number of evidence including the concomitance between riba and sadaqāt (almsgiving) when riba was mentioned in Quran, the notion of injustice with riba, and the notion of compounded repayments. Similar examples where given by Qaradawi when he argued that the paying of zakat al-fītr in kind only was a literalists opinion which fails to understand the historical context of the practice and made it a general rule. He asserted that it could be paid by kind or money and in many cases money is better. And he used the same rationale to argue that women are allowed to travel without a mahram (unweddable companion) for the prohibition was for fear of safety which is now, mostly, not a serious concern, and he gave other examples of rulings that should be understood in their context and, hence, changed if necessary. He rejected, however, the

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638 ibid 123. See also the general discussion in his book: Qaradāwī, Fawaʾid Al-Bunuk Hiya Al-Riba Al-Haram.
640 ibid 166
641 ibid 77-82
same rationale of historical context in matters of hudūd. The liberal argument is that amputation for the thief and stoning for adulterers is an ancient practice that is not suitable to the less gruesome modern world and Islam can punish criminals with other means more suitable for the day. Qaradawi disagrees on the grounds that these rulings are certain (thābita) and cannot be changed or contextualized. 642

This is where the problem lies. The differentiation between what belongs to the changeable in Sharia and what does not belong is a practice that depends entirely on the usuli’s judgment. Most of the mentioned examples are based on Quran, so the text is authentic, but the hermeneutical process causes the diversion in opinions. Similarly, the context and validity of the text play a role in deciding what is changeable and all these factors are matters for ijtihad (opinion) which immediately negates any chance of certainty or thubūt (unchangeability). Qaradawi fails, despite his extensive writings on the matter, to show how Sharia will cope with the pressure of ever-changing times. His main goal seems to be the preservation of Sharia, not just the underlying theory, but even the law itself. The evidence he gives to prove the flexibility/changeability of the law are taken from historical authorities which means that flexibility lies only in choosing between existing classical legal opinions. And when a fatwa is not grounded in historical sanction it is based on necessity; rendering, thereby, all notions of tajdīd or adaptability of the law to be superficial.

**Political Islam school:**

Thinkers in this school have, naturally, tended to consider reform/tajdīd in Islam and Islamic law through a political prism. The state has been the dominant framework for their vision of a modern Islam, but since the Islamists have mostly been out of power in the Muslim world, their ideas have not undergone the test of reality. The clear exceptions here are the Khumaini in Iran and Turabi in Sudan. Focus here will be on the latter.

Turabi had a reputation among his admirers, and perhaps among others as well, for being a radical thinker. He is known to use sarcasm and humour to ridicule traditional religious views.

642 ibid 124-134
This, in addition to his Western education, might explain why he is considered as *atraditional* if not anti-tradition. But a closer look at his work on *usul al-fiqh* might show a different picture.

Turabi’s commitment to the principle of unchangeable Sharia (Quran and Sunna) is stated clearly in the beginning of his book ‘*Tajdid Usul al-Fiqh al-Islami*’ where he summarizes his vision of how Islamic legal methodology should function. The theoretical order of exercising *ijtihad*, he argues, should start with the text using the rules of hermeneutics and then expands using the other sources like *maslaḥa* and *istiḥāb*. But he qualifies this traditional statement by asserting the complexity of the process of *ijtihad*. It is unavoidable for a *mujtahid* to be influenced by his reality and by the traditional culture that shaped his learning. Further, the *mujtahid* should only consider the *maslaḥa* in light of his considerations of revelation in order to maintain the bond between revelation and reason. Every rule a *mujtahid* gets directly from Quran must be elaborated by the Sunna which represents the mundane manifestation of Quranic injunctions. It is imperative then to consider the real-life implications of applying the rule, for it could cause great difficulties or have outcomes that contravene other rules. Finally, it is the responsibility of the state to legislate, by the process of *shura* (council), the collection of *ijtihadi* opinions that are accepted by society to become proper law.  

Turabi’s traditional views on the changeable and unchangeable is emphasised further in his work. It is up to the community of believers, he argues, to make of *Sharʿ* an absolute reference, hence, Islam has an unchangeable legal reference that is the Quran as elaborated by the Sunna, and a renewable (changeable) positive reference in the practices of the Muslim community, which are also based on Sharia, throughout the ages. *Sharʿ*, which is the source of all sources, is validated directly by theology which is not the domain for lawyers. This way, after placing *Sharʿ* beyond change, Turabi has put the arguments for this placement, that is, its rationale, in the domain of theology where it is difficult to distinguish what arguments are based on logic and what are based on faith only. Still, Turabi uses the same arguments used by the classical usulis without attempting to address its weaknesses. Quran, he confirms, is authentic and

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644 Hassan Turabi, ‘Usul Fiqh Al-Ahkam’. 

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preserved by God; this is imperative from believing the truth of its word since it declares its authenticity and preservation. We can further feel assured of its authenticity by the induction of its history. And while it was an address to the people of its time, it remains of timeless validity where one can interpret a historical original meaning or a renewed derivative (far’i) meaning which arises to address a new reality.\footnote{ibid 37}

Turabi’s political bent is evident in his views on Ijma’. He asserts that Ijma’ is in the classical sense impossible and has never been achieved except during the time of the companions. True Ijma’, however, he argues, is the consensus of the whole present Umma where a majority opinion would represent its will. He then ranks different types of Ijma’ according to legal certainty. Al-Ijma’ al-Istifta’i (Ijma’ based on popular referendum) is equivalent to constitutional consensus. Al-Ijma’ al-niyābi al-ām (Representative or parliamentary) comes next and is subordinate to the former after its subordination to Sharia. On the other hand, what Turabi calls ‘Ijma’ ittifāqi’ (agreement consensus) is only żanni (probable) in its validity. Turabi did not explain what he means by ‘Ijma’ ittifāqi’ but he clearly ranks it below the parliamentary and constitutional.\footnote{ibid 38} Also, his emphasis on its probable validity alludes to the certainty of the higher Ijma’s, albeit he never explains the grounds of this certainty. He maintains that the ‘Ijma’ ittifāqi’ can be changed by new fiqh that manages to establish new consensus to support it.\footnote{ibid} This again alludes to the unchangeability of the higher Ijma’s without making the case for this legal certainty.

Turabi then adds what he calls ‘al-Amr’ (decree or ordinance) to the sources of Islamic law. This stands on legitimate authority and obligatory shura. Amr ranks third below Sharia and Ijma’, and all decrees must be based on Sharia by one of the methods of interpretation.\footnote{ibid} Turabi does not offer any idea on how Amr is classified in terms of its certainty, epistemic or legal, but one can infer from its rank that it belongs, in Turabi’s scheme, to the changeable domain.

\footnote{ibid 37} \footnote{ibid 38} \footnote{ibid} \footnote{ibid} \footnote{ibid}
With regards to the debate on the prioritization of ʿillah (ratio legis or effective cause) and ḥikma (wisdom or rationale), Turabi acknowledges that the usulis preferred ʿillah because it is objective and can be taken directly from the text (sometimes) whereas the ḥikma entails judgment and lacks the objectivity and clarity of the ʿillah. Yet, it is imperative that the ʿillah of fiqh is grounded by the rationale lest fiqh practice becomes abstract and ritualistic.649 Once again Turabi states the obvious in asserting uncontentious principles like balance, moderation, and reconciliation in case of ostensible conflict. On the other hand, he does not offer any scheme for the application of these established principles. He offered the idea of a ‘wider’ istiṣḥāb and a ‘wider’ qiyas, but did not elaborate on how this expansion can be carried out or on what basis.650 His inclusion of Amr to usul, while seems to be theoretically pertinent, lacks a clear explanation on how this will add or change the reality of fiqh or law. Obedience to state authority is a well-established principle in Islam, and Muslims are obligated by numerous texts and traditions to ‘listen and obey’ (al-samʿ wa al-ṭāʿa) to their governments (waliyy al-Amr).651 Turabi does not make it clear how this can be improved or changed by adding this principle to usul.

Like most political Islamists, Turabi’s thoughts were charged with hostility towards secular ideas even if it came from “ones who claim to belong to Islamic thought”.652 He considers the discourse that puts “objectives over texts”, “the spirit of religion instead of its letters” and similar arguments to lead to the suspension of what is certain in akhām (rulings).653 He criticizes the religious scholars who ‘patch’ (talfiqiyūn) and cherry-pick (intiqāʾiyūn) akhām to succumb to the pressures of reality, and others who permit what the masses want by over-interpretation.654 Yet, Turabi submits that some of the traditional theories in usul will not suffice the requirements for a renaissance in fiqh nor suit the material, social, and cultural environment of the modern times. To address this, Turabi affirms the certainty of Quran, Sunna, and Ijma’, asserting that these are not matters of disagreement. Hermeneutics, qiyas,

649 ibid 39
651 Quran 4:59; Ibn Hajar al-ʿAsqalānī, Fath al-bāri sharh Sahih al-Bukhārī number: 6647,6725, 6723,
652 Hassan Turabi, Qadāyah Al-Tajdid : Nahwa Manhaj Usuli (Kitāb Qadāyah Islāmiyah muʿāsjrah 1999) 134.
653 ibid
654 ibid
maqāsid, influencing public opinion by shura, expressing public will by Ijma‘ and ‘urf, and political authority, however, are all renewed matters (umūr mutajaddida). It is difficult to see where in Turabi’s ideas, despite his various articulations of them, can a significant change be achieved in Islamic law. Again, the better test of theory can be made by exploring the practical implications on law, therefore, screening for his stance on some practical legal issues helps to observe how the theory have made change in practice. In this regard, Turabi does not seem significant. His ideas on Islamic finance are brief and traditional, and the entire experiment of Islamic finance in Sudan, which was developed under his intellectual auspices, is a failure according to Turabi himself. Turabi did not articulate a detailed opinion on Islamic finance but his position seems to be more political than intellectual. For the political Islamists in general, Islamic finance, particularly the prohibition of riba, is an identity issue. It gives Islam a distinguishing character in economics that sets it apart from the European dialectic of socialism and capitalism. The prohibition of riba is seen as the moral position of Islam against the secular wave coming from the West and their local agents. The moral position that has shaped the Islamists’ political discourse in their quest for popular support is the context in which to understand their positions on riba. Turabi condemned in an interview with al-Shaq al-Awsat newspaper what he called ‘Muslim disciples and rabbis’ for making fatwas to meet the wishes of kings and emperors. They argued for the permissibility of riba on the bases of darūra and put the consideration of darūra at the hands of the government. He argued, “Allah did not allow riba for his Prophet even when they were in dire need and poverty in Madina”.

655 ibid 138
658 See conclusion of chapter One above.
659 ibid.
Another Islamists, the Tunisian Rachid al-Ghannushi, who is a friend of Turabi, was less forthcoming when he was interviewed and asked about what his vision (as leader of al-Nahda party) for an Islamic finance was particularly whether he thought banks interests are riba or not. Ghannushi said he believed in what the Quran says, but understanding how it applies to current matters is ‘fiqh’, meaning, it needs to be studied carefully before making an opinion on it. One needs to know “what is riba precisely; where do the Quranic prohibitions apply; what is the precise economic practice carried out by the bank; what is this practice to which the Quranic ruling applies for being exploitative of the weak instead of assistive. When we know that this particular financial transaction practiced by the bank or any other institution is exploitative of the weak and we have an alternative at hand, then we will make a change”.\textsuperscript{660} Ghannushi understands the complexity of the matter, on the one hand, prohibiting banks interest is not a simple task without consequences, on the other hand, abandoning the Islamists rhetoric is politically costly, hence the evasive response.

We can still seek Turabi’s application of his methodology in other areas of the law, namely, his \textit{ijtihad} on issues related to women. He argues that a Muslim woman should be allowed to marry a Christian or a Jewish man; that the testimony of a woman is equal to that of a man; and that a woman can lead men in prayers.\textsuperscript{661} All these arguments go against mainstream \textit{fiqh} and were met with vehement rejection and condemnation from traditional scholars. Yet, and as was shown by some researchers,\textsuperscript{662} these opinions are not novel and were a minority opinion at some stage in the history of \textit{fiqh}. This is not surprising if we acknowledge that Turabi’s methodology in usul is only superficially different. For the first two cases, he simply adopted a different interpretation to the Quranic verses, and to the Sunna for the third case. He had no clear use, in his well-known ijtihads like the above examples, to what is claimed to be his contribution in renewing \textit{usul al-fiqh}, namely, the expansion of \textit{qiya}s and \textit{istiḥāb} and the notion of \textit{amr}, testimony, perhaps, to their superfluity. This is not to deny Turabi’s rich insights

\textsuperscript{661} Turabi, ‘Interview with Turabi’.
\textsuperscript{662} A book was written specifically to address Turabi’s new fatwas including those regarding women; see: Muhammad Mukhtar and al-Shinqiti, \textit{Ara‘ Turabi Min Ghair Takfir Wala Tashhir} (1st edn, Markaz al-Raya li al-Tanmiyah al-Fikriyyah 2006).
in usul, but it is one thing to provide critical analysis to usul, albeit deep and thoughtful; and it is quite another to claim a renewal of the legal theory based on some abstract concepts that can hardly be manifested in any form of application.

The maqāṣid school:
The idea of having Maqāṣid (objectives of) al-Sharia as the framework of Islamic legal theory goes back to the classical writings of usul. The pioneer of this school, although not the first write on the subject, is Abu Iṣhāq Shatibi whose ideas have been discussed briefly in chapter two. In terms of certainty, maqāṣid school has two main principles, the first is that the sources of Shar', when taken individually, are not certain (zanniyya), for even the mutawatir sources depend for their certainty on probable postulates such as issues of semantics, transfer of original meaning, possibility of allegorical use, etc., rendering them, hence, essentially probable. The second principle is that general principles of Sharia (kulliyyāt al-Sharia) are certain, for these are based on induction which yields certain knowledge. These general principles form the objectives of Sharia which, according to the adherents of this school, have primacy over classic usul as the ultimate theory of Islamic law.

But the school of maqāṣid seems to suffer from the same problems faced by the traditionalists and the Islamists, that is, while the theory successfully articulates a sound critique of classic usul, it fails to show a significant change in practice. This is not to say that changing Sharia is necessarily the right course for reform in Islam, nor, indeed, to say that Islam must be changed in any way, but simply to assert that a change in the methodology of law must entail a change in law. Muhammad Mahdi Shams al-Din (d. 2001), a scholar of maqāṣid, confirms that a change in methodology must lead to a qualitative or quantitative change in results, otherwise, this ‘tajdīd’ is “formalistic and superficial”. Shatibi’s work did not offer any such practical changes and this might explain why his work has gone unnoticed for centuries. It was only when modernity had exposed the urgent need for adaptation in Islamic law, that Shatibi’s work on maqāṣid gained prominence as it offered a new and fresh perspective on Sharia. Using

663 Shātibī 20.
664 Muhammad al-Tāhir ibn ʿĀshūr, Maqāṣid Al-Shar’i’ah Al-Islāmiyah (2nd edn, Dar al-Nafa’ is 2001) 96.
665 ibid 107
objectives as the theoretical framework for law allowed, at least in theory, for more adaptability in Sharia, thus, the prospect of validating Sharia in the modern world became achievable. Yet, it seems that the powerful appeal of a law taken directly from the word of Allah persisted as the dominant framework of Sharia despite the elegance of the *maqāṣid* methodology as, notwithstanding the vast literature written on *maqāṣid*, classical *fiqh* is still predominant and the modern attempts to change it are having little success.

One of the pioneering figures in the modern school of *maqāṣid* is the Tunisian scholar Muhammad al-Tahir b. Ashur (d. 1973), and his book ‘*maqāṣid al-Sharia al-Islamiyya*’ is one of the first, if not the first, to be written on the subject in modern times. 666 Like Shatibi, Ibn Ashur thought the determining factor for the validity of classical usul was whether or not it can be certain. The usulis, he argues, have tried to make *usul al-fiqh* certain like *usul al-din* (theology) only to realize that certainty in the former was very rare. Evidence for this is the fact that there is disagreement among scholars in most of usul. It is imperative, asserts Ibn Ashur, in order to have certain sources that help us understand religion, to rethink the known issues about the sources, scrutinize them, and remould the science to be named ‘Maqāṣid al-Sharia’. *Usul al-fiqh* must be left as it is but brought under the umbrella of *maqāṣid*. 667 He also follows Shatibi in arguing that induction can yield certain knowledge, and that an important concept to infer with certainty from Quran and sound Sunna is that rulings of Sharia are rationalized by the benefit to society and individuals. 668 Having established that rulings are rationalized by certain wisdoms (*hikam*, sing. *ḥikma*); the task becomes to browse the sources to find these *hikam* and assert them as a *maqṣad* for Sharia. One way of achieving this is to find the rulings that have known causes, if we gather a sufficient number of causes that all seem to underlie a particular *ḥikma*, then we can discern from them one *ḥikma* and assert it as a certain *maqṣad* for Sharia. 669 Another way is to find the hermetic verses of Quran which meaning cannot be disputed. Quran, being *mutawatir* in word, is undoubtedly the word of the Lawgiver. However, since it is

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667 ibid 172
668 ibid 180
669 ibid 190-191
semantically only probable, a Quranic text will need a lucid connotation where the possibility of another interpretation becomes unlikely. When this is added to the certainty of the text we can discern a certain *maqṣad*, as in the verse “and Allah does not love mischief-making” or “O you who believe! Do not devour your property among yourselves falsely”.670 A third way is to look at the *mutawatir* Sunna where it is possible to discern from the actions of the companions a certain *maqṣad*. Ibn Ashur gives a number of examples where the companions understand the *maqāṣid* of Sharia from their continuous communication with the Prophet and act upon that understanding. A companion, Abu Barza al-Aslami, stood to pray in one of his travels and his horse strayed away while he was praying, so he interrupted the prayer, went after the horse, then reperformed his prayer after getting the horse back. One man, unimpressed by this, made the comment that al-Aslami puts his horse before his prayer. al-Aslami justified his action by the fact that he lived far and would not have been able to get home before night had he lost his horse. But most importantly, he defended his action by saying that he had accompanied the Prophet before and observed his leniency, therefore, he understood that one of Sharia’s objectives was to make life easier not increase hardship.671

Ibn Ashur divides *maqāṣid* into the usual certain/probable dichotomy. He urges the scholars studying *maqāṣid* to exert their efforts before determining a Sharia *maqṣad* as it will be the basis of many rulings in law. Nonetheless, the scholar will still find that the certainty of the *maqāṣid* he finds differ depending on the number of evidence available, something which is not necessarily dependent on the scholar’s efforts but, rather, on the circumstances surrounding the matter.672 Ibn Ashur, however, seems to recede from the ostensible advancement made by *maqāṣid* on usul when he bounds the certainty of the *maqṣad* to the certainty of the text.673 He argues that the *maqṣad* of ‘ease’ in Sharia is certain because it is evidenced by induction of the Quran where many verses point to the same meaning, as in “Allah intends for you ease and does not intend for you hardship”.674 On the other hand, the *maqṣad* of “do not inflict injury

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670 ibid 193  
671 ibid 194  
672 ibid 231-32  
673 ibid 314  
674 Quran 2:185
nor repay injury with another” 675 is probable because, although many verses allude to the same meaning, this text remains an āḥād hadith, hence, probable. While Shatibi used the evidence to ascertain the probable hadith, Ibn Ashur did the opposite and argued that the maqṣad in this case can only be probable (albeit high probability close to certainty) because of the probable hadith.

We can recall here that Shatibi did not think that individual evidence for the authenticity of the Quran or Sunna will yield certainty. This certainty will have to come from induction where the greater number of evidence taken together can provide the certainty that, when taken individually, cannot be provided. Tawatur will not prove authenticity nor would the rules of hermeneutics give the true will of Allah with certainty; it is only the collective epistemological force of the evidence that can give the certainty required. And since the individual evidence will be pointing to individual cases, the collective evidence will point to a general principle which forms the common denominator to these cases, thus, we have a certain maqṣad. This argument by Shatibi did two things: first, it recognized the weakness of the usulis arguments about the certainty of the sources; second, it avoided this weakness by expanding the legal framework from the sources to the objectives which can be taken from these sources by induction. Ibn Ashur did not seem to share Shatibi’s scepticism. He referred to Shatibi’s attempt to re-form the arguments for certainty in usul as “rhetorical and sophistic” 676. He therefore took a step back towards the traditional arguments of usul by maintaining that the certain maqāṣid are based on evidence from the Quran because its content (matn) is certainly authentic. 677 The probable hadith, even when supported by Quranic verses but only as secondary evidence, will yield probable maqāṣid.

This conservative position of Ibn Ashur regarding the certainty of maqāṣid gives an indication of how Sharia will change, or not, according to his methodology. He argues, for example, that tribal customs are accounted for in Sharia. Imam Malik said that a woman of high social status must not be forced to breastfeed her baby because this was the custom. The verse “mothers

675 ibid 237.
676 ibid 234
677 ibid 236
should breastfeed their children for two years” is addressing women of lower social status only. He also argued that one must try to understand the reasoning of prohibitions in Sharia where no clear harm is evident. For example, when the Prophet cursed the women who put hair extensions draw tattoos, and other acts that “change Allah’s creation”; the rationale of this prohibition, as conceived by Ibn Ashur, is that women who performed these acts at that time were the less virtuous ones, hence, cursed by the Prophet who identified them by describing certain behaviour of theirs. Does this mean that these acts are not prohibited if culture changes and they become practiced by ordinary women in society without stigma? Ibn Ashur does not clarify this, but the hint is that he does not see a prohibition. This is important for it bares resemblance to the prohibition of riba as will be discussed below. Another important feature in Ibn Ashur’s arguments is his assertion that rulings of Sharia are based on meanings and descriptions not names and forms. He gives the example of the prohibition by some jurists of smoking cigarettes because when it was first introduced it was called ‘hashīsha’ (weed) and also the prohibition of coffee which was called ‘qahwa’, the name of khamr (alcohol). The prohibition was based on the name rather than the actual effect of the substance, hence, the fatwa is wrong. Nevertheless, Ibn Ashur stays mostly with the traditional Maliki fiqh as he considers hiyal to be wrong and gives examples from sales with deferred payments (buyūʿ al-ājāl) which are used as means to riba; and similarly he argues in favour of blocking the means (sadd al-tharāʾi’). All this is classic Maliki fiqh and nothing here seems to benefit from the theory of maqāṣid Ibn Ashur has presented. His position regarding Islamic finance is not different either as his discussion of the riba verses in his tafsir (exegesis) of Quran named ‘al-Tahrīr wa al-Tanwīr’ clearly shows. Ibn Ashur is evidently aware of the concerns and debates about riba. In his discussion of the difference between selling and riba, he sees the distinction in comparing the status of the seller to that of the lender, and the status of the buyer to that of the borrower. In the latter case, the borrower resorts to borrowing only to spend on himself and his family, he is

678 ibid 322
679 ibid 323
680 ibid 347
681 ibid 368
acting out of need; whereas the buyer is a well-off tradesperson. In the former case, the lender who lends money to the needy in order to benefit from the riba they will pay him, is only adding to their troubles, whereas the seller is someone who does hard work to avail goods for buyers. Selling, therefore, is a transaction between two financially capable parties, whereas there is disparity in a riba transaction. This is the rationale of prohibiting riba, acknowledges Ibn Ashur, it is, unlike selling, an exploitative transaction. One would think that this rationalization entails permitting the transaction if there is no exploitation; this would put the argument in line with the theory of maqāsid and with the example of the wrong prohibition of hair extensions and tattoos. That is, the prohibition must be understood in its context and must not be generalized beyond serving its underlying purpose. But Ibn Ashur does not depart from traditional fiqh and circumvents this point by arguing that the lender should not take profit from helping the needy. And the one who looks to borrow money for trade and business, that is, not poor, should not be lent money. In case he was, then the lender has done so voluntarily and must not take riba from him.

Arguing that people should not lend money except for the needy or as a voluntary act is evidently problematic. But Ibn Ashur would rather abandon the routes which his maqāsid methodology would naturally lead to, and adhere, to the traditional position of fiqh. Even when he maintained that riba was only in nasi’a (deferred payment) and not in riba al-fadl, he was only following Ibn Abbas, and the prohibitions of riba al-fadl transactions still stand but under different headings. Ibn Ashur gives two reasons why he thinks riba is prohibited. One already mentioned, is to encourage the rich in the community to help the ones who may be in temporary need; a loan to ease emergent difficulties which is a form of sadaqa (almsgiving) below zakah (no payback in zakah). And since the custom goes, especially among the Arabs, that one only borrows for necessity, it is an obligation for the community to assist him/her, hence riba is prohibited as it exploits, rather than assists, the person in need. Moreover, the Sharʿ differentiated, argues Ibn Ashur, between lending to the needy and lending as a
commercial practice, not by the status of the parties involved in the transaction, but rather by the essence of it. What Ibn Ashur is trying to achieve by this vague statement is to avoid identifying a riba transaction by its transacting parties, this way the prohibition of riba is not circumstantial and will not depend on the notion of exploitation. He then adds another *maqṣad* for the prohibition of riba, that is to encourage Muslims to invest in the real economy rather than finance. For this, they can enter into different kinds of partnerships and commercial activities to make legitimate profit. Ibn Ashur is not troubled by, perhaps not aware of, the complexities of the modern financial world and argued that Muslims should find alternatives. Muslims lived for long centuries without having to resort to riba and they were as wealthy as the rest of the world, he asserts, but once they ceased to be the dominant community in the world and had to deal in commerce and transactions with more dominant, non-Muslim societies which use riba, Muslims were bewildered and are asking for a solution. There is no circumvention for the prohibition of riba, argues Ibn Ashur, as the prohibition in Quran is lucid. The only solution he envisages to this problem is that Muslim countries should adopt in their financial institutions, sales, and contract, laws based on Sharia.  

It is evident that Ibn Ashur, notwithstanding his bold and pioneering book on *maqāṣid*, remains a traditional Maliki jurist. Like the other traditional school thinkers, he demonstrates insightful analysis of legal theory, issues of adaptability and the challenges of maintaining a legal system that is not void of meaning, reason, and ethical spirit; but he too fails to demonstrate the applicability of the theory in practice. It is quite possible that there are social, political, and psychological reasons why, despite the serious attempts to recognize and reform (even when it is not called reform) the problems in legal theory, the traditionalist did not follow through to change the law in any significant way, in the case of Turabi, or at all, in the cases of Qaradawi and Ibn Ashur. Such reasons, however, would lie beyond the scope of this research.

**The new hermeneutics school:**

Scholars of this modern school of thought have tried to bring Islam into the modern world by dichotomizing its legal sources into absolute and relative. Most of what is found in the Sunna is

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685 ibid 3:130-132

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relative to its time and cannot be used to legislate for all times. Conversely, Quran is absolute, its meanings and rulings are eternal and are not bound by spatiotemporal factors. But for Quran to be the sole textual source, its traditional interpretational methods must be overhauled, and new hermeneutics must be brought in place.

The most prominent figure in this school is the Syrian writer Muhammad Shaḥrūr (b. 1938). Originally a professor of Engineering, he turned his attention to Islamic thought and published an influential book ‘al-Kitāb wa al-Qurān’ (The Book and The Quran) in 1990 where he laid out his vision of a different Islam, one more fitting to the modern world and more adaptive to changing times, based on a different methodology of understanding revelation. The first step in this new understanding is the differentiation between Quran and Kitāb where Quran is the part of revelation that speaks about the unseen, the universe, the laws of nature, and history; while Risala, the second component of Kitāb, is the part that contains the legal rulings and divine decrees in general. This furnishes his way to make another distinction between al-nabī (the Prophet) and al-rasūl (the messenger), where Quran relates to the former and Risala to the latter. Law is part of the Risala which is delivered by the messenger and the practice of Risala by the Prophet represents Sunna.686

Shaḥrūr builds a theory of epistemology constructed from a typology of three types of knowledge: the first is what he calls the fu’ad knowledge (al-Ma’rifa al-fu’adiyya) which is basically perception knowledge, particularly hearing and vision. Second, is testimony knowledge (al-ma’rifa al-khabarīyya) which comes from tawatur, either verbal or practical. Third is inductive knowledge (al-ma’rifa al-naẓarīyya “al-istintājiyya”) that depends on logic which he defines as ‘the inference of an unknown from a known by the rule of non-contradiction’.687 This epistemology, however, does not seem to feed into a discussion about certainty of the sources. It is, rather, part of what Shaḥrūr calls jadal al-kawn wa al-insān (The Dialectic of the Universe and the Human) where he discusses issues like the origins of language, evolution, revelation, fate, etc.688 He seems to have little to say about certainty. Although his

687 ibid 362-364
688 This is the second section of his book, ibid 217–440.
whole theory is based on Quran,\textsuperscript{689} he did not dedicate any serious discussion to the topic of Quran authenticity and focused entirely on issues of interpretation. He briefly mentioned that Quran was preserved by Allah by \textit{tawatur}. For, ever since the Prophet was alive and until this day there are people memorizing the Book continuously, in addition to the fact that it was transmitted to us by textual \textit{tawatur} after the collection of the \textit{Mushaf}.\textsuperscript{690} It is not clear why Sha\texteth{h}r\texteth{u}r does not see the need to discuss authenticity when his hermeneutics relies heavily on the accuracy and exactitude of the Quranic term. Not a syllable can be changed without changing the meaning significantly. This makes the level of accuracy required in authenticity all the more vital. Moreover, and unlike the usulis who did not discuss authenticity for the idea that it belonged to theology, Sha\texteth{h}r\texteth{u}r did not shy from discussing theology. He discussed difficult subjects like the omniscience of Allah and his \textit{qada’} (predestination), and he took unorthodox positions in these subjects,\textsuperscript{691} yet, he chose to completely ignore in his book the more pressing and difficult issues of Quran collection and transmission. The argument that Quran is preserved by Allah because that is what the Quran states, is clearly circular. One can only assume Sha\texteth{h}r\texteth{u}r had no answers to these problems.\textsuperscript{692}

The dichotomy of changeable and unchangeable in Sha\texteth{h}r\texteth{u}r’s legal theory is presented in what he calls the dialectic between \textit{istiqāma} (straightness) and \textit{ḥanīfīyya} (curvature). \textit{Istiqāma} represents the straight limits (\textit{ḥudūd}) in Sharia while \textit{ḥanīfīyya} is the domain in which law can move (change) should change be needed, but this movement is limited by the straight limits of \textit{istiqāma}.\textsuperscript{693} There are six types of limits – and movement within those limits – according to Sha\texteth{h}r\texteth{u}r’s theory. First, the lower limit case. The example of this type is the prohibited marriages (mother, sister, daughter, etc.) where the prohibitions mentioned in the Quran form

\textsuperscript{689} Although Shahrur differentiate between Quran and Kitab, the discussion here will use the common connotation and refer to the contents of the mushaf as Quran unless the context requires otherwise.
\textsuperscript{690} ibid 363
\textsuperscript{691} ibid 385-409
\textsuperscript{692} Indeed, Shahrur raised the issue of \textit{qirā’āt} (readings) in his writings where he argued that these readings are better explained as scribes’ errors, but he leaves most of the questions he raises to be further researched by others. The important point here is that Shahrur does not address the difficulties this problem of \textit{qirā’āt} might have on his theory, considering he advocates for the ‘Book’ to be an absolute text. See: Muhammad Shahrur, ‘Nahw Usul Jadida Li Al-Fiṣḥ Al-Islami, Fiqh Al-Mar’ā’<https://drive.google.com/file/d/0B1gXouZfeS4mRFc1d1Q5LUxxU0E/view>.
\textsuperscript{693} Shahrur, \textit{al-Kitāb wa-al-Qur’ān : qirā’ah mu‘āṣirah} 445–450.
a lower limit that cannot be reduced further, but there is no upper limit in this case, which means that should it be medically advised not to marry one’s cousin (not prohibited by Quran) it is possible to preclude cousins from marriage. This will not transgress the limits of Allah, and yet, will make it possible to change the law when necessary.694

Second, the case of the upper limit. An example of this type is punishment of theft by amputation of the hand. In this case the punishment of amputation is an upper limit, meaning that a thief can be punished by other less severe punishments but not a harsher punishment (amputation of more limbs, or death, for example).695 Shaḥrūr does not explain, however, the basis of setting the amputation of the hand as an upper limit rather than a lower limit. It might seem by today’s standards as an extreme, perhaps even inhumane, punishment for theft and it is unthinkable to suggest a harsher punishment. But the designation of upper or lower limits to a punishment or a rule should be made upon objective theoretical grounds. Appeal to intuition or common sense seems unfitting to the divinity and exactitude proclaimed in Shaḥrūr’s concept of the unchangeable limits.

This problem is made more evident by the arguments Shaḥrūr makes to address in his discussion of the inheritance law which is the third case of having an upper and a lower limit together.696 He took this from the verse “Allah instructs you concerning your children: for the

694 ibid 453
695 ibid 455
696 Shaḥrūr’s theory of inheritance seems unstable. He made some changes to the theory discussed here in his book ‘Nahwa Usul Jadīda’ and then he changed these too according to his website. He says that what he says in all his books about inheritance is cancelled and he acknowledges only the facebook posts he wrote about inheritance and the discussion on the television program ‘al-Naba’ al-ʿazīm’. He did however, offer a few points on the website to explain the main issues and he offered an online calculator to apply the theory. This study, however, will stay with the discussions given in his first book, this is for two reasons: 1. The critique here is focused on the problem of hudud, and although this has changed in later versions of the theory with regards to sons and daughters, it remains true for brothers and sisters, which means the analysis remains valid. 2. His amendments, presented in the website and the tv program (I have not seen the facebook posts) are not as elaborate and detailed as the ones in his book, hence, cannot be critically analysed without some speculations about the theory. In addition to this, and when applying his amended theory (confirmed by his calculator) he gave equal shares to son and daughter when there are only one sone and one or two sisters, but in the case of one son with ten sisters, for example, he gets five times the sister. The maximum ratio in the traditional theory, which Shaḥrūr wants to reform, is 2:1 for the brother. This cannot be an improvement. For his amended theory see: Muhammad Shahrur, ‘The Official Website for Dr. Muhammad Shahrur. The Distribution of Inheritance according to the Modern Reading’<http://shahrour.org/?p=11985> accessed 29 November 2017.

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male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one’s estate. And if there is only one, for her is half. And for one’s parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise”.

From this, he infers that the limits correspond to the ratio of 2:1, or 66.6% to 33.3%, meaning that the male cannot take more than 66.6% of inheritance and the female cannot take less than 33.3%. The shares can change according to the circumstances of the case but only within the limits: a maximum of two thirds to the male and a minimum of a third to the female. “what if someone asks” acknowledges Shaḥrūr “how do you know that 33.3% is the lower limit for the female and 66.6% is the upper limit for the male and that the curvature movement (al-ḥaraka al-hanīfīyya) is between these limits?”

In other words, how did he know that it is a convergence rather than divergence? His answer was “if we ask a billion people on Earth relating to Islam and know the verse of inheritance, and a billion people who know nothing about the rules of Islamic inheritance, about the movement, within or without? The answer from all of them would be: the movement will be within (convergence)”.

Clearly Shaḥrūr’s only grounds for the designation of upper and lower limits is intuition, and while his solution to the problem of how women are valued in relation to men in Islam is appealing, his rationale for it is wanting.

There are other issues regarding Shaḥrūr’s theory of inheritance. First, he talks specifically about an upper limit for the male and not just an upper limit, similarly the lower limit is specified for the female and not a general limit; does this mean that there is no upper limit for the female nor lower limit for the male? This does not seem to be a sound proposition as it entails clear injustice. Second, even if we assume that Shaḥrūr was not precise in his wording

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697 Quran 4:11
699 Ibid
but what he intended was a general limit, that is, the upper limit he mentioned for the male will also hold the female, and likewise for the lower limit. This means that positions can be switched where the female can get twice as much as the male. Again, this does not seem sound as it renders the Quranic specification of the shares of male and female pointless. Third, if there was one female, she gets half as a lower limit. This means that she can get more but the male in this case will get less while the opposite does not hold. This, if intended by Shaḥrūr, needs justification. The same problem appears in the fourth case where he argues that the punishment of the adulterer according to the verse “The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment”⁷⁰⁰ is limited by a single point: a hundred lashes. The notion of not taking pity, he argues, points to the fact that it is also a lower limit, that is, it is not possible to reduce the number of lashes out of pity.⁷⁰¹ But how did he assert that it is an upper limit? Why not increase the lashes if, for example, an adulterer does not show repentance and keeps going back to the act of adultery? If the fact that mentioning a number means a fixed punishment (single point), then the comment about the implication of not to take pity is redundant.

Shaḥrūr discurses the issue of riba as an example of his sixth case of limits, the case where there is a positive upper limit which is riba; a zero point which is a loan without interest; and a negative lower limit which is charitable giving (zakat and ṣadaqāt).⁷⁰² That is, when one gives money with no return, he is in the negative domain, when he gives with equal return, he is at the zero point; and when he gives money and gets extra value to his principle loan he is in the positive domain. Zakat is the obligatory part of ṣadaqāt, this makes the lower limit. Yet, in order to accommodate ṣadaqāt (voluntary alms) in the scheme, Shaḥrūr makes this an open limit. Meaning that zakat is the least one must pay without return (negative), but there is

⁷⁰⁰ Quran 24:2
⁷⁰¹ ibid 463.
⁷⁰² ibid 464
always the opportunity to pay more. The upper limit, however, does not have that characteristic as it is not allowed for anyone to receive more than double the original principle of his loan. This is taken from the verse “O you who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful”.

There are three types of people with regards to lending money. First, there are the poor and needy who need help and cannot repay even the principle. For those, one should pay zakat and ṣadaqāt; those who demand riba from this group should expect war from Allah and his messenger. Second, are people who can pay back the principle but without any interest. For this group, one should lend qard ḥasan (loan without interest) but this is an upper limit, therefore, no return of more than the principle is allowed but any charitable giving is encouraged. Third is the group of active economic agents who occupy the productive part of the economy and are not considered poor. It is possible to lend to this group with interest but on the condition that the interest does not exceed the upper limit of double the principle.

These, according to Shaḥrūr, are the principles of Islamic finance. If the financial institutions conform to these principles, it is possible for a Muslim to deposit his money with them and receive interest. The state has the exclusive right to set interest rates according to the conditions of the economy, and the financial institutions have the exclusive right to lend with interest.

The cases’ inconsistencies are not the only ones in Shaḥrūr’s theory, the foundation of the theory also suffers from inconsistency. It is not clear, what are the bases upon which he categorizes revelation or the verses of aḥkām and it is less clear how something would count as belonging to what he calls āyāt al-ḥudūd (verses of limits). The cases which Shahrūr discusses in his book are:

1. The prohibited marriages
2. The prohibited foods
3. Theft

703 Quran 3:130
704 ibid 469.
705 ibid 470
4. Murder or unintended killing
5. Inheritance
6. Adultery
7. The sexual relationship between male and female
8. Issues of finance including riba, qard hasan, and zakat and ṣadaqāt

These are clearly choices which do not exhaust the verses of ḥaḵām in Quran (the Book) and Shaḥrūr makes it clear that not all verses containing ostensible commands are necessarily hudud.706 This raises the question: are the eight cases mentioned above the only hudud, and if so, on what basis did he identify them? And if these are not the only hudud but only examples, how do we identify the hudud? A problem that also applies to his other categorizations of Kitāb, Om al-Kitāb, Quran, etc. There does not seem to be a solid common denominator between the cases above to form a solid basis for hudud cases. They are not all crimes, nor are they mentioned in Quran by the word ‘hudud’ or ‘haram’. They do not all involve money or a relationship between male and female. In fact, the only thing they have in common is that they fit Shaḥrūr’s theory, and even there, not always neatly, as discussed above. Shaḥrūr acknowledges that people can set up their own limits as part of a positive law that seeks the benefit of society (maṣāliḥ mursalah).707 These remain changeable, however. But the divine limits (hudud Allah) are unchangeable and must be conformed to always, which makes it imperative to methodologically identify them with certainty. If a law is to be made unchangeable, its divine origin must be certain. With his theory of limits, Shaḥrūr managed to address many of the issues that troubled Islamic law in modern times by turning the traditional rulings of Sharia into limits whereby movement between these limits is possible, giving Sharia some degree of flexibility without discarding the traditional ahkām. The problem, however, is that the certainty required as epistemological basis for these divine limits is missing from Shaḥrūr’s arguments because the methodology he uses to select them is obscure. He did not give a lucid explanation as to how he identified the cases he discussed as limits, nor did he assert the certainty which justifies his choices.

706 ibid 447
707 ibid 474
In general terms, Shaḥrūr’s treatment of certainty when it is relevant in his theory is casual if not wanting. He mentions the authenticity of the Quran in a few words in spite of the fact that his whole theory is based on ‘The Book’. One cannot say that Shaḥrūr accepts traditional discourse about Islam easily, for he follows a radically different method of hermeneutics and vehemently rejects classical interpretations of the Quran, as he did reject classical jurisprudence in favour of his theory of limits. Shaḥrūr did, however, allude to the issue of authenticity in his introduction by arguing that for the Book to be truly from Allah it must have the following characteristic: it must have the ‘divinely absolute’ in its content, and the ‘humanistic relativity’ in the understanding of this content, a feat that only God can achieve.\(^{708}\) This concept was the platform from which Shaḥrūr went on to devise his arguments for unchangeable limits based on immutable text (\(\text{naṣṣ}\)) and a changeable, moving content. Furthermore, his position on the certainty of Sunna is similarly vague. He does not discard Sunna completely as he thinks it is a legal source in many cases, even \(\text{hudud}\) cases which are, presumably, certain, such as the 2.5% limit of \(\text{zakat}\).\(^{709}\) He also calls for the review of the Sunna corpus to recategorize the hadiths to hadiths of \(\text{Risāla}\) and hadiths of \(\text{Nubūwwa}\) (message and prophecy) and other categorizations.\(^{710}\) Hadiths authenticity should be tested according to their conformity to Quran; if a hadith decrees some rule which is not in Quran, like the prohibition of music, its validity is bound by its time only and does not necessarily apply to all times.\(^{711}\) But suppose a hadith was ostensibly conforming to Quran, does that automatically qualify it as authentic? Do we only take what is considered by the major hadith collections? Shaḥrūr hinted at his scepticism in the authenticity of hadiths in general in a long discussion of the historical circumstances in which hadith was collected and he says that this process was politically motivated.\(^{712}\) He adds to this point the fact that most of the high-ranking companions who accompanied the Prophet most of his life narrated very few hadith, while Abu Huraira who accompanied him for only three years narrated more than any other one. This calls for

\(^{708}\) ibid 36
\(^{709}\) ibid 473
\(^{710}\) ibid 571
\(^{711}\) ibid 572
\(^{712}\) ibid 566
questioning, according to Shaḥrūr. But he did not pursue the questioning any further nor did he explain the basis of his use of hadith, considering his suspicions. Conformity to Quran will still leave many hadiths as authentic (some narrated by Abu Huraira). For example, in his treatment of riba, Shaḥrūr does not discuss the hadiths that prohibit the riba of commodities. These cannot be considered as non-conforming to Quran since they are considered by jurists as elaborations by the Prophet to the concept of riba, which is not too different a case from the Prophet’s determination of the percentage of zakat at 2.5%, which Shaḥrūr accepts.

A final point to be mentioned about Shaḥrūr’s theory is regarding language. Shaḥrūr adopts a linguistic theory that rejects the concept of synonym ‘tarāduf’, from which he made his important distinction between Quran and Kitāb. He also relies heavily on the lexicographer Ibn Faris and his lexicon ‘Maqāîyyaṣ al-lughâa’. According to this school, one word can have multiple meanings stemming from the same root, but no two words can share the exact meaning, hence, Kitāb, Quran, dhikr, rasūl, nabī, etc. are all semantically different. This theory of non-synonymy is debatable among linguists and using it as a foundation for the theory with the little qualification that Shaḥrūr offers only mounts to its difficulties. Moreover, he seems to take the use of words roots too far in finding a wider semantic field in order to aid his theory. For example, in the verse “Beautified for people is the love of that which they desire - of women [nisa'] and sons, heaped-up sums of gold and silver, fine branded horses, and cattle and tilled land. That is the enjoyment [mata'] of worldly life, but Allah has with Him the best return” Shaḥrūr does not accept that the word nisa’ actually means ‘women’ because this would mean that Allah has made them as ‘enjoyment’ for men. This implies the dehumanization of women.

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713 ibid 569
714 ibid 44
715 The Oxford Reference website defines ‘synonym’ as: “The relation between two lexical units with a shared meaning. ‘Absolute’ synonyms, if they exist, have meanings identical in all respects and in all contexts. ‘Partial’ synonyms have meanings identical in some contexts, or identical only in that replacing one with the other does not change the truth conditions of a specific sentence. Thus paper is a partial synonym of article: compare I got my paper published, I got my article published. But their synonymy is not absolute: e.g. paper, but not article, can also be used to refer to a newspaper.” PH Matthews, ‘Synonymy - Oxford Reference’ <http://www.oxfordreference.com/view/10.1093/acref/9780199675128.001.0001/acref-9780199675128-e-3324>. Shahrrur, however, is rejecting synonymy regardless of context, which entails rejecting all synonymy including partial synonymy. In this case he is mistaken in the claim that synonymy is rejected in modern linguistics. See: Shahrur, al-Kitāb wa-al-Qur’ān : qirā’ah mu’āṣirah 44.
716 Quran 3:14
Shaḥrūr went back to the root (n.s.a) and argued that it has two meanings, one is women and the other is delay, thus, anything new (comes later) is also ‘nisa’, and, therefore, *nisa* in the verse means new things. People enjoy having new cloths, cars, etc. and these are all referred to as *nisa*.\(^{718}\)

The semantic gymnastics in this rationale and methodology is evident. It strips the word from its usual use and context and manipulates the meaning to fit into the theory. His objective of arguing that the Quran treats women with the utmost respect is understandable but if the methodology of achieving this is not solid, the chances of success will not be good.

Furthermore, Shaḥrūr does not seem to be aware of the problems of circularity in the use of lexicons (partly discussed in relation to Quran in Chapter One above). He relies mainly on Ibn Faris who lived and died in the fourth century (329-395 A.H.) by which time the Quran was already the most important document in the Arabic language and has shaped it in many ways not least by its reintroduction of the diacritical marks in writing. The common use of a word is a strong indicator of the intended meaning by the author. This is a tradition among the usulis who argue, and rightly so, that the obvious meaning is to be considered as the intended one unless there is evidence that it could be otherwise.\(^{719}\) Shaḥrūr ignores this principle and takes liberty in using the root to excavate an unorthodox semantic that is rarely, if at all, used in common language. This methodology would surely open up every text to unlimited possibilities of meaning rendering the text effectively meaningless.

It remains to be said that, among the thinkers discussed so far and perhaps among the modern Islamic thinkers generally, Shaḥrūr is distinct in the fact that he made a serious attempt to offer a complete methodology to understand Islam and legislate for an Islamic law. He managed to provide, using the Islamic sources, a different concept of Islam that is adaptable and thus, more suited to the modern world. This would be viewed by some as the main reason for rejecting his work, but it shows how Shaḥrūr’s work contrasts to the other attempts of renewing Islamic law which could offer nothing new and remained in the abstract. One of the weaknesses in

\(^{717}\) ibid 595.
\(^{718}\) ibid 643
\(^{719}\) This was discussed in Chapter Three.
Shaḥrūr’s theory is his insistence on an absolute source of law and religion in general that is timeless and unchangeable. This burdened Quran to the extent that Shaahrūr resorted to unsound reasoning in many occasions to buttress the coherence of his theory. Nevertheless, the intellectual endeavour of departing from the traditional ways of thinking is surely beneficial.

The second line of argument: Sharia has absolute values from which law is derived

In this line of argument primacy is given to values rather than law proper, once the ‘Islamic values’ are known, then law can be derived from them in a manner that is temporally fitting. This argument is similar to what is found in the literature about maqāṣid. Shatibi’s thesis was based on the induction of the sources to discover the maqāṣid of Sharia, law, then, must conform to those maqāṣid. Similarly in this argument, Islamic values must be discovered, perhaps also by induction, then law must be subjugated to them.

Fazlur Rahman (1919-1988), a renowned scholar of Islamic Studies, is a good example of this mode of thinking. For Rahman, the Quran is mostly “moral, religious, and social pronouncements that respond to specific problems in concrete historical situations”. Quran, therefore, does not decree direct legal injunctions but offers, rather, their underlying values, “moral and quasi-moral precepts not enforceable in any court”. The idea of fiqh, or even Islamic law, being law in the proper sense is inaccurate; fiqh only provides raw material for a legal system but does not constitute a legal system itself. Traditional jurists, having failed to understand the underlying unity of the Quran, had a more ‘atomistic’ approach to its verses leading to the derivation of law from verses that were not actually legal injunctions.

Rahman offered an alternative approach to derive law from the sources, namely, the Quran, he called it the ‘Double Movement’ theory. The first movement is “from the specifics to the eliciting and systematizing of its general principles, values, and long-range objectives, the

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720 Others would include: Muhammad Sa‘īd ʿashmawi, Muhammad Arkoun, Naṣr Hamid Abu Zaid, among others.
722 ibid 32
723 ibid 2-3
second is to be from this general view to the specific view that is to be formulated and realized now”. Put simply, Rahman’s theory is a combination of inductive and deductive processes where the former finds the underlying values and principles from revelation, and the latter uses these values as raw material from which law can be derived and formulated for the historical moment. Evidently, the second movement is positive legislation which can change and adapt according to the historical context. Yet, it is not entirely clear whether Rahman intended the first movement to be immutable. He assigns the first movement to the historian and the second to the social scientist, but he asserts that the “actual ‘effective orientation’ and ethical engineering are the work of the ethicist”. Whether this work of the ethicist belongs to the first or second movement, Rahman does not elucidate, but in either case it remains a human endeavour, that is, *ijtihad*. Nonetheless, Rahman still believes that there are absolute values to be discovered in the Quran. This discovery is an *ijtihadi* process, but their existence is divine and independent of human cognizance. In Rahman’s words, “[i]f the results of understanding fail in the application now, then either there has been a failure to assess the present situation correctly or a failure in understanding the Quran”. This implies that, although these values are divine, hence, immutable, the fallibility of the human understanding of them, the error-prone inferences of humans put these values in the sphere of the changeable. In this light, the induction process to find the true Islamic values must be ongoing as long as reviewing the law involves reviewing the double movement in both directions. This is asserted by his argument that there is both room and necessity for new interpretations as it is, in truth, an ongoing process. And while it is possible that Rahman was only referring to legal interpretations for the second movement, it is fair to admit that the first movement is similarly an interpretation process, hence, too, ongoing.

This does not mean that Rahman has abandoned the notion of certainty completely in his methodology. He argues that certainty “belongs not to the meanings of particular verses of the Quran and their content, but to the Quran as a whole, that is, as a set of coherent principles or

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724 ibid 7  
725 ibid  
726 ibid  
727 ibid 145
values where the total teaching will converge".\textsuperscript{728} He, then, adds his assertion that the Quranic text is authentic evidencing this by the claim that no Western scholar has created doubt about the Quran’s integrity and authenticity,\textsuperscript{729} but did not seem to deem it necessary to further qualify his assertion by any detailed analysis. That is to say, Rahman completely rejected the long-standing view of Quran as a source of legal injunctions, yet he seems to have unquestionably accepted the authenticity of its text. Even if Rahman did not see parity in the certainty of the two concepts, he should have still been conscious of the problematic approach of rejecting established orthodox views on Quranic law, and accepting them on authenticity, with his analysis offered only to support the former. Rahman must have been well aware, despite his earlier claim, of the controversies surrounding some issues regarding the Quranic text like \textit{tawatur}, \textit{qira’āt}, the collection of the Quran, etc. He quotes a long passage from Shatibi where Shatibi rejects the traditional views of the certainty of \textit{tawatur} and language, and opts instead for the certainty from induction even in the authentication of Quranic text.\textsuperscript{730} Perhaps Rahman was assured by that passage that the certainty of the text was established one way or another and thought it, thereby, safe to take it as a given.

A second comparison with Shatibi can highlight another issue regarding Rahman’s theory with respect to certainty. Shatibi was adamant that induction yields the certain \textit{maqāṣid} of Sharia, therefore, he went on and emphasised the \textit{maqāṣid} that were given by earlier scholars as the certain objectives of Sharia: the preservation of life, religion, intellect, wealth, and offspring. These are fixed concepts which were brought forth as a result of the process of the induction of the sources. The first movement in Rahman’s double movement theory, which resembles Shatibi’s induction, is not exercised by Rahman to offer a set of values that can represent a cornel for a Quranic value system that, in turn, underlies a legal system in the same manner that \textit{maqāṣid} should underly Islamic law. Of course, this is not to suggest that Rahman should have necessarily taken that task himself; he could very well set the theory and leave its application to others. But this would leave us to only speculate, in terms of certainty, about

\textsuperscript{728} ibid 20
\textsuperscript{729} ibid 103
\textsuperscript{730} ibid 21
values inferred by the first movement. Will they be relative to the time or people who apply the theory? Or will the result of applying it always be the same, meaning that these values and principles are absolute? And in this case why did Rahman not name them?

With regards to finance, Rahman wrote a paper in 1964 titled ‘Riba and Interests’ in which he argued for a distinction between riba and banks’ interest.⁷³¹ For him, the prohibited riba was only the excessive usury where the original principal was doubled and redoubled in exchange for deferment.⁷³² Rahman made a chronological analysis where he argued that riba was condemned as early as the 4th year of the Prophet’s mission (start of revelation). The practice of riba was a known and rife economic practice in the commercial setting of the Meccan society at that time. The Quran, in line with its mostly moral discourse of the Meccan period condemned riba; but the explicit prohibition was revealed later in Madinah.⁷³³ The emphasis on this fact in Rahman’s analysis is, perhaps, an allusion to his conception of Quran as essentially a source of moral guidance rather than law. Rahman does not talk here about the double movement theory as he wrote this in his book ‘Islam and Modernity’ in 1982, eighteen years after his paper on riba; but it is quite possible that the basic ideas were present in his thinking since that time. By asserting the Quran’s condemnation of riba very early in Islam, Rahman affirms the essentially moral message of Quran, whereas the later prohibition is more of a confirmation of that early condemnation. Furthermore, and to understand the prohibition in the context of his thinking, Rahman shows the difficulty in assigning a precise definition of riba from the sources, Quran and Hadith, because there are clear contradictions, whether in understanding the riba verses in Quran or in the hadiths about riba. For instance, some hadiths say explicitly that there is no riba in animals while some others are explicit in stating the opposite.⁷³⁴ If law was to be taken directly from the sources, the ambiguity in the definition of riba would hinder this process; but the main message of the sources, Quran in particular, is to underscore the values behind the law. The prohibition in this context serves as an indication of the extended legal

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⁷³¹ Fazlur, ‘RIBĀ AND INTEREST’.
⁷³² ibid 5
⁷³³ ibid 3
⁷³⁴ ibid 16
dimension of the condemnation of riba, however, it is not the actual legal injunction since it lacks, in the Quran, a precise legal definition, and hadith is too unreliable to provide it. In other words, the Quranic injunction cannot be used in a court of law; for this, a law is derived, to use Rahman’s terminology, from the movement from the particulars to the general principles, followed by a formulation of law from these principles according to the present situation. In the case of riba, Rahman asserts that the Quran prohibits an atrocious kind of riba which “went on multiplying in a manner that the poor debtor, in spite of his regular payments, could not pay off the usurious interest let alone the capital”. 735 The riba system was “so exorbitantly usurious. Therefore, what had to be banned was the system as a whole”736 even if some individual cases were of a less usurious nature. Banks’ interest, therefore, should not be prohibited according to this Quranic rule since they belong to a different system. He, thus, defines riba as “an exorbitant increment whereby the capital sum is doubled several-fold, against a fixed extension of the term of payment of the debt”. 737 Rahman here does not use the double movement theory for, as mentioned above, this was a later development of his ideas, however, the emphasis on the underlying values in the Quran is evident in his treatment of riba where his definition for it is clearly morally grounded. He is obviously referring to the exploitative nature of the pre-Islamic riba as the underlying vice for which the practice was prohibited; thereby, a clear distinction between riba and banks’ interest can be drawn.

But we are still unclear about Rahman’s position regarding the certainty in his theory; whether any part in his scheme is not changeable. He offers very little with regards to epistemological certainty. He asserted the authenticity of the Quran with no discussion, and he gave hints of his scepticism regarding hadith, but again without detailed analysis. He showed the contradictions in the hadiths regarding riba but did not use that analysis to challenge the bases for certainty in hadith, this was not Rahman’s concern. In fact, he gave an emphatic ‘negative’ to the suggestion that having found the traditions about riba unauthentic they should be rejected ‘in toto’, for “they are sincere and performed attempts at interpreting and elaborating the Sunnah

735 ibid 7
736 ibid
737 ibid 40
of the Prophet and the Quranic injunctions”. In his discussion about hadith criticism, he remarks that it should remove a mental block of thinking about Islam. But he abstains from going so far as to suggest any critique of the Quranic text or history. This only confirms his position regarding the unquestionable immutability of the Quran even when its use is radically rethought, which again draws the question: is absolute certainty a necessary pre-requisite if Quran is to be understood as a whole unit and as providing only an ethical framework for law? Or is Rahman just unable to unchain himself from a dichotomy of changeable and unchangeable in Sharia that finds more bases in theology than in law?

In summary, by elevating Quran from the domain of law to the domain of ethics, Rahman neatly formulates a system of combined induction and deduction of the sources to give a law that is dynamic and adaptable without losing its ethical spirit and divine connection. The arguments he provided for this methodology, however, were not demonstrative. He took positions regarding the epistemic certainty of the sources (authentic Quran, questionable authenticity for Sunna) without qualifying them systematically, and, considering that his discussion of riba preceded his articulation of the Double Movement Theory, he did not offer much applied examples of how his theory would change Islamic law.

**Institutionalizing Change: absence of effects on Islamic finance:**

The conspicuous fact is that none of the ideas that advocate anything other than the traditional views on Islamic finance could become institutionalized, that is, none were adopted by a major institution of standards or regulation in any legal jurisdiction. All the standards of the ‘Accounting and Auditing Organization of Islamic Financial Institutions’ (AAOIFI) are based on the principle of prohibiting banks interest as a form of riba. It is also a founding principle of

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738 ibid 30
740 For different examples of interest-free financial standards see: *Shari’ā Standards for Islamic Financial Institutions 2010 (English Version)* (Accounting and Auditing Organization for Islamic Financial Institutions).
other institutions such as the ‘Islamic Financial Services Board’ (IFSB)\textsuperscript{741} and of some sovereign legal frameworks of finance such as that of Sudan and Iran.\textsuperscript{742} Non-Islamic jurisdictions can only take Islamic finance as it is defined by Muslim authorities and legal jurisdictions. Judges in the UK did not venture, when ruling on a case of Islamic finance, to delve into the juristic details of what is riba or how to define it; their judgments were mainly based on the contracts between the parties.\textsuperscript{743} This was, for example, made clear by Lord Justice Potter in the \textit{Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain}

Finally, so far as the “principles of ... Sharia” are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute. The fact that there may be general consensus upon the proscription of Riba and the essentials of a valid Morabaha agreement does no more than indicate that, if the Sharia law proviso were sufficient to incorporate the principles of Sharia law into the parties’ agreements, the defendants would have been likely to succeed. However, since I would hold that the proviso is plainly inadequate for that purpose, the validity of the contract and the defendants’ obligations thereunder fall to be decided according to English law.\textsuperscript{744}

Even in Muslim majority countries where judges may be less cautious with regards to discussing the issues of Sharia, references are made to common law, equity, and Sharia positions.\textsuperscript{745} The latter is usually classical opinions that form part of one of the canonical schools of \textit{fiqh}, that is to say, judges usually choose from existing and established legal opinions and do not venture to rule on the basis of a controversial opinion that has not been established as a recognized constituent of the field. The works of people like Shaḥrūr and Rahman are not usually cited in

\textsuperscript{741} See their standards page in: ‘IFSB’ \url{http://www.ifsb.org/published.php}.
\textsuperscript{742} See the website of the Higher Sharia Supervisory Board of Sudan in: ‘HSSB’ \url{http://www.hssb.gov.sd/en}.
\textsuperscript{744} \textit{Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] APPLR 01/28}, [55].
\textsuperscript{745} Hasan and Asutay 50.
the litigation processes nor are they considered in standard-setting institutions. Nor are the different schools of thought, ones that contravene the major religious establishments, represented in such institutions or sovereign legislative processes. In short, the new ideas in Islamic finance or Islamic studies in general, have failed so far to move from the peripheries of the intelligentsia to the mainstream institutionalized ideas, and thus, have failed so far to have any real impact on the development of the law.\textsuperscript{746}

One reason which may help explain this is the role Islamic finance play in forming the identity of the Muslim communities now. Unlike issues of clothing and food which form part of the Islamic identity and for which non-Muslims are mostly indifferent, Islamic finance, particularly after the financial crises, have presented an Islamic solution as a contender for an international problem and it has indeed gained the attention of the world. These recent developments, however, only amplified a historical development where Islamic finance have always been an indication of true identification to Islam.\textsuperscript{747} Therefore, any reconciliation between it and conventional finance would undermine that acclaimed distinction. Something that is further evidenced by the symbolic difference between conventional finance and the alternatives offered by Islamic finance in practice like \textit{murābaḥa}, \textit{salam}, \textit{bayʿ al-īnāh}, and others. That is to say, Muslims are not necessarily keen to change Islamic finance in any way that might make it formally more like conventional finance even if this was demonstrated by objective reasoning from the sources, because it is that formal difference which serves as an identifier. Similarities in substance cause little worry in this regard. Rahman alluded to this issue when he argued that “[T]he pet issues with the neofundamentalists are the ban on bank interest, the ban on family planning, the status of women, collection of zakat, and so forth – things that will most distinguish Muslims

\textsuperscript{746} In this regard, Hallaq makes the interesting following remark: “The religious utilitarianists succeeded in having their ideas implemented on the practical level, albeit only partially. This success may be explained by the fact that the reformist ideas espoused by this trend represented more a justification of what was already taking place on the legal scene than a prescription of what ought to take place. On the other hand, the religious liberals remain entirely marginal, this being a function of the foreignness of their theories to the existing legal systems and of their isolation from the centres of political power which is indispensable for the practical implementation of any idea” see Wael B Hallaq, \textit{A History of Islamic Legal Theories : An Introduction to Sunnī Usūl Al-Fiqh} (Cambridge UP 1997) 261.

\textsuperscript{747} Some of the discussion on issues of identity are made in chapter One.
from the West”. He then adds “while the modernist was engaged by the West through attraction, the neorevivalist is equally haunted by the West through repulsion”. These movements, argues Rahman, notwithstanding that they reoriented the lay Muslim emotionally towards Islam, did Islam a great disservice by their lack of positive effective Islamic thinking and intellectual bankruptcy.

In addition to the problem of identity, the resistance of Islamic finance to absorbing new ideas can also be attributed to the purported certainty of its fiqh; the stern prohibitions in the sources buttressed by centuries of consensus and a voluminous literature on nominal contracts that should provide an alternative to the proscribed transactions. The fact that banks were a new type of institutions to the Muslim world should have confined the debate to whether or not interest was riba. This would render the consensus about the prohibition of riba mostly irrelevant as it preceded the bank, and a new debate should have ensued after the banks were introduced to Muslim societies. But the certainty around the fiqh of finance was strong to the degree that jurists, rulers, and the Muslim societies in general preferred a secular approach to finance than a new thinking in fiqh. This attitude was not confined to finance, other aspects of the law like family law were also replaced by secularization rather than juristic renewal or rethink. Banks were introduced as part of the secular state that came with colonialism and they functioned accordingly. When the idea of Islamic finance started to take shape half-way through the twentieth century it was based on classical fiqh, little attempt was made to change fiqh to suit this new industry that belongs entirely to modernity and bears little resemblance, when it comes to lending and other forms of financial transactions, to what the Arabs were used to in the time when the schools of fiqh were formed and matured.

It was easier to let Islamic finance develop as a separate field where it can adhere strictly to classical fiqh circumventing the need for change, while conventional finance is uninterrupted by

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749 ibid
750 ibid 137
751 See Chapter One
the parallel development of Islamic finance nor its conventional methods altered. It became a matter of choice for consumers, states, or financial institutions which mode to adopt; a setting preferred to the other option which would have meant change in both modes: the Islamization of conventional finance together with the rethinking of classical fiqh of Islamic finance. The difficulties of the task of changing the current financial system are evident as the troubles of conventional finance are still debated to this day without being nearly resolved. The latter task is a challenge for Muslims to rethink their whole system of law by questioning the basis of certainty that prevent change and adaptation when clearly needed.

The false dichotomy of the changeable and unchangeable in Sharia:

There is no contention that at least some part of Sharia is changeable, it is the unchangeable part, however, that requires attention. The most conspicuous feature of the unchangeable is that it is correlated, or perhaps even concomitant to the degree of correspondence, with certainty; if a rule is certain it is most likely unchangeable or if it is very resistant to change it is most likely considered certain by some measure, and both concepts, certainty and unchangeability, underscore divinity. In other words, for any law, rule, or other aspects of Islam to be divine, they must be rigid, which is an unfortunate inference from the idea of God being an Unchanging Deity. This concept can hardly be supported by Islamic sources and is likely an import from Greek philosophy as much of Islamic theology is.753 The Quran talks about a very active God who creates, talks, sends messengers, punishes, forgives, and basically, runs the universe as a whole. The Quran even associates change to God in the verse “Of Him seeks (its need) every creature in the heavens and on earth: every day in (new) Splendour doth He (shine)!”.754 Similarly, the concept of abrogation (naskh) is a concept of change in the divine

753 This was one of the arguments Plato discusses in his ‘Republic’.
754 Quran 55:29
law; of course, it is *divine* change to the divine law, but it indicates that divine law is not absolute.

Besides the possible, and likely, psychological desideratum for certainty, it is difficult to trace the origins of this dichotomy in Islam. Wael Hallaq points to the fact that it is an Aristotelian concept but he does not assert that Aristotle was the source of the idea in Islam. The verse “He it is Who has sent down to thee the Book: in it are verses basic or fundamental (of established meaning); they are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical seeking discord and searching for its hidden meanings but no one knows its hidden meanings except Allah and those who are firmly grounded in knowledge say: “We believe in the Book; the whole of it is from our Lord”; and none will grasp the Message except men of understanding” is the verse that is mostly cited to imply a dichotomy of changeable and unchangeable. This follows from the rationale that verses of ‘established meaning’ will give certain law reflecting the true will of God, therefore, this forms a domain of unchangeable law, whereas, using the same rationale, the allegorical reflects probable divine will, thus, probable/changeable law. Similarly, the hadith “The *halal* (lawful) is clear and the *haram* (prohibited) is clear, and between them are unclear matters that are unknown to most people. Whoever is wary of these unclear matters, has absolved his religion and honour. And whoever indulges in them, has indulged in the *haram* (prohibited). It is like a shepherd who herds his sheep too close to a preserved sanctuary, and they will eventually graze in it. Every king has a sanctuary, and sanctuary of Allah is what He has made *haram* (prohibited)” is cited in support of the dichotomy of certainty. Neither the verse nor the hadith speaks of a clear demarcation of what is changeable and unchangeable in Islam but they allude to the concept by a division in terms of understanding and clarity. The lucidity of the verse or rule in Islam entails, it is understood, a rigidity of the meaning or the law, and the fact that there is a mention of a part that is obscure only affirms this understanding since it answers for the existing perplexity towards some parts of revelation. It is

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756 Quran 3:7
757 Ibn Hajar al-ʿAsqalānī, *Fath al-bārī sharḥ Sahīḥ al-Bukhārī* number 51
an acknowledgement that not every part of revelation is lucid, direct in its discourse, or solid and unitary in its meaning, something that Muslims encounter regularly when reading the Quran and would have caused them great difficulty if Allah did not acknowledge it. Since He did, however, and having accepted this concept for the relief it affords Muslims, it follows then that there is a part which is indeed lucid, direct, and understandable in revelation, that is, certain, and thus, it must be adhered to with utmost strictness. In other words, the desideratum for the divine acknowledgement of obscurity in revelation geared the understanding of the text that speaks of clarity towards an interpretation that engendered the dichotomy of changeable/unchangeable. Scholars needed the license not to understand some parts of revelation, but they had to accept, in their guided interpretation, that other parts of revelation were hermetic. Once the concept of certainty is set, unchangeability will axiomatically follow.

Having argued for the dichotomization of Islam into changeable/unchangeable, the jurists are left with the greater and more contentious task of deciding what belongs to each part. The classical usulis theory which was discussed in detail in the previous chapters concludes that Quran, hadith, and Ijmaʿ provide the certain aspects of Islam. Any idea or law that is derived from what is considered manifest Quran, sound hadith, or Ijmaʿ is certain and therefore unchangeable. Of course, when the interpretation of Quran or the soundness of hadith is a matter of disagreement between the major schools of fiqh, it is the degree of consensus which will ultimately set the degree of certainty and unchangeability of the matter in question. This classical theory of certainty is still the prevalent theory to date, which might in part explain the unchangeability of Islamic finance as discussed above; but there have been attempts throughout the history of Islam to review the certainty purported to the three sources where some have rejected Ijmaʿ and some rejected both Ijmaʿ and hadith maintaining that the only certain source is the Quran. The basis for rejecting the certainty of hadith and Ijmaʿ have been discussed in chapter four above, and although these arguments have not succeeded in becoming mainstream, they seem to be getting increasing attention as the movement of modernizing Islam seems to be gaining momentum recently. The effects that hadith had, or should have, on Islamic law were diluted in some way in the writings of Shaḥrūr, Fazlur
Rahman, Gamal al-Banna, Abdulkarim Surush, Muhammad Abulgusim Haj Hamad, and others. Even the more conservative thinkers such as Turabi try to minimize their use of hadith and rely almost completely on Quran.

The critique of hadith certainty, however, does not amount to a rejection of the dichotomy of certainty, nor even a reduction of its effect. It is as if there is a fixed amount of certainty that must be achieved in usul regardless of how it is distributed. This was quite clear in the writings of Haj Hamad who thought hadith was unreliable and its reliability should be referred to Quran instead. But he ossifies Quran much more than what can be found in the traditional view of its certainty, as if he was giving Quran the share of certainty that was initially in Sunna. He argues that Quran is the written book of Allah (Kitāb Allah al-maṣṭūr) while the universe is the observed or witnessed book of Allah (Kitāb Allah al-manẓūr); and like the universe where a single change in the structure of its elements will disrupt its whole system, the Quran is absolute in its design and system, no syllable can be changed without disrupting the whole system of meaning. He cites the verse “Furthermore I call to witness the setting of the Stars. And that is indeed a mighty adjuration if ye but knew. That this is indeed a Qur’an Most Honourable. In Book well-guarded”. This is a concretization of the text that leaves no room for plurality or uncertainty. He, therefore, rejects synonymy in the Quran and makes up for the lost flexibility by looking at the roots of the word to expand its semantic field, a methodology adopted later by Shaḥrūr and others.

Attempts to rethink certainty in Islam have mostly kept at a distance from the Quran, there are two reasons to explain this. First, the Quran is considered to be, literally, the word of Allah. It is the only aspect of divinity that is part of this world, and after the Prophet’s death, it remains

758 Jamāl Bannā, Nahwa fiqh jadīd (Dār al-Fikr al-Islāmī 1996).
761 ibid 53–69.
762 ibid 59.
763 Quran 56:75-78.
764 ibid 55–59.
the only bridge to the unseen. It must, therefore, be certain in order to keep the connection to the unseen and to Allah active. Uncertainty in Quran would entail a disruption or a breakdown in that connection. This is the certainty concomitant to divinity; a psychological surety for the believer who is dealing with subjects that lie, literally, out of this world.

The second reason is the concept that any system of thought must be rooted in fixed, unchanging postulates;\textsuperscript{765} this gives a sense of stability and certainty usually required for such a system, particularly a legal system, to function properly.\textsuperscript{766} The usulis, considering the divine dimension in their system of law, adopted this concept with fervour. Naturally, the Quran ranks highest in the structure of usul since it is the most divine as it is evidently the most authentic. Therefore, even if there were bases to raise questions regarding the certainty of the Quran, this is mostly avoided for the simple fact that it stands as the only remaining certain source. Casting doubt over the Quran, it is thought, will bring down the entire edifice of Sharia and possibly Islam as a whole.

But this school of thought cannot but admit that this certainty does not include interpretation for the entire Quran; it is a certainty that is confined mostly to authenticity. So, the question is: how does a certainly authentic Quran with probable meaning constitute an improvement in the dichotomy of certainty or in the definition of what is unchangeable? The improvement in authenticity comes, when Sunna is rejected, at the price of elaboration; one would have a qualitatively more certain text that tells much less. From a jurisprudential perspective, the lacuna must be filled by less certain methods and the law cannot be absolute. When a lesser part of the law becomes more authentic, this will not, overall, make the law more unchangeable. If riba was prohibited only by the Quran, the prohibition will be certain but the definition of riba will remain probable, and the same would apply to any legal matter as it is simply not viable to construct a comprehensive body of law from Quran alone. So, what benefit is there in redistributing certainty between the usul, giving more certainty to Quran at the expense of Sunna and Ijma’? The arguments regarding the problematic authenticity of Sunna

\textsuperscript{765} See the arguments of Shatibi in Chapter Two.
\textsuperscript{766} See also the arguments of D’Enterves in Chapter One.
are valid; however, the focus on Quran will only emphasise the concept of certainty but will not yield certain unchangeable law. It will satisfy the psychological need for certainty in religion even if it was not possible to identify what, in particular, is certain or unchangeable. The very idea of an existing, albeit unidentifiable, certainty is a good enough platform, it seems, to embark on religious ijtihad and proclaim unchangeability for its results (which might explain the multitude of different opinions that make the same claim); in Rahman’s words “[t]he contention that certainty belongs not to the meanings of particular verses of the Quran and their content, but to the Quran as a whole, that is, as a set of coherent principles or values where the total teaching will converge”. Although Rahman here is alluding to an induction of values, his reference to certainty, nonetheless, is towards Quran as a unit, that is, he is not referring to anything in particular in Quran, which, in practical terms, means that certainty is definitely associated with Quran but the question of how we can utilise it, remains unanswered.

Similar arguments were made by the Iranian philosopher Abdul Karim Surush who argues that “there are essentials and non-essentials, changeables and unchangeables, but exactly what those changeables and unchangeables are, is at the mercy of the faqih”. Surush seems to reject this dichotomy arguing that the distinction is, rather, epistemological. Therefore, what is changeable or unchangeable will be relative, it will depend on “the context of interpretation” but it does not have an independent ontological existence. Likewise, there is no objective method by which we can distinguish between the Quranic verses that use metaphors and those that must be read in their literal meaning; it depends on the context of interpretation. Yet, on other occasions, Surush’s arguments seem to reflect the same idea that he rejected elsewhere, that is, a distinction between certain and uncertain parts of Islam, religion, or Sharia. He argues that there is “one absolute essential and one unchangeable. That is the Kitāb (book) and the Sunna”. Surush’s main thesis is a distinction between religion and religious

769 ibid 13
770 ibid 14
771 ibid 15
knowledge (al-dīn wa al-ma`rifah al-dīnīyyah). Religion – which he also denotes as Sharia – is a collection of pillars, sources, and branches which were revealed to the Prophet; religious knowledge, on the other hand, is the people’s methodological and systematic understanding of Sharia. Religious knowledge is a human effort, he argues, while “pure Sharia” exists only with The Lawgiver.\textsuperscript{772} But this implies that in this life, there cannot be unchangeables. He alludes to this idea on a number of occasions where he argues that in spite of the constant changes in general human knowledge, there can still be thawābit (constants, or unchangeables) in religious knowledge, but he qualifies this, paradoxically, by arguing that the unchangeability of religious knowledge is dependent on external factors which might change, then adds “chicks are counted after hatching, and the unchangeables are known at the end of history”.\textsuperscript{773} This indicates that these unchangeables are present but cannot be known, only when the veil of the unseen is lifted can our knowledge become complete and we can then know the true religion which might very well be present now without, for the shortcomings of our knowledge, being recognized with certainty, that is, by everyone with sound reason and cognitive ability. How do we reconcile this with Surush’s rejection of there being, ontologically speaking, things changeable and others unchangeable? He sums up his arguments by the simple sentence “Islam is nothing but a series of interpretations of Islam”;\textsuperscript{774} but talks elsewhere about the pure Sharia and the revelation of truth on the Day of Judgement. It seems that Surush is taking a peculiar middle ground between accepting and rejecting the idea of dichotomizing Islam into changeables and unchangeables. He seems to argue that the dichotomy is indeed there but the unchangeable branch of it can only be revealed in the afterlife. The concept of this unchangeable is present in the mundane, even the tangible Sharia, Quran and Sunna, is present, but these remain abstract and passive elements of certainty. Their effects on life are only possible through interpretation which belongs to the uncertain, changeable domain.

Surush’s arguments only confirm the idea that the dichotomy of certainty in Islam is a false one. The fact that the unchangeable is absolutely beyond our knowledge is effectively the same as, \textsuperscript{772} Surūsh 29–30. \textsuperscript{773} ibid 78 \textsuperscript{774} Soroush 14.
in the context of jurisprudence, its non-existence. In other words, by arguing that it is unreachable it is rendered unusable, and we are only left with the relative, uncertain, and the changeable.

Other writers were more blunt with regards to the issue of unchangeability. Asma Barlas argued that unchangeability of the Quran only means that it is “unalterable”, that is, it cannot change after it was uttered by the Prophet.\textsuperscript{775} She then adds that the Quran teaches us “that everything will perish but the face of God” thus, God “is the only unchangeable in Islamic thought and practice – all else is changeable and will pass, whether we will it or not”.\textsuperscript{776}

Viewing the issue of unchangeability from a more legally-oriented perspective, Muhsin Kadavi argues that traditional Islam has compulsory criteria and standards for formulating legal opinions that “cannot be cast aside without departing from the whole framework”.\textsuperscript{777}

Therefore, reading the Quran according to these criteria can only lead to accepting unequal rights for Muslims and non-Muslims, and for men and women, etc., in short, the traditional faqih has to admit to the conflict between Sharia and human rights.\textsuperscript{778} Kadavi then brings home the main problem of the dichotomy, he argues that “the problem that traditional fiqh is facing today, i.e. disparity with the notion of human rights, falls squarely in the realm of the precepts that traditional Islam considers unchanging. Hence, the division of precepts into two categories of unchanging and changing does not solve the problem”.\textsuperscript{779}

This is evident in the case of Islamic finance. The problem of defining riba using the traditional framework of law have always yielded the same results: any increase over the original principal is riba. The primacy of ‘illa over hikma (effective cause over wisdom) will always ignore the context of the prohibition and pay heed to the form. Alcohol is prohibited for the mere effect of

\textsuperscript{775} Asma Barlas, “Hold(ing) Fast By the Best in the precepts” The Quran and Method’ in Kari Vogt 1940-, Lena Larsen and Christian Moe (eds), New directions in Islamic thought : exploring reform and Muslim tradition (IB Tauris ; In the United States and Canada distributed by Palgrave Macmillan 2009) 19.
\textsuperscript{776} ibid 22.
\textsuperscript{777} Mohsen Kadivar, ‘Human Rights and Intellectual Islam’ in Kari Vogt 1940-, Lena Larsen and Christian Moe (eds), New directions in Islamic thought : exploring reform and Muslim tradition (IB Tauris ; In the United States and Canada distributed by Palgrave Macmillan 2009) 56.
\textsuperscript{778} ibid 57.
\textsuperscript{779} ibid 58.
intoxication not for the vices that might occur due to the loss of reason; interest is prohibited for the mere fact of increase, not for the exploitative nature of the transaction. This rationale is sometimes faced with difficulties; for example, in the case of gharar (uncertainty). It is admitted that gharar is impossible to omit completely in any commercial or financial transaction, thus, the jurists, in line with the original concept of the dichotomy of certainty, divided gharar into an acceptable yasīr (light) gharar, and unacceptable fāḥish (exess) gharar, and it is down to the jurists to identify which transaction belongs to which type. These difficulties instigated the development of a host of legal trickery (hiyal) in fiqh to circumvent their effects in law without having to change the traditional paradigm. The permissibility of transactions such as murābahah, salam, ‘inah, and takaful on the one hand, and the prohibition of interest and insurance on the other, in spite of the fact that the differences between the two groups are mostly insignificant, can only be explained by the classification of the latter as unchangeable in form rather than substance, an attitude which is deeply rooted in the conception of certainty in usul al-fiqh. However, and while the juristic output of the traditional school is seemingly coherent with its precepts, the clinging of some of the modern Muslim thinkers to the dichotomy of changeable/unchangeable is less explicable and possibly less coherent. For them, the unchangeable was too sacred and too certain to tamper with its unchangeability, so they resorted to isolating its effects in law and religion generally to the degree of obsoleteness. Shahrūr turned the particular limits into ranges where movement within the range was possible; Rahman side-lined the particularity of the Quranic discourse in favour of a holistic, value-oriented reading where certainty associates only with the whole rather than the particular; and Surush, while accepting the existence of a pure and unchangeable Sharia, rejected the possibility of knowing it before the Hereafter.

In short, there seems to be a dogmatic dichotomization of Islam into changeable and unchangeable. To circumvent the rigidity caused by the unchangeable in law, the traditionalists resorted to legal trickery, while the modernists reduced its domain of effectiveness to the

minimum. The logical bases for this dichotomy are unsound and its effects are either minimal or negative. However, and due to its inextricable connection to the concept of certainty, it remains difficult to dispose of it before a solid critique to the latter.
Certainty has always been extremely difficult if not impossible to prove since it was equally difficult if not impossible to refute the arguments of scepticism. Nonetheless, humans have learned to live with the uncertain knowledge their limited cognitive capacities have allowed them. Muslim jurists and theologians, however, have always attempted to demonstrate their religious propositions to be absolute certainties. This was the underlying concept of Islamic law theory, *usul al-fiqh*, which aims to understand God’s true will from revelation and other sources. The methodology produced mixed results as revelation itself was not uniform in terms of its authenticity, semantics, context, etc., leading to a taxonomy of the sources classifying them according to their certainty. The certainty of the source, in turn, defined to a great degree the rigidity of the law engendering, thereby, a dichotomy of changeable and unchangeable law, the latter being portrayed as pronouncements of the true will of Allah. The argument of Muslim jurists and usulis is that only a small section of the law is considered unchangeable and most of it is open for ijtihad giving Sharia the required flexibility to adapt and evolve. But the problem with this argument is that the methodology of law is classified as unchangeable; therefore, even if a law is considered changeable and jurists use the present elements of the matter in question to legislate a new law, using the same methodology will not yield significantly different results. Between the pressures of modernity and the weight of the over-revered tradition, some Muslim communities, under the auspices of the nation-state resorted to secularism. With the exception of a few countries that chose to uphold traditional *fiqh* against the modern wave, and at the price of being outsiders to the modern day, most Muslim countries chose to abandon Sharia and secularize their laws. The heavy weight of traditional *fiqh* and its inability to change was to the degree that it was easier for Muslim countries to stop its practice and choose a foreign legal system than to make changes in it. There were other ways to circumvent the law other than secularism which predated the nation-state going back

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782 Nagel 12–29.
to the classical era. Judges were given high discretion in suspending hudud under any shred of doubt especially in adultery where it is almost impossible to meet the conditions for conviction.

In finance, the form of the law was upheld while its substance was diluted to near obsoleteness. In some cases, even the form is not maintained, and the violation is passed under the rule of necessity (darūra) which, in general, was used by the jurists as a get-out-of-jail card whenever applying the law caused difficulty. Throughout the history of their legal endeavours, the jurists and usulis avoided resolving the legal difficulties by changing the law, it was shielded by the certainty of its divine origin.

The objective of this research was to investigate the basis of certainty in usul al-fiqh and understand the extent of its influence on the ability of Islamic law to change and adapt.

Examples of the analysis focused on Islamic finance law. The findings can be summarized as follows:

First, Sharia, which is the main motif behind the arguments for certainty, is an obscure, difficult to identify concept. The scholars have always tried to attach a sense of certainty to Sharia but that was impeded by the obscurity of the concept. Sharia has two dimensions, first, its mundane status where it represents law and identity for the Muslims, and second, its divine status where it represents, through its sources, a connection to God and the unseen (ghayb). Sharia as a concept has not evidently been at the heart of the Islamic discourse from the beginning; it has, in fact, developed through the ages until it became in recent times almost synonymous to Islam itself. With its status as a symbol of identity for Muslims, it acquired a sense of sacredness which made it difficult to critique or question its certainty.

Second, notwithstanding the centrality of certainty in Islamic legal theory, justifying the quest for it is inexplicably rare. The usulis seem to treat the question of why certainty is necessary for law as if it was either too evident to merit a discussion or that it belonged to a different field of scholarship. Justifying the quest for certainty becomes more pressing when considering its effects on the law. Certainty induces the development of legal ruses to circumvent laws that are too difficult to apply but too certain to change. A number of Islamic financial contracts are good examples of this phenomenon. The few arguments which attempted to justify the quest for
certainty were based on the idea that God has forbidden us from following assumptions (zann) and the idea that God has promised to preserve Sharia which is not possible if doubt is accepted in its asl (origin) since doubt implies changeability. By contrast, legal certainty in Western legal theory has a clear justification, that is, stability and predictability. It allows people to know what to expect from the law. But this certainty must be counter-balanced by adaptability when social standards change, admit legal theorists. Furthermore, the concept of certainty, like that of Sharia, suffers from obscurity of meaning and definition; and the usulis who did make a systemic analysis of certainty chose to define it in the absolute sense, furnishing the way for unchangeability in the law.

Third, the Quran, which is considered the highest source of Sharia in Islam, is thought to have been preserved by concurrent testimony (tawatur) and a written record that was made during the life of the Prophet and under his auspices, both methods were considered to have delivered the Quran with perfect accuracy. In addition to this, and to complete the delivery of God’s will intact, the usulis devised a methodology of interpretation (bayan) which guarantees, they argue, the true intent behind the text, at least for what they considered as hermetic verses. None of the authoritative manuscripts of Quran, the Hafsa collection, the Uthmanic master copy or any of the companions’ manuscripts is extant today and the analysis shows that the writing of the Quran was done in very difficult conditions that it is difficult to ascertain that it was transmitted flawlessly. Similarly, the concept of tawatur, which is the main argument for the perfect transmission of Quran, relied mostly on the epistemological idea that concurrent and independent testimony produces certain knowledge such as the knowledge of the existence of Baghdad. But the argument that this concept readily applies to Quran is not water-tight and the existence of different ‘readings’ (qirāʾāt) of Quran suggest that some changes did occur during the transmission. Furthermore, and supposing the text was authentic, it was very difficult to demonstrate that the interpretation could be achieved with absolute certainty. With these results in mind, analysing the verses of riba shows that its prohibition was not a matter of contention, but its definition was very contentious. The Quranic context strongly associates riba to exploitative lending which is known in the modern sense as usury. Therefore, it is not possible to prove the prohibition of banks interest from the Quran.
Fourth, the usulis acknowledge that Sunna in the form of the major hadith collections does not qualify for the status of certainty enjoyed by the Quran. Nevertheless, it remains valid and legally binding if it is authentically sound (*sahih*), which is a reliable degree of authenticity but, nonetheless, only yields probable knowledge. Hadith, however, provided the bulk of legal material for Sharia and the usulis could not dispense with it on basis of epistemological imperfection. Their argument for its validity relied on the fact, which was known with certainty, that the Prophet and his companions all acted upon solitary testimony without insisting on corroboration. Here again, the usulis use an epistemological concept with questionable applicability as their arguments for the validity of solitary hadith failed to justify the degree of legal rigidity engendered by hadith. The scope of financial restrictions and alternative nominal contracts was greatly expanded by hadith but with much reduced certainty in comparison to Quran. Still, with the assertions of the usulis of the certain validity of hadith, the Sunnaic injunctions remain upheld despite their internal contradictions and impeding effects on finance.

The final source of certainty in *usul al-fiqh* was the concept of *IJMA* (consensus). Every aspect of *IJMA* was a moot point among the usulis; its definition, scope, validity, certainty, etc.; yet, *IJMA*, in the broad sense of scholars’ consensus, forms the main pillar upon which certainty in Islam stands, in spite of the fact that its own authoritativeness as a source and its capacity to yield certainty are matters of debate and extensive disagreements.

Fifth, considering the enormous changes modernity brought on human societies, Muslim scholars and jurists had the challenge of reviewing the classic law and legal theory in order to allow them to adapt to these changes. However, certainty in Sharia makes the task of changing the law all the more difficult. The modern scholars and thinkers who attempted to articulate new methodologies which will facilitate change and adaptability for Sharia could not depart from the established dichotomy of changeable and unchangeable in it. It seems they felt a need to preserve a place for at least the concept of certainty if not substantive certainty in Sharia. None of the new ideas, however, managed to find popular acceptance or institutional sanctioning. This is conspicuous in Islamic finance since a number of modern thinkers have offered ideas that will give it more flexibility and perhaps improve its competitiveness. Yet,
Islamic finance has not departed in its main premises from classical *fiqh* as it applied the same prohibitions and nominal contracts. Even the little variety that can be found in different jurisdictions is only a product of the variety that was found in classical *fiqh*, and the challenge for the modern scholars has become to use legal trickery to maintain the competitiveness of Islamic finance even if its adherence to its principles becomes superficial. It is concluded that the dichotomization of Sharia as changeable and unchangeable is unfounded and possibly injurious to Sharia.

It is now possible to draw some conclusions and recommendations from the findings of this research.

First, having established that certainty could not be successfully demonstrated in *usul al-fiqh*, the justification for it should be critiqued and reconsidered. One of the main concepts underlying the quest for certainty in usul is the divinity of Sharia, but the association of Sharia to the divine is vague, therefore, and to facilitate a rigorous critique for the justification of certainty, a clear understanding of Sharia’s divinity is essential. Questions that need to be answered in this regard include: what is the nature of the relationship between morals and law in Sharia and is it possible to draw distinctions between them? Is revelation to be understood as both moral and legal injunctions or only as a moral guide? Does divinity necessarily entail absoluteness? Is it not possible to have a law – supposedly divine – which God has only intended for certain time or circumstance? If Muslims can have a better understanding of what the imperatives of divinity on the law are, it will be possible to understand the quest for certainty in law in a better context.

Second, the arguments of the usulis fall short of precluding at least some doubt from the law and its sources, even the Quran. Epistemologically speaking, absolute certainty, which is the goal of the usulis, is unattainable because radical scepticism is almost impossible to refute. But this level of scepticism is not needed to refute the arguments of the usulis since none could demonstrate for usul the level of certainty attributed to, for example, the senses. Nothing in usul enjoys the certainty of one’s knowledge of the colour of an object he sees or of our knowledge of the existence of Australia. The usulis have sought absolute certainty for, *inter
alia, theological reasons but this quest must be abandoned because it only engenders unjustifiable dogma, legal rigidity, and legal ruses. Even the most established of scientific theories maintains some degree of uncertainty, not just because it is inevitable, but also because it keeps an open path to criticism, revision, and improvement. It is much better, therefore, to embrace a reasonable degree of uncertainty in mundane matters than to adhere to an artificial certainty.

Third, certainty in Sharia is not only unjustified and unproven, it is also injurious to Sharia and to Muslim societies. It ossified Sharia in its classical form precluding, thereby, the possibility for revision and improvement. To circumvent the drawbacks caused by this rigidity, the jurists developed a host of legal trickery or used the fiqh of darūra with more frequency than the concept permits. This undermines the integrity of Sharia and reflects an image of a pseudo-Sharia that conforms only superficially to its professed values. Maintaining a strict conformity to Sharia, on the other hand, entails applying a law that was applicable more than fourteen centuries ago to the modern day, which is not less injurious to Sharia than circumvention. The current argument of Sharia scholars is that societal welfare (maṣlaḥa) cannot contradict a certain law. The cases of law where arguments have been raised to change the law such as cases of hudud, or banks interest are dismissed on the basis that the certainty underlying the classical fiqh outweigh the perceived maṣlaḥa. This balance can be changed if certainty is reviewed according to the arguments forwarded by this research. Of course, more detailed research will have to be conducted on particular issues where the sources on the specific issue are studied with more focus since the certainty will vary between different issues. It is possible that not all classical fiqh will be changed but the objective is to open up these legal issues for fresh discussion of their validity and keep an open mind to the outcome of these discussions.

Fourth, the religious discourse is generally oriented towards certainty. This stands against the wave of scepticism unleashed by the revolution in science and the scientific method of inquiry. But in a globalized, inter-connected world like today’s world, it is impossible to prevent the exposure of young generations to these different discourses and methods of knowledge. Insistence on the traditional discourse will either drive people away from religion or away from
modernity. In the latter case, the rift between modernity and religiosity will only exacerbate existing problems of extremism and tribalism within and between societies. Therefore, and considering the importance of education in improving social awareness as emphasised by thinkers like Rahman and Muhammad Arkoun, it is imperative to educate young Muslim generations on the ideas of epistemology and religious history from an objective standpoint. Skills of critical thinking must not be confined to scientific higher education but taught abstractly as a learning skill and embedded in early education curricula. Furthermore, education about epistemology in religion must be linked to the history of ideological differences in Islam. Just as students are taught how jurists, when interpreting the sources differently, produced a variety of juristic opinions which were all accepted within the one sect (the Sunni sect for example); they should also be taught that the same differences in perceptions and understandings can lead to the differences between different sects in Islam like Sunna and Shi’a. The disarming of dogma as a state of mind will be conducive in the field of law. It will raise the standard of required proofs for any proposition and will, thereby, make purporting a proposition more rigorously substantiated.

Fifth, to succeed in the above recommendations or in achieving any significant change in areas of religious sensitivity as the ones discussed in this research, arguments must come from within the Islamic intellectual reserves, because Muslims, and people in general, will be very defensive against external impositions on culture or religion. Fortunately, the Islamic intellectual history is vastly rich and diverse that none of the required changes will have to be based on foreign ideas. The magnitude and range of variety start from the very concept of God and down to the minute details in the fiqh of ṭahāra (ablution and cleaning). Issues raised in this research about the fallibility of human knowledge, uncertainties regarding Quranic manuscripts, tawatur, Quranic readings (qira’at), authenticity of hadith, Authoritativeness of Ijma’, and many other issues of certainty in usul have all been discussed in pre-modern Islam with a great range of diversity in opinions which are not represented in mainstream traditional Islam. It will be a healthy practice to unearth some of the classical ideas from the school of Mu’tazila regarding Quran and taklīf (religious obligation). And considering the primacy given by Mu’tazila to the methods of reason and the value of ‘adl (justice), their perspective might give some fields of modern significance
like Islamic finance a new frame of reference from which Muslims can improve their ideas on finance without succumbing to conventional finance or ‘Islamic’ ruses. Thinking about riba in the context of justice, to give one example, while easing the unnecessary rigidity of the traditional views will furnish a review of the current prohibition of banks interest. This does not necessarily imply an endorsement of interest, but it recommends a revision under a new, less rigid, framework where factors considered will not be confined to the literal and uncontextualized interpretations of texts. And considering the problems caused by the interest-based system or the speculative nature of the industry, some prohibitions might still stand or be imposed anew under a more rational or morally structured system.

Sixth, the structure of fiqh institutions is currently improving by the inclusion of professionals as a qualitative addition to traditional fiqh scholars. However, their role is still secondary to that of the scholars when there is disagreement. Economists cannot use economic reasoning to, say, allow conventional insurance nor can pharmacologists allow pig fat in pharmaceutical products. Professors of astronomy are usually present in fiqh councils, and they can, and do, determine the exact time of Ramadan or Eid but it is down to the scholars to decide the matter, either based solely on visual observation of the crescent or based on a correspondence between the scientific opinion and, at least the possibility of, visual observation. If the scholars are not advantaged by the certainty of their sources and methods, a better balance between the professional opinion and the ethico-religious one can be achieved.

Finally, certainty in Islam is an extremely complex issue. It is underscored by fourteen centuries of a tradition of submission and acceptance, is deeply rooted in theology, and is entangled in a mesh of other complex issues such as identity, morality, and politics. Opening up a debate on it, therefore, will be vigorously resisted. But under the overwhelming pressures of modernity, no system of thought can be protected by dogma, and religions in general, and Islam in particular, will have to take the challenge of questioning some of their long-established beliefs. For this, they will have to start with the concept of certainty.
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