FATWA: THE EVOLUTION OF AN ISLAMIC LEGAL PRACTICE
AND ITS INFLUENCE ON MUSLIM SOCIETY

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**ABSTRACT**

My dissertation examines the transformation of Islamic legal discourse and the impact of that discourse on Muslim society. More particularly, it analyzes fatwas (religious legal edicts) over the course of Muslim history so as to determine how this legal mechanism was instrumental in the making and remaking of Islamic law and society. Historically speaking, substantive aspects of Islamic law developed out of the material of fatwas. In the very early stages of Islamic history there were no codified laws to guide people in their religious and social concerns, but the manner in which Muslims received guidance with regards to their religious practice was that they posed their concerns to early proto-jurists in the form of religio-legal questions, which these jurists addressed in the form of fatwas. Out of the critical mass of these fatwas, Islamic legal manuals began to be compiled and a definitive corpus of Islamic law came into being.

Essentially, my investigation looks at the development and continuing evolution of Islamic law through lens of a particular legal practice: issuance of fatwas. By examining fatwas in different periods of Islamic history from the beginning until today, I chart the transformations that take place in Islamic legal tradition(s) as a result of the encounter with changing socio-historical conditions. More particularly, my analysis draws attention to the way in which legal practices amongst jurists created discursive shifts to established norms within Islamic legal discourse on how these discursive shifts contributed to the evolution of Islamic law. Moreover, by analyzing fatwas issued from Muslim jurists from various regions and periods, I identify how fatwas were essential catalysts for historical change, which gives us a better appreciation of the interrelationship between law and society.
This historical foundation provides a basis for a diachronic assessment of the transformations that take place in Islamic legal tradition as a result of the encounter with colonialism. In latter part of my investigation, I examine how the practice and rationalization of fatwa has changed due to the ramifications of colonialism on the Muslim world. In this era, the established practices and doctrines of Islamic law were critiqued through the lens of modern Western ideas. This spawned modern Muslim movements that sought to reform Islamic law and redefine its relationship to the state and society.

After historically establishing the ideas which were advocated by reformers, my goal is to assess whether those calls for reform have actually affected the practice Islamic law at the substantive and procedural levels. I do this by subjecting fatwas issued in the postcolonial period to critical analysis, so as to determine whether the procedures or rationale of fatwas have changed in a fundamental way. The larger themes that I address in my latter analysis is whether this modern trend amongst some Muslim thinkers and jurists towards contextually oriented legal concepts represents a lasting shift away from the traditional textually oriented legal methodology to produce a new type of discourse that is revolutionizing Islamic law or is it a passing phenomenon that will not make a lasting impact on how Islamic law is derived in the future. Fatwas are the key starting points in addressing these question because they represent the most elemental dimensions of Islamic law and the new legal developments within it. So, they offer vistas on how Muslim religious and legal practice will undergo a transformation in the future.
DEDICATION

For Misala.

Thanks for your continuous love and support.
I would like to thank my dissertation committee members for their advice, support, and patience through this long process of completing the dissertation and their mentorship throughout my years as a graduate student at Temple University. I would like to especially thank my advisor, Dr. Khalid Blankinship, for his valuable comments on my dissertation manuscript. I would like to thank all of my professors at Temple University, whom I learned a great deal from over the many years of studying and conversing with them. Lastly, I would like to thank my colleagues and the staff at Temple University’s Department of Religion for their support and their contributions to my intellectual development through the many engaging interactions we had during my tenure in the department.
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INTRODUCTION

My investigation examines the transformation of Islamic legal discourse and the impact of that discourse on Muslim society. More particularly, it analyzes fatwas over the course of Muslim history so as to determine how this legal mechanism was instrumental in the making and remaking of Islamic law and society. A fatwa is an Islamic legal edict on new issues that confront Muslim society. This activity dates back from the very inception of the Islamic social order, as we will come to find out in the upcoming chapters. Yet despite its early origins, fatwa was integral to shaping the Islamic legal tradition over the ages and continues to be a legal product that is shaping contemporary Islamic law. This dissertation will examine the evolution of this legal practice.

Historically speaking, substantive aspects of Islamic law developed out of the material of fatwas. This is because fatwas are the ‘atomic’ components of this law and hence they tell us a lot about its anatomy. In the very early stages of Islamic history there were no codified laws to guide people in their religious and social concerns, but the manner in which Muslims received guidance with regards to their religious practice was that they posed their concerns to early proto-jurists in the form of religio-legal questions (istiṭfa’), which these proto-jurists addressed in the form of fatwas. Out of the critical mass of these fatwas, Islamic legal manuals began to be compiled and a definitive corpus of Islamic law came into being.

Essentially, my investigation looks at the development and continuing evolution of Islamic law through lens of this particular legal practice, issuance of fatwas. By examining fatwas in different periods of Islamic history from the beginning until today, I chart the transformations that take place in the Islamic legal tradition(s) as a result of the
encounter with changing socio-historical conditions. More particularly, my analysis draws attention to the way in which legal practices amongst jurists created discursive shifts to established norms within Islamic legal discourse and how these discursive shifts contributed to the evolution of Islamic law.

Moreover, by looking at the development of Islamic legal tradition through the lens of fatwas we get a sense of how the internal dynamics of the religion of Islam led to this legal formation. Western scholarship has emphasized the foreign elements that have contributed to the rise of Islamic law, but have given very little attention to the origins of the law and the legal tradition from the discursive and social roots of the religion itself. This is not to say that external factors did not contribute to this legal framework or that the practice of fatwa making was the only contributing factor, but it is important to understand the dynamics of these developments from the internal sources of the religion as well. This work seeks to fill that lacuna.

On the other hand, this investigation not only seeks to map the transformation which have occurred in the Islamic legal discourse and tradition through the examination of its elemental components of fatwas, but also seeks to assess the impact that this discursive legal practice on the history of Islamic Civilization. There is a reciprocal relationship between fatwas and social change in Muslim society because fatwas have their origin in the social and religious issues that have arisen in Muslim society, since they are legal responses to those issues. So, they play the role of indicators of social change as they are a legal representation of that change. On the other hand, since they are legal responses to social changes, they either facilitate those changes by legitimating them or hinder the establishment of those changes by branding them illegitimate.
In addition, fatwas have their origin in civil society because of their dialogical character. This is because they are a social exchanges between the public and the *mufti* who legally responds to the public’s concerns. Although it is not an exchange between those of equal social status, the process of seeking a fatwa is nonetheless is a dialogical activity which stems from the concerns of the Muslim public and thus this process is spurred from factors in the social environment. We will see later how this peculiar character of fatwa is embedded in the discursive sources of Islam which encouraged its dialogical form.

Before proceeding with an outline of the topics that are addressed in this inquiry, I would like to say a few words about the historical materials used in the first three chapters of my research. Modern Western historical scholarship has problematized many of the historical reports about the first two hundred years of Islam claiming that such reports are not authentic reflections of the actual events that took place. This assertion poses a problem for anyone who seeks to make historical claims about the early period of Islam. On the other hand, more recent voices in Western historical criticism have come to question the categorical nature of this assertion that has dominated western circles of scholarship for much of the 20th century.

For instance, the work of the German *hadith* critic Harold Motzki, entitled The Origins of Islamic Jurisprudence, was an extensive study on certain sections of the *Musanaf* of Abdul Razaq al-San‘ani (d. 211 AH), a collection containing opinions about Islamic religious practice from religious figures in the first two centuries of Islam. After

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1 Also see Motzki’s more recent work *Analysing Muslim Traditions: Studies in legal, Exegetical and Maghazi Hadith*, pg. 3, where he critiques some of Schacht’s assertions about the inauthenticity of early Islamic traditions.
analyzing the opinions (i.e. fatwas) of religious figures dating from the late first and early second century of Islam, Motzki argues persuasively that the reported legal opinions found in this work can be safely dated to that period. Gregor Schoeler is another western scholar whose works have also questioned the prevailing Western assumptions about the historicity of early Islam.²

The new developments in Western historical criticism create room for researchers to make claims about the early Islamic period with some confidence. Yet whether you believe that the historical reports about early Islam, which are used in the initial part of this study, are authentic or not does not take away from what this study seeks to accomplish. What matters most for this investigation is that those who constructed the Islamic legal tradition believed that such reports were accurate and consciously appealed to these representations when forming this tradition. With this in mind, the debate within Western historical scholarship about the historicity of early Islam will not be of concern to this investigation, as my main concern is the construction of a legal tradition regardless of whether the historical information used in that construction was authentic, from the western point of view, or not.

With this prelude, the following paragraphs contain a synopsis of the chapters of this dissertation so the reader is primed to the issues that will be addressed in each chapter. The first chapter deals with the substantive origins of Islamic law and how it differs from other legal systems. There is a preliminary discussion of the epistemological and normative basis of Islamic law since Islamic law is anchored in a theological and ethical understanding of reality and not in state power. I go on to trace the changes that

² For example, see his works The Biography of Muhammad: Nature and Authenticity and The Oral and Written in Early Islam.
the Qur’anic discourse introduced to seventh century Arabian society both on a conceptual and practical level as a prerequisite to understanding the establishment of the Islamic legal tradition in general and the practice of fatwa in particular. The purpose of this chapter is to lay the conceptual framework and the social context for the formation of an Islamic legal culture.

In chapter two, I examine the discursive origins of fatwa by examining the fatwas during the period of prophecy. My argument here, is that the process of ifta’ (i.e. fatwa production) is fundamentally a dialogical activity that has its discursive roots in the dialogical manner by which both the Qur’an and prophet engaged early Muslim adherents. Then I look at some of the fatwas in the post prophetic period, where the early Muslim community faced new socio-political challenges and how Muslims resorted to activity of ifta’ as a socio-legal mechanism for resolving there problems. In their resolutions to these problems, I show that early Muslims employed various approaches of scriptural hermeneutics and legal reasoning that would later become standardized legal precepts in Islamic legal methodology and theory.

Chapter three analyzes fatwas from the late first century and second century of Islam for the sake of discovering the defining features of the fatwa tradition. Here I show how fatwas became the vehicle by which the Qur’anic ethico-legal norms become actualized in socio-historical context of Islam. I show how the Islamic legal norms and injunctions that were promulgated by the Qur’anic discourse and prophetic practice became interpreted, applied and re-interpreted in various historical and cultural contexts through the process of ‘ifta. The forms legal reasoning and the interpretive devices employed in these fatwas became the basis of an Islamic legal discourse.
Chapter four discusses the emergence of a distinct Islamic legal tradition in the third/ninth through fifth/eleventh centuries AH/CE. I do this by charting the formation of Islamic legal theory and Islamic legal doctrines/schools and show how the substantive and formal roots of these disciplines and institutions emerged from the fatwas of previous generations of Muslim jurists. Moreover, I spell out the dialectical relationship that developed between the activity of *ifta* and these new legal formations. Past legal practices played a very determinative role in the formation of the Islamic legal tradition. I describe the nature of the relationship of the past to the Islamic legal tradition by looking at the ideas and institutions that came to embody that tradition and how these ideas and practices were a direct product of the fatwas of past jurists whose legal pronouncements informed the content of Islamic legal doctrines developed in subsequent centuries.

Chapter five I show that the establishment and maturation of Islamic legal schools (i.e. *madhabs*) and the legal doctrines that define them, led to a structuring of the process of *ifta* where this activity became governed by a set of discursive rules and procedures that contributed to the greater formalization of this legal practice. Muslim jurists within each school now began to lay down rules on how fatwas were to be issued within the confines of the legal doctrines of those schools. So as to understand the form that fatwas take in the post-classical period of Islam, I delineate those discursive rules for fatwa production as found in what is known as *adab al-fatwa* (i.e. the etiquette of fatwa) literature.

I use chapter six to illustrate more concretely how the discursive rules of fatwa, which were defined in the previous chapter, were applied in actual fatwas of the period between 1100 CE and 1900 CE. This was the period when legal schools/doctrines
(madhabs) and legal theory (usul al-fiqh) were fully established and firmly rooted in Islamic legal practice in ways that they exerted the most influence on Islamic legal production. The manner in which I accomplished this task is by sampling and analyzing fatwas from this period. In my selection of fatwas I choose representative samples of major fatwas so as to show the nature of the activity of ifta during this era and how this activity had been transformed since the classical age of fatwa. Moreover, this chapter demonstrates how fatwas helped Muslim society keep pace with social change by modifying the legal corpus that governed it.

The seventh and final chapter, is concerned with outlining the historical effects that European colonialism had on Muslim society and law in the nineteenth and twentieth centuries. The intellectual challenge posed by Western modernity on established Muslim ideas and institutions had a seriously destabilizing outcome. I document the impact of modernity on Muslim thought and society, focusing on the challenges presented to Islamic legal institutions and how these challenges effected the Islamic legal discourse in the colonial period. After presenting this historical foundation, I gauge the impact of modernity on the postcolonial Islamic legal discourse by analyzing fatwas produced by the International Islamic Fiqh Academy of the Organization for Islamic Cooperation. The purpose of this analysis is to assess how Islamic law and legal institutions are negotiating the challenges of modernity through the use of traditional legal practices such as fatwa as well as gauging the extent to which new approaches to legal reasoning represent substantive transformation in Islamic legal discourse and practice.

Ultimately, the primary question that my dissertation seeks to address is how the legal practice of issuing fatwas (‘ifta) played an influential role the in evolution of a
peculiar legal tradition. Moreover, this investigation sheds some light on how this practice was a social instrument that facilitated the formation of an Islamic society that was centered on legal norms and how this practice allowed those legal norms to adapt to socio-historical changes over time. So, fatwas in a way are a discursive barometer to measure change and continuity in Islamic civilization.

Before I begin this investigation, I want to define my understanding of what constitutes a fatwa for the purpose of this study. I define a fatwa as any statement, oral or written, that establishes the legitimacy or lack thereof of an action or position, and is pronounced by someone who is vested with legal authority whether the origins of that authority lay in political institutions or the religious and social sphere. In delineating fatwas in this way, I exclude most juridical decisions (qada’) from being fatwas because these verdicts did not necessarily establish the legitimacy of human actions, at least in the history of Islamic law. In most cases these decisions merely adjudicated whether those actions were within the bounds of the established norms. At the same time, fatwas are different from court decisions because they are not inherently political act as they were not backed by state sanction as in the case of juridical verdicts.

Moreover, given this definition of a fatwa, I take the statements of early Muslim jurists as fatwas even when we do not always know the social circumstances that brought about their pronouncements. This is because their statements that carried legal implications were not binding during their lifetime in the same way they came to be religiously binding when later generations of legal specialists selected some of those opinions to be especially authoritative. Even when some of the pronouncements of this early jurists made their way into the body of Islamic law that came to be known as fiqh,
at the time that these legal statements were made they functioned like fatwas in the sense that they were legal responses to religious issues that were of concern to Muslim society. Hence, I use such statements in my work as fatwas. Furthermore, this definition of a fatwa includes short treatises that were written by later legal authorities that respond to new issues that arose in Muslim society even though we do not have the specific questions that were posed to them, which generated their response.
CHAPTER 1
THE QUR’AN AND THE FORMATION OF AN ISLAMIC LEGAL CULTURE.

Introduction:

As Islamic law, most broadly, is the subject of this investigation, it is important to recognize how the formation and structure of this law differs from other legal systems. So this first chapter is a preliminary discussion of the epistemological and normative basis of Islamic law as an antecedent to understanding the role that fatwas played in developing that law. This prelude is important because the immediate social environment for which Islam was revealed was not a legal culture that would have supported the development of a legal system. Hence, some very fundamental transformations had to take place on a conceptual and cultural level before an Islamic legal system could evolve and the legal practice of fatwa, which would give shape to this system, could take root. This chapter is very much about that religio-cultural transformation that takes place in seventh century Arabian society.

Moreover, these socio-historical changes are interconnected to the peculiarities of Islamic legal system. A peculiar feature of Islamic law is that it has its roots in particular discourse and set of discursive practices; thus it behooves us to explore that discursive formation in some detail before diving into the main subject of fatwas so we can understand the peculiarities of this legal practice and how it fits in the entire Islamic legal scheme. The particular discourse and discursive practices I am referring to are the Qur’an, the sacred text of Islam, and the reported practice of the Prophet Muhammad. More particularly, I allege that these texts are not only discourses in the normal linguistic sense, but are discursive formations in the Foucauldian sense. But in what ways can the
Qur’an, for example, be said to represent a Foucauldian discourse? If I take Foucault's notion of discourse to mean: “a systematic and relational sequence of meaningful statements…..that influence practices and give expression to values, behavior, and worldviews of social groups,” \(^1\) then the Qur’an can certainly meet this definition of discourse in several ways.

First, although the Qur’an is considered a text and texts do not necessarily correspond to discourses, yet at times both text and discourse are used interchangeably where text is considered the material product of the communicative process of discourse.\(^2\) Moreover, the manner of revelation of the Qur’anic text in many ways resembles Foucault's notion of discourse “as a 'dispersion of statements' that follows certain regularities...”\(^3\) In that sense, the Qur’an is comprised of a heterogeneous set of meaningful statements that were revealed over a period of time and in various places through a series of revelatory events.

Second, regarding the systematic aspects and regularities found in these heterogeneous statements, even though these Qur’anic statements were revealed at different times and are arranged in the text in what may appear to the outsider as being


randomly juxtaposed to one another in that they are neither arranged chronologically in the order of their revelation nor narratively so as to make a story. Nonetheless, Qur’anic statements all reinforce one fundamental message: i.e. *tawhid* -- oneness of God and all of its corollaries (i.e. *islam*—submission to God).[^4] In this way, the Qur’anic text contains its certain regularities that would qualify it as a discourse on the grounds that all of its statements have one underlying theme.

Third, in terms of how Qur’anic statements influenced practices and gave expression to values, behavior, and worldviews of social groups, the remaining sections of this chapter will demonstrate in greater detail how they have impacted society in these arenas by charting the cultural and socio-economic transformations that occurred to pre-Islamic Arabia at the historical juncture that this society became exposed to this discourse. Suffice it to say at this point that the Qur’anic text had a profound impact in reshaping people's conceptions of reality and their ways of life in whatever society it became an authoritative text, hence, giving one more reason to qualify the Qur’an as a discourse onto itself. I will trace the changes that the Qur’anic discourse introduced to seventh century Arabian society both on a conceptual and practical level as a prerequisite to understanding the formation of Islamic legal system in general and the practice of fatwa in particular. This is because it was as a result of these socio-historical changes that prepared the ground for the cultivation of an Islamic legal culture as a foundational step to the formation of a new legal system. In doing this, I intend to show that “Discourses assume that ideas structure social spaces, and therefore ideas can play a significant role in historical change.....because ideas produce historical transformation and not simply.

[^4]: More will be said about this subject later in the chapter.
reflect them, discourse theory teaches us to be very attentive to small shifts in how ideas are expressed in language.”

It is with this in mind that I will investigate in the next section the religious and cultural shifts in seventh century Arabia with particular attention to changes in the connotations and usages of the Arabic language. Changes in the linguistic discourse will be used as a measure of change in culture and vice versa, changes in culture will be reflected in changes in language. In carrying out this investigation of the transformation of seventh century Arabian society by the Qur’anic discourse, I will employ pre-Islamic Arabic poetry as evidence of the religious and cultural worldview that was held during this period. This may seem peculiar way to approach the subject, but because of the scantiness of traditional historical records documenting the religious and cultural life, poetry from the period will serve as a good measure.

The idea that Arabic poetry is a good indicator of Arab history and culture prior to Islam goes back to the advent of Islam itself. It was the companion of the Prophet Muhammad Ibn ‘Abbâs who said “Poetry is the historical registry (diwan) of the Arabs.”

This is because prior to the coming of Islam to Western Arabia (i.e. Hijaz), Western and Central Arabian societies did not keep historical records of events aside from noting these things in their oral transmission of poetry and other like mediums as is the case in most simple societies. So, in a sense, Arabic poetry is the best reflection we have of the

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6 See al-Khatîb al-Baghdâdî’s *al-Jâmi’ li-akhlâq al-râwî wa-âdâb al-sâmi’* for reference to this statement.
attitudes and beliefs that Arabs had in the more western and central regions of Arabia\textsuperscript{7} prior to Islam. Yet this poetry as a discourse did not simply reflect these things, it in many ways gave rise to these attitudes and beliefs.

In the second section of this chapter, I will draw attention to the socio-economic transformations that the introduction of Qur’anic ideas produced in Arabian society of that period. Ibn Khaldun's social concept of 

\textit{asabiyya} and Karl Polyani's economic concept of socially 'embedded' economies are important constructs that will be employed in helping us understand the socio-economic realities of Arabia at that time and the nature of the transformation of those realities by the Qur’anic discourse. Once this background is established, we will have greater understanding of both conceptual framework and the social context for the formation of Islamic law.

\textbf{The Advent of Islam and the Religio-Cultural Transformation of Seventh Century Arabia:}

The introduction of the Islamic religion to the Arabian Peninsula produced tremendous changes in the socio-economic conditions and the political and cultural milieu from what had been practiced in earlier. Revelation of the Qur’anic message reshaped the beliefs, values and practices of Arab society in ways that sometimes broke with previously established patterns of life and sometimes reformed those patterns in ways that suited this new message. One way of measuring the changes inspired by this

\textsuperscript{7} I say Western and Central Arabia here because I restrict these assertions to communities that resided there. As for southern or northern Arabia, Arab peoples who inhabited these areas had their own civilizations or were part of larger civilizations where historical records are found to give us an idea of the history and events in those regions. Yet, we focus our attention in this inquiry on western area because it is the part of Arabia known as the Hejaz and the surrounding nomadic regions because it was the immediate context in which Islam was formed and the Qur’an was revealed.
new message is to look at how the Qur’an shifted Arab people’s religio-ethical orientation by changing the connotation by which certain linguistic terms were being used.

Izutsu, the 20th century linguistic and Islamic studies scholar, analyzes the ethico-religious terms of the Qur’an with respect to how such terms were being used prior to the revelation of the Qur’an. In doing this, he highlights the shift in connotations of Arabic ethical terminology during the period in which the Qur’anic discourse was introduced. He establishes this historical explanation by looking at the poetic literature of the time and inferring from that how the Arabs conceived reality and responded to it. It must be remembered that poetry was the only form of preserved oral record which gives a sense of how the pre-Islamic Arabs viewed the world.

For instance, Izutsu scrutinizes this poetry and shows how the idea of generosity (karam) was a much revered virtue among pre-Islamic Arabs. But this virtue was done in a spirit of pride and vainglory and was usually practiced in an extravagant and impulsive way. Some of these points are indicated in the following verses that are found in the corpus of pre-Islamic Arab poetry known as the Mu’allaqat: “Whoever makes of generosity a shield for his personal honor makes it grow. But whoever neglects to guard himself from blame, will be blamed.”

Izutsu shows how this concept of generosity was transformed by the Qur’anic revelation. Although Islam continued to place high value on the virtue of generosity and charity as the pagan Arabs had done before, the Qur’an gave the concept a completely new orientation by considering the intent behind the act of generosity and placing limits on how it ought to be practiced. Consider the following Qur’anic verses: “O believers,

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8 Izutsu, 1959, 76.
you must not make your charity vain by grudging and making disagreeable remarks, as one who expends of his wealth simply for the pleasure of an ostentatious display, and not from his belief in God and the Last Day. Such a man may be compared to a smooth stone covered with soil; a rainstorm smites it and leaves it smooth and bare. Though they amassed great wealth, they can make naught out of that, for God guides not the Kafirs (ingrates).”

It can be inferred from the verse that although charity and generosity are virtues, they cease to be so when they are done with the spirit of ostentatiousness, which turns them into vices. Similarly, extravagance or miserliness in the act of generosity is reproached in the Qur’an: “The true servants of the Merciful God are….. those who, when they spend, are neither prodigal nor miserly, but whoever takes the constant mean between the two.”

As can be seen from the examples above, the Qur’an reformulated the old pagan concept of karam (generosity) by disassociating the term from its old connotations of individual boastfulness and pride and giving it a new value by associating it with sincerity of intent and moderation. In this way, the same act of generosity performed during the period of Jahiliyah (pre-Islamic Arabia) and the period of Islam carried completely different values due to the intent behind the act. In the concept of karam, we see the notion of continuity in the fact that the Arabic linguistic term and the act is retained in the Islamic fold, yet there is change in the sense that the term is given a new orientation and is disassociated from some of its pre-Islamic connotations.

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What this example indicates is that the introduction of the Qur’anic discourse in Western Arabia in the 7th century produced a shift in the value system of Arab society. Yet how did the Qur’an effect this shift? The shift in the value system was premised on the change of the conception of reality that the Qur’anic discourse brought about in 7th century Western Arabia, where nomadic/tribal ideals predominated and Islam first took root and later spread to other parts of Arabia. Yet I will concern myself with only three dimensions of that change that are most relevant for this discussion: change in the theological conceptions, the ethical precepts, and customary practices by which Arabian society operated. The change in the ethical precepts and customary framework is premised on the change in the theological conceptions. So I will begin by discussing the theological changes first.

In pre-Islamic Western Arabia the predominant religious outlook and practice was idolatry where gods were worshiped by the tribes of the region each tribe having a particular deity which they worshiped. Although the idolatrous Arabs believed in the high god Allah who was a creator of all things and was to be called upon for assistance in the most dire circumstances. But like most conceptions of high gods, Allah did not play a major role in their lives and was perceived to be distant from the day to day human affairs. So the god Allah of the pagan Arabs of Western Arabia was recognized as a high god, but not explicitly nor exclusively worshiped by them. Moreover, because of His distance from human affairs, the pre-Islamic Arabs felt there was a need of intermediary gods who could bridge the chasm between Allah and humanity.

The Qur’an demonstrates this pre-Islamic conception of Allah among the pagan

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Arabs in several verses. In reference to Allah being the creator, it says: “If you ask them (i.e. the pagan Arabs) 'Who created the heavens and the earth, and who facilitates (for your good) the sun and the moon?’ They say Allah”\textsuperscript{12}. In reference to Allah being called upon in dire circumstances the Qur’an attests: “And when waves enshroud them like dark clouds, they cry to Allah making their faith pure to him alone.”\textsuperscript{13} Yet once they achieve safety their attitudes towards Allah changes once again and reverts back to polytheism: “But when He brings them safe to land, behold they begin [once again] to ascribe partners [to Him].\textsuperscript{14}

So God occupied a marginal position in pre-Islamic Arab religious consciousness. Nothing demonstrates this more clearly than their conception of human destiny. The question of human fate preoccupied the polytheistic Arabs more so than any other cosmological question including the question of human origins. This problem is reflected in pre-Islamic poetry where the problem of eternal life was one of its favorite subjects, despite it being an unattainable goal that pre-Islamic poets were aware and drove the polytheistic Arabs to an outlook of pessimistic nihilism: “what are we (if were not a combination of body and soul). The body, we go down with it (at our death) under the earth, while our souls (pass away) just like a gust of wind”\textsuperscript{15}

To the polytheistic Arabs, human affairs and ultimate human fate were controlled not by the creator god Allah but by an impersonal force named \textit{dahr} (time/fate). \textit{Dahr}

\textsuperscript{12} Qur’an, 29:61.
\textsuperscript{13} Qur’an 31:31-32.
\textsuperscript{14} Izutzu, 1964, 101-103.
\textsuperscript{15} Izutzu, 1964, 123-124.
was seen as a destructive force that brings all things to decay and brings suffering to human life.\textsuperscript{16} Her is how this entity was represented by one of the most famous pre-Islamic poets Imr' al-Qays: “After having seen the death of (my grandfather) the king of Harith, and (my father) Hujr the Peerless, who possessed so many mansions, how could I hope for tenderness from the suruf (turns; i.e. vicissitudes) of Dahr, which I know never leave untouched even the lofty mountains of massy rocks?”\textsuperscript{17} Another verse of pre-Islamic poetry it represents dahr in the following fashion: “the daughters [i.e. powers] of dahr have shot at me from a place I cannot see. What can a man do when he is shot at without being able to shoot back?”\textsuperscript{18}

These verses show that the polytheistic Arabs saw that human affairs, and especially death, was in the hands of the impersonal force of dahr and not the supreme creator god Allah. Given the irresistible and merciless nature of this force that dominated over human life, it was futile for anyone to escape its clutches bringing about a more pessimistic picture of human life. Although, Allah as high god existed in the consciousness of polytheistic Arabs of central Arabia, He occupied a marginal place in that consciousness compared to other beliefs and values that played a more central role in Arabian life.

Before, I discuss the prized values and practices of pre-Islamic natives of central Arabia, I want to spell out here how the Qur’anic discourse transformed polytheistic Arabs theological and religious notions either by the introduction of new religious ideas

\textsuperscript{16} Izutzu, 1964, 126; Watt, 1988, 26.

\textsuperscript{17} Izutzu, 1964, 126.

\textsuperscript{18} Izutzu, 1964, 126; additions to the translation in brackets included by author.
or modifying their already held views. In the first place, the Qur’anic discourse introduced a different concept of Allah from what most of the Arabs of Western and Central Arabia had recognized. This alteration was crucial as the rest of the Islamic message rested upon it: rather than Allah of the polytheistic Arabs being only a god amongst other gods, albeit a high god, He was the only god, hence the only one worthy of worship and adoration.

Allah could no longer be a creator god who was distant from human consciousness and affairs, but was to be propelled to the very center of human consciousness by the Qur’anic discourse. This was because He was represented by the Qur’an not only as the Creator, but He was also sustainer and determiner of all affairs in His creation including the affair of humankind. So the understanding among polytheistic Arabs that human destiny lay in the hands of the impersonal power of *dahr* was transferred by the Qur’anic discourse to be in the hands of Allah: “It is He [Allah] who has created you from clay, then he determined a term [for your life];”19 “No soul ever dies except with the permission of Allah, at an appointed time;”20 “And Allah created you and what you do.”21

So what emerges from the Qur’anic discourse about the nature of Allah is an ameliorated notion of a deity that is omnipotent and purposeful and thus worthy of greatest attention that can be given by humans. This discourse in a sense eventually pushed out ideas such as *dahr* that dominated polytheistic Arabs’ consciousness and

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19 Qur’an, 6:2, translation by Izutsu, 1964, 130. Also see Watt, 1988, 27 for an elaboration of these themes.

20 Qur’an 3:139; Izutzu, 1964, 130.

21 Qur’an 37: 96. Translation by the author.
placed this new image of Allah at the core of this consciousness by shifting their understanding of the ontological importance of Allah and the role He should occupy in human life as the only lord that should be worshiped and obeyed. This understanding is crucial to comprehending the theological motive that underlies action in Islamic law, whose connection I will demonstrate later in this chapter.

Closely related to the notion of the centrality of Allah to humans is another theological concept which the Qur’anic discourse introduced in Arabian society of the seventh century and that is the concept of a resurrection and afterlife. This is one of the most difficult concepts for the polytheistic Arabs of Western Arabia to accept due to their rooted belief that there was nothing to expect after the perishing of the present human life. This attitude is attested by pre-Islamic poetic discourse: “What are we (if we are not a sort of combination of a body with a soul?) The body, we go down with (at our death) under the earth, while the soul (passed away) just like the gust of wind”\(^\text{22}\).

Furthermore, the Qur’anic discourse reinforces this portrayal of the polytheistic Arabs having a very skeptical attitude towards an afterlife. In the following verse it represents them as disbelievingly questioning the notion of resurrection: “Who shall give life to bones when they have rotted away?”\(^\text{23}\). In another verse, the polytheistic Arabs are shown to explicitly reject any notion of afterlife and affirm their belief in the human destiny is solely controlled by \textit{dahr}: “They say there is nothing but this present life of ours; we die and we live; and it is only Time [i.e \textit{dahr}] that destroys us.”\(^\text{24}\).

\(^{22}\) Izutzu, 1964, 124

\(^{23}\) Qur’an 36:28; translation by the author.

\(^{24}\) Qur’an 45:24; arguments and translation adapted from Izutzu, 1964, 90.
verse, “They say it is only our worldly life and we will not be resurrected.”

So the concept of an afterlife was something completely alien to Arab thinking even though some of the pre-Islamic poetry attests that this concept began to creep in the thought horizons of some the polytheistic Arabs as a result of the influences from the interaction with Arab Christian and Jewish communities found in Arabia and beyond. The Qur’anic discourse inserted in the polytheistic Arab discourse the idea that there was something beyond our present state of existence and that this life was but one stage in the various phases of human life. Already in the content of the very first revealed chapter (surah), of the Qur’an,27 Sūrah Al-‘Alaq, we have an allusion to a resurrection: “unto thy lord all must return.”

Moreover, the concept of hereafter played a very functional role in influencing attitudes and behaviors because this meant that beliefs and actions in this world would determine ones existential states in the hereafter and hence one would be held accountable for deeds beyond the means by which people are held accountable for them in this world. Take for instance one of the early chapters revealed in the Qur’an that assert the concept of resurrection and divine judgment:

When Earth is shaken with her (final) earthquake.  
And Earth yieldeth up her burdens,  
And man saith: What aileth her?  
That day she will relate her chronicles,

25 Qur’an, 6:29, translation by the author.


27 Some traditional Qur’an commentaries tells us that this chapter (surah) was revealed in two parts in distinct revelatory events and the verse in question appears in the second half of the surah. So the verse was not disclosed in the very first instant of revelation as the first half of the surah.

28 Qur’an 96:8, author's translation.
Because thy Lord inspireth her.
That day mankind will issue forth in scattered groups to be shown their deeds.
And whoso doeth good an atom’s weight will see it then,
And whoso doeth ill an atom’s weight will see it then.29

This, of course, would revolutionize the way by which the polytheistic Arabs viewed life and specifically how they viewed morality and human responsibility. But to appreciate how the Qur’anic discourse transformed the attitudes and moral worldview of the peoples of 7th century central Arabia, we have to understand how their previously held cosmological beliefs affected their practice. The belief amongst the polytheistic Arabs that death meant the existential end of life produced in them a pessimistic conception of life which is reflected in their poetic discourse. This discourse often expresses their frustration at not being able to achieve earthly immortality and hence the futility of life: Never, never think that riches can make their possessor immortal.”30, “Thou seest a man ever yearn and pine for length of life: but what is long life's sum but a burden of grief and pain?”31, “All that is pleasant must be snatched away, and everyone that gathers spoil is spoiled in turn.”32

This nihilism that pervaded the attitudes of the polytheistic Arabs led to a hedonistic approach to life where lust, lechery, and intoxication were glorified to assuage the futility of life. Izutsu says that one of the striking verses that correlates the Arabs nihilism and hedonism is a verse by the famous poet Tarafah in one of the most famous


30 Izutsu, 1959, 42

31 Izutsu, 1959, 43

32 Izutsu, 1959, 43
odes of pre-Islamic Arabic poetry: “Well now, thou who censurest me because I attend the turmoils of war and because I cease not to pursue pleasures, canst thou then eternalize my existence? But since thou art unable to defend me from eternal death, pray allow me to forestall it with what wealth I possess.”

To attest further from pre-Islamic poetry that it is replete with verses about wine, women, and wealth here are the following verses: the poet 'Abid says “We bid up the price of all old wine,... whilst we are sober; and we hold of no account, in pursuit of its delights the mass of our inherited wealth, when we are drunken;” Tarafah says: “…at eventide a singing girl comes to us in robes striped and saffron colored; wide is the opening at her bosoms, delicately soft her nakedness when the fingers of my companions touch it and caress.” Labid says: “how I take pleasure in quaffing pure wine in the morn, holding close a girl while her nimble fingers touch the strings of her lute.”

Yet the polytheistic Arabs were not completely deprived of virtues and had a code of chivalry (mururwah) by which the governed their interactions with each other. These virtues included great propensity to generosity, courage and ultimate loyalty to their tribal affiliations so as to honor the reputation of their tribes and reinforce their solidarity. I mentioned at the beginning of this section the concept of generosity (karam) upheld by the polytheistic Arabs and how the Qur’anic discourse shifted the

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33 Izutzu, 1959, 43
34 Izutzu, 1959, 45.
35 Izutzu, 1959, 44.
36 Izutzu, 1959, 45.
37 Goldziher, 1966, Vol 1, 22.
38 See Izutzu’s elaborate discussion of these individual virtues in The Structure of Ethical Terms in Koran pgs. 67-88.
meaning of this term and its practice. So, it would pertinent to discuss the virtue of loyalty among the polytheistic Arabs.

Loyalty (wafa’) was a cardinal virtue amongst the polytheistic Arabs of central Arabia. Loyalty, for them, meant a faithful devotion and self-sacrifice towards kinsmen and other peoples with whom one had a bond. In the Mu'allaqat, the famous poetic odes of the polytheistic Arabs, the poet Zuhair underlines the importance of loyalty in Arabia: “He who proves faithful to his covenant escapes blame.” Yet, I have alluded to the idea that the ultimate aim of the chivalrous code of muruwwah which structured the polytheistic Arabs social actions was to perpetuate the tribal ethos and loyalty (wafa’) of the individual to his/her tribe which stood as the central virtue of that code. Loyalty to tribal solidarity and honor took consideration above all other virtues as is demonstrated in the verse by Duraid ibn Simmah: “I am of Ghaziyyah (name of his tribe): if she is in error then I will err; And if Ghaziyyah be guided right, I will go right with her.”

One can also conclude from the attitude expressed in such verses, as Izutsu has done, that the tribal ethos was the only way to “preserve the balance of good order among the people” because one was reluctant to do things that would endanger or shame their tribe. Moreover, tribal solidarity must have had a tempering effect on the individual nihilism and hedonism that so marked the polytheistic Arabs attitude to life because they in a sense projected their individual desires for immortality to the continuity and honor [hasab] of their ancestors as embodied in the tribal grouping.

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39 Izutsu, 1959, 78.
40 Izutsu, 1959, 49; material in parenthesis are has been added.
41 Izutsu, 1959, 55.
Izutsu also concludes from the polytheistic Arabs tribal feelings that even moral virtues were not so much an individual property as much as they resided in the group (tribe): “moral virtues were rather a communal possession inherited from father and forefathers. A man's honor or glory.... always came to him as an inheritance within the tribe”\(^{42}\). Izutsu quotes the following per-Islamic poem to reinforce his point: “We inherited our glory from our fathers. Lo, it has grown in our hands to a lofty height”\(^{43}\).

So much were both virtue and vice seen as group possessions, the polytheistic Arabs customs often held the whole tribe accountable for the actions of its members.\(^{44}\) If an infraction was committed by a person from a particular tribe against a member of another tribe, the tribe that was aggressed against would seek revenge by committing the same or greater infraction on a member of the aggressor's tribe even when they could not carry out their revenge against the actual perpetrator.

To recapitulate, Izutsu argues that pre-Islamic Arabian society was defined by two social trends: individual hedonism and tribal solidarity. These trends were fostered by the attitude of pessimism that existed amongst the Arabs as a result of their ‘this worldly’ orientation. In other words, their general conception that all that there was to life was to be found in this world and death meant the end of human existence created a sense of futility in their attitudes that naturally led them to exploit their current life in a hedonistic way. But this hedonistic individualism was tempered by their tribal affiliations which was a form of social control to ensure their survival in their harsh physical and social

\(^{42}\) Izutsu, 1959, 55; see Goldziher, 1966, Vol 1. 46-47 who also supports this view.

\(^{43}\) Izutsu, 1959, 55.

\(^{44}\) Izutsu, 1959, 50.
environment.45

Now that we have a representation of some major aspects of the pre-Islamic socio-cultural life of the polytheistic Arabs of central Arabia, we can appreciate more fully the ethical-social transformation that the Qur’anic discourses attempted to induce in this society. Before charting a more detailed argument about this transformation in Arabian ethical discourse and practice, I can say most broadly that the Qur’anic discourse introduced the following changes: first, it showed that life was not futile; second, it changed the moral outlook and introduced and/or shifted ethical virtues. In doing this, the Qur’anic discourse engaged in a process of formation of new ethical subjects.

One of the most essential aims of the Qur’anic discourse is to affect a transformation in the human being making him/her into an ethical subject. At the very core of its ethical program is instilling a moral consciousness in humanity. The term it uses for this moral consciousness is *taqwa*. Prior the Qur’an’s revelation the root meaning of this term was used linguistically to signify guarding oneself from harm by the use of a shield.46 Similarly, one of the illustrious companions of the Prophet, Ubayy ibn Ka'b, explains that the connotation of the term *muttaqi* (someone who practices *taqwa*) “is a person who walks through thorny bushes, *taking care* that his cloths are not caught in those bushes and torn by their branches and thorns.” 47

Likewise, commentators on the Qur’an, such as the authors of the Jalalayn commentary, have said the use of this term in the religious sphere implied “that you guard

46 Izutsu, 1964, 235.
47 Omar, 618; emphasis added.
yourself against divine chastisement by putting between it and yourself the shield of ‘iba\textdagger’adah (obedience)”\textsuperscript{48}. This meaning is encapsulated in Qur’anic verses like the following: “Beware of (ittaqu) Allah for Allah is severe in punishment”\textsuperscript{49}. Given the linguistic connotations of the term and the Qur’anic usage of the term taqwa, the basic idea that emerges is that taqwa means maintaining a state of mental vigilance\textsuperscript{50} of God specifically in being conscious of not crossing any of His moral boundaries. In other words, the term taqwa in the religious sphere connotes a state of mind by which an awareness of one’s moral self is generated leading to conscious vigilance with regards to ethical action.

Yet one of the most compelling Qur’anic usages of the term taqwa, which connotes a sense of moral consciousness is found one of the earliest Qur’anic chapters revealed in verses speaking about the nature of the human self: “And by the self and that which has shaped it and inspired it (with the knowledge of its/ with consciousness of) as to its deviance (fujuraha) and rectitude (taqwaha).”\textsuperscript{51} The verse suggests that humans have an inborn moral compass that is capable of recognizing what is right from what is wrong. Yet the most important thing to note with respect to our discussion how the pair of terms fujur and taqwa are employed in this verse.

The term taqwaha technically means “its taqwa” with the attached suffix ha

\begin{enumerate}
\item Izutsu, 1964, 235.
\item Qur’an 5:2; translation by the author.
\item Many translators translate taqwa as having fear of God (more aptly represented by the Arabic term khawf; but I disagree with this understanding and assert that the primary meaning of the term is better represented by the idea of vigilance and even in the core of this concept there is the notion of fear as implied by the definitions of it given above. It actually means how one responds to this fear and not fear itself. Hence the idea of vigilance and guardedness.
\item Qur’an 91:7-8, translation by the author with assistance from Arberry’s The Koran Interpreted; Muhammad Asad’s The Meaning of the Koran; and Izutzu, 1959, 151.
\end{enumerate}
being a pronoun referring back to the 'self' (nafs) in the verse; similarly the term fujurha means “its fujur” with the attached suffix ha being a pronoun referring back to the 'self' (nafs) in the verse. I have already discussed the linguistic connotations of the term taqwa as guarding oneself from harm by use of some shield. In religious context, the meaning of taqwa becomes guarding oneself (i.e. being vigilant) from God's punishment by shielding oneself with acts of obedience. It is interesting to note that the term fujur linguistically connotes a splitting and breaking and when this term is used in the Qur’anic discourse, one of the meanings it connotes is breaking through the protective cover/shield of religion.52 So while taqwa, in the Qur’anic discourse, implies a state of moral guardedness, fujur on the other hand implies a breach in that shield.

Yet fujur also carries the connotation of drawing further away and deviating.53 Hence, my translation of it in the verse as deviance; and since the Qur’anic discourse employs an Arabic rhetorical device known as dibaq (parity, opposite parings, co-relative pairing) often in its discourse because by paring of opposite terms one becomes clear about what meaning is intended54, one can see that term taqwa used in the verse would mean rectitude in keeping with parity of these opposing terms. Of course, the semantic parity of deviance and rectitude are in reference to the moral state of the self as reinforced by the subsequent Qur’anic verses in the same chapter which says: “Surely s/he succeeds who purifies it (self); and surely s/he is ruined who defiles it (self)”55; whereby the purification and defilement are clearly in reference to moral cultivation.

52 See al-Asfahani, 626.

53 See al-Asfahani 626 and Izutsu, 1959, 151.

54 See Walid Qassab, V1, 272 for more on dibaq.

55 Qur’an 9-10; translation by the author.
Moreover there is a significance in referring to *taqwa* and *fujur* as in this verse as *taqwaha* (its *taqwa*) and *fujurha* (its *fujur*) and that is that these two terms are portrayed as states/attributes of the 'self' implying that *taqwa* is a state of moral consciousness; and if this moral consciousness is lacking the self descends into an immoral state of deviance and decrepitude (i.e. *fujur*).

To further support the idea that the term *taqwa* describes a state of consciousness, the term *taqwa*, its roots and derivatives, is always used to describe the state of the subject and his/her actions and is never used to describe objects whether those are materiel or moral. For instance, you never describe a material or immaterial object (e.g. charity) as having/being *taqwa* or any of its roots and derivatives, but you may say somethings is *hasan* (i.e. good); yet you may say that a person has *taqwa* or that his/her actions (e.g. an act of charity) are consistent with his/her moral state of *taqwa*.

Now that I have demonstrated that *taqwa* is a state of ethical vigilance born out of a state of moral consciousness, what external motives that put this moral consciousness into operation? The theological and particularly the eschatological ideas expounded above have bearing on the operationalization of *taqwa* and the cultivation of an ethical subject. It is crucial recognize the theological and eschatological foundations that *taqwa* stands upon, because for one to be guarded and maintain vigilance implies that there must be an object that one is vigilant about and in this case it is ethical vigilance shaped by an awareness of eschatological consequences.\(^{56}\)

I have quoted above the Qur’anic verse (5:2) which enjoins people to have *taqwa* (be vigilant) of Allah (i.e. His imperatives) because He is severe in punishment for those

\(^{56}\) Izutsu, 1959, 234.
who transgress moral boundaries\(^57\). So, it is clear from that verse, and many other verses, that awareness of nature of Allah (being omniscient and omnipotent) and the fact that He takes account of our deeds on a Day of Judgment are the factors that give the Muslim an impetus to have \textit{taqwa} (i.e. be ethically vigilant). In other words, \textit{taqwa} is being vigilant of Allah specifically with reference to keeping his moral imperatives so as to escape any eschatological harm; it is this awareness that provides the moral foundation and motivations for ethical action.

Izutsu notes that the term \textit{taqwa} was very rarely used if at all in pre-Islamic poetry in a religious sense in the way the Qur’anic discourse utilizes the term. Prior to the introduction of the Qur’anic discourse in the Arabian social milieu, the term was consistently used in its basic linguistic meaning as shielding oneself from material or social (i.e. reputation) harm\(^58\). But the Qur’anic discourse transformed the meaning of the term \textit{taqwa} to signify moral consciousness and ethical vigilance.

In other verses of the Qur’an, the term is further developed where it builds on the meaning ethical conscientiousness to designate most generally speaking those who are pious and righteous\(^59\) as is indicated in the following verses: “This is the Scripture (i.e. Qur’an) whereof there is no doubt, a guidance unto the \textit{muttaqun} (those who have \textit{taqwa}); Who believe in the Unseen, and perform the prayer, and spend of that We have bestowed upon them; And who believe in that which is revealed unto thee (Muhammad)\(^57\).

\(^57\)There are many verses in the Qur’an that implore one to have \textit{taqwa} (vigilance) of Allah (i.e. His imperatives) where the one mentioned serves as a typical example.

\(^58\)Izutsu, 1959, 234-237.

\(^59\)Izutsu, 1959, 239.
and that which was revealed before thee, and are certain of the Hereafter; those are upon guidance from their Lord, those are the ones who prosper.  

*Taqwa* as used in these verses clearly goes beyond mere conscientiousness and vigilance to include ones beliefs and deeds; but still the very core of this evolved notion of *taqwa* is this moral consciousness that impels one to be righteous in their convictions and actions. Moreover, the verse indicates that vigilance of *taqwa* and its corollary beliefs and actions not only shield one from any impending harm, but also leads to ones felicity as indicated by the final verse in the above quotation: “Those are the ones who prosper”.

It is interesting to note this transformed understanding of the term *taqwa* effected by the Qur’anic discourse begins to be manifested in the discourse of people in seventh-century Arabia. Here is a poem from 'Abdah b. al-Tabib, one of the contemporaries of the prophet Muhammad which not only shows the religious usage of term, but even demonstrates the positive outcomes of *taqwa* that I just mentioned above: “I enjoin upon you the *tuqa* (=*taqwa*) of God, for it is He who gives and withholds from, whomever He likes, all things are valuable and desirable”.  

As I will show later in this investigation, *taqwa* is a critical concept to the construction of the Islamic ethical subject, which is the basis of the formation of an Islamic legal subject that the Islamic legal discourse presumes. Without an Islamic legal subject there could not be the practice of fatwa, which shows the fundamental importance that *taqwa* plays in the scheme. Nevertheless, this a subject that I will return to at later point and in the meantime I turn my attention to another Qur’anic idea that is also crucial.

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60 Qur’an, 2:2-4; translation by the author with assistance from http://Qur’anexplorer.com/Qur’an/ and Arberry’s *The Koran Interpreted* Vol 1, pg 30.

61 Izutsu, 1959, 239.
to the formation of an Islamic ethical subject. If *taqwa* was the primary device that the Qur’anic discourse employed to effect change in the moral consciousness of the ethical subject, there was an ethical imperative that it established by which all social actions, both at the individual and collective level, were to be guided by and measured against:

Commanding virtue and forbidding vice (*al-amru bil ma’ruf wa nahyu ‘an al-munkar*). It can be thought of as the golden rule of Islamic ethical action because all of the moral values and imperatives delineated by the Qur’anic discourse can be said to meet this end and all actions can evaluated under the rubric of this ethical imperative.

The formulaic statement commanding good and forbidding evil appears in the Qur’an in seven places;\(^62\) one typical verse containing this statement runs as follows:

“and let there be from among you a community [of people] (*ummah*) who invite unto all that is good, and enjoin the doing of what is right (*ma’ruf*) and forbid the doing of what is wrong (*munkar*): and it is they, they who shall attain to a happy state!”\(^63\). A slight variation from this verse a few verses down from this one in the same surah states: “You are indeed the best community (*ummah*) that has ever been brought forth for [the good of] mankind: you enjoin the doing of what is right (*ma’ruf*) and forbid the doing of what is wrong (*munkar*), and you believe in God…..”. \(^64\)

On the other hand, there is yet another verse that uses this formulaic statement but in a way which implies individual as opposed to the collective responsibilities in the previously quoted verses: “And [as for] the believers, both men and women - they are

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\(^63\) Qur’an 3: 104; Translations taken from Asad’s *The Meaning of the Qur’an* with some changes and additions by the author in italics.

\(^64\) Qur’an 3:110; Translations taken from Asad’s *The Meaning of the Qur’an* with additions by the author in italics.
guardians of one another: they [all] enjoin the doing of what is right and forbid the doing of what is wrong, and are constant in prayer, and render the purifying dues, and pay heed unto God and His Apostle. It is they upon whom God will bestow His grace: verily, God is almighty, wise!”

There are several things that one should take note of when considering this Qur’anic ethical principle. The first thing of these are the key terms of this formulaic statement especially the terms ma'ruf/munkar that consistently appear in the formulation of this ethical imperative, which I have rendered as virtue/vice and other translators have translated as right/wrong or good/evil. Etymologically speaking the two terms do not mean good/evil, virtue/vice or right/wrong in the manner which the Qur’anic discourse utilizes them. In fact, the linguistic connotation of ma'ruf is something that is known or familiar; while the term munkar linguistically designates that which is unknown and unfamiliar.

This linguistic understanding of the two terms led some modern Western scholars to conclude that the intent of the Qur’anic discourse in using these paired terms was to imply that which was familiar/known to the Arabs was something that was socially acceptable and that which was unfamiliar/unknown to them was something that was not socially acceptable in accordance with their state of civilization or lack thereof. Yet I claim that there is a major oversight in the above interpretation of the Qur’anic intent in using the terms of ma'ruf and munkar to designate good (virtue) and evil (vice)

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65 Qur’an 9:72; Translations from Asad’s The Meaning of the Qur’an pg 339 with some changes and additions by the author in italics.
68 See Izutsu, 1959, 218.
respectively. My contention that using the terms *ma'ruf/munkar* to designate good/evil even when etymologically they did not necessarily connote that in the previous Arabic discourse was to point to the idea that good is something that is inherently familiar and known to human nature and thus something to be accepted; while evil is something that is foreign to human nature and thus to be rejected.

This argument is corroborated by what was mentioned earlier in our discussion of *taqwa*. There it was mentioned that the verse implied that knowledge of good/evil and hence moral consciousness was something that was inspired in human nature by God; in light of this it would seem reasonable for the Qur’an to designate the good by a term indicated familiarity (i.e. *ma'ruf*) to human nature while designating evil by a term indicating that it was unfamiliar (i.e. *munkar*) to its nature because this inborn human moral consciousness accepts good as being harmonious with its nature and rejects evil as being foreign to its nature.

The second thing to note about this ethical statement is that the Qur’anic discourse makes it a prescriptive standard by which the Muslim nation (*ummah*) as a collective and as individual Muslims, has to measure its actions and in other circumstances the Qur’anic discourse employs this formulaic statement in a descriptive fashion stating that it a characteristic of the collective actions of the Muslim nation (*ummah*) and the individual actions of the believer. Not only is this ethical imperative used to describe the nascent Muslim nation being formed in seventh century Western

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69 For example see Qur’an 9:71.

70 Qur’an 22:41
Arabia (i.e. Hijaz), but it also is used in the Qur’anic discourse to describe the ethical attitudes and actions of previous believers⁷¹ and faith communities prior to the advent of Islam⁷² and it condemns those previous faith communities who fail to uphold this imperative⁷³ as well hypocritical members of the nascent Muslim community who practice the opposite by commanding evil and forbidding good.⁷⁴

One may conclude from this that the Qur’anic discourse envisioned and prescribed the principle of commanding virtue and forbidding vice as a universal and absolute ethical standard by which all human actions are to be measured and the motive by which one should act in the world. Furthermore, all ethical values found in the Qur’an can be said to fulfill one of the two objectives (i.e. commanding virtue or forbidding vice) of this absolute and universal ethical imperative, thereby subsuming all Qur’anic values under the rubric of this formulaic statement.

The recognition that this imperative was paramount to the religious teaching of Islam and a standard for ethical action was not lost by the Muslims who first heard the Qur’anic discourse. We find a report where ‘Umar al-Khattab, one of the earliest Muslims and a close companion to the Prophet Muhammad as well as the second Caliph in Islamic history, who was also one the premier legal minds in early Islam, states that commanding virtue (good) and forbidding vice (evil) were two components that made up Islam.⁷⁵ This illustrates that the very earliest Muslims acknowledged the fundamental

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⁷¹ Qur’an 31:17.
⁷² Qur’an 3:114.
⁷³ Qur’an 5:79
⁷⁴ Qur’an 9:67
⁷⁵ Cook, 71.
importance of this principle so much that they saw it as one of the building blocks of the religion itself.

Yet this was not just some theoretical matter but was implemented by the first generation of Muslims. We return to Umar ibn al-Khattab who implemented the second part of this principle of forbidding vice by championing the cause of an overloaded beast.\textsuperscript{76} It should be noted that this action taken by Umar indicates the wide scope by which the ethical imperative was applied, even in the case of animal rights, which underlines the universality and absoluteness of this principle. Furthermore, it is interesting to note that this story is found in a work entitled: 'the commanding of virtue and the forbidding of vice' written by a by a classical Muslim author; including this historical report in a work concerned with this subject implies that the motivations behind Umar's actions and the action itself were but a living example of the application of this ethical imperative.

More importantly this story is an illustration of the transformation of the ethical dispositions of the polytheistic Arabs of that time that was evoked by the Qur’anic discourse. Umar prior to his conversion to Islam in many ways represented the archetypical \textit{jahili} (of period in Arabia prior to the advent of Islam) Arab who was given to the excesses of short temperedness and hedonism associated with ideals of that period. But after his conversion, he became one of the greatest figures in Muslim history and there are many stories of his piety and passion for social justice. Yet this is but one of many narrations of how the Qur’anic message not only changed the theoretical views of the peoples of Arabia but went even further to alter their personal dispositions and hence

\textsuperscript{76} Cook, 68.
formed new ethical attitudes.

Before I complete the discussion of the ethical dimensions of Qur’anic discourse, it is worthwhile to draw the relationship between the Qur’anic injunctions for *taqwa* (moral vigilance) and that of commanding virtue and forbidding vice in the Qur’anic ethical framework. The Prophet Muhammad said that the most morally vigilant of people (*atqa al-nas*) are those who are most zealous in commanding virtue.\(^{77}\) This prophetic statement establishes a direct relationship between these two fundamental components in the Qur’anic ethical scheme: moral consciousness (*taqwa*) is signified by ethical actions in general and by this ethical imperative (commanding virtue,...) in particular. The greater this moral vigilance the greater ones vigilance to undertake the ethical actions that realize the imperative of commanding virtue and forbidding vice. So there is an intimate relationship drawn between moral consciousness and ethical actions.

This ethical scheme that was as established by the Qur’anic discourse served as the normative foundation in the emergence of an Islamic legal discourse in seventh century Western Arabia (Hijaz). The legal anthropologist Bohanan noted that the emergence of law in society is premised on the existence of norms and customs that were previously established in the society in which the legal institutions emerge. For Bohanan, norms are rules that express ought aspects of relationships between human beings, while custom is a body of such norms followed in practice governing the way people behave if society is to endure. “Customs….are norms that have been institutionalized” in various social spheres.\(^{78}\)

According to Bohanan the process of legal formation undergoes the following

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\(^{77}\) Cook, 38.

\(^{78}\) Donovan, 116.
steps: from norms—general prescriptions for appropriate behavior but lacking in specific authority—arise customary rules—which is a subset of those norms—for specific social institutions. Yet customs are unable to settle problems that come between the customary social institutions; hence a smaller subset of those customary rules arises to serve as regulatory rules for all institutions becoming the legal institutions.\textsuperscript{79}

Without confining this discussion to Bohanan's tripartate model of the evolution of law in society, it is worth mentioning that his model underlines the importance of norms in the formation of law, and this observation is critical to the understanding of the formation of an Islamic legal culture in the very early period. It was Qur’anic ethical norms that served as a catalyst for the development of this Islamic legal culture in early Muslim society and eventually an Islamic legal system. Speaking in this regard, Davoutoglu says: “The Qur’anic norm-centered structure is the prerequisite of the prescriptivist parts of the supreme law. Law is attached to this value system, while social mechanisms and institutions are expected to be determined by the interconnected sphere of this axiological normativeness and prescriptivism. The aim of life is the realization of these values on whole parts of life. Law itself and institutional mechanisms as the social consequences of the application of this law are only the means for the realization of this value system.”\textsuperscript{80}

Davoutoglu's argument establishes that law is the means by which Qur’anic ethical norms, some of which we have delineated above, are fully realized; so law was crucial institution for the full actualization of the ethical objectives of the Qur’anic

\textsuperscript{79} Donovan, 117.

\textsuperscript{80} Davoutoglu, 83-84.
discourse. But before we address how Islamic law arises from these ethical norms and is an actualization of them, what needs to be clarified is what is it that constitutes law in general and how law is distinguished from other social and ethical norms of society. Weber defines law as “an order...externally guaranteed by the probability of coercion [physical or psychological] to bring about conformity or avenge violation, and it is applied by a staff of people holding themselves for that purpose.”

What emerges from this definition is that law, like norms, is a means of organizing societal relationships, yet what distinguishes laws from norms according to Weber's definition, is that laws contain additional attributes that are not necessarily possessed by norms; the main additional attribute being a clearly defined authority that establishes those laws and enforces them. But how is legal authority established? Weber says: "...the situation in which the manifested will (command) of the ruler or rulers is meant to influence the conduct of one or more others [the ruled] and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled has made the content of the command a maxim of their conduct for its very own sake. Looked upon from the other end, this situation will be called obedience.”

Donovon interprets Weber's understanding of authority as a kind of power that is not necessarily rooted in violence but "acquires its power through normative legitimacy." One can argue that this normative legitimation of authority occurs when the ruled perceive the commands of those issuing rules as constituting authoritative

81 As quoted in Donovon, 51.
82 In that both law and norms are orders or rules expressing ought aspects of relationships.
83 As quoted in Donovon, 51.
84 Donovon, 51.
conduct in and of itself as result of some power and/or knowledge that is possessed by those authorities to perceive social reality as it truly is and that their decisions/statements are in consonance with that social reality and are not simply arbitrary. Hence, their statements and commands become normative and even prescriptive, yet at the same time the recognition of the normative nature of their statements legitimates their authority.

So one may ask at this point how do legal norms in general and legal authority in Islam come to be? On a discursive level, the Qur’anic message disseminated ideas within the first generation Muslim community that became the epistemological foundations for Islamic legal norms and authority, which were manifested more overtly in the second half of the Prophet Muhammad's prophetic career. One such concept was the Qur’anic term din which generally came to mean religion. Yet the term din is loaded with several linguistic connotations. Izutsu tells us, prior to the revelation of the Qur’an the term was used in the pre-Islamic poetic discourse to mean several things: customs including religious rituals, requital and reckoning, and lastly obedience.85 The Qur’anic discourse affirmed and utilized all of these connotations of the term. Yet what is most relevant for our discussion on the beginnings of Islamic legal institutions is the connotation of obedience to authority.

Izutsu shows how the term din (and the root word dana from which it is derived) has contrary meanings connoting both obedience/subservience and the ability to subdue and govern by power: “This is why in many cases the same word din is capable of being interpreted as both qahr ‘exercise of superior power of subduing others’ and ta’ah ‘obedience’….The truth of the matter is that both (i.e. meanings) are meant at the same

85 Izutsu, 1964, 221.
time without distinction, the concept of din being comprehensive of these two contrary directions”86. So embedded in the concept of din is the notion of authority and this meaning is implicit in the Qur’an in the following verse: “To God belongs whatever is in the heavens and the earth. His is the din forever.”87 

It is clear from the context of the preceding verse that the term din here connotes ultimate authority given that the verse establishes God’s dominion over the entire creation. Implicit in this statement about God's ultimate authority in all matters is that He possesses legal authority and hence the capacity to legislate legal norms. So the Qur’anic discourse established very early on through its discourse on din, even before any specific legal content was legislated, that divine authority was the foundation of (religious) law and that this authority acquired its power by means of the ontological status of the divine. This divine authority, as we will see later, was humanly represented by the Prophet Muhammad, whose practice along with the divine speech (i.e. Qur’anic) legislated the legal norms that formed the institutional basis of Islamic law.

But to leave no doubt that the notion of law and its corollaries were embedded in the Qur’anic concept of din, one of later revealed verses of Qur’an states when speaking about the legal sanction against those who committed adultery: “As for the adulteress and adulterer- flog each of them a hundred stripes, and let not compassion for them keep you from [carrying out] this law (din) of God....”88. It is clear from this verse that the matter that is being addressed is legal matter (legal punishment for adultery) and that the verse

86 Izutsu, 1964, 222 material in parenthesis has been added)
87 Qur’an 16:52; Translation in Izutsu, 1964, 224.
88 Qur’an 24:2; Translation by Muhammad Asad, 532 with addition in parenthesis by the author.
refers to this legal matter as constituting the peoples *din*; in fact it the wording of the
verse makes the law synonymous with *din* (i.e. religion) giving a very strong indication
that law was a preponderant element of *din*.

So, the theory of religion implied by this term does not only express religious
beliefs and practices but even legal norms and authority. Muhammad Asad, in his
translation of the Qur’an, says: “The primary significance of *din* is 'obedience'; in
particular obedience to a *law* or to what is conceived as a system of established – and
therefore binding – usages, i.e. something endowed with moral authority.”\(^8^9\)

So inherent in the Qur’anic concept of *din* are many of the elements that are
constitutive of law according to Weber: command, obedience, authority, sanction, etc. Yet
the influence of the Qur’anic discourse on the formation of an Islamic legal culture is
more clearly pronounced in the Qur’anic binary pair of *halal* and *haram*. These two
terms represent the institution by the Qur’an of legal categories by which all possible
human actions can be ethically and legally evaluated. *Halal* represent those categorize of
actions or objects which are permissible; while *haram* represent those categorize of
actions/objects that are not permissible.

Yet these two terms had undergone significant transformation from their pre-
Islamic usage to their usage in the Qur’anic discourse. Izutsu says that the term *haram* in
pre-Islamic times signified all that was seen as taboo; while *halal* etymologically
designated those things that were “set free” (i.e. from taboo).\(^9^0\) Taboo is understood here

\(^8^9\) Muhammad Asad, pg.981, fn. 3. Emphasis added.

\(^9^0\) Izutsu, 1959, 245.
as a prohibited act or use of an object under the threat of some supernatural punishment.\textsuperscript{91} So, what constituted something being \textit{halal} or \textit{haram} amongst the polytheistic Arabs of the seventh century was determined by custom.

Yet Qur’anic usage of these terms indicated significations that were legal in nature in terms of determining social action and not just those things related to religious objects and rites that issues of taboo are so often restricted to\textsuperscript{92}. For instance, when speaking about some of Jesus' message to the Israelites, the Qur’an quotes him as saying: “I will surely make lawful (\textit{uhilla}, verb of \textit{halal}) to you some of the things that were before unlawful (\textit{hurrima}, verb of \textit{haram}) to you”\textsuperscript{93}. This statement is made in reference to Mosaic laws which are recognized as forming a legal corpus which implies that Qur’anic usage of these two terms in this context is intentionally conveying issues of legality.

Even more definitive is the use of these terms in the following verse: “And God has rendered lawful (\textit{ahalla} a verb of \textit{halal}) trading and has prohibited (\textit{harrama} a verb of \textit{haram}) usury”\textsuperscript{94}. The subjects of trade and usury are not typically subjects of taboos, but are subjects of legal discourse. Hence, the Qur’anic usage of the terms \textit{halal} and \textit{haram} in these instances indicate the determination of legal categories.


\textsuperscript{92} Izutsu thinks that the term \textit{haram} and its contrary \textit{halal} as used in the Qur’an still convey and are related to the archaic notions of taboo and that their use in the Qur’an represent an intermediate stage in the process of development from their original meaning to legal concepts (see Izutsu, 1959, 246). Although these connotations to the terms are still operable in the Qur’anic discourse, it is also clear from how those terms are also employed in the Qur’an that they connote full legal categories. See argument above.

\textsuperscript{93} Qur’an 3:44; as quoted from Izutsu, 1959, 246 with some changes in the translation by the author).

\textsuperscript{94} Qur’an 2:275; translation by author.
Furthermore, *halal* and *haram* as legal categories signifying permissibility and prohibition are determined by God alone\(^95\) and are no longer defined by tradition and custom as they once were when they merely conveyed the idea of taboo. This argument is most clearly supported by the following Qur’anic verse which rebukes the Meccan polytheists for whimsically declaring some things lawful and other things unlawful without reference to divine decree: “Say: 'Have you ever considered all the means of sustenance which God has bestowed upon you from on high- and which you thereupon divide into 'things forbidden' (*haraman*) and 'things lawful' (*halalan*)? Say: ‘has God given you leave [to do this]- or do you perchance, attribute your own guesswork to God?’”\(^96\)

It should be noted that this Qur’anic chapter and verse were revealed in the Meccan period of the Prophet Muhammad's career before much of the legal matter was legislated in the later Madinan period. This gives strong indication that law was conceived in the Qur’anic discourse as the providence of religion (*din*) from the very inception of the religion and it is from this Qur’anic conceptual foundation that an Islamic legal culture emerges. In other words, the Qur’anic discourse, from the very early periods, paved the way for the establishment of legal attitudes amongst early Muslims by transforming common Arab ideas into legal concepts (*din, halal, haram*) that facilitated later legal practices especially during the Madinan period of the Prophet Muhammad's career. It was in this period when explicit legislation was promulgated by the Qur’an to serve the needs of the nascent Muslim community. These issues will be explored in

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95 Izutsu, 1959, 246.

96 Qur’an 10:59; Translation by Muhammad Asad, 300-301.
greater detail in the following chapter.

Moreover, the terms *halal* (permissible) and *haram* (prohibited) become fundamental legal categories in determining the legality of human action in the Islamic legal discourse. These two Qur’anic terms came to serve as the fundamental binary classification in Islamic law for assessing certain practices in terms of their sanction or reprehensibility. To some extent the whole corpus of Islamic law is a detailed exposition of those actions that are considered permissible-*halal* or prohibited-*haram*. So these two Qur’anic legal concepts became foundational for the whole enterprise of Islamic law as it evolved as fundamental legal categories, so that the whole range of human actions can be classified in terms of their legality.

Furthermore, it is important to take notice of the theological and ethical foundations from which this Islamic legal culture arises. Legal concepts such as *halal* and *haram* and the embeddedness of the concept of legality in the Islamic understanding of religion (i.e. *din*) could not be operational without the theological ideas and ethical teaching of the Qur’an that animate the body of rules that came to makeup Islamic law. Islamic law is not state-sanctioned law, as we will come to find out, so the means of its authoritativeness and operationalization are different than many other law codes.

The sanction of Islamic law derives from what Hallaq calls epistemic authority;\textsuperscript{97} I interpret this notion of epistemic authority as being represented by the Qur’anic discourse and the psychological effects it produces in subjects who affirm that discourse. The epistemic authority of the Qur’anic discourse further derives its authority from the fact that it claims to be the stated will for humanity of God, Who is the ultimate authority

\textsuperscript{97} Hallaq, 2005, 88.
to be obeyed by humanity as a part of its moral commitments towards its Creator. So, Islamic law and its sanction are grounded in the Qur’anic theological and ethical claims outlined earlier in this chapter.

It is in the acceptance of those Qur’anic theological and ethical precepts that provides the psychological motivations for the subjects to observe Islamic law first and foremost, irrespective of whether or not there exists an explicit governing agency that enforces that law. Islamic law evolved in history independent from institutions of government as you will find explicated in later chapters and yet it was widely implemented in Islamic society through history, based on the ontological and epistemic authority of its sources. More will be said about this issue in my subsequent discussions of Islamic law but to illustrate my point about the connections between Islamic law and the Qur’anic theology and ethics I would like to draw on correlations between Qur’anic teachings mentioned earlier and Islamic legal theory and doctrine.

Earlier, I discussed the importance for Islamic action of the ethical imperative: “Commanding virtue (good/right) and prohibiting vice (evil/wrong).” Despite being an ethical imperative, I contend that it is the conceptual foundation and impetus behind the formulation by Muslim jurists of the legal principle that is identified as primary aim of Islamic law: i.e. “Accruing a benefit (jalb al-maslaha) and averting harm (wa dar’ al mafsadah).” Muslim jurists over the ages (e.g. al-Ghazali, al-Shatibi and in modern times Ibn ‘Ashur) have noted that all of the injunctions of Shari’ah (i.e. Islamic law) are

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98 In asserting this proposition, we bring to light an aspect of discourse that was ignored in the introduction to this chapter and that is discourses do not solely derive their power from linguistic significations of the text, but from the extra-linguistic (material or tactical) forms of power that shaped those discourses (see Hook, 15). It becomes apparent that in the case of the Qur’anic discourse, its authority is derived from the extra-linguistic factor of its supposed origin as being divine speech.
designed to serve these two primary goals of accruing benefit to humanity and/or averting harm from it.

One can easily recognize that this fundamental aim of Islamic law is a reformulation of the Qur’anic ethical imperative of commanding virtue and forbidding vice in legal terms. This further reinforces that idea of the prominence of this ethical imperative in motivating and evaluating human action. But more importantly shows for purposes here that Islamic legal theory and doctrine are premised on Qur’anic theological and ethical principles which are the basis for their formulation.

Now I turn my attention to the socio-economic situation in seventh century Western Arabia (primarily the Hijaz, region the immediate context where Islam was founded) to explore the historical context for the emergence of Islamic legal culture; giving special emphasis to the role of the Qur’anic discourse in transforming this milieu through the declaration of religio-legal injunctions which become the foundation for the later development of Islamic legal doctrines.

Socio-Economic Transformation of Seventh Century Arabia and the Qur’anic Legal Discourse.

Nomadic and Tribal Life in Pre-Islamic Arabia

The Near East in the 7th century, as the larger context for Arabia, like all pre-industrial societies, consisted of agriculturally based societies in that the wealth and power of social institutions (temple and court) were limited by agrarian production. Although these societies reached a level of cultural complexity that is associated with dominance of

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99 Hodgson, V.1, 107.
citied life, this dominance was itself based on agrarian resources.¹⁰⁰

Yet a good portion of the population of the western and central regions of the Arabian Peninsula was pastoralist in its way of life, which meant breading and pasturing of camels for their subsistance and constant moving from one place to another in the sparse vegetation of Arabian desert so as to attend to their animals.¹⁰¹ The Bedouin-based societies of Arabia presupposed an agrarian-based society which they were an extension of because they too were limited by agricultural resources they needed that wealth and leisure were ultimately based upon. But Bedouin-based culture was different from agrarian culture in that there was less class stratification and concentration of wealth. So the herdsman could not be as easily exploited as the peasant.¹⁰² Speaking about nature of pastoral society and its contrast with sedentary societies, the 20th century anthropologist of Muslim societies Gellner says the following:

“The shepherd is the protector of flocks against raids (when he is not himself a raider); he must...combine in the mutual-aid groups known as tribes; and his warlike role within them, and his own mobility and that of his flocks, make it difficult to dominate and oppress him excessively. It is certainly much harder to do this to him than it is to oppress an agriculturalist, whose normal task is to work rather than fight, and whose worldly goods are immobile. Ibn Khaldûn cites the tradition according to which the Prophet himself observed that the plough brings submission in its train. By contrast, pastoralism tends towards an at least relatively egalitarian society, which does not

¹⁰⁰ Hodgson, v1, 107; more will be said about the historical conditions of the Near East in the following chapter.
¹⁰¹ Watt, 1961, 35.
¹⁰² Hodgson, v1, 148.
normally or seriously segregate a specialized stratum of warriors.”

This relative equality among Bedouins was reinforced by the tribal social structure that herdsmen usually developed, which implied hereditary economic and social solidarity amongst groups of families sharing common responsibility. The basis of this solidarity is what Ibn Khaldûn calls ‘asabiyya i.e. a common feeling which engenders social cohesion in a group. According to Ibn Khaldûn, ‘asabiyya is often “a function of lineage affiliation or something that fulfills the role of such an affiliation.” Gellner’s interpretation of Ibn Khaldûn's concept of ‘asabiyya is that it “is engendered in groups living in a rough natural environment, far from the law enforcement militias of the state, and in groups which are bound to each other by ideas of consanguinity (blood relations).”

Given this understanding of ‘asabiyya, nomads naturally have the strongest sense of group cohesion because of the uniform physical and social environment they live in and the familial relations they share with each other. It is important to note that ‘asabiyya is not just function of blood ties as Ibn Khaldûn’s definition of it may imply, but can also be a result of social intercourse, growing up together, and the sharing of other circumstances of life. Hence, it is this uniformity that is found in pastoralist societies, as opposed to the heterogeneity found in sedentary cultures, which produces strong social

103 Gellner, 21
104 Hodgson, v1, 148-149.
105 Ibn Khaldûn’s Muqadimmah as quoted by Azmeh, 31.
106 Gellner, 26-27.
107 On this point, see Lindholm, 53.
cohesion amongst them.

The main social unit of pastoralist society by which this solidarity was manifested was the tribe and its subdivision into clans. In Arabia, the tribe was a sovereign and independent body politic although on occasions tribes made alliances with other tribes.\textsuperscript{108} Tribal solidarity is manifested in protecting its camels, women, and children against raiders from other tribes. The foremost obligation of tribesman is to help fellow tribal members against strangers as well as to provide mutual material assistance which is necessary in the pastoralist lifestyle so as to insure the economic survival of tribal members from the harsh realities of pastoral life.\textsuperscript{109}

So, it can argued that in tribal societies in general, and pre-Islamic Arab tribes in particular, that economy is something that is embedded\textsuperscript{110}, to use Karl Polanyi’s term, in social relationships where humans value material goods only in so far that they safeguard and raise their social status and not necessarily to advance their particular material interests.\textsuperscript{111} According to Polanyi, in tribal society, individual economic interest is rarely paramount, for it is rather the community which ensures the survival of its members. The maintenance of social ties is crucial: firstly, by disregarding tribal conventions (honor, generosity, etc.) one becomes cut off from the community (therefore endangering his survival). Second, since social obligations are reciprocal, this exerts pressure on the

\textsuperscript{108} Watt, 1961, 35.
\textsuperscript{109} Watt, 1961, 7 & 36.
\textsuperscript{110} What Polanyi means by this term is that economic actions/relations are not separate from social relations and are submerged within the social structure. This is unlike how 19th century theorists represented economic relations as independent of social relations [See Polanyi’s The Great Transformation].
\textsuperscript{111} Polyani, 2010, 48.
individual to eliminate\textsuperscript{112} economic self-interest from their consciousness.\textsuperscript{113} To illustrate how Polanyi’s notion of the embeddedness of economy in social relations manifested itself in pre-Islamic Arabian tribal society, there is a tradition about the great grandfather of the Prophet Muhammad named Hashim, who rallied his tribe together when many of them met financial ruin and were committing a sort of suicide known as \textit{i’tifad}. He got them to agree that every poor member of the tribe would be attached to a rich a member who would offer the poor financial security in return for the poor member helping out in the rich one's business activities.\textsuperscript{114} Another tradition, states that before the time of Hashim there was a great deal of poverty in Mecca, but under the leadership of Hashim trade flourished and the tribe of Quraysh would “divide their profits among the rich and poor so that the poor became like the rich.”\textsuperscript{115}

The point here is that individual economic profit was seen as secondary to tribal solidarity and social welfare of the weak; furthermore, this story illustrates that economic calculations were not the sole motivators in economic action and that social relations played an important role in these determinations. This is what Polanyi means by embeddedness of economy in social relations. Polanyi maintains that there were three main principles that drove production and distribution in pre-capitalist societies\textsuperscript{116}:  

\textsuperscript{112} Polyani’s use of the term eliminate is perhaps too strong; it is probably more accurate to say that the nature of tribal social obligations exerted pressure to mitigate (rather than eliminate) economic self-interest from motivations of its members.

\textsuperscript{113} Polanyi, 2010, 48-49; with additions in parenthesis by the author.

\textsuperscript{114} Kister, 1965, 122.

\textsuperscript{115} Kister, 1965, 125.

\textsuperscript{116} In limiting the causes of production and distribution in pre-capitalist societies to these three, I believe Polanyi exaggerated the differences between pre-capitalist modes of life and our current capitalist run society. Furthermore, Gemici notes that Polanyi contrasts “ancient societies based on status with modern societies based on contract. (Gemici, 23). But he argues that this idea is ill founded because it disregards
1) Reciprocity - which was gift giving for social prestige.\textsuperscript{117} A manifestation of this practice in pre-Islamic Arabia was the tribe of Quraysh's, which was the main tribe in Mecca, feeding, giving drink and clothing the polytheistic pilgrims to the Ka'aba sanctuary during the yearly pilgrimage for which in return the pilgrims would give Quraysh a part of the animal sacrifice in the pilgrimage ritual.\textsuperscript{118}

2) Redistribution - where portions of the produce are delivered to the authorities to be distributed to non-producers.\textsuperscript{119} The point is illustrated in the example we cited above of how the tribe of Quraysh, headed by the grandfather of the Prophet Muhammad, redistributed their wealth to the poor.

3) House-holding - was production primarily for one’s own use, even when one engaged in trade in the market so long as the motive was one’s sustenance.\textsuperscript{120} This phenomenon is also demonstrated in mercantile activities of the Meccan merchants, which is the topic of the next section, who bought and sold their wares in the markets of Arabia and beyond\textsuperscript{121} although their motivations were not restricted to sustenance and the profit-motive played a role in their economic activity.

Although the examples that I mentioned above all come from Meccan society which was a settled society more than a pastoral one, nonetheless is was a tribal society

\textsuperscript{117} Polyani, 2010, 49-50.

\textsuperscript{118} Kister, 1986, 33-34.

\textsuperscript{119} Polyani, 2010, 49-50.

\textsuperscript{120} Polyani, 2010, 56.

\textsuperscript{121} Kister, 1965, 116; Rahman 292-294; Watt, 1961, 6-7.
that preserved many of the ideals of its pastoral roots. The very same social ideals possessed by the Meccans as demonstrated in these examples were shared by other pastoral or settled tribes around Arabia.\textsuperscript{122} So, economic relations in seventh-century Arabia were tightly wedded to the social relations of tribal solidarity. In the next section, I will explore in greater detail how these economic and social relations played out in settled societies of Arabia.

Pre-Islamic Arabia: Settled Societies

Arabian society had two sets of law, one for the settled [merchants and agriculturalist] and one for the pastoral Arabs. Both of these were followed in part by each of the two groups, depending on the arena. In criminal law, the settled as well as Bedouin Arabs followed the Bedouin custom of exacting blood money or revenge for a murdered victim.\textsuperscript{123} In settled and commercial societies such as the one found in Mecca, trade was conducted using various commercial mechanisms such as various forms of partnership or where capitalists would hire labor to conduct business on their behalf for a fixed wage. For example, before the advent of Islam, Muhammad's future wife Khadija engaged him in a sleeping partnership\textsuperscript{124} as well hiring him on a fixed sum (i.e. waged labor) to conduct business on her behalf.\textsuperscript{125}

The development of the town of Mecca, the immediate context for the advent of Islam, as a commercial center is partly due to its geographical location in the middle of the caravan route between Yemen and Syria (also Abyssinia). But it was also facilitated

\textsuperscript{122} Kister, 1965, 124.
\textsuperscript{123} Hallaq, 2005, 18.
\textsuperscript{124} This a partnership where one party provides the capital and the other party provides labor.
\textsuperscript{125} Rahman, Vol.2, 293, 299-300.
by the fact Mecca contained the sanctuary (i.e. Ka’ba) so that tribal blood feuds were prohibited in the sacred precincts giving some security for men to go there and trade. Certain months of the Arab calendar were also regarded as sacred where no fighting took place, and those were when trade fairs took place.\textsuperscript{126} The relative peace in Mecca and in Arabia as whole during the sacred months, further enhanced Mecca's economic position because it would ensure that during those months trade could flow unhindered.\textsuperscript{127}

In terms of Mecca’s political affairs, the only body of governance was the \textit{mala’}, a senatorial assembly. Watt's notes that “[t]his was an assembly of chiefs and leading men of the various clans. The council was merely deliberative and had no executive power”.\textsuperscript{128} Influence of individual in the affairs of Mecca depended on clan affiliation and personal qualifications\textsuperscript{129}. The social and political prestige within Arabia of the resident tribe of Mecca, the Quraysh tribe, lay in several factors among which was their political astuteness in securing agreements (known as \textit{ilaf}) with other Arab tribes. These agreements were established based on Meccan trade interests and they constituted a practice that was previously unknown in Arabia.\textsuperscript{130} Their caravans required the services of large number of nomads, escorts etc. So, they would pay chiefs for safe conduct through their territories as well as for supplies (e.g. water) and laborers.\textsuperscript{131}

Meccan commercialism may have had an impact on the social cohesion in

\textsuperscript{126} Watt, 1988, 40; also Watt, 1953, 3.
\textsuperscript{127} Hallaq, 2005, 14-15.
\textsuperscript{128} Watt, 1953, 8.
\textsuperscript{129} Watt, 1953, 9.
\textsuperscript{130} Kister, 1965, 120.
\textsuperscript{131} Kister, 1965, 120; Watt, 1953, 10-11.
Meccan society. While the traditional tribal structure tended to reinforce relative equality between the members of the tribe, Watt argues that the success of some Meccan merchants perhaps led to a greater growth of individualism and disregard for the less fortunate members of the clan.\textsuperscript{132} The Qur’an and various narrations of hadith indicate that some measure of social distinction amongst prominent Meccans (i.e. the mala’) was present and this is attested to by their refusal to sit and listen to the Prophet Muhammmad's message so long as he was in the company of less fortunate members of Mecca who had joined his religion.\textsuperscript{133} There are several narrations in the major collections of prophetic traditions (i.e. hadith) such as Muslim, Nasa'i, and Ahmad that explain the occasion for the revelation of these Qur’anic verses. Here is an example of those narrations is found in the commentary of al-Tabari:

Ibn Masud said that: The leaders (mala’) of Quraysh passed by the Messenger of Allah while he was with Suhaib, Bilal, Ammar, Khabbab and others from the weak Muslims and they (i.e. the leaders) said: O Muhammad are you satisfied with them aside from your own people; are they the ones Allah has favored amongst us; should we become followers of them? Throw them out and perhaps in throwing them out we may follow you. Then this verse was revealed: “And do not repulse those who call on their lord during the morning and evening seeking his countenance.....” (Qur’an 6:52).\textsuperscript{134}

The attitude and actions by some prominent Meccan leaders towards the less fortunate in their society, as reflected in this story meant the ideal of Bedouin egalitarianism was being sacrificed for the sake of individual social prestige. It may be difficult to argue that individualism was becoming prominent in Mecca as there is no clear historical evidence to support this argument, but what these narrations show is that there might have been a growing class consciousness among some of the elite that was

\textsuperscript{132} See Watt, 1953, 19; and Watt, 1961, 7.

\textsuperscript{133} See Qur’an 6:51-52; 18:28-29.

\textsuperscript{134} Narration quoted from Zaydan, 70. Translation by author.
based on their economic success.

The attitudes of the Meccan leaders towards the weak in their society at the time of the Prophet are vastly different from the attitude displayed just a few generations earlier by Hashim, the great grandfather of the Prophet, towards the less fortunate in his tribe, which was cited earlier in the previous section of this chapter. Hence, one can argue that Meccan economic success was not only undermining the social fabric of traditional Arab tribal society, but that economic relations were also being slowly divorced (dis-embedded) from the tribal social structure and being re-embedded in either individual or class ambitions since the primary motives of economic action was no longer seemingly undertaken to perpetuate the tribal ethos.

Instead, the economic success of some of these prominent Meccan merchants gave them added social prestige and power above and beyond their tribal relatives rendering their economic activity largely independent of tribal interest and serving their own self-interests; creating economic and social inequalities in seventh century Meccan society.

The Qur’anic Discourse and the New Socio-Economic Paradigm

From Tribe to Ummah:
The Qur’an introduced a new way of imagining socio-political life, not based on ties of kinship, but on bonds of religious fraternity espousing a common theological and ethical cause. This new socio-political imagination is symbolized by the Qur’anic term ummah (religious community). From the various Qur’anic usages of the term,\textsuperscript{135} al-Asfahani deduces a linguistic definition of this term as “every group that has a common

\textsuperscript{135}See Denny's article “The Concept of Ummah in the Qur’an” 1975 for the various usages of the term in the Qur’an.
purpose (or united by a cause) whether that be one religion, a particular time, or particular place; regardless of whether that common purpose (uniting cause) was innate endowed (taskheeran- literally subjected) or intentionally chosen (ikhtiyyaran)\textsuperscript{136}. Yet the overwhelming usage of this term was to designate a religious community.\textsuperscript{137}

The term existed in pre-Islamic discourse denoting a religious community as evidenced by the following verse of the Arab Christian poet Nabigha: 'Can one belonging to a religion (literally religious community--dhu 'ummatin) sin if he is obedient.'\textsuperscript{138}

Although in this poetic verse the context in which Nabigha employs the term ummatin (a declined form of ummah) means religion as notions of sinfulness relate to one’s individual religious commitments and not necessarily social ones, yet in using the term ummah for religion instead of the usual term din, he must have meant a reified form of religion that is embodied in a religious community.

The following Qur’anic verse, roughly from the same period of Nabigha's poetic verse, support this interpretation of the use of ummah:

Nay, but they say, "Behold, We found our forefathers agreed on what to believe ['ala ummatin i.e. following a common communal religion] - and, verily, it is in their footsteps that we find our guidance!"
And thus it is: whenever We sent, before thy time, a warner to any community [qariyah- literally town], those of its people who had lost themselves entirely in the pursuit of pleasures would always say, "Behold, we found our forefathers agreed on what to believe ['ala ummatin i.e. a common communal religion] - and, verily, it is but in their footsteps that we follow!"\textsuperscript{139}

So we can see that the term ummah (in the declined form of ummatin) as employed in these Qur’anic verses also implies the notion of a reified and firmly established communal religion. The evidence for this understanding of the term ummah is

\textsuperscript{136} Al-Asfahani, 86; translation by the author.

\textsuperscript{137} See Denny's article “The Concept of Ummah in the Qur’an” 1975.

\textsuperscript{138} As quoted in Denny, 1975, 37; translation has been slightly revised by author.

\textsuperscript{139} Qur’an 43:22-23, Translation by Muhammad Asad 959-960 with some modifications from Denny's translation, 1975, pg. 58 and the author.
in the very context of these verses is because God is rebuking peoples for rejecting religious truths that have come down to them through a prophet and basing their rejection on their blind following of their communal religious beliefs and practices established in their tradition. So *ummah* as employed in these Qur’anic verses implies a community that is united by common religious cause which also lends support to al-Asfahani’s definition of the term.

Yet the Qur’anic discourse started to employ this term more and more to define the new religious community of Islam and the espoused aims that would give identity to this community. This represented a transformation for how polytheistic Arabs from seventh century Arabia would identify themselves and give impetus to a new social imagination for what constituted the basis of social solidarity. Recall that the tribe based on kinship was the basic unit that Arab society in the seventh-century defined and organized itself by. Yet this would change with introduction by the Qur’anic discourse of a nuanced sense of the term *ummah* to define a new type of community based on a particular religious belief and practice.

Starting from an early Meccan period before even a proper Muslim community actually existed, the Qur’anic discourse began to lay the seeds for envisioning a new basis for a communal identity for the early Muslim converts that were from various ethnic backgrounds that was based on religion and not based on tribal affiliation: “Verily, [O you who believe in Me.] this community (*ummah*) of yours is one single community (*ummah*), since I am the Sustainer of you all: worship, then, Me [alone]!”140 And another verse proclaims: “And, verily, this community (*ummah*) of yours is one single community

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140 Qur’an 21:92; Translation Asad, 640.
(ummah), since I am the Sustainer of you all: remain, then, conscious of Me!”

What is interesting about these Meccan verses is that this new Muslim ummah (community) is something divinely mandated and not an eventual outgrowth of recognized common purpose for social solidarity on behalf of its constituents. Moreover, the basis of this new ummah is its recognition of the one God (tawhid) and their persistent consciousness (taqwa), obedience and worship ('ibadah) of Him. Hence, there is an early attempt by the Qur’anic discourse to move Arab social imagination away from tribal consciousness and all that entails to a new theological basis for social solidarity. This theological basis for the new Muslim ummah in these early Meccan verses is to be understood in a context of very few explicit social obligations—given that Muslim converts at this stage were few in number and were a persecuted minority who were struggling for their survival.

Yet there is a development in the Qur’anic discourse about the Muslim ummah once the Muslims flee persecution in Mecca and establish a nascent Muslim community in Medina. At this stage the Qur’anic discourse about the Muslim ummah retains its theological coloring, but there is a greater emphasis on being a virtuous community that espouses ethical action, social responsibility, and justice:

And thus have We willed you to be a community (ummah) of the middle way, so that [with your lives] you might bear witness to the truth before all mankind, and that the Apostle might bear witness to it before you (i.e. "that your way of life be an example to all mankind, just as the Apostle is an example to you" in Asad's commentary)....

And hold fast, all together, unto the bond with God, and do not draw apart from one another: And remember the blessings which God has bestowed upon you: how, when you were enemies, He brought your hearts together, so that through His blessing you became brethren; and [how, when] you were on the brink

141 Qur’an 23:52; Translation Asad, 670; Also see Denny, 1975, 46-47 for the dating of these verses.
142 See Denny, 1975, 46-47 for the dating of the following verses.
143 Qur’an 2:143; Translation by Asad, 47, 49; additions in parenthesis by author.
of a fiery abyss. He saved you from it. In this way God makes clear His messages unto you, so that you might find guidance, and that there might grow out of you a community [of people] (i.e. an ummah) who invite unto all that is good, and enjoin the doing of what is right and forbid the doing of what is wrong: and it is they, they who shall attain to a happy state! You are indeed the best community (ummah) that has ever been brought forth for [the good of] mankind: you enjoin the doing of what is right and forbid the doing of what is wrong, and you believe in God......

What is peculiar about the Muslim ummah at this stage of its development is that the Qur’anic discourse identifies its primary purpose now, after having initially established the theological truth of tawhid (oneness of God), is implementing what I have called the Qur’anic ethical golden rule: Commanding the virtue (good, right, etc) and forbidding vice (evil, wrong, etc) as is indicated in the just quoted Qur’anic verses 3:103-104 and 3:110. This development is a logical one given that at this juncture in the Qur’anic discourse, the Muslim ummah in Medina is an established community that is capable of practicing ethical and social norms on a community wide level. This was not the case in Mecca where Muslims were a persecuted minority barely able to assert their theological beliefs and perform rituals without escaping persecution. So, it would not have been reasonable to demand of them at that point to 'command virtue and forbid vice'; this is why this ethical imperative does not become associated with Qur’anic discourse until the Muslims established an independent community in Medina.

I have noted in the previous section how the ethical imperative of 'commanding virtue and forbidding vice' was the precursor to the establishing of legal norms in Islam. Given that the Qur’anic discourse ties the new Muslim ummah's identity with this moral imperative in some ways foreshadows the legalistic (i.e. Shari‘ah) orientation which this ummah develops. But the important point to be made here is that the Qur’anic discourse

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144 Qur’an 3:103-104; Translation by Asad, 113; additions in parenthesis by author.

145 Qur’an: 3:110; Translation by Asad, 114; additions in parenthesis by author.
endowed this new community with religious and moral vision that was to act as the basis of a new social solidarity that is very much at odds with their previous tribal chauvinism and its notions of social solidarity.

It is important to note that this notion of *ummah* (i.e. Muslim community) did not remain at the level of a Qur’anic ideal, but was established in the practices of the nascent Muslim community. Once the Prophet Muhammad and his Meccan companions fled persecution and found refuge in the town of Medina, the Prophet immediately undertook concrete social and political steps to institutionalize this Qur’anic vision for a community. On the social level, he had undertaken pairing individuals from the newly converted Muslim inhabitants of Medina (who became known as the Ansar i.e. helpers) with the fleeing Muslim emigrants from Mecca into fraternities that would mutually assist one another both socially and financially even to extent that they would inherit each other as if they were true blood brothers.\(^{146}\)

This was a novel idea given that people of Arabia at that time were most strongly bound to one another through kinship. So to take someone who was from a particular tribe and town and to forge a brotherhood with someone from a different town and tribe (and in some cases even different races as was the case for Bilal the Abyssinian and Salman the Persian) was rather peculiar social practice in the tribally-conscious Arabs of that period. One of the many purposes of these fraternities was to solidify the bonds amongst the Muslims and dilute tribal loyalties. This initiative was designed to strengthen ummatic consciousness amongst the nascent community of Muslim believers in a very practical way so as to help bring about the fruition of Qur’anic social ideals of

\(^{146}\) Ibn Ishaq, 234-235; Nadawi 184; al-Khidhri 100.
unity based on faith.

On the political level, the Qur’anic notion of Muslim *ummah* became institutionalized in the very early years of the founding of the Muslim community in Medina with promulgation of the Charter of Medina in year 1 A.H. The Charter of Medina was a charter that was established by the Prophet shortly after his arrival in Medina that would govern the socio-economic but mostly political relations amongst the various religious (Muslims, Jews and Pagans) and ethnic (tribal) groups that resided in the and around the town of Medina (previously known as Yathrib). The very first clause of this constitution states: “This is a writing of Muhammad the prophet between the believers and the Muslims of Quraysh [i.e. Mecca] and Yathrib [i.e. Medina] and those who follow them and are attached to them.....They are a single community (*ummah*) distinct from (other) people.”

This clause enunciates unequivocally Muslims from various towns (Mecca and Medina) and tribal affiliations (Quraysh, the tribes of Yathrib and whatever Muslim was affiliated with them) constituted a unified community in distinction from all other communities and affiliations. From this it becomes evident that the Prophet Muhammad was consciously trying to alter the basis of social solidarity amongst seventh century Arab society that was steeped in tribal chauvinism and conflict by providing the a new vision of how society should be constituted based on Qur’anic social ideals. This inter-
tribal and inter-racial solidarity that is based on belief is something that comes with real social responsibilities which gives evidence to the reality of this ummah as enunciated in clause 11 of this document: “The believers do not forsake a debtor among them, but give him help....”

It should be noted that tribes or tribalism was not something that was eliminated by the Qur’anic discourse in its establishment of a Muslim ummah nor was there any intention to. The Qur’anic discourse is very explicit in recognizing the social validity of tribal formations: “O humankind! Behold, We have created you all out of a male and a female, and have made you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him (i.e. the most taqwa). Behold, God is all-knowing, all-aware.”

Yet what the Qur’anic discourse did seek to achieve was to change the tribal ethos that was existent at that time, which was in many ways excessive and socially destructive and diminished from the purpose that the Qur’an cites as the reason for human distinction and diversity: “so that you may know one another”. At the same time, the Qur’anic discourse sought to encourage alternative notions of solidarity that would foster the moral capacities of human beings and help them bring into fruition their existential purpose of the worship of God. This was the role that new social formation of ummah was to play.

Reforms on an Economic Level:

There are several areas where Qur’anic injunctions transformed economic relations in Arabia in the early seventh century such as in changing prevailing attitudes

151 Denny, 1977, 40; Watt, 1956, 222.
152 Qur’an 49:13; Translation by Muhammad Asad, 1015; with some modification by the author.
towards wealth, the institutionalized redistribution of wealth through injunctions commanding charity (i.e. *zakah*), the enjoining of the ethics of fair dealing and honesty in trade, the reform of the inheritance practices of Arabian society, etc. But this discussion will focus on the issue of usury, known in Qur’anic terminology as *riba*, because it can serve as an introduction to our later discussion on fatwas of Islamic finance where the Qur’anic principles on *riba* form a basis for that financial system.

With the increasing commercialization of Arabian society, usurious transactions grew substantially as a way of financing commercial ventures as well as of providing loans to those who fell on hard times. For instance there were several wealthy financiers in Mecca that gave interest loans some of whom included family relatives of the Prophet Muhammad like his uncle Abbas.153 Furthermore, in places like Yathrib (aka Medina) there is evidence that members of the Jewish community there engaged usurious loans: al-Bukhari records in the chapter of *Buyu’* that one of the native Muslim of Medina (i.e. an *Ansar*) took a 80 *dinar* loan from a Jew at 50% interest.154 So there is evidence that *riba* (usury) became a widespread practice in Arabian society in particular in the Hijâz judging from the rate of interest being charged in the narration mentioned here, it appears to have become a very exploitative financial practice for those who had enough wealth to give out loans.

The practice of *riba* in Arabian society of the seventh century appears to be a departure from the ideals of tribal cooperation just a few generations earlier as represented in the story cited above of Hashim, the great grandfather of the Prophet

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153 Nadwi, 85.  
154 As quoted in Watt, 1956, 297.
Muhammad, who urged richer members his tribe to undertake the social welfare of the less fortunate members of Quraysh. What the practice of *riba* in seventh-century Arabian society may signify is that some economic relations, as in Polanyi’s analysis, were being disembedded from the prevailing social relations, because loans and similar financial transactions were no longer seen as means of assisting those who were less fortunate and hence reinforcing the social solidarity, but now were becoming utilized as pure financial instruments for profit leading to a re-embedding of aspects of that economy in individual materialistic ambitions.

The Qur’anic discourse progressively condemned the practice of *riba* as an illegitimate financial instrument and sought to re-embed the financial transaction of seventh century Arabia not in the ideals of tribal solidarity, but in the new Qur’anic ethical framework that was being established. Already in the middle to late Meccan period, the Qur’anic discourse starts discouraging the practice by expressing its disdain for *riba* in the following verse:

> And [remember:] whatever you may give out in usury [*riba*] so that it might increase through [other] people's possessions will bring [you] no increase in the sight of God- whereas all that you give out in charity, seeking God's countenance, (will be blessed by Him) for it is they, they (who thus seek His countenance) that shall have their recompense multiplied!\(^{155}\)

This verse shows that the Qur’anic discourse sought to anchor the discussion on *riba* in the moral universe of Islam by claiming that this practice does not produce moral gain in eschatological terms even when it seen as procuring material profits. It shifts the economic transactions such as usury from purely a materialistic realm into a moral realm that impacts ones salvation (i.e. other worldly survival) in the same way that procuring material profits impacts ones survival in this world. *Riba* is represented in this verse as a

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\(^{155}\) Qur’an 30:39; translation by Asad, 792; with additions by the author in brackets.
sort of spiritual bankruptcy because it does not advantage one in the moral universe of God and one is asked to make a choice between gaining the spiritual capital of God's countenance or the economic capital from the gains of *riba*. Yet at this stage in the Qur’anic discourse, there is no clear prohibition of *riba*, but there is an aversion to its practice.

As the Muslims migrate from Mecca to Medina and establish a community there, the Qur’anic discourse on *riba* takes a stronger tone: “O you who have attained to faith! Do not gorge yourselves on usury (*riba*), doubling and redoubling it- but remain conscious of God (*ittaqu Allah*), so that you might attain to a happy state;”\(^{156}\) This verse is said to have been revealed during in the third year of the Madinese period.\(^{157}\) In this verse, the condemnation of usury (*riba*) becomes more pronounced as it explicitly asks the believers to abstain from hoarding wealth through the practice of usury.

Commentators say that the phrasing of the practice of *riba* in terms of 'gorging' and 'doubling and redoubling' is indicative of the pervasive practice of usury in Arabia at that time, which consisted of gains that were multiple sums of the actual principle lent, and not merely a condemnation of its excessive practices.\(^{158}\) In addition, there is a strong moral tone in this last verse as indicated by the phrase *ittaqu Allah* (i.e. have *taqwa* of Allah). This phrase appeals to the consciences of ethical subjects so as to impel them to be scrupulous about this practice that is deemed exploitative. The Qur’anic discourse is situating the discussion of *riba* within a moral framework, hence wanting to embed

\(^{156}\) Qur’an 3:130; translation by Asad, 119; additions in parenthesis by the author.

\(^{157}\) See footnote 97 in Muhammad Asad translation *The Meaning of the Qur’an*, pgs. 119-120.

\(^{158}\) See for example Darwaza, 371.
economic transactions within the value system of Qur’anic social justice.

The last chronological set of Qur’anic verses revealed on the issue of *riba*\(^{159}\) shows the strongest condemnation an unequivocal prohibition of the practice:

….for they say, "Buying and selling (i.e. trade) is like usury (*riba*)" – the while God has made buying and selling lawful (*halal*) and usury unlawful (*haram*). Hence, whoever becomes aware of his Sustainer’s admonition, and thereupon desists [from usury], may keep his past gains, and it will be for God to judge him; but as for those who return to it - they are destined for the fire, therein to abide! God deprives usurious gains of all blessing, whereas He blesses charitable deeds with manifold increase. And God does not love anyone who is stubbornly ingrati and persists in sinful ways......... O you who have attained to faith! Remain conscious of God (‘*ittaqu Allah*) and give up all outstanding gains from usury, if you are [truly] believers; for if you do it not, then be warned of a war (against you) from God and His Messenger. But if you repent, then you shall be entitled to [the return of] your principal: you will do no wrong, and neither will you be wronged.\(^{160}\)

The first thing to notice about these verses is that they call attention to those who want to equivocate between the transactions of trade in usual commodities and the financial transactions of usury. In other words, money is also seen, by those who advocate usury, as a commodity to be traded in the market, and their reasoning seems to be on solely economic grounds. The Qur’anic discourse refuses to accept this reasoning. The implications are that money, from Qur’anic point of view, is a medium of exchange and not a commodity to be traded for profit. Hence, from the Qur’anic point of view, there is no such thing as a purely economic matter that is determined by an economic rationality that is disembedded from ethical and social considerations.

The Qur’anic discourse is unequivocal in pronouncing the unlawfulness of (*harrama*) usury by divine decree and the legal nature that this discourse assumes is implied by the Qur’an’s use of the legal terms of *halal* (lawful) and *haram* (unlawful). So if there was any doubt about whether the previous Qur’anic injunctions on usury were of

\(^{159}\) See the narration on the chronology of these verses from Ibn Abbas, a companion of the Prophet Muhammad, in Bukhari; cited in footnote 268 on page 88 in Muhammad Asad's translation of the Qur’an.

\(^{160}\) Qur’an 2:175-176; 2:178-179; Translation by Asad, 86-88; with slight modification from the author.
a legal nature, that doubt is now laid to rest by the legal language employed in this verse. Moreover, the legality of the command is reinforced by the legal sanction against those who violate the prohibition: first, the sanction is of an eschatological/psychological nature (hellfire) and later it implies actual physical force (having a 'war' declared against the violators by God and his messenger i.e. being physically prosecuted).

Even though there is a strong legal tone to these verses, yet this discourse retains much of the spiritual and ethical prescriptions found in the earlier verses about riba, such as God depriving usury of spiritual blessings, encouraging the acts of charity in contradistinction to usury, and calling on the believer's moral consciousness (taqwa) as a motivator to abstain from usury, etc. This shows the spiritual/moral basis of Islamic law in general, but more particularly it shows that the Qur’anic discourse attempted to embed economic practices of seventh century Arabia within its ethical/legal precepts.

In other words, the practice of riba signified a disembedding of economic practice from social relations as practiced in tribal redistribution of wealth. While the Qur’anic prohibition of riba and simultaneous encouragement of charity as a counter practice to riba was a re-embedding of economic practices, no so much according to a tribal ethos, but in a new framework of social and ethical values that were universal for all those who espoused them. The practices of economic redistribution and reciprocity were no longer a matter of tribal custom, but were governed by a legal framework that instituted practices such as zakah (alms giving) and prohibition of usury that were enforced by the legal authority of the Prophet Muhammad as executive of the nascent Islamic polity.

Take for example the following dialogue between the Prophet Muhammad and a polytheistic chief of one of the Arab tribes who had recently submitted to the religion of
Islam and the authority of the Prophet Muhammad. The dialogue is about what are lawful and unlawful practices for his tribe and on the topic of *riba* (usury) the following exchange between them takes place: “….Kinana said again: 'What you say about usury means that our entire property is nothing but usury.' 'You have the right', replied the Apostle, 'to get back the original sum lent by you for God has ordered: O ye who believe! Observe your duty to Allah, and give up what remainth (due to you) from usury, if you are (in truth) believers' (Qur’an, 2:178)…..”\footnote{As quoted in Nadwi, 371.}

This exchange between the Prophet Muhammad and the tribal chief dealt also with other Qur’anic social rulings such as those on adultery and intoxicants, each of which the tribal chief Kinana was equally reluctant to accept, just as with his opposition to the ruling on usury. Yet the Prophet Muhammad refused to back down from requiring these Qur’anic rulings in each instance, quoting the verses from Qur’an that imposed those injunctions, as he did in the above cited passage. In the end, the tribal chief capitulated to these demands. But what this passage shows is how the practice of usury had become so prevalent in seventh century Arabian society even outside the commercial center of Mecca and how prophetic practice delegitimized usury by appealing to the new standards by which social practices were to be measured, that is, divine authority as represented by the authoritative discourse of the Qur’an.

Moreover, in the sermon delivered by the Prophet Muhammad during his 'Farewell Pilgrimage', which was attended by thousands of people from all over Arabia, he enunciated the abolition of usury and enforces this abolition starting first with one of the biggest financiers, his own uncle 'Abbas: “….The usury of the days of Ignorance
(jahiliyyah i.e. the period of Arabia before Islam) is abolished, and the first of our usury I abolish is that of my own uncle 'Abbas b. 'Abdul Muttalib, for it is all abolished....." 

But the point here is that the Qur’anic rulings on riba were not merely ethical prescriptions but were enforced by sanctions of law. Legal rulings, like those for riba, helped transform the social landscape of Arabia by making it a society that was ruled by universal laws rather than social custom, while still accepting those customs that did not conflict with the newly established ethical norms and legal prescriptions. The establishment of an Islamic legal culture based on the Qur’anic discourse and prophetic practice that changed the practice of seventh-century Arab practice was something rather novel in Arab society up until that point and hence represents a departure from how Arab society was governed. As we will see in more detail in the next chapter, it was this new legal instrument that was a mechanism for forging a new society.

**Conclusion:**

Historians often emphasize the continuities of history keeping with their evolutionary approach. This perhaps explains some of the reason why Western scholars of Islam have tended to accentuate the aspects of early Islamic attitudes and practices that showed a continuity with the pre-Islamic Arabian past. Although there were many aspects of early Islamic practices that displayed a continuity with the pre-Islamic era, placing great emphasis on these relatively minor aspects of continuity does not explain the revolutionary course of events that occurred in the seventh century Near East with advent of Islam.

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162 As quoted in Nadwi, 381.
This historical approach often raises more questions than it answers\textsuperscript{163}.

Foucault historical approach, on the other hand, highlighted the continuity in a historical period that was facilitated by what he dubbed as a common discourse, but at the same time he also exposed discontinuities in the historical process through what he called discursive breaks. The establishment of a particular discourse indicates a continuity of practices within the order of that discourse. Yet, Foucault also recognized that there are junctures in history when there are disruptions in that continuity when discursive breaks occur leading to a transformation from one dominating discourse in a society to another.\textsuperscript{164} The first appearance of the Qur’anic discourse in seventh-century Arabian society symbolized such a discursive break with the predominant discourse and discursive practices of that period.

This discursive break is first exemplified in the cosmological plane with the Qur’anic discourse introducing a new conception of reality which displaced the prevailing worldview amongst the polytheistic Arabs. I have shown the manner in which this discourse introduced new theological concepts such as the absolute supremacy of the one God Allah and the idea of an afterlife replaced the materialistic notions of life that were held by the polytheistic Arabs. Moreover, this new conception of reality contained within it ethical corollaries that shifted the way the recipients of this new discourse would view the purpose of human action and social practice. This discursive break was a

\textsuperscript{163} The Qur’an utilized many of the same concepts that had been prevalent in the Arabian milieu. One should not understand from this that the Qur’anic discourse merely continued the same ideas and practices that had been prevalent. I have shown that although many of the linguistic terms between the pre-Islamic and Qur’anic discourses were the same, they had undergone such drastic transformations in their semantic fields that in many ways they could be considered as new concepts. In other words, the signs had remained the same, yet their significations had changed.

\textsuperscript{164} See Dean, 37-39 for an elaboration of this theme.
necessary prerequisite to fundamentally transform the social structure of Arabia to accommodate new social forms and this accommodation provided a fertile ground for the cultivation of an Islamic legal culture. This is because seventh-century Arabian society was governed by custom and not law and in order for the shift from custom to law to take place, changes had to take place on a cultural level.

The Qur’anic discourse was instrumental in this cultural shift first in providing the normative values (e.g. commanding the virtue and forbidding the vice) as well as legal concepts (e.g. halal/haram) and injunctions (e.g. prohibition of usury) that were essential to the formation and functioning of a legally oriented society. Secondly, by changing the basis of social solidarity from one based on kinship (i.e. tribe) to one based on a universal ethics (i.e. ummah) shifted the emphasis of social practice from those bound by custom to those informed by moral/legal norms.

My assertion is that a legal culture is formed when the behaviors and patterns of conduct in a society are informed by legal norms. This is what happened in the case of early Muslim society and it was a historical prerequisite to establishing authoritativeness of Islamic law because law could only take root amongst a people who are culturally predisposed to it. Therefore, it was out of these discursive transformations and socio-legal components that an Islamic legal culture evolved that fostered the creation of an Islamic legal framework starting in the seventh and eight centuries and it was the Qur’anic discourse that made such developments feasible. The discussion of these issues will be elaborated in the following chapters.

But how is this new cultural formation relevant to the practice of fatwa, which is the subject of our investigation? Suffice it to say at this stage that practice of fatwa
presupposes a set of established legal categories, like *halal* (permitted) and *haram* (prohibited), for its function. These categories were made culturally relevant in early Muslim society by the Qur’anic discourse. Moreover, the practice of fatwa also presumes the acceptance of legal authority from those participating in its practice. This legalistic tendency would not have arisen had it not been for the existence of a peculiar cultural disposition that would give support to it. These issues will be explored in more detail in the following chapter.

Finally, this chapter has represented the Qur’anic discourse as monological in the sense that its statements dictate the beliefs and practices of its adherents. Although this portrayal of Qur’anic discourse remains undoubtedly true to an extent, in the following chapter the dialogical features of the Qur’anic discourse which give rise to the practice of fatwa will be displayed. I call the Qur’anic discourse dialogical because the gradual manner of its revelation allowed for the people who were exposed to that discourse to influence it by inquiring about religious matters that were of concern to them. We will see in the next chapter how these concerns did not go unaddressed.
CHAPTER 2

FATWA IN THE PROPHETIC AND POST-PROPHETIC PERIOD

Introduction

In the previous chapter, I showed the non-discursive impact of the Qur’anic discourse on Arabia in the seventh century especially in regards to its institution of legal norms that became the primary substantive source for the foundation of a legal culture that eventually gave rise to a new Islamic legal tradition. In this chapter, I will explore how this very same discourse along with the discursive practices of the Prophet Muhammad contributed to the formulation of formal mechanisms for the instituting of law in the Islamic tradition. More precisely, I will analyze how the Qur’anic and Prophetic discursive practices encouraged the practice of ifta’ (the process of generating a fatwa) as a legitimate initiative for generating legal solutions to outstanding social problems.

My argument here, is that the process of ifta’ is fundamentally a dialogical activity between a seeker (mustafti) who is faced with a social problem and searches for a resolution of this problem by means of an ethical/legal consultation and a jurist (i.e. mufti) who issues a legal edict addressing the case that is presented to him. This dialogical nature of the fatwa process has its discursive roots in the dialogical manner by which both the Qur’an and Prophet engaged early Muslim adherents. This manner of engagement played a role in facilitating the formal dimensions of ifta’ as the primary mechanism by which Islamic legal edicts would be generated.

In the second half of this chapter, I will look at some of the fatwas in the post prophetic period, where the early Muslim community faced new socio-political
challenges that could only be resolved by fresh insights and how Muslims resorted to *ifta’* as a socio-legal mechanism for resolving these problems. As will be seen in their resolutions to these problems, they employed various approaches of scriptural hermeneutics and legal reasoning that would later become standardized legal precepts in Islamic legal methodology and theory. More importantly though, many of the legal decisions made in these early period set a legal precedent and were adopted in the later formulations of Islamic legal doctrines, hence, making this period a crucial one for understanding the development of the institution of fatwa in particular and the Islamic legal tradition in general.

**The Dialogical Style of the Qur’anic Discourse and the Epistemological Foundations of *Ifta’***

The phenomena of *ifta’*--the practice of making a fatwa--has been around since the very inception of Islam with the revelation of the Qur’an. This fact is affirmed by the presence of terms in the Qur’an that indicate that the Prophet Muhammad was asked questions [e.g. *yastaftunaka* (they seek your opinion/instruction/advice...) and *yasalunaka* (they ask you about...)] to which the Qur’an would respond with legal or theological assertions depending on the nature of the inquiry.¹

Muhammad Riyadh, 20th century scholar from Morocco, asserts that the phenomena of *ifta’* [i.e. process of fatwa production] was facilitated by the manner in which the Qur’an was revealed.² The Qur’an was not revealed in one event but was disclosed in installments over many years; this facilitated dialectic interaction between

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¹ For more on this point, see Hallaq, 1994, 64-65.
² Riyadh, 19.
the Qur’anic discourse and people’s religious and social needs. The dynamic of inquiries that arose from people's concerns and the subsequent response of the Qur’anic discourse to these inquires demonstrates the dialectical aspects of this discourse; this in turn created the atmosphere for religious consultation that later became the discursive impetus for the activity of ifta’ in Islam.

Take for example, the following early revealed Qur’anic verses which show the dialogical mode of the Qur’anic discourse responding to the theological inquires or challenges posed by the polytheistic Arabs and/or Jews to the Prophet Muhammad on various occasions:

And they will ask thee (yasalunka) about [the nature of] divine inspiration (ruh). Say: "This inspiration [comes] at my Sustainer's behest; and [you cannot understand its nature, O men, since] you have been granted very little of [real] knowledge."

They will ask thee (yasalunka) [O Prophet] about the Last Hour: "When will it come to pass?" [But] how couldst thou tell anything about it [seeing that] with thy Sustainer alone rests the beginning and the end [of all knowledge] thereof? Thou art but [sent] to warn those who stand in awe of it.

The internal evidence of these Qur’anic statements, and there are several others

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3 There is disagreement amongst Qur’anic scholars whether the term ruh in this verse designates the human soul or divine inspiration (i.e. revelation) as the translator has chosen to render it here. The dispute is of little relevance to our discussion here since the point is to show how the Qur’anic discourse responded to peoples theological inquiries into which both the issue of revelation and the human soul fall.

4 Qur’an 17:85; Translation by Muhammad Asad, 550. Materials included in the parenthesis have been added by the author.

5 Qur’an 79: 42-45; Translation by Muhammad Asad, 1184. Materials included in the parenthesis have been added by the author.
that begin with the same or similar construction, is a clear indication that the Qur’an, through the medium of the Prophet Muhammad, engaged in a sort of indirect dialogue with its audience by responding to the inquiries that were posed by them as shown by the phrase 'they ask thee' (yasalunka). Phrases like these were signs that the Qur’an recognized the concerns of its audience and in responding to their concerns encouraged dialogical interaction as a vehicle for acquiring knowledge and achieving understanding.

The nature of fatwa activity presupposes a dialogical model for achieving knowledge and understanding. This process of generating a fatwa necessitates that there be a question posed that would act as a stimulus for the respondent to address those concerns raised by the question(s), thus simulating a dialogical mode of interaction between questioner and respondent. The Qur’anic discourse served as a catalyst for this dialogical model of facilitating religious understanding in two respects: first, the sheer fact that the Qur’an was unlike other texts that are usually presented all at once. Instead, as already mentioned, it was revealed in a fragmentary fashion over many occasions so as to respond to the situations confronting the Prophet Muhammad in his propagation of Islam. The disclosure of the Qur’anic discourse spanned the entire prophetic career of the Prophet Muhammad of twenty-three years.

So the manner of the Qur’an's revelation made this discourse interactive and responsive to the various historical situations that would arise; so much so that a Qur’anic science came into being known as *asbab al-nuzul* (Occasions of Revelation) which sought to track those historical events--whether those events were personal such as individual inquires or communal in nature like actual social/political happenings-- that

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6 Illustrations of this science will be given later in this chapter in order to historically contextualize Qur’anic fatwas.
precipitated the disclosure of certain Qur’anic statements or acted as the historical context for which those Qur’anic statements were revealed. The point of this discipline is that it recognizes that the Qur’anic discourse was not completely a monological one and was responsive to the exigencies of the historical situation. This model of interaction—responding to an inquiry or event—precisely how the fatwa process operates showing that is it has its methodological foundations in the Qur’anic discourse itself.

The second respect in which the Qur’anic discourse catalyzed the activity of fatwa is its explicit recognition that certain Qur’anic statements were disclosed as a response to certain inquiries that were posed to the Prophet Muhammad and these statements were introduced by the phrases of *yas’alunka* (they ask thee) or *yastaftunka* (they consult thee). The explicit recognition by the Qur’anic discourse that some of its particular statements were in direct response to certain questions gave legitimacy to peoples impulse to inquiry and hence the enterprise of fatwa. This is because the enterprise of fatwa itself is based on the inquiry posed by a questioner(s) who is seeking an understanding through the agencies of higher authority. So this Qur’anic discursive practice played a foundational role in establishing the practice of fatwa and planting the seeds for a new legal tradition.

Before I further explore the formations of this legal tradition, it is important to discuss in greater detail the Qur’anic responses (i.e. Qur’anic fatwas) to legal questions posed to the Prophet Muhammad. This is to illustrate in concrete terms how the Qur’anic discursive practices became the catalyst for later Islamic legal practices. Although many Qur’anic legal injunctions came in response to questions posed to the Prophet Muhammad as is shown in *asbab al-nuzul* (Occasions of Revelation) literature, I will restrict my
analysis to those Qur’anic verses that are introduced by what I will call the *ifta’* phrases.

Those phrases are the two that I previously mentioned: *yasalunka* (they ask thee) and *yastaftunka* (they seek your advice); where both phrases mean that an inquiry is being posed, but the term *yastaftunka* (a conjugation of the root term for fatwa: *afta*) is perhaps more specific in indicating that the question being posed is no mere ordinary question posed in everyday affairs, but a question of greater import, although the Qur’anic discourse also utilizes both phrases in issues that share similar significances. The reason for this restriction of the analysis to those types of verses is because they contain internal evidence from the Qur’an itself, without having to appeal to *asbab al-nuzul* literature to determine it, that an opinion was sought which those verses are a response to. Nonetheless, I will appeal to *asbab al-nuzul* literature to access further details about the questions and their circumstances which are not available in the actual verses.

There are approximately nine verses in the Qur’an that begin with either of the two *ifta’* phrases that are of a legal nature.7 The questions posed and responses given are on variant social, economic and political topics. A sample of those issues include: the nature of determining times for ritual practice8, the legality of fighting during the sacred months9, the legality of alcohol and gambling and what to give in charity10, how to

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7 There are several more verses dealing with theological topics, some of which I have quoted earlier.
8 Qur’an 2:189.
9 Qur’an 2:217.
10 Qur’an 2:219.
dispense of the wealth of orphans\textsuperscript{11}, sexual conduct during menses\textsuperscript{12}, types of lawful food\textsuperscript{13}, spoils of war\textsuperscript{14}, treatment of women and orphans\textsuperscript{15}, and division of inheritance\textsuperscript{16}. 

Let me take one of these verses and subject it to further scrutiny: “They will ask thee (yasalunka) about intoxicants and games of chance. Say: 'In both there is great harm as well as some benefit for man; but their harm is greater than their benefit'............”\textsuperscript{17} The verse is introduced with ifta' phrase 'yasalunka' indicating that the verse is a response that was prompted by an inquiry made about the permissibility of intoxicants and gambling; though we are not given the details about who is doing the asking and what prompted that question. We find out from extra-Qur’anic literature such as asbab al- nuzul (Occasions of Revelation) the circumstances of the inquiry that prompted the disclosure of this verse: “(They question thee about strong drink and games of chance…) [2:219]. This was revealed about 'Umar ibn al-Khattab, Mu'adh ibn Jabal and a group of Helpers\textsuperscript{18} who went to the Messenger of Allah, Allah bless him and give peace, and said: 'Please give us your verdict about intoxicants and games of chance, for intoxicants suspend people's reasoning faculties while games of chance waste their money'. As a response, Allah, exalted is He, revealed this verse.”\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{11} Qur’an 2:220
\item \textsuperscript{12} Qur’an 2:222
\item \textsuperscript{13} Qur’an 5:4
\item \textsuperscript{14} Qur’an 8:1
\item \textsuperscript{15} Qur’an 4:127
\item \textsuperscript{16} Qur’an 4:176.
\item \textsuperscript{17} Qur’an 2:219; translation by author with assistance from Asad's \textit{The Meaning of the Qur’an}, 70.
\item \textsuperscript{18} The designation of the Muslim natives of Medina (Yathrib) who gave refuge the Prophet Muhammad and his Meccan companions when he fled Mecca.
\item \textsuperscript{19} Wahidi, \textit{Asbab al Nuzul}, \texttt{http://www.altafsir.com/AsbabAlnuzol.aspSoraName=2&Ayah=219&search=yes&img=A} accessed January 5, 2012.
\end{itemize}
This incident shows that it was the initiative of the early Muslim community members whose inquiry precipitated the disclosure of those Qur’anic verses and initiated the establishment of new norms that would transform the practices of this nascent community. It is clear from the language of the verses quoted that the practices of drinking alcohol and gambling were not condemned outright nor prohibited, but what is clear is that these practices were seen as doing more harm than good hence violating the fundamental Islamic legal maxim maximizing benefit and minimizing harm which we mentioned in the previous chapter. Nonetheless, this Qur’anic verse laid the seeds for the eventual prohibition of these deeply rooted practices, which occurred at a later period through the dictates of other Qur’anic verses.²⁰

Yet what is most interesting about this incident is that it illustrates how members of the nascent Muslim community were internalizing Qur’anic norms because of their recognition that practices of consumption of alcohol and gambling were inconsistent with those norms as demonstrated in their reported appeal to the values of reason and conservation in the tradition cited above, yet they lacked the authority to implement their point of view on the rest of the community and hence sought legislation in this regard as indicated in their request to the prophet to give them his ‘verdict’. These advocates did not immediately achieve their objective of decisive legislation prohibiting those practices, but nonetheless catalyzed the process that led to eventual prohibition. Hence they were participants in the formation of new practices that were in accordance with the ethos of this new Islamic community.

The following Qur’anic verses, concerning the legal guardian's management of

²⁰See Qur’an 4:49 and 5:90.
the orphan’s wealth, also utilize the *ifta’* phrase, and the subsequent *asbab al-nuzul* narration corroborates that fact:

“And they will ask thee (*yas’alunka*) about [how to deal with] orphans. Say: ‘To improve their condition is best.’ And if you share their life, [remember that] they are your brethren: for God distinguishes between him who spoils things and him who improves. And had God so willed, He would indeed have imposed on you hardships which you would not have been able to bear: [but,] behold, God is almighty, wise!”

One of the *asbab al-nuzul* narration that set the context for these verses runs as follows:

Ibn ‘Abbas said: “When Allah, exalted is He, revealed the verse (And approach not the wealth of the orphan save with that which is better…), whoever had an orphan’s wealth with him proceeded to isolate his food and drink from the orphan’s food and drink, and whatever remained of the orphan’s food was kept aside until the orphan would use it or it gets bad; and this was a source of anguish for people. They went and mentioned this to the Messenger of Allah, Allah bless him and give him peace, and as a response, Allah, glorified and exalted, revealed (And they question thee concerning orphans. Say: To improve their lot is best), by mixing their food and drink with their food and drink”.

This Qur’anic fatwa for this given situation has a different dynamic than the previously mentioned fatwa. In the previous fatwa on alcohol and gambling, the

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21 Qur’an: 2:220; Translation Asad, 70.
legislation was wholly initiated by concerns of members of the Muslim community. In this fatwa, according to the narration, the legislation came as a follow-up to and a clarification of a previously legislated practice. In this case, a seemingly unprovoked Qur’anic legislation requiring that legal guardians show scrupulousness when using the wealth of orphans in their custody seemed ambiguous in terms of its implementation and this ambiguity created hardship in terms of its practice. This necessitated the practitioners to pursue a fatwa (i.e. clarification) on how to understand this new practice whereby the subsequent portion of the verse (i.e. the Qur’anic fatwa) was disclosed as a reply.

These incidences and their accompanying verses highlight the indirect dialogue taking place between the Law-giver and members of the first Muslim community and are an indication of the dialogical aspect of the Qur’anic discourse. Discourses in the Foucauldian sense are normally considered monological and determinative in the sense that the subjects of the discourse (i.e. those who are subjugated to that discourse) do not partake in shaping that discourse; instead they are shaped by it.²³ Although the Qur’an in that way operates much like a Foucauldian discourse, yet there are respects in which it departs from that to show that discourses need not be completely determinative and one way in their communication and may be communicative and reflexive.

What this may imply is that people of the day were taking an active role in determining their religious and social practices by engaging the authoritative discourses with their inquiries. By seeking solutions to the issues that meant the most to them as is

²³ See Paul Bove’s article “Discourse”, pg. 58 in Critical Terms for Literary Study by Frank Lentricchia and Thomas McLaughlin. Also, See Foucault’s article “What is an Author” in Twentieth Century Literary Theory by Vassilis Lambropoulos and David Miller where Foucault expounds on how the author (as a particular type of subject) is a function of discourse (pg. 130) and not the other way around.
represented by the practice of fatwa, ordinary people were and still are participating in shaping their religious and social fields. They are influencing the discourses and the social forces that affect their lives even when they are unable to completely determine them. Yet this dynamic is facilitated by the dialogical and communicative elements of discourse such as the ones displayed in Qur’anic fatwas.

But more poignantly, fatwa as a legal practice derives its basis from the Qur’anic discursive practice as demonstrated in the examples above. As the authoritative text for Muslims, the Qur’an's responsive engagement of people’s inquiries and concerns provided the epistemological legitimation for the validation of this practice in Muslim life. In other words, fatwa gained its acceptability as a valid form of legal practice and law production because it was something that was enunciated and practiced by the authoritative discourse of Islam (i.e. the Qur’an). Once validated, ifta’ became the foundational practice for the establishment of whole legal tradition as I will demonstrate in the following pages.

The Beginnings of Ifta’ in the Prophetic Practice

While the Qur’an is the primary discursive source for fatwa, the prophetic practice was instrumental in establishing ifta’ as a legal practice in Islam. This is probably no surprise given that the Prophet Muhammad was a legislator, but one may ask how the art of ifta’ was practiced during the career of the Prophet Muhammad and what impact did that practice have on institutionalizing fatwa in Muslim legal tradition? What distinguished in the Prophetic fatwa from the Qur’anic fatwa and how were those peculiarities instrumental to the development of ifta’ as an Islamic legal institution?

What is peculiar about the Prophetic fatwas is his usage of legal reasoning to
justify some of his fatwas, while this feature was on a whole absent from Qur’anic fatwas. This is understood given that the Qur’an is viewed as divine text and hence needs no rational justification to support its position; although the Prophet's authority is also from a theological point of view unquestioned in Islam, nonetheless, his authority is derived from the Qur’anic discourse and therefore his authority is seen as derivative and not seen as absolute in the same manner as the Qur’an.24 Despite its derivative nature, his Prophetic authority did not create the necessity for the use of reason in his fatwas, as his authority and the divine authority of the Qur’an were seen as equal on an epistemological level although not an ontological one. Hence, his use of reason in fatwas must have been for pedagogic purposes to show his followers how arrive at their own fatwa deductions.

Let me give a few illustrations of when the prophet Muhammad used reasoning to support his fatwa. First, is his fatwa to Maymunah on the legality of benefiting from the skin of a dead sheep. Maymunah mistakenly expanded the range of objects that are legally prohibited by a Qur’anic verse25, which prohibits the eating of the meat of dead sheep that had not been properly slaughtered, to include a prohibition of the utilization of its skin as well. The Prophet argues that her extension of the prohibition is invalid and that the verse only stipulates the eating of the meat and not the utilization of its skin.26 In this incident we see that Prophet used a sort of hermeneutical reasoning to justify his legal position by showing how the text of Qur’an should be understood.

Yet another example of where the use of reasoning in a fatwa is even more

24 Later in the chapter, I will discuss the nature of prophetic authority and its relationship to law.
25 Qur’an 6:146.
26 Riyadh, 42.
pronounced is when the Prophet uses an analogy\textsuperscript{27} to justify some of his fatwas: Umar asked about the permissibility of kissing while fasting; the Prophet responded by making an analogy to the performance of the ritual washing of ones mouth as being something allowed during the fast and hence on the same grounds argues for the acceptance of the act of kissing while fasting.\textsuperscript{28} The point of this analogy is that if swishing water to clean ones mouth without willingly ingesting it does not break ones fast, neither should kissing one’s spouse during the fast as an act of love so long as it does not produce sexual excitement which is against the spirit of fasting.

So these two examples show how the Prophet contributed to the methodological practices of \textit{ifta’} by purposefully displaying legal reasoning when issuing some of his fatwas. There was no need on behalf of the Prophet Muhammad to enunciate a rationale for his fatwas, as he enjoyed, by Qur’anic mandate,\textsuperscript{29} independent authority to legislate without recourse to external authority other than the Qur’an; nonetheless, in showing his rationale, it should be understood that he was trying to teach his followers the rational basis of Islamic law and the types of rationale that should be employed in its production.\textsuperscript{30}

Muslim tradition found in the Prophetic practice of \textit{ifta’}, especially the types of fatwas where the rationale for his fatwas was enunciated, the methodological seeds that germinated into Islamic legal theory. Take for example the two fatwas mentioned above

\textsuperscript{27} Which is known as \textit{qiyas} in Islamic legal theory and become one of the main sources for the production of Islamic law.

\textsuperscript{28} Riyadh, 45.

\textsuperscript{29} See Qur’an 3:32; 3:132; 4:59; 5:92; 8:1; 8:20; 8:46; 24:54; 24:56; 47:33; 58:13; 64:12; as examples of verses that urge the believers to obey the commands of the prophet including legislative matters.

\textsuperscript{30} Sayis, a contemporary historian on Islamic law, makes a similar assertion in his book \textit{Tarikh al-Fiqh al-Islami}, 42.
where the Prophet in one case based his fatwa on textual hermeneutics and the other on analogy; in the Islamic science of *usul al-fiqh* (i.e. Islamic legal theory), textual hermeneutics and legal analogy (i.e. *qiyas*) comprise more than half of the studies in this discipline. Muslim scholars have long argued that this science and others have their roots in the prophetic practice where these legal devices were employed by the Prophet in his legal edicts and judgments.\(^3\) The point in this argument is to show how the prophetic practice contributed to the discursive formation of Islamic law and Islamic legal theory.

On other occasions the Prophet's fatwa were corrected by Qur'anic revelation such as the case when a women by the name of Khawlah came to him to inquire about her husband's enactment of a *dhihar*.\(^3\) The Prophet judged that she was no longer married to him as he interpreted the action as an act of divorce, whereby revelation came and corrected this fatwa in the first four verses of “Surat al-Majadalah” thus going against the Prophet’s judgment and abolishing the legality of *dhihar* as a legitimate act of divorce.\(^3\) According to Abu Zahrah, reputed Egyptian scholar in the 20\(^{th}\) century, these types of examples show that mistakes in prophetic legislation (i.e. fatwas) cannot have been and were not left unchecked by revelation.\(^3\) But more poignantly for our discussion this illustration gives historical precedent for the later practice of *ifta’* where the individual jurist's fatwas remain tenuous until they are cross examined by other legal

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\(^3\) See Riyadh, 44; and Sayis 41 for example of Muslim historians on Islamic law who make such assertions.

\(^3\) When a husband enacts a pre-Islamic form of divorce by pronouncing the statement: “you are like the back of my mother”, which deprives her of her marital rights and makes it impossible for her to remarry (see The Message of the Qur’an by Muhammad Asad pg 843)

\(^3\) See *The Message of the Qur’an* by Muhammad Asad pg. 843; and Linah Al-Himsi’s *Tarikh Al Fatwa fil Islam: wa Ahkhamuhaha al-Shariyyah* pg 68. Dar Ar-Rashid, Damascus Syria 1996.

\(^3\) Abu Zahara, 239-240.
authorities and then officially incorporated into the canons of law.\textsuperscript{35}

On another note, it seemed like the Prophet Muhammad encouraged \textit{ijtihad} (the exercise of using judgment to develop legal rulings) amongst his companions by affirming the validity of their disparate rulings on various religious matters. For instance, when Amr ibn Al-\textsuperscript{1}As became \textit{junub} (i.e. in the state of greater ritual impurity) and did not have appropriate water to purify himself, he just performed \textit{tayammum} (alternative purification) and performed his prayers and did not repeat his prayers when he eventually found water\textsuperscript{36}; seeing that at the time of prayer, he had met the proper conditions to perform the alternative ritual purification (\textit{tayammum}) and hence did not need to repeat the prayer once water was found.\textsuperscript{37}

Yet in another setting where the companions found themselves in a similar situation they did the same, but when they found water they performed their prayers again; believing that, since the exceptional conditions necessitating the performance of prayer under \textit{tayammum} had been resolved, they had then to re-perform the prayers once water was found. The Prophet endorsed both opinions/actions as legitimate;\textsuperscript{38} seeing that they both had their legitimate recourse to proper reasoning. This illustrates that variant opinions were accepted so long as the reasoning behind them was valid, thereby encouraging an atmosphere of independent problem solving that was required when encountering new scenarios that had to be resolved by \textit{ifta} and \textit{ijtihad}.

Another example where the Prophet encouraged his companions to practice

\textsuperscript{35}This will be discussed in greater detail in chapter 4.

\textsuperscript{36}Abu Zahra, 239.

\textsuperscript{37}Abu Zahra, 239.

\textsuperscript{38}Abu Zahra, 239.
ijtihad, was when he gave orders that the army going against the Banu Qurayzah should not perform the ‘asr (afternoon) prayer until they reached there. When the time of asr seemed to be passing, some within the group understood the command as an injunction to hasten their travel to the destination and not to miss the time to perform the prayer in the process of traveling and so they prayed on the way; while others interpreted it as a mandatory injunction by the Prophet not to pray ‘asr except in the territory of the Banu Qurayzah, and so they didn’t pray along the way. When they brought the matter to the Prophet, he did not object to either opinion.39

This shows that matters or statements could be interpreted differently and still be considered within the range of valid interpretation so long as the language allowed for it. So the rudiments of fatwa by the companions (i.e. their ijtihad) was something cultivated by the Prophet himself. Yet another example of the Prophet encouraging the process of legal reasoning and fatwa is the famous report where one of his appointed judges Mu‘adh was sent by the Prophet to be a judge in Yemen. When he asked Mu‘adh about the criteria that he would use to judge cases, Mu‘adh responded that if he finds no example in the Qur’an and in the Sunnah (i.e. scriptural precedence) then he will deduce judgments from his own reasoning/discretionary opinion (ra’y).40 The Prophet goes on to commend Mu‘adh on his understanding of the proper recourse that should be taken in legal matters.

The point here is that the Prophet's approval of the methodology that Mu‘adh outlines is yet another indication that he encouraged the use of ijtihad/qada/fatwa on new matters that had no previous scriptural precedence. Moreover, traditional Muslim scholarship asserted that the Prophet's approval of ijtihad and ra’y (discretionary opinion)

39 Al-Sayis, ND, 40.
40 Al-Sayis, ND, 39. I am following Hallaq in translating of ra’y as discretionary opinion.
as a legitimate source of law paved the way for later acceptance and legitimation of use of legal methodologies like *qiyas* (analogy), a constituent of *ra'y*, as one of the primary non-scriptural sources of law.⁴¹

What I am suggesting is that these illustrations of the prophetic practice of *ifta'* represent a seminal beginning point for the establishment of the rules that became associated with the subsequent practices of *ifta'* in particular and Islamic legal theory in general. The Prophet’s employing of various methodologies and approaches in generating fatwas such as the use of textual hermeneutics and analogical reasoning, and his encouragement of others to exercise their own legal reasoning (*ijtihad/ray*) to arrive at legal positions, became authoritative and foundational norms and practices for the establishment of an Islamic legal tradition.

This is not say that entire corpus of prophetic fatwas displayed the same sophistication in use of legal devices in their pronouncements. In most cases fatwas don't provide the rationale for their assertion whether they are prophetic or post-prophetic fatwas, but in providing the legal rationale in some cases established a precedence for how legal reasoning in Islam should be practiced. It is here where the prophetic fatwa can be distinguished from the Qur’anic fatwas. While the Qur’anic fatwas, to use Weber's terminology, have an oracular character⁴², in the sense that there is no appeal to rules on how they are arrived at, some of the prophetic fatwas begin to display the rules of their formation as indicated by the examples illustrated above when the Prophet used analogical reasoning to show that kissing did not negate one’s fast.

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⁴¹See Abu Zahara pg. 246 for an elaboration of this assertion.
⁴²See Weber, 74.
When I say the prophetic practice of fatwa began to establish the legal norms of Islamic legal tradition I mean by this formal standards that gave rules for the application of legal decisions. I do not mean to imply in describing Qur’anic fatwas as having an oracular character that no legal norms were established by them. On the contrary, as we have demonstrated in the first chapter, many of legal norms of Islamic law are a result of the substantive ethical teachings of the Qur’an. So, although the Qur’an did not provide much in terms of formal rationality in its fatwas, it certainly did give much in terms of substantive rationality and values for the establishment of Islamic law.

So describing Qur’anic fatwas as having an oracular character refers to the lack of formal rules for their formation, and it is in this formal dimension of law and legal edicts that Weber asserts that legal “norm formation occurs when there is a weakening of the originally purely oracular character of the [legal] decision.”43 It is in this respect that the Prophet’s practice of ifta’ planted the seeds for the development of formal legal norms in his application of rational devices such as analogical reasoning and textual hermeneutics that became seminal ideas and practices for the development of Islamic legal theory and tradition.

Later Islamic legal theorists used these prophetic legal practices as legitimating factors in their construction of an Islamic legal theory (usul al-fiqh). For instance, classical and medieval Muslim jurists often cited the prophetic tradition about Mu’adh, and other traditions that were cited earlier, for the sanctioning of the exercise of legal

43 Weber, 74, with additions from the author in brackets.
reasoning (*ijtihad*)\textsuperscript{44} in general and analogical reasoning (*qiya\textsuperscript{s}*\textsuperscript{45}) in particular to establish new laws that were not directly legislated by the Qur’an and the prophetic practice. The point here is that Muslim jurists and legal theorists were conscious of the prophetic legal practices when constructing and legitimating the legal methodological tools employed in the derivation of Islamic law underlining the importance of these prophetic practices in establishing the Islamic legal discourse.

But what does this discussion of *ijtihad* and *qiya\textsuperscript{s}* have to do with fatwa? Fatwa represents a sub-category of *ijtihad* in that it is a particular activity that is subsumed under the larger category of *ijtihad*. So, the licensing of *ijtihad* opened the doors for the practice of *ifta’*, both of which were practiced and encouraged by the prophet himself.

Some of rules for this *ijtihad/ifta’* such as analogical reasoning (*qiya\textsuperscript{s}*), textual hermeneutics (e.g. *dalalat al-alfadh*), and the legality of different legal opinions (fatwa) were also established by prophetic practice which later Islamic legal theorists and jurist used to construct the discipline of *usul al-fiqh* (Islamic legal theory) as the rules for deriving Islamic law in general and the practice of *ifta’* in particular.

So what we have in these prophetic practices are the seminal beginnings of a legal discursive formation. But what is meant by a discursive formation? In reference to discursive formations, Foucault says in the *Archeology of Knowledge* “whenever, between objects, types of statements, concepts, or thematic choices, one can define regularity (an order, correlations, positions and functionings, transformations), we will

\textsuperscript{44} See the following medieval *usul al-fiqh* works that make those points: al-Ghazali’s *al-Mustasfa* vol 2, pg 392; and al-Razi’s *al-Mahsoul* Vol. 6, pg 20. Also see the classical Muslim jurist al-Shafi’s work *al-Risala* pg 299 (translation by Khadduri) where he justifies *ijtihad* by reference to prophetic statements.

\textsuperscript{45} See al-Ghazali’s *al-Mustasfa* vol 2, pg 266-267.
say….that we are dealing with a discursive formation.” 46 A discursive formation is the defining feature of any discourse. In this regard, Foucault says in his Archeology: “We shall call discourse a group of statements in so far as they belong to the same discursive formation” 47

So what can be deduced from Foucault's statements is that discourses are the result of discursive formations and discursive formations are defined by the order and regularity that they bring to any particular set of statements/events. So what sort of regularities does one detect from the prophetic practice of ifta’ that contributed to the rise of an Islamic legal discourse? It is obvious by now that these discursive practices provided substantive legal norms, which were the normative material by which an Islamic legal discourse was constructed. Furthermore, these discursive practices led to the establishment of some of the formal legal mechanisms for the derivation of Islamic law. Yet what lies at the core Qur’anic discourse and the prophetic practice is the notion of authority.

Reverberating across the various Qur’anic statements and prophetic practices is a shift towards a new form of authority that was not practiced amongst polytheistic inhabitants of the seventh-century Hijaz (i.e. western Arabia). Central to this new form of authority was the notion of legality (i.e. religio-legal authority). Prior to the advent of Islam, Arabian society was ordered by customary norms and rules that were traditionally established and were widely accepted but lacked a defined centralized authority by

46 As quoted in Whisnant, Foucault & Discourse, pg 5. webs.wofford.edu/whisnantcj/his389/foucault_discourse.pdf Downloaded March 12, 2012

which they would be set and enforced. These customary norms were ambiguously derived in that they represented transmissions from the authoritative practices of their forefathers without specific genealogies as to whom and how they were established. Moreover, their application wholly depended on social means of coercion such as being ostracized by the tribe to which one belonged if s/he failed to meet the requirements of those customs.

The advent of Islam introduced an entirely novel form of authority in the Arabian social environment and that was religio-legal authority as represented by prophecy in particular the prophecy of the Prophet Muhammad. This induced a shift in the discourse and communal ethos of Arabian society away from customary practice based on the tradition of the forefathers to a religio-legal practice based on prophecy and revelation. This shift was not immediate, but the seminal points of this shift were clearly enunciated in the early Qur’anic discourse. In this regard, Watt says:

“Part of the stories of the prophets which occupy so much of the Meccan passages of the Qur’an is that they are a counterblast to this claim to follow in the steps of the forefathers. The Muslims must have felt they were deserting their ancestors, especially when asked difficult questions about the present or future state of deceased pagans. These stories of the prophets, doubtless helped them realize that, as followers of a prophet, they had a distinguished spiritual lineage.....and so helped the Muslims to realize that they

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48 See Watt, 1956, pg 126. Also there are several Qur’anic statements that attest to the Arabs’ (and previous peoples’) reliance on transmitted customs and particularly religious practices from their forefathers; see the following Qur’anic passages: religious practices 7: 70; 11:62; 11:87; 14: 10; 21: 53; and general customs: 2:170; 5:104; 7:28; 10: 78; 26: 74; 31: 21; 43:22-23; For Qur’anic criticism of blindly following traditions of forefathers, see the following Qur’anic passages: 2:170; 5:104; 27: 69.

49 More particularly what Weber would call law-prophets.
were members of a community with deep roots in the past.\textsuperscript{50}

But this shift in authority was not confined to merely changing the Arab social imagination as indicated by Watt's remark. Rather, it eventually changed what would be viewed as authoritative conduct based on jurisprudential considerations. For instance, in simple societies based on custom there is little by way of members making inquiries to authorities about the application of customary rules. These rules become inculcated in the members through the socialization process and guide members’ practices with little conscious recourse to the authorities by the members to verify the validity of their practices.\textsuperscript{51}

On the other hand, in the case of Qur’anic and prophetic fatwas, one sees an active engagement of members of the Muslim community in trying to validate their practices in accordance to the norms that were established by this new forms of authority (i.e. prophetic). Aside from the nature of the norms that guide practice, it is precisely this engagement (i.e. iftāʾ) which constituted jurisprudential activity because of its purpose of trying to legitimize social and legal practices.

This jurisprudential activity of iftāʾ is an indication that the Prophet's authority was legal in nature as well as religious. This marked a shift in the nature of authority and what constituted authoritative conduct in seventh century Arabian society from one that was dictated by customary norms and traditional authorities (i.e. chiefs and the practices of forefathers) to one that was increasingly taking on a legal coloring guided by a law-

\textsuperscript{50} Watt, 1945, 126.

\textsuperscript{51} For more on this point, see Bronislaw Malinowski’s \textit{Crime and Custom in Savage Society}, pgs. 66-67.
prophet. Whether the Prophet Muhammad's authority can be genuinely construed as legal authority and whether his pronouncements in general and his practice of *ifta’* in particular constituted legislative activity may be contested. With regards to whether his pronouncements can be considered legal in nature, the legal anthropologist Pospisil states that law is made of decisions of authorities rather than codes or litigant behaviors.\(^{52}\) So decisions by legal authorities are the starting point of law in society. Thus, politics is not the only means by which law is produced although that is the predominant feature of law in Western societies.\(^{53}\) It is clear that in the Prophet's fatwas and judgments we have authoritative decisions that guide people's social practices; the question is whether these decisions constitute law proper and/or legal matter by which laws are derived or rather merely represent ethical and/or customary prescriptions.

To help us answer this question, Pospisil defines several attributes of law which distinguish it from other social phenomena such as customs and political policies. There are four essential attributes to law according to him:

1-*Authority*: Pospisil defines it as “one or more individuals who initiate actions….and whose decisions are followed by the majority of the group’s members.”

2-*Intention of Universal Application*: authoritative decisions make law when they formulate ideal—“a solution intended to be utilized in all similar cases in the future.”

3-*Obligatio*: authoritative decisions become law when they create rights for some and obligations for others.

4-*Sanction*: authoritative decisions are legal when they are backed by effective

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\(^{52}\) As summarized in Donovan, 125.

\(^{53}\) Donovan, 53-54.
social control whether that control has physical or psychological repercussions.\textsuperscript{54}

With regards to the nature of the Prophet's Muhammad's authority, there are many Qur’anic statements that imply that the Prophet's Muhammad's authority as being legislative and juridical in nature and not just religious. Some of these statements include the following: “But nay, by thy Sustainer! They do not [really] believe unless they make thee [O Prophet] a judge (yuhakkimuka) all on which they disagree among themselves, and then find in their hearts no bar to an acceptance of thy decision and give themselves up [to it] in utter self-surrender.”\textsuperscript{55} This passage is unequivocal in asserting the Prophet's role as judge in all matters which includes legal issues as implied by the term used to designate this authority: yuhakkimuka. This term and its root term hakama are most often employed when judicial authority is being invoked.\textsuperscript{56}

Yet Prophetic legal authority is not only corroborated by religious sanction of Qur’anic scripture, but by actual historical events. The Charter of Medina for instance, which was described in the first chapter, contained clauses which gave the Prophet Muhammad political-legal authority over the city-state polity of Medina. For example, clause 42 of this constitution states: “Whenever among the people of this document there occurs any incident (disturbance) or quarrel from which disaster for it (the people) is to be feared, it should be referred to God and to Muhammad, the Messenger of God....”\textsuperscript{57} This statement implies juridical functions to the Prophet's authority and points to the legal

\textsuperscript{54}As summarized in Donovan, 126.

\textsuperscript{55}Qur’an 4:65; Muhammad Asad translation The Meaning of the Qur’an, 154. Emphasis and materials between parentheses added by author.

\textsuperscript{56}See the connotations of the Arabic term hakama and its various derivations in E.W. Lane's Arabic-English Lexicon, Vol. 1, pg. 616-617.

\textsuperscript{57}Watt, 1961, 224. Also see Denny, 1977, pg 43 and al-'Umari, 1991, vol. 1 pg 110.
nature of his activity.

There is little question that the dictates of the Prophet Muhammad were indeed observed and obeyed by followers within his community, which attests to his authority. Yet the greatest attestation that some of these dictates were of a legal nature, and hence constituted law and give testimony to his legal authority, was his capacity to enforce these dictates. This basically constitutes Pospisil's notion of sanction, which is the fourth criteria that distinguishes law from other social phenomena such as ethical prescriptions or customary practices.

The following represents a historical report where the Prophet Muhammad enforced legal injunctions that he promulgated. The subject of this regulation was methods of sales transactions: “Bukhari narrated upon the authority of Ibn Umar that during the time of the Prophet, some would buy food directly from the transporters (i.e. before it reaches the market); so the Prophet sent to them (i.e. the transporters) those who would prevent them from selling it (i.e. food) where it was being sold until it was transported to the place where food is sold (i.e. the marketplace)”\(^{58}\) The point here being that this practice was an attempt to circumvent ordinary market functions for establishing the legitimate prices for commodities. By purchasing commodities before they reached the market, the normal market pricing mechanisms for those commodities would be circumvented, hence procuring an unfair pricing advantage to those engaged in this practice. As this practice went against the Islamic norms of economic transactions, the Prophet Muhammad prohibited it.

As for whether the Prophet Muhammad's authoritative decisions were intended

\(^{58}\) As cited in al-Tilimsani, 299. Translation by the author.
for universal application, this being the second criteria that Pospisil asserts as being crucial to law, it should be noted that his decisions formulated legal ideals that extended beyond the particular issue/problem he was addressing. This is demonstrated in his very own practice in cases where he used analogies to previous decisions to establish rulings for similar scenarios as was the case in his decision to permit kissing during the fast based on the permission of using water to clean ones mouth while fasting, which was previously cited.

This practice of drawing analogies to previously established norms was not an isolated incident. There were similar situations to this such as the case of the women who came to ask the Prophet Muhammad about whether it would be of benefit to perform the Hajj pilgrimage on behalf of her aged father who was not capable of performing it. The Prophet responded by making an analogy to a previously established ruling regarding the obligation to pay back monetary debts. He asked her if her father had debts whether it would benefit him if she paid back those debts; when she answered affirmatively, he responded by claiming that the rituals like the Hajj were debts to God and that His debts were more entitled to be paid back.59

The employment of analogical reasoning is an indicator that some principle is being applied beyond its original purpose, thus making that principle some sort of ideal or norm by which other cases may be judged. The very fact the Prophet employed analogical reasoning to deduce new authoritative decisions based on previously established authoritative norms is an indication that his decisions can be seen in some ways as general legal norms by which other legal decisions can be derived. This mean

that these decisions represented ideals and norms for universal application outside the scope of the scenarios he was immediately addressing, hence giving these decisions a legal coloring.

Lastly, with regard to Pospisil's third criterion that distinguishes law and legal matters from other social phenomena is the issue of whether the Prophet Muhammad's decisions created mutual rights and responsibilities. We need not look any further then the previously cited example about the women asking the Prophet about her father's Hajj obligations. It is clear from that report that his authoritative decision in that case spelled out a basic framework for mutual rights and responsibilities: the rights of the creditor (God, lender) and the responsibilities of the debtor (servant [father], daughter). Yet, this is not unique to this scenario and represents the general tenor of both Qur’anic and prophetic injunctions.

This all goes to show that the Prophet Muhammad’s authoritative decisions do meet the criteria spelled out by some social scientist as to what constitutes law, hence making these decisions go beyond the scope of ethics, customs, or politics. But the whole point of this exercise is not so much to prove the legal authority of the Prophet Muhammad or to show that his pronouncements and decisions constituted law as much as it is about the discursive shift in seventh century Arabian society away from customary practice towards social practices that were defined in terms of the new paradigm of religious legality. This new legal based culture that germinated in the nascent Muslim community was fostered by the discursive activity of iftâ’ that both the Qur’anic discourse and prophetic practice promoted.

Yet the practice of iftâ’ presumed a new form of authority (i.e. the mufti in the
form of a law-prophet) which was legal in character and a departure from the forms of authority (sheikh, kahin, sha’ir, nassâbah, etc) that had previously existed in seventh century Hijazi (western Arabian) society where Islam initially came into being and made its first marks. In other words, *ifta’* as a legal activity with legal consequences (i.e. fatwas) could not have been an outcome of the pre-existing forms of authority in Arabia and could have only come about with an establishment of forms of authority that were conducive for its materialization. It is this new form of authority (i.e. law-prophet, which in some ways foreshadows the office of *mufti*) and its corollary practices (*ifta’*) and productions (fatwas) that represent a new discursive formation where religious and social practices are regulated and ordered in terms of their legality.

It was the discursive legal practices of *ifta’* by the legal authority of a law-prophet (i.e. *mufti*) that gave production to the discursive statements (i.e. fatwas) which provided the legal matter for the formation of an Islamic legal tradition. This discursive formation had its non-discursive effects by influencing and shaping the religious and social practices of the communities where this new formation took root. In this sense, fatwas were more than just discursive statements that were the substance of a new discursive formation, but were also catalysts for religious, social, economic and political transformation as will become more evident in later parts of this investigation.

So, the Prophet Muhammad’s legal activities became the catalyst for the formation of a legal culture amongst this nascent Muslim community, and *ifta’* and fatwas become instruments in the engineering of a different type of society that would be bound by the orders of legality. This dynamic would further develop in the post-prophetic period when the Muslim community broke out of the confines of Arabia and takes root in
the Near East and North Africa. But before we address the development of this new discursive formation and its non-discursive effects, it’s important to assess the socio-economic and political context of the Islamic expansion in the Near East and North Africa as a background for understanding the evolution of Islamic legal discourse and its non-discursive consequences.

**The Near East and North Africa during the Period of Early Islamic Expansion**

By the time of the death of the Prophet Muhammad (632 CE), almost the entire Arabian Peninsula had come under Muslim sovereignty through conversion, conquest and capitulation. In the aftermath of the Prophet's death, Muslim governments continued that policy of Islamic expansion outside of Arabia into the greater Near East and North Africa. Within a period of one hundred years of the Prophet Muhammad's death, the entire Near East and North Africa along with Spain came under the scheme of Muslim governance. I intend to briefly outline the social, economic and political changes that took place in these regions during this one hundred years so as to set the geopolitical context for the formation of early Islamic law.

From the beginning this rapid Muslim expansion posed challenges to the nascent Muslim polity which for the first time had to learn how to govern outside the confines of Arabia. Societies in the greater Near East and North Africa were more complex and more religiously, ethnically and linguistically diverse than the communities found in Arabia.\(^{60}\) This necessitated a rethinking of some of the political and legal practices that had been the mode by which the Muslim governance had been operating since the Prophet’s period of governance at Madīnah. From these socio-political challenges emerged new practices

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\(^{60}\) Hodgson, V.1, 203.
by which the nascent Muslim polity adapted to those challenges.

In terms of governing these new territories of Persia, the Fertile Crescent and Egypt, two basic principles were followed during the early the period of Islamic conquest: Firstly, the conquering Muslim Arabs were to be prevented from damaging agricultural society; 61 secondly, the new Muslim elite would cooperate with the chiefs and notables of the conquered population. 62 These policies were carried out by separating the conquering Muslim Arabs from the native populations by placing Muslim Arab armies in their own military settlements outside the conquered towns and then working out an arrangement with local elites of the native population that established a governing relationship between the non-Muslim population and their new Muslim suzerains. These settlements eventually grew into permanent towns like Basra and Kufa in Iraq, Fustat in Egypt, Qayrawan in North Africa, Marw in Central Asia. 63

In this way, the old social and religious order of the conquered peoples was left intact. Muslims suzerains restricted themselves to collecting the taxes and militarily protecting the non-Muslim populations. 64 In both the Sasanian and Byzantine Empires poll tax and land taxes had been collected from these populations where the privileged elements had been exempted. The Muslim administration adopted and adapted the same taxation schemes abolishing the previous exemptions granted to the elite. 65 Therefore, in

61 Lapidus, 34.
62 Lapidus, 34.

63 Lapidus, 34, 36. Syria was the lone exception to this rule as the new Arab elite had relationships with those societies through trade prior to Islam. For this point, see Hodgson, Vol.1, 208 and Hallaq, 2005, 30. Moreover, the conquered population in Syria was most likely predominately Arab (Christian) like the conquering Arab (Muslim) armies. For more on this point, see Hallaq, 2005, 10-11.

64 Lapidus, 36-37.

65 Hodgson, Vol 1. 242. Also see Lapidus, 37.
each province, the taxing scheme was different:

-Iraq, the Sasanian system of collecting both a land tax (*kharaj*) and a poll tax (*jizya*)\(^{66}\) was extended.

-In Syria and Mesopotamia, many of the previous Byzantine taxing schemes were continued. For example, land taxes were levied based on the amount of land that can be worked by one man and a team of animals in a day (*iugum*). A poll tax was levied on urban, non-farming population.\(^{67}\)

-In Egypt, land and poll taxes were assessed on the whole village population and then divided internally by villagers.\(^{68}\)

This was how non-Muslim population was governed, but how were the settlements of Arab Muslim population in these new established military garrison towns (i.e. *amsar*) administered? The initial Muslim Arab armies that occupied these settlements consisted of diverse and sometime incompatible Arab nomadic tribes and ethnic groups each given its own separate quarters.\(^{69}\) This segregation would eventually breakdown as a result of factors I will explore later. In each of these settlements a commander representing the central Muslim authority (i.e. the caliph) was appointed and

\(^{66}\) Lapidus, 37.
\(^{67}\) Lapidus, 37.
\(^{68}\) Lapidus, 37.
\(^{69}\) Hallaq, 2005, 30
was charged with leading Muslim worship rituals, settling disputes among the faithful in accordance to Qur’anic injunctions, managing the tribute that was collected and carrying out further military expeditions.\(^70\)

Moreover, in this early period we witness an increasing sophistication of the Muslim state through the creation of the army *diwan* (registry), started in the reign of the second Caliph Umar (r. 634-644 CE). This *diwan* was a register of all the Muslim army members and their descendant so they could receive a salary/pension that was extracted from the spoils of war.\(^71\) In addition a public treasury (*bait al-mal*) was established that would manage these payments of the *diwan* and other state expenses.\(^72\) More will be said in the next section of this investigation about how a fatwa by the Caliph Umar spawned the creation of these two institutions.

On the political economy front, the Arab Muslim expansion in the greater Near East facilitated the unification of the Afro-Asiatic landmass\(^73\) (North Africa to China) that had been split by the a millennium old rivalry between Persian and the Greco-Roman worlds. This political rivalry by the seventh century CE had created barriers that hindered the flow of trade between eastern and western regions of the Afro-Asiatic landmass. The unification of those regions under Muslim suzerainty helped produced a major commercial, as well as cultural revival.\(^74\) Moreover, this unification Afro-Asiatic

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\(^70\) Hallaq, 2005, 30-3; Hodgson, Vol 1. 209.

\(^71\) Hodgson, Vol 1. 207-208.

\(^72\) See Ra'ana, 104-109 for discussion on the institution of the public treasury.

\(^73\) This term is borrowed from Hodgson. See his *The Venture of Islam* Vol.1, pg. 110 and pg 121.

\(^74\) Hodgson, Vol.1, 91; Lapidus, 38.
landmass helped link two major economic regions: i.e. Mediterranean and Indian Oceans, which had been split since Hellenistic times. Describing the political economic impact of Muslim expansion in the seventh and eight centuries, Wink say the following:

The Arab conquests were swift and, in sharp contrast to the barbarian conquest of Europe, left the monetary and urban history of antiquity unbroken. Establishing a thin Islamic superstructure on the rich urbanite substratum of late antiquity, and by fusing the formerly rival Byzantine and Sassanid commercial circuits, and forcing links between the Mediterranean and the Indian Ocean, the Arab caliphate from the eight to the eleventh century achieved an unquestioned economic supremacy in the world……the unity of the Islamic economy was founded on large scale trading networks along overland and maritime routes connected by old and sometimes new urban centers.76

One example of the economic transformations resulting from the Muslim expansion, was in the economic stimulus brought about by the settlements in these newly established garrison towns and the reconstruction of irrigation systems that the previous agricultural societies deeply depended on. Prior to the Muslim expansion, Iraq agricultural development had suffered from neglect of irrigation, exploitative taxes, and wars with the Roman Empire. Irrigation works degenerated in southern Iraq so that in 627-628 the dikes of Tigris River system burst and there was a major shift in the river westward creating a marsh land. Also the agricultural production of Diyala region

75 Wink, Vol.1, 10.
76 Wink, Vol.1, 10.
declined because it depended on state maintained irrigation system. Muslim rule of Iraq provided a stable government and encouraged recovery because the Muslim established military garrison towns of Basra, Kufa and Mosul stimulated agricultural output and some of the swamps around Kufa were drained and put to cultivation. But not all places prospered that came under Muslim rule. Syria suffered in some respects because it was cut off from Anatolian trade.

The political unification in the Afro-Asiatic landmass had other economic consequences. New monetary initiatives were adopted by the Muslim government that reshaped the flow commerce in the region. Within fifty years of the Muslim expansions into the Near East and North Africa, the Umayyid Caliph Abdul Malik ibn Marwan (r. 685-705) established a new Muslim coinage that was marked by Islamic inscriptions which replaced the previous coins that had been in circulation, the Byzantine gold solidus and the Sassanid silver dirham. In striking their own coins, the Muslim political authorities introduced a unified bi-metallic currency system to the region consisting of a gold dinar and silver dirham which was a fusion and revaluation of the Byzantine and Sassanid mono-metallic monetary systems. This new bi-metallic currency facilitated the circular movement of trade across east and west and brought to an end the drainage of gold eastward to a stop.

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77 Hodgson, Vol.1 201-203; Lapidus, 38.
78 Lapidus, 38-39.
79 Lapidus, 39-40.
80 Hodgson, Vol 1, 226, 246.
81 See Wink, Vol 1, pg.11 and 34 for more on this point.
The Muslim expansion in the Near East and North Africa had its consequences also on the social and religious fronts. For example, Umar's *diwan* presupposed the religious character of this new and largely Arab Muslim community because it assigned the individuals arranged in it social status based on faith rather than lineage. The prime criterion for this social status was the priority in accepting Islam.\(^8^2\) Moreover, each military garrison town was centered on the mosque where public worship would be practiced and where Islamic values would be propagated as the basis of communal life to the newly converted Arab tribesmen who made up the bulk of these armies.\(^8^3\)

The military and administrative systems initially established by the Caliph Umar (r. 634-644) later generated changes in social structure. The tribal social structure of the Arab Muslims was rearranged according to military administrative groupings where large Arab clans were subdivided into smaller uniform regiments of a 1000 men.\(^8^4\) In 670, tens of thousands of families were removed from the garrison towns of Basra and Kufa in Iraq to the new garrison town of Marw in Central Asia and so the remaining groups had to be reorganized. Military units might have kept their tribal names but no longer represented the same pre-Islamic Arabian social structure.\(^8^5\)

By the time of the Umayyad caliphate reached its peak under Caliph ‘Abdul Malik (r. 685-705) social intermingling between the Arab Muslim elite and the non-Muslim population had gone far. As Arab Muslims were being granted lands by the

\(^{8^2}\) Hodgson, Vol 1, 211.


\(^{8^4}\) Lapidus, 41.

\(^{8^5}\) Lapidus, 41, See Hodgson Vol. 1, 227 for similar point.
caliphate and were settling to become landlords, more and more Arab Muslim armies became sedentary and abandoned military expeditions. For example, of the 50,000 military families that settled in Marw in 670, only 15,000 were still in military service by 730. Moreover, as these Arab Muslims became more sedentary, a process of cross assimilation took place between the Arab and non-Arab (non-Muslim) population through conversion to Islam by these non-Arab subjects and their intermarriage with Arab Muslims as well as the Arab population adopting the high culture of their non-Arab subjects.

As Lapidus notes: “Settlements also entailed the transformation of Bedouin and soldiers into an economically differentiated working population”. For example, the formerly garrison town of Basra became an important administrative capital and trade city connected with Iran, India, China and Arabia. Arab settlers became merchants and the new religion offered opportunities of social mobility through teaching, scholarship and legal administration. As a capital and commercial center, Basra attracted non-Arab/non-Muslim settlers which slowly broke down the barriers between Arab and non-Arab population in addition to the fact that non-Arabs represented the bulk of the government administration.

It was under these rapidly changing social and political conditions that Islamic

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86 Hodgson, Vol 1. 243.
87 Lapidus, 40.
88 Lapidus, 40.
89 Lapidus, 41.
90 Lapidus, 41.
91 Hodgson, Vol 1. 243; Lapidus, 41.
law first took shape and fatwas were the primary legal recourse by which Muslim
authorities’ legitimated new socio-political practices that would assist them in adapting to
these challenges. The practice of *ifta* during this period became a means of legal renewal
under changing circumstances and the accumulating fatwas from this practice over time
became the legal matter from which later Islamic legal doctrines were formulated and a
new legal tradition established. Hence, I intend to explore fatwas during this period of
Islamic expansion in the Near East and in the early post-expansionist period\(^{92}\) in the
following sections of this investigation.

**Fatwa in the Post-Prophetic Period**

There are several ideas to keep in mind before venturing to speak about fatwas in
the post-Prophetic period. First, the loss of prophetic authority in issuance of fatwas let to
a greater relativity in their legal authoritativeness. During the prophetic period, fatwas
issued by the prophet Muhammad were considered as legal dictates solely based on his
prophetic-legal authority. Hence, the prophetic fatwas constituted authoritative norms
which his followers were obligated to practice. Fatwas in subsequent generations lacked
that sort of authoritative mandate because those engaging in fatwas lacked the same level
of authoritative position that the Prophet had amongst his followers.

Thus, fatwas issued by learned Muslims after the Prophet’s demise at most were
considered legal opinions that may or may not have influenced the Muslim communities’
practices or policies unless they were adopted and enforced by those in political authority.
Nonetheless, despite post-prophetic fatwas not enjoying the same degree of
authoritativeness as prophetic fatwas, the combination of prophetic and post-prophetic

\(^{92}\) Both of these periods cover the first two hundred years of the history of Islam.
fatwas provided the legal substance from which Islamic law was derived as will be demonstrated later in this investigation.

The second point is the greater social and geographic context in which these fatwas were now issued and the new problems they were designed to address. As the domain of Islam in the post-prophetic period began expand outside the confines of Arabia, the early Muslims begin to encounter new social and political situations that they had not encountered during the prophetic period and hence these scenarios had not been addressed during his lifetime. These changes in conditions would necessitate new solutions to the challenges that confronted them and fatwas were the legal means by which they dealt with those challenges as will be demonstrated in subsequent paragraphs.

Thirdly, just as in the prophetic period, in their early years, post-prophetic fatwas maintained their ad hoc character of being impromptu solutions to social or religious problems that arose. *Ifta’* as a legal practice was never intended to anticipate legal problems that had not yet arisen and this attitude was especially the case in the early period of its practice. This is verified by historical reports about the early post-prophetic period that indicate the companions of the prophet were suspicious of giving fatwas for situation that had yet to arise. One such case was where ‘Ammar ibn Yasir was sought out by a group for a fatwa on a particular matter; he retorted: “Did this matter occur?” They said no. Whereby he replied: “Let me be until it occurs; so if it occurs, I will undertake the matter for you.”

This shows that some companions had a disdain for dealing with hypothetical matters and preferred to provide legal judgments on actual issues. This attitude began to

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93 As quoted from Linah Al-Himsi’s *Tarikh al-Fatwa fil Islam: wa Ahkamuhaha al-Shar ‘iyyah* pg 78, Dar Ar-Rashid, Damascus Syria 1996. The story was related by al-Darimi in his *Sunan* Vol 1/50.
change in the following generations of fatwa practitioners as is shown in the case of Ata ibn Rabah\textsuperscript{94} answering what seem to have been hypothetical questions about women converting to Islam and the compensation owed to their non-Muslim husbands.\textsuperscript{95} Yet despite this shift in approach to fatwas, fatwas by and large maintained their ad hoc character of being attempted legal solutions for actual religious and social concerns.

Lastly, the Muslim geographical expansion eventually led to the development of regional schools of law that had their peculiar approaches to the production of legal decisions. These schools evolved as early as the second generation of Muslims after the death of the Prophet. The appearance of regional legal schools can be explained by several factors which I will briefly outline here and expand on later in this investigation. The geographic and social diversity that had developed within the Muslim community was possibly the first factor that gave impetus for these various regional approaches to law. Another factor had to do with the various learned contemporaries of Prophet who settled in different regions and influenced subsequent generations of Muslims in these regions with their own interpretations of Islamic teachings in general and Islamic law in particular.

All of the issues and observations about fatwa in the post-prophetic period are best illustrated in the context of examining actual fatwas of this period. So, in the following paragraphs I will survey fatwas from this period, but it is crucial that I delineate the boundaries of this period. I am calling the first century and half to two

\textsuperscript{94} Among the first generation of Successors (\textit{tabi‘un}) who represent the succeeding generations of Muslims after the prophet’s death. Hence ‘Ata ibn Rabah comes after ‘Ammar ibn Yasir, mentioned in the previous paragraph, who is a companion of the prophet and from the first generation of Muslims.

\textsuperscript{95} See Motzki, 110 to reference this fatwa.
centuries of Islam as the post-prophetic period of fatwas. This age designates the period prior to the evolution of schools of law which established more systematic approaches to law production that I will examine in future chapters. Suffice it to say that the post prophetic period of *ifta’* can also be broken in in sub-periods all with their own peculiarities and developments in establishing Islamic law and legal practice. In the next subsection, I will examine fatwas in one of these sub-periods from those contemporaries of the prophet Muhammad who attained legal authority after his demise.

Before starting an analysis of the fatwas from this period, I need to clarify the criteria I used in choosing from the many fatwas that are extant. Similar to the case of the prophetic fatwas, I have chosen fatwas in the post prophetic period that demonstrate some legal rationale or hermeneutic so as to foreshadow the development of Islamic legal theory in particular and Islamic legal intuitions in general. It is important to emphasize that later generations of Muslim legal authorities looked at the practice of their predecessors for insights in establishing a legal tradition.

Yet their predecessors left no theoretical works on legal methodology or law for them to construct this tradition. But it was in the predecessors actual legal decision (i.e. fatwas) and the rationale employed in them that later generations were able to derive legal precepts that eventually served as the material from which a legal tradition was constructed. This is why it was important to select those fatwas that demonstrated types of legal rationale that were the impetus for the development of the Islamic legal tradition in history. This criterion should be kept mind when thinking about the fatwas that have been subsequently chosen.

**Fatwa in the Post Prophetic Period: Fatwa in the Age of Early Caliphate.**
This period represents about the first fifty to sixty years after the departure of the Prophet during which many of his contemporary followers continued to live and influence the affairs of everyday Muslim life. This is also the period when the institution of the caliphate was established as a post–prophetic political institution to rule over the quickly expanding Muslim community and empire in lieu of the loss of the prophet’s political leadership. During this period, we witness the Muslim community grappling with new socio-economic and political concerns that were not dealt with in the prophetic period; hence, there was a need for fresh legal decisions to settle the new challenges facing the early Muslim community.

The beginning of ifta’ in the age of the companions begins with issues of inheritance as there arose scenarios of inheritance in their period that were not directly covered by the sacred texts thus needing to exercise the legal effort and judgments in those matters (i.e. *ijtihad* and fatwa). It is understandable that the prophet Muhammad could not have addressed all of the scenarios with reference to inheritance because of the brief period from which he was officially considered a lawgiver which coincides with his period as political authority in Medina only spanning ten years. Hence, it was unlikely in this brief period that all scenarios with reference to inheritance would have presented themselves so as to be addressed by him directly or by Qur’anic legislation. Overtime, new situations arose that had not been dealt with which needed nuanced solutions.

The most illustrious example that he provides to demonstrate this phenomena during this period is the two issues in inheritance that are known in Islamic legal literature as *mas’lat al-umariyatain* (i.e. Umar's two issues in inheritance). This refers

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96 See Riyadh, 59-61 for a fuller explication of this issue.
to the second Caliph Umar whose legal decisions (fatwas or qa’dha) became legal precedence in later Sunni legal tradition. The two scenarios in this case revolve around the deceased leaving as his/her heirs a mother a father and a spouse (male or female thus making two separate cases depending on the gender of the spouse). The Qur’anic injunctions on inheritance speak about the case where a person dies and doesn’t have children yet is survived by his/her mother and/or father: one third of the inheritance to the mother and the rest to the father and the male agnates;\(^97\) but is silent about the one who is survived by the mother, father and spouse.

In another Qur’anic injunction it speaks to how much a spouse should receive if the deceased does not have children\(^98\) (in the case of the wife it is one fourth (1/4) which I have chosen here for the sake of illustration of one of these two scenarios), but is silent about the scenario where deceased also has parents. So what we have is several Qur’anic injunctions which give instructions for how to dispense with the shares of inheritance to these heirs when taken separately, but what we have no explicit injunction for how to dispense with inheritance for these heirs when they come together in one case.

So, when you attempt to apply all of the separate injunctions to solve this scenario which bring all of these disparate cases under one case, you end up with the following problem: if we give the mother one third (4/12) and the spouse (i.e. wife in this case) one fourth (3/12), then what is left for the father is five twelve (5/12) and that is less than what Qur’anic injunction demands that a male should receive twice as much as his female counterpart\(^99\) (in this case the father should have received two thirds (8/12) share

\(^{97}\) Qur’an 4:11.

\(^{98}\) Qur’an 4:11.

\(^{99}\) Qur’an 4:11.
Therefore, by applying all of the Qur’anic injunctions of inheritance towards the heirs, the result is unsatisfactory because these two scenarios made it impossible to implement those injunctions fully without falling short of inheritance shares. Moreover, there did not seem to be any prophetic precedence with these two scenarios so as to provide the Muslim community guidance on how to deal with this matter. So it required the exercise of legal judgment (*ifta’*) from the companions on how to resolve this legal problem. What follows is the rational of two opposing fatwas issued by what Islamic tradition considers as two of the most prominent legal minds of the amongst the companions of the Prophet: Umar and Ibn Abbas

Umar decides (i.e. gives fatwa) that the mother should be given one third (1/3) of what is left of the inheritance after the spouse receives her/his share, rather than receiving one third of the actual inheritance, so that the rest of two thirds can go to the father. This way they would have employed the injunctions of all of the Qur’anic passages, albeit in compromised fashion, which requires giving a mother one third (1/3) and giving the father twice as much as is required by the general Qur’anic rule that the male gets twice as much as the female in inheritance.

Ibn Abbas, on the other hand, dissented from this opinion because he rationalized that the mother's share of one third was designated specifically and unequivocally by the Qur’anic passage under the condition that the deceased did not have children or siblings; making her inheritance one of fixed obligation (*faraidh*); while the father is considered an aganate (*asabat*) who only gets what is left of the inheritance after the obligations
(faraidh) have been distributed. That is, for the agnates, they have no fixed sum of inheritance; they just appropriate what is left of inheritance after the obligations have been distributed. So, for Ibn Abbas, it would be the father who should receive what is left over after the mother and spouse had been given their share.

This case illustrates several important points about fatwas and the process of fatwa making (i.e. ifta’). Firstly, both Umar’s and Ibn Abbas in their fatwas do not forgo the application of the Qur’anic injunctions, even when their strict application to the current scenario does not produce the results intended. Although they looked at the same Qur’anic injunctions and reached different conclusions of how to resolve that problem, both persons attempted to remain within the spirit of the law even when the letter of law had to be adjusted. In other words, in both cases no party attempted to ignore previously established norms even when they may not have wholly fit the current issue facing them. As our discussion about fatwas proceeds, you will find that this type of consideration is an enduring features of how ifta’ was practiced in the Islamic legal tradition.

Second, both Umar’s and Ibn Abbas legal reasoning for their judgments represent variant hermeneutical approaches of how to apply Qur’anic injunctions to new situations. Umar’s reasoning inclined more towards the application of formal aspects of the Qur’anic injunctions even when their application had to be modified for the new case. This is seen in his attempt to maintain the linguistic demands of the relevant Qur’anic passages that required one fourth of inheritance be given to the wife, one third to the mother and the general rule demanding that males receiving twice as much as their female counterparts.

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100 See full discussion of this issue in Riyadh pgs 59-61
Umar’s reasoning attempted to keep intact all of the formal elements of these injunctions despite having to modify the way in which they were applied by not allotting the mother’s third immediately from the entire inheritance, but waiting after the wife had gotten her one fourth and then allotting the mother one third of the remaining inheritance so as to be able to keep the formal requirements of the third injunction that the male (father in this case) receive twice as much as the female (the mother in this case). In this way all of the formal linguistic elements of the relevant passages would be satisfied.

On the other, Ibn Abbas’ legal reasoning inclined more to preserving the substantive elements of the injunctions than its formal aspects. This assertion is demonstrated in the fact that he held that the third injunction of male heirs receiving twice as much as their female counterparts as having less priority of being fulfilled then the other two injunctions because it lacked the specificity of the other two injunctions in that it did not demand an actual numerical portion of the inheritance but only established a certain proportion to be distributed.

Moreover, because the relevant Qur’anic passages sight specifically the allotment of the mother and spouse and no specific allotment is assigned for the father since he is only comes to occupy the position of inheriting agnate, Ibn Abbas sees greater priority to the specific injunctions allotting the mother and spouse’s portions of the inheritance then the unspecified allotments due to the agnates. In doing this he does not try to equally enact all of the relevant passages, but gives precedence of some over others and hence his reasoning considers the substantive value of the Qur’anic injunctions over above their formal requirements.

The legal reasoning of Umar and Ibn Abbas indicate a variance in hermeneutical
approaches in the assessment and application of legal norms to various social situations. In essence, that is the aim of any fatwa which is to apply certain established norms to new scenarios not covered by already promulgated legislation. In the case referenced here, there was a display of formal and substantive rationalities in the attempt of interpreting the relevance of legal norms to a social situation. As we explore the development of the legal tradition of Islam, we will find that these types of considerations are a recurring theme in ifta’.

The second point that this analysis of mas’lat al-umariyatain [i.e. Umar's two issues in inheritance] reveals about the ifta’ process is that neither of the two decisions (Umar or Ibn Abbas’s) were ultimately normative, as is the case of prophetic fatwas and/or legal judgments. Yet these two fatwas did enjoy a great deal of authoritativeness since they served as precedence for future jurists to construct Islamic legal positions on this issue in inheritance. Later generations of Muslim legal scholarship remained divided on this issue based on the two decisions rendered; yet most Sunni Islamic legal schools adopted Umar’s position as authoritative and minority of legal schools such the Zahiri school of Ibn Hazm adopted Ibn Abbas’s position. The point that stands out here is that fatwas became the legal substance from which legal doctrines are formed.

Thirdly, although Umar was the preeminent political authority as caliph (i.e. head of the Muslim state), that did not give him sole authority to determine law despite having the prerogative to implement his judgments as policy in his reign. Umar might have implemented his decision as policy during his rule, but that did not necessarily mean that

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101 Hanafi, Malaki, Shafi, and Hanbali schools adopt this position (see Riyadh pg 60-61)
102 See Riyadh, 60-61.
his word was law as evidenced by the fact that some Islamic schools of law adopted Ibn Abbas’s decision on the issue. This points to a peculiar feature of fatwas--being the legal matter from which Islamic legal doctrines were constructed--in that they were not the sole prerogative of political authority; hence making the substantive formation of Islamic law independent from the state.

What this tells us is that formation of legal authority and legal doctrine in Islamic civilization was independent of political authority. Had legal authority been subordinate to political authority later Islamic legal doctrines and schools would not have adopted Ibn Abbas’s view since he did not enjoy any political authority at the time despite serving in a consultative capacity to the caliph. Yet Ibn Abbas, and even Umar for that fact, enjoyed legal authority amongst subsequent generations of Muslim jurists and it was based on this legal authority that their opinions were seen as authoritative and influenced later Islamic legal doctrines. We will come to discover, that those in political authority in Islamic civilization did not necessarily enjoy legal authority nor were legal decisions made by them seen as authoritative amongst later generations of Muslim jurists.

To look at another fatwa from the age of the caliphate in the domain of political economy, once again we turn to a ground breaking fatwa made by the Caliph Umar that established a political and legal precedent for all policy after him with regards to conquered lands. When the Muslim armies conquered Iraq they were conflicted on what to do with in the area known as the sawad (i.e. fertile area) of Iraq: whether to leave it to be tilled by the original inhabitants of Iraq and have them pay taxes on its produce or whether distribute it among the soldiers who participated in the conquest (i.e. practice
known as *qanimah*)\(^{103}\) as had been previously practice of the Prophet based on a Qur’anic injunction.\(^{104}\)

The dilemma that Umar faced was that if he distributed it in accordance to the previously established prophetic practice so as to keep with the letter of the law, then a large amount of wealth would have been concentrated in the hands of a few individuals to the detriment of the larger society. This was not the case in the previous distributions by the Prophet Muhammad which consisted of small plots of land in desert oasis towns like Khaybar.\(^{105}\) Yet if Umar didn't distribute the land to the conquering soldiers then he would be violating the established practice of the prophet which was seen as normative by the Muslim community.

Umar, acting on the advice of some of his advisors like 'Ali and Mu'adh\(^{106}\), chose to go against the previously established practice of distributing the land to the soldiers and sought the larger public's interest by leaving the land in the hands of inhabitants while extracting taxes for the state to be utilized for the greater good of the Muslim public.\(^{107}\) It could be argued that Umar and those who supported his conclusion in this case came to this judgment based on *maslaha* (i.e. utility or public interest) even when this legal decision seemed to have contradicted the established normative/legal practice of the Prophet Muhammad. Yet the prominent Muslim jurist of second century of Islam

\(^{103}\) Abu Zahrah, 245. Also see Tilimsani, 533-534.

\(^{104}\) See Qur’an 8:41.

\(^{105}\) Muhammad Baqir Al-Sadr, a prominent 20th century Shiite jurists argues in his book Our Economics (English translation vol 2. Pt.2) pgs 89-99 that the Prophet Muhammad’s practice in Khaybar and in other places was to give away the usufruct of the land to the soldiers while keeping the land itself under public ownership. But the majority of Sunni Muslim scholars do not agree with this interpretation.

\(^{106}\) See Tilimsani, 534.

\(^{107}\) See al-Tilimsani, 533-534.
Abu Yusuf narrates several report in his book entitled *Kitab al-Kharaj*\(^{108}\) that Umar supported his position with the following Qur’anic verse:

That which Allah giveth as spoil [i.e. ‘afa’ which is a verbal form of noun *fay’*] unto His messenger from the people of the townships, it is for Allah and His messenger and for the near of kin and the orphans and the needy and the wayfarer, that it become not a commodity [circulating] between the rich among you. And whatsoever the messenger giveth you, take it. And whatsoever he forbiddeth, abstain (from it). And keep your duty to Allah. Lo! Allah is stern in reprisal.\(^{109}\)

This verse, which Umar purportedly employed, gives indication that his decision for the public ownership of conquered lands was something that could be legitimated by divine decree and not just a case solely determined by maslahah (i.e. public interest/greater good), since it entirely relegates the charge of the spoils (*fay’*) to those in governance\(^{110}\) so as to be utilized for the greater public interest as indicated by the verse (i.e. the needy, orphans, wayfarer, etc).\(^{111}\) Moreover, the verse also gives the moral rationale for the judgment by saying so that this *fay’* (i.e. spoils) should not become “a commodity [circulating] between the rich among you” indicating that it should not be a cause for the circulation of wealth between a few; Thus, the larger public's interest is in

\(^{108}\) Abu Yusuf, 23-26. See also al-Sayis’ work *Tafseer Ayat al-Ahkham*, V.2, 532.


\(^{110}\) Muhammad Asad argues in that the phrase in this verse “Allah and His messenger” is metonym for the Islamic cause especially as represented by Islamic governance. See his *Message of the Qur’an* pg 851, f.8.

\(^{111}\) Yet we mentioned previously that there was another Qur’anic verse (Qur’an 8:41) which seemed give the implication that spoils of war should be largely distributed to the participating soldiers and this is what the Prophet himself practiced. Thus there seems to be a contradiction between the content of this verse and prophetic practice and the Qur’anic verse (Qur’an 59:7) which Umar employed in bolster his position. Traditional Muslim scholars say that the issue is resolved by the different terms used in the two passages to designate the idea of spoils: ganimah and *fay’*. They say that the term ganimah, used in Qur’an 8:41 which calls for distributing most of the spoils between the participants in the battle, designates the types of spoils taken after armed conflict; while the term *fay’*, used in Qur’an 59:7 which calls for the withholding of all spoils for public interest, designates that type of spoils which were acquired without armed conflict (See al-Sayis *Tafseer Ayat al-Ahkham*, Vol 2, pg 9 and 528). Hence, both passages are speaking about different subjects; hence, reconciling any apparent conflict between them.
not keeping this new found wealth in the strict domain of those who participated in the conquest.\footnote{112}{See the 20th century Muslim scholar Abu Zahra in his *Tarikh al-Madhahib al-Islamiah fi l-Siyasah wa al-Aqa'id wa Tarikh al-Madhahib al-Fiqhiyyah* for details of the argument.}

Yet it is strongly arguable that Umar had the rationale of *maslaha* (i.e. public interest) primarily in mind when supporting his decision and not any particular Qur’anic injunction because the historical reports say that he only employed the Qur’anic passage in question several days later when he received opposition to his verdict. Hence, he sought to bolster the legality of his position and satisfy his opponents who demanded that the previously established practice of distributing the spoils amongst the participating soldiers be upheld.\footnote{113}{See Abu Yusuf, 23-26.}

So one may argue that *maslaha* (utility and/or public interest) was the primary consideration in Umar's fatwa and the Qur’anic passage that he employed was for secondary support given the time lag between his initial judgment and his furnishing of Qur’anic support for his position. This lag indicates that he initially had other in mind when first pronouncing his position and it is clear from the narratives that he thought distributing the land to the army was not in the larger interest of Muslim society even when he seemed to be opposing accepted practice.

Moreover, Umar's employment of this Qur’anic passage to support his position is not entirely consistent with its aims given that the lands of Iraq may not have been considered strictly *fay’* lands, which was the subject of this Qur’anic passage, because of its acquisition through armed combat.\footnote{114}{According to the categories of the types of spoils. See footnote 75.} So, his scriptural reasoning to support his fatwa
may have been deficient given that he was using a Qur’anic passage that may not have spoken to the scenario he was addressing.

Nonetheless, there was an element in this very same Qur’anic passage which shunned the idea that wealth should be made “a commodity [circulating] between the rich among you” and in dividing the landed spoils of Iraq between the participating soldiers, who represented only a fraction of the Muslim nation, would have achieved the opposite of what this verse was advocating. Therefore, I will argue that this was the principle or value that Umar attempted to preserve in his decision to not distribute the landed spoils.

Hence, Umar was advocating a position that fit in with what the general aims of this Qur’anic passage, even when some of the particulars of the verse did not entirely fit the scenario that Umar was addressing. Umar understood the broader aims of Islamic law are to satisfy the greater good and that trumped out any consideration to specific injunctions that under different conditions may not achieve this aim. Hence, looked at what decision would achieve the greater good (i.e. maslaha) and judged based on that.

Yet the point here is not to argue for the validity or lack thereof of Caliph Umar's fatwa on what ought to be done with conquered lands of Iraq, but to see what this fatwa reveals about the fatwa making process and the role of these fatwas on the establishment of the Islamic legal tradition. This policy/legal decision (i.e. fatwa) promulgated by the Umar presents us with several interesting conclusions about the process of ifta’. The first being that many of the conclusions about the nature of fatwa that were reached in my analysis of the Caliph Umar's previous fatwa on inheritance also apply to this case. Yet this fatwa sheds some new light about our understanding of this activity that may not have been as clear in my previous illustrations.
What this scenario and the accompanying legal disputation illustrate most is the reflexive relationship between Islamic law and society and the process of ifta’ or fatwa production being one of the essential mechanisms mediating this relationship. This reflexivity is manifested in this case as follows: There were Qur’anic injunctions implemented by prophetic practice that governed how spoils of war were to be distributed based certain circumstances that prevailed in Arabia, which then established a normative precedence for how the Islamic polity should deal with spoils. Yet a new situation arose in the conquest of the lands of Iraq where the spoils far exceeded those spoils that were acquired in the Muslim campaigns in Arabia. This then required the old rule to be reworked so that it stays consistent with the overall aim of the law (i.e. public interest or greater good).

So what we see here is a dynamic interplay of legal and social forces where both law and political circumstances affected one another. It is clear that the socio-political circumstances in Iraq in the seventh century were different from those of Arabia necessitating the establishment of new rules to fit the new situation. This was the case in terms of Umar's fatwa which became a legal precedence for how new conquered lands (e.g. Iraq, Syria, Egypt) were to be treated both in his reign and the reigns of those came after him. And it was this decision that later generations of Muslim jurists enshrined in their jurisprudence as the accepted practice by the political authorities (i.e. caliphate). An example of this is second Muslim century jurist Abu Yusuf's Kitab al-Kharaj which represents legal treatise written for the then Caliph Harun al Rashid of how these conquered lands were to be treated primarily based on the legal positions and practices established during the reign of the Caliph Umar in the early first century of Islam.
Yet if this is the way which socio-political circumstances influenced law and subsequent legal tradition, in what ways did this new ruling shape socio-political trajectory of the emerging Muslim society and state? There was a tremendous impact to Umar's fatwa on the workings of both state and society. On the political level, Umar's adopted policy in accordance to his fatwa meant that the Muslim armies would have to be paid in a different manner from which they were paid before i.e. directly from the spoils. Since his fatwa and subsequent policy hindered this practice to some degree, there would have to be a new way for soldiers to earn remuneration for their services. So, Umar, on the advice of his counsels, eventually set up a registry (i.e. diwan) where the names of soldiers were recorded and they would receive salaries from the state treasury instead of the spoils of conquest being directly divided amongst them.115

From that point onward the administrative structure of Muslim armies was changed and this was one ramification that resulted from his fatwa. But paying the soldiers from the public treasury instead of directly from the spoils meant that the state had to adopt revenue generating system that would pay for these expenses. So, agricultural conquered lands (e.g. the sawad) were taxed instead of confiscated so as to generate revenue for the state. The taxation scheme in newly conquered land, known as kharaj, was often adopted and adapted from the taxation schemes that were already in existence from the previous governing bodies whether Byzantine (Roman) or Sassanid (Persian).116

This opened up new vistas on a socio-economic level, where now the Muslim

115 Hodgson, Vol.1, 208; Ra’ana, 111-112.
116 See Ra’ana, pg 78, 88, 90-91 for the various taxation schemes that were adopted in Iraq, Syria, and Egypt.
state could run a treasury where public works were paid for. The irrigation system of the 
sawad lands in Iraq had fallen in disrepair during late Sassanid period. So through the 
new tax revenue generated from the sawad tax scheme the Muslim state was able to 
repair these irrigation systems and restore the productivity of land\textsuperscript{117} which had a positive 
economic impact on the native population that was tilling the land. Moreover, although 
the cultivators of these lands never gained ownership of them as their ownership of the 
sawad lands was transferred from the Sassanid private landlords known as dhihqans to 
the control of the Muslim state\textsuperscript{118}, nonetheless, the policy of not distributing the lands 
amongst the Muslim soldiers had several consequences: first, it allowed the inheritance 
of the userfruct of the land to the original cultivators and their heirs which they did not 
have in the previous arrangement\textsuperscript{119}; second, it prevented the establishment of Muslim 
controlled feudal estates which would replace the old feudal estates system that had 
exited under the Sassanids.\textsuperscript{120} This policy probably worked out in the interest of the 
originally peasant cultivators of the land.

My point in this long excursion was to show how this fatwa was both born out of 
and impacted by the state of affairs at that time which illustrates the reflexive nature of 
the process of ifta\textsuperscript{'} and its relationship to social circumstances. As was the case in the 
Caliph Umar's fatwa, the new geo-political scenario confronted the nascent Muslim state 
which demanded a revision of their previous political practices. But since those political 
practices were established by scriptural and prophetic authority, this made those practices

\textsuperscript{117} Lapidus, 37-39.
\textsuperscript{118} See Ra'an'a. 14-15.
\textsuperscript{119} See Ra'an'a. 14-15.
\textsuperscript{120} See Dennet, Conversion and Poll Tax in early Islam, as cited in Ra'an'a, pg 98. Also see Ra'an'a, 14-15.
normative. This meant that any new sanctioned practices would need to attain the same
degree of legitimacy to revise the established practices. Fresh legal reasoning was
employed that was based on an understanding of the fundamental aims of the scriptural
injunctions that trumped any considerations of scriptural literalism with respect to its
details.

The newly legitimated political practices that were at first necessitated by the
existing circumstances had their corollary effects which transformed the social,
economic and political scene in ways that could not have been initially imagined (e.g.
new taxation schemes, creation of public treasury, repair of irrigation systems, revived
productivity of land, etc). These new circumstances in turn necessitated their own legal
categories that needed to be legitimated by the employment of further legal reasoning.
The point I am trying to make is that law is both an effect of certain social dynamics and
cause of some others and vice versa. This is what I mean by the reflexivity of law and
society as illustrated by the process of ifta’.

There is one last thing that I would like to note regarding Umar's fatwa on the
lands of al-sawad. I have already mentioned that Umar's argument supporting his
legal/policy position was primarily based on the notion of what would be called later in
Islamic legal theory maslahah mursalah (i.e. utility and/or public interest)\(^\text{121}\). By initially
arguing for the establishment on new political/legal practices with reference to spoils
without scriptural evidence but based on considerations of public interest, Umar was
employing this legal technique to support his decision. In doing so, Umar was subverting
previous normative practices that had been established by Qur’anic and prophetic

\(^{121}\) See Hallaq, 1997, 112-113; Hallaq, 2005, 145-146 for more on this concept.
authority. But his subversion of these scripturally based practices was based on his recognition that particular legal or normative rulings in Islam had as their aim of serving utilitarian ends and when those ends were not met by those rulings, then this required that literalism towards the rulings be abandoned in order that the spirit of the law may not be compromised.

Umar's employment of non-scriptural based reasoning in his fatwas probably set a precedent for some later jurists and theorists, like the founder of the Maliki legal tradition Malik ibn Anas, to make *maslahah* a legal principle by which new Islamic laws can be established. The interesting thing about this principle is that it is based solely on rational grounds. This is perhaps why not all later Islamic schools of law agreed that this principle could be an independent basis from which particular Islamic rulings may be derived, but there was general consensus among many of the prominent Islamic legal theorist, both in the past and today, that the legal principle of *maslaha* (i.e. utility/common good), in its transformed guise of *maqasid al-Shari’ah* (i.e. aims of Islamic law), lies ontologically at the very core of Islamic law even when they differ on the epistemological status of *maslaha* (or *maqasid*) in establishing particular Islamic rulings. More will be said about this legal precept later in the discussion.

Since we surveyed fatwas from the generation of proto-jurists who were both contemporaries of the prophet Muhammad and the carriers of his legal legacy to the subsequent generation, it's time to transition this discussion into examining the *ifta’*

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123 See Shafi'i's argument in his *al-Risala*, pg 304-305 against non-scriptural based legal reasoning.
process in subsequent generations of Muslims after the early caliphate period. But I could sum up the period we just examined as follows: the Islamic legal discourse in this period consisted entirely of the corpus of legal norms and practices that this generation inherited from the prophetic period with the addition of ad hoc legal decisions (fatwa and qada') that this generation produced in response to new circumstances that confronted them.

These legal decisions were in some ways extensions of the Qur’anic and prophetic legal norms and practices as evidences in the formulations of their arguments supporting these legal decisions. Yet in their attempt to extend scriptural norms to new situations they employed various hermeneutical and rational techniques to deduce new legal judgments. But the legal decisions made and legal devices employed by this generation of proto-jurists established legal precedence for future generation of jurists even when they lacked any systematization.

**Conclusion**

What becomes evident from the forgoing discussion on fatwas and the process of their production (i.e. ifta') is that fatwas in this period were impromptu responses to social events. There was no formal paradigm or legal framework that guided how the production of fatwas would take place. Instead, situations arose that needed legal solutions and the solutions (i.e. fatwas) that were generated conformed to no particular legal mechanisms other than the preferred legal reasoning of the individual muftis (i.e. those pronouncing the fatwas) who issued these edicts. This feature of fatwas has several implications for the understanding of Islamic law and its legal tradition.

First, as I will come to show in greater detail in subsequent chapters, it is out of these fatwas that a body of Islamic legal doctrines emerged. Given that fatwas ad hoc
responses to arising situations, tells us that Islamic law is something that grew out of promptings of everyday events often happening to everyday people.\(^{125}\) In this respect then, Islamic law is partly an outgrowth of bottom up social forces given that the very stuff that makes up the law (i.e. fatwas) are often provoked by the concerns of non-legal individuals who were seeking ethical/legal solutions to their everyday problems.

Secondly, out of the legal processes and rationale of these early fatwas, legal discursive practices were constructed by subsequent generations of jurists and proto-jurists who drew on these antecedences to formulate their own legal methodologies, principles, and doctrines. So the fatwas in this period were crucial in establishing a model from which future legal specialists constructed a legal tradition for Islam. Yet, in the subsequent generations of jurists issuing these fatwas, we will witness an increasing level of formalization and structuring of legal rationale that legitimate these fatwas. This will be dealt with in the next chapter.

\(^{125}\) For more on this point, see Hallaq, 1994, 61.
CHAPTER 3

FATWA IN THE CLASSICAL AGE

Introduction:

What I intend to do in this chapter is cover the early history of fatwa and how this institution evolved from the early authoritative discourses and practices of Islam. More precisely, fatwas from the late first century and second century of Islam will be analyzed so as to discover the defining features of the fatwa tradition and what that may say about the development of Islamic law in general. Moreover, the socio-historical background of this period also will be explored, as fatwas are often responses to changes in socio-historical environments and therefore these changes tell us a lot about the social factors of fatwa production.

My contention is that fatwas and the process of *ifta‘*—the practice of fatwa production—are to be understood as a form of the Aristotelian concept of *phronesis*. As one author put it: “*phronesis* designates a form of historically informed, prudential judgment which seeks to determine not what is eternally true or valid, but…..‘what is feasible, what is possible, what is correct here and now.’”¹ Aristotle understood that in matters of practical reasoning (i.e. those concerning human action), there are no hard and fixed rules that can mechanically generate particular decisions as is the case for logic.² So applying universal ethical norms to a particular situation, for example, requires more than just knowledge of those ethical norms, but the prudence for when, where and how to apply those norms to the situation that we are faced with.


Ifta’ is in some essential ways precisely this type of procedure where jurists are attempting to apply general Islamic principles to a particular scenario so as to produce normative guidelines that would inform one’s ethico-religious practices. As we will see, the fatwa more particularly became the means by which the Qur’anic ethico-legal norms spoken of in the previous chapter became actualized in the socio-historical context of Islam. I will show how the Islamic legal norms and injunctions that were promulgated by the Qur’anic discourse and prophetic practice became interpreted, applied and re-interpreted in various historical and cultural contexts through the process of ifta’ (i.e. fatwa production) by those who had the authority to engage in this process and issue fatwas.

What will also become apparent is that these muftis (i.e. those who have the authority to issue fatwas) employed all sorts of legal rationale and hermeneutical devices to reformulate and apply Qur’anically- and prophetically- based norms in a way that seemed fitting for the peculiar situations that were faced by the early Muslim community. In the next chapter, we will come to recognize that the types legal reasoning and the interpretive devices employed became the basis of an Islamic legal discourse. This discourse, along with the legal authorities who shaped it, was the genesis of an Islamic legal tradition.

Fatwa in the Age of Regional Distinctions

By the last quarter of the first century after the advent of Islam, many religious authorities who were contemporaries of the Prophet Muhammad and carried his religious and legal teachings to the subsequent generation had passed on. Unlike those religious authorities of the first generation who were contemporaries of the Prophet and who continued to reside largely in Arabia proper (particularly the towns of Mecca and
Medina) even during the Islamic expansion in the Near East, many of the subsequent generation of religious authorities took up residence in the garrison settlements that were now evolving into proper towns such as Basra and Kufa in Iraq, Marw in Central Asia; and Fustat in Egypt and other towns in the Muslim-governed lands that had already existed prior to the Muslim expansion like Damascus in Syria and San'a in Yemen.

The regional diversity of the places where the new religious authority was being cultivated and the changing political circumstances s in those areas gave a peculiar coloring to the practice of ifta' in this period. Therefore, we need to note some of the general characteristics about fatwa during this period so as to understand how the practice of ifta' developed. The first thing to note is that a distinction developed between the new religious specialists who gave advice on religious matter and the new the political leadership. This was in stark contrast to the status of religious specialists in the post-prophetic period where these figures, who were the close companions of the prophet Muhammad, often shared political authority as we have seen above in the case of the Caliph Umar.

This gave many of the fatwas during the post-prophetic period the character of qada' (i.e. juridical rulings) because, as we have seen, it was often carried out by those who fused both religious and political leadership like the Caliph Umar. Yet during successive periods, the religious leaders become distinct from the political leadership and ifta' had more of the characteristics of what it finally developed into, which is a legal edict that has moral and legal authority but does not necessarily have the sanction of the state as it once had during the time of the early caliphate. This is was a result of the two civil wars between opposing camps within the Muslim community, which took place
towards the middle of the first century 35-40/656-661 AH/CE and 64-73/683-692 AH/CE. These brought about the division of the political from the religious leadership.

Hence, a clear bifurcation took place and causing the rise of a scholarly class who specialized in religious learning and the law as the best way to preserve the religious character of the nascent Islamic society from the less religiously authoritative Muslim political leadership. On a whole, many of the members of this new religious authority stayed out of the direct domain of politics and focused their attention on religious learning and law. As we will see they continued to tackle new legal issues that were continuously arising as a result of the new socio-political dynamics created by the Muslim expansions to the Near East and North Africa.

But how did this new, distinct class of religious scholars legitimate their legal authority to promulgate law even as they lacked political power? To answer this complex question requires revisiting the discussion on the nature of social transformation effected by the Qur’anic discourse. The Qur’anic discourse, with its epistemic and ethical emphasis, brought about novel ways for groups to acquire social legitimation within the nascent Islamic society. Given that the Qur’an enshrined universal moral values for the Muslim community which gained their acceptance from the fact that they were derived from scripture and not from custom or tradition, those who were purveyors of this scriptural knowledge and upholders of its ethical values were given authoritative legitimacy that those in the political corridors by and large did not enjoy.

The reason why the new political authorities lost their religious and social

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3 Hodgson, V.1, 255-256. Yet there were still other camps of religious authorities such as those who went on to form the Shi‘a and Khariji religious groups who took less of a politically quietist stance and actively opposed the Muslim regime. See Hodgson, V.1, 260-263.
legitimacy among the larger Muslim public in the second half of the first century of Islam is that they reverted to previous forms of Arab practice (e.g. favoring kinship ties over religious considerations and Arab political dominance over other ethnic groups in Muslim society) and traditional forms of political legitimization (e.g. hereditary transmission of political power) that in many ways ran against the new religious ethos that the Qur’anic discourse had planted and was becoming rooted in the new society that was being formed.\textsuperscript{4} So while the new political elite secured their prominence in Muslim society based on military power and political astuteness along with the claim that they had politically reunited the Muslim community, they lacked both the epistemic and ethical legitimacy that the Muslim public sphere increasingly demanded.\textsuperscript{5}

This role was now to be filled by a new group of individuals, whom Hodgson calls the 'piety minded'.\textsuperscript{6} They garnered religious authority within this newly forming Muslim society based on these epistemic and ethical grounds. As the Qur’anic discourse became increasingly rooted in the collective consciousness of the evolving Muslim society the by standardization of both doctrine and practice pursued by the piety-minded, Muslims came to expect that the legitimacy of social practices rested on their reference to scripture (i.e Qur’an and Prophetic practice) and not pre-Islamic traditions. Given that these groups of individuals were the carriers and advocates of this scriptural knowledge,

\textsuperscript{4} Hodgson, V.1, 248-252.

\textsuperscript{5} It should be noted here that not all individuals in the corridors of political power had lost their religious legitimacy and epistemic authority to influence the early development of Islamic law although over time their authoritative status surely dwindled. For instance, the pious Umayyid Caliph ‘Umar ibn ‘Abd al-‘Azîz (r. 99H/717CE-101H/720CE) statements were seen as religiously authoritative among the Muslims public at the end of the first century of Islam. Even the statements and practices his successor the Umayyid Caliph Yazid Ibn Abdul-Malik (r. 101H/720CE-105/723CE), at the beginning of the second century of Islam were viewed by the second century jurist Malik b. Anas as authoritative (See Hallaq, 2005, 68).

\textsuperscript{6} Hodgson, Vol. 1, 250.
they had the epistemic credentials to legitimate their religious authority.\textsuperscript{7} But more importantly, since they were the modelers of Qur’anic ethical ideals, their religious authority acquired an ethical legitimacy.\textsuperscript{8}

In short, they were regarded by the Muslim public as the defenders, exemplars and transmitters of the recently established Islamic norms in the face of a relapse to pre-Islamic practices and in this way they were seen as the successors of the prophetic tradition, in contrast to the ruling elite. It was from the group of such individuals that a class of legal specialists would emerge in the latter part of the first century of Islam who produced and promulgated Islamic legal rulings independently of the state\textsuperscript{9} and were driven by motivations of piety and religious commitment.\textsuperscript{10} So, it was in this period that the locus of legal expertise diverged from the political establishment and from this point onward legal production rested outside the confines of the political authorities.

Having noted the differentiation of political and religious authorities as one of the main developments of legal production during this period, we may now move to another major development. The late first century and early second century witnessed the rise of regional centers of Islamic law (Iraq, Syria, Hijaz, etc) with their own approaches to law. Ansari claims, though, that despite each center having its own approach to and doctrines of law, they shared norms from which various questions arose and further elaboration of doctrine occurred, tending to discuss the same issues, which is an indication that they all

\begin{itemize}
\item\textsuperscript{7} See Hallaq, 2005, 66 for the notion of epistemic quality of religious authority in Islam.
\item\textsuperscript{8} See Davutoglu, 123-125 for the nature of socio-political legitimation in Islam.
\item\textsuperscript{9} Ansari, 1966, 88.
\item\textsuperscript{10} Hallaq, 2005, 63.
\end{itemize}
had an original source (i.e. Qur’anic norms and Prophetic practice).\textsuperscript{11}

But why did various approaches to law and differing legal doctrines also develop in these regional centers? If we look at the two main regional centers where most of the eminent legal specialists conducted their activities, Kufa (Iraq) and Medina (Hijaz),\textsuperscript{12} we can see that the variant historical and social factors had an effect on the legal edicts that were issued. Ansari says that Kufa, being part of Iraq which was a part of the Persian cultural orbit prior to the Islamic expansion, had a different intellectual climate than the one that existed in Medina in western Arabia (i.e. Hijaz). This region was exposed to a greater degree of various religious and philosophical doctrines than Arabia proper.\textsuperscript{13}

Moreover, there was a greater degree of ethnic heterogeneity of Arabs from northern and southern regions as well as a more significant number of non-Arab Muslim converts in Kufa than in Medina due to migrations that occurred in the early Islamic period.\textsuperscript{14} This made Kufa more of a melting pot of different religious and cultural traditions that naturally made the place less conservative than other parts of the Muslim world like Medina.\textsuperscript{15}

\textsuperscript{11} Ansari, 1966, 84.
\textsuperscript{12} Hallaq, 2005, 64-65.
\textsuperscript{13} Ansari, 1966, 90.
\textsuperscript{14} EI2, “Al-Kufa” V.5, 347.
\textsuperscript{15} In addition to the stated reasons for diversification of legal doctrines, I speculate that the isolation of religious authority from the corridors of political power contributed to this complexity because it made the religious authorities focus their awareness on their differences of religious doctrine instead of being preoccupied with political intrigue. This heightened doctrinal awareness must have contributed into fomenting the various theological and legal rivalries. Although differences had always existed between earlier generations of Muslims, those differences came to the fore in greater contrast during the last quarter of the first century AH when these differences morphed into established local precedents. This factor along with the fact that these religious authorities did not preoccupy themselves directly with politics gave them the freedom to debate those legal differences. These debates over legal doctrines and methodology were the means by which the piety minded religious authority attempted to close its ranks and practice religious resistance against those in political power.
Despite the diversity of legal doctrines that were partially due to geographic considerations, the two most important legal approaches that were developing at the end of the first century and beginning of the second century A.H. and became emblematic of two camps of early Muslim jurists known as *ahl al-ra’y* and *ahl al-hadith*. Hallaq defines *ahl al-ra’y* as those legalists who favored rational and pragmatic considerations in their jurisprudence and did not restrict their legal production to what was strictly found in the hadith traditions (i.e. prophetic sayings), while *Ahl al-Hadîth* were those legalists who preferred the use of prophetic traditions known as *hadith* as the singular source, aside from the Qur’an which both camps held in common, from which jurisprudence ought to be derived with little to no consideration for rational and pragmatic concerns.

It should be noted that the legal approach advocated by *ahl al-hadith* for supporting the observance of prophetic practice (i.e. *sunnah*) as the sole source for Islamic law in addition to the Qur’an --may not have had its final formulation in beginnings in the end of the first century. One may argue though that this approach was rather an outgrowth of a more general movement at the end of the first century AH that advocated the precedents and practices of previous generations of proto-jurists (which

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16 See Al-Sayis, ND, 84. Hallaq is of the opinion that this rivalry between the two approaches to law began much later in the middle of the second century AH and only showed the rudimentary beginnings of the rivalry in the beginning of the second century AH (Hallaq, 2005, 75). Yet, one can say that even though the debate between these two schools had not crystalized around the issue of *hadith*in the late first or early second century AH, nevertheless, in this very same period there is a clear rivalry between those who advocate a rational/pragmatic approach (i.e. *ahl al-ra’y*) and those who prefer to restrict their fatwas to previously established norms and practices (i.e. *ahl al-athar* later evolving into *Ahl al-Hadîth*) as will become evident in my discussion.

17 Hallaq, 2005, 74 asserts that *ahl al-ray* “were recognized in terms of their non-reliance on hadith”, but this wording is perhaps too strong as we will find out that this camp did not necessarily shun hadithHallaq’s phrasing implies, but dealt with it differently than the *Ahl al-Hadîth*.

18 Hallaq, 2005, 74.
included prophetic practice) as the only authoritative sources of law besides the Qur’an (countering ahl al ra’y who were less conservative). These practices (i.e. sunan sing. sunnah) were represented in historical reports that were known as athar (pl. athaar). But it was not until later, towards the middle of the second century AH, that some of these advocates of athar started advocating the hadith of Prophet Muhammad as the singular source.\textsuperscript{19}

So one evolved from the other, but in general both represented a conservative movement that wanted to preserve a tradition rather than innovate new ways. So in this sense, when I speak of Ahl al-Hadîth I mean to include its precursor movement, the advocates of precedents (sunnan) in the form of athar, a movement from which the advocates of hadith evolved from. In this sense, I can assert that ra’\textsuperscript{y}/hadith debate has its roots dating back to the end of the first century AH, even though the contention around the hadith per se did not become clearly distinguished and manifest until the middle of the second century.\textsuperscript{20}

Perhaps the biggest factor that contributed to these divergences of method by early Muslim jurist was their varying social environment. It was in the region of Iraq, particularly the town of Kufa, where the advocates of ra’\textsuperscript{y} was dominant;\textsuperscript{21} while it was in the region of Hijaz, particularly the town of Medina, where the advocates of athar were in ascendancy.\textsuperscript{22} I have already noted how the social conditions in these two regions differed significantly and it was probably this difference this that contributed to varying

\textsuperscript{19} See Hallaq, 2005, 74-76 who corroborates some of what has been stated above although my argument differs with his in some respects.

\textsuperscript{20} Hallaq, 2005, 113.

\textsuperscript{21} Al-Sayyis, ND, 85.

\textsuperscript{22} Al-Sayyis, ND, 84.
approaches to the law.

Iraq’s more cosmopolitan environment necessitated that answers to legal problems not be restricted to previously established traditions that came into being in a different environment; hence the need to take practical and rational considerations into account when applying Islamic legal norms in the new milieu. On the other hand, the Hijaz experienced less fluctuation in its simpler mode of life where many of these *ahadith* (pl. *hadith*) were first transmitted and were in wider circulation; hence there was little need to alter the tradition of observing the practice of previous generation in particular the practice of the prophet.23

In addition, the fact that the region of the Hijaz was the area which the Prophet Muhammad and most of his learned companions spent most of their lives naturally meant that their sayings and practices in the form *athar*24 would be most widespread because it was in this arena where they were in touch with the most people.25 Iraq on the other hand, did experience an influx of people who were contemporaries to the Prophet during the first half of the first century AH and who did indeed propagate his sayings and practices, by the nature of things those would have been far less than those found in Hijaz.26 By comparison, this scarcity of *hadith* (i.e. reports of prophetic practice) led Iraqi jurists to rely more than their Madinan counterparts on their judgments than on previous

23 See al-Sayyis, ND, 84-86 who makes a similar argument.

24 One must recall in the earliest debates about *ra’y* and *hadith*, *hadith* was not clearly distinguished from the term *athar* both of which in the late first century AH still meant recorded sayings and actions of predecessors whether they were the Prophet Muhammad or his companions or the following generation. It was not until later, sometime in the second century AH, that the term *hadith* became strictly associated with the sayings and practices of the Prophet Muhammad, while the term *athar* came connote sayings/practices of predecessors other than Muhammad. See Ansari, 1966, 121.

25 Ansari, 1966, 112; Al-Sayyis, ND, 85.

26 Al-Sayyis, ND, 86.
precedent when settling legal issues.

These opposing approaches led to some differences in legal edicts and eventually legal doctrines. To illustrate how this opposition played out at the end of the first century of Islam, the following report exemplifies the differences between these two camps of law: a debate took place between famous Medinan proto-jurist Sa'id ibn al-Musayyib (d. 94 AH/712 CE) and his younger Medinan contemporary, the proto-jurist Rabi'ah ibn Farrukh [al-Ra’y] (d.136 AH/753 CE). Rabi'ah asks Sa'id about the compensation ('aqlá) owed to a women who loses her finger (i.e. due to someone’s negligence/recklessness), whereupon Sa'id answers that it is 10 camels. Then Rabi'ah asks about the compensation for two fingers, Sa’id answers 20 camels. Rabi'ah then asks the compensation for three fingers, Sa’id says 30 camels. When Rabi'ah asks him the compensation for four fingers, Sa'id puzzlingly answers 20 camels.27

Rabi'ah, dumbfounded by Sa’id’s response, protests against this judgment by rhetorically asking that: “when her injury became greater, her compensation becomes less?” That is, it is unreasonable that a greater injury should result in a lesser compensation then a smaller injury. Sa'id answers this criticism by saying: “Are you an Iraqi!!! It is the sunnah (i.e. previously established practice)”. Sa'id's reference to Rabi’ah being an Iraqi, although Rabiah is a resident of Medina, is a sarcastic comment implying that Rabiah is one of those who employs reason/opinion in his juridical judgment in lieu of existing and established practice (i.e. sunnah). Here, Sa’id is applying the principle

27 See Malik ibn Anas’ Al-Muwatta (Bewely translation), section 43.11, pg. 41: ‘The Blood-Money for Fingers’; Also see Al-Khidri, 93; Al-Sayyis, ND, 87.
established by practice\textsuperscript{28} that a women's compensation is the same as a man up to 1/3 of the indemnity (i.e. diyyah), but after that she only gets half of the indemnity (i.e. diyyah) of a man.

Yet, this conclusion seems illogical from a rational point of view. Nonetheless, the point here is that this dialogue shows that there were early differences in legal approaches in the different regions as indicated by Sa'id's objection to Rabi’ah: “Are you an Iraqi!!!”; that is, are you one of those who practices ra’\textsuperscript{y} (i.e. reason/opinion) instead of following established sunnah (i.e. practice) as was more prevalent in Medina. There are number of conclusions to be drawn from this incident that shed light on the legal rivalry between ahl al-ra’\textsuperscript{y} and Ahl al-Hadîth in the early Islamic legal formation.

First, despite the preferences towards the use of ra’\textsuperscript{y} (discretionary opinion or reason) amongst the legal authorities in Iraq and the preference of the use of athar (i.e. prophetic traditions and precedent) or sunnah (i.e. established tradition of predecessors) amongst legal authorities of the Hijaz, the divide in legal approaches between the two regions was by no mean complete. Rabi’ah, who was of a Persian background, so that his legal outlook might have been colored by his cultural background, was a legal authority in Medina and yet he was of ahl al-ra’\textsuperscript{y} in opposition to the hadith/athar approach that was espoused by most of the legal authorities in Medina. Indeed, he was so much known for his use of ra’\textsuperscript{y} that he became known by the epithet Rabi’at al-Ra’y (i.e. Rabi’ah the opinionest)\textsuperscript{29}.

\textsuperscript{28} The later Iraqi school, i.e. the main proponents of ra’\textsuperscript{y} (i.e. discretionary opinion), claimed that what is meant by the term sunnah here was not the practice and/or judgment of the Prophet himself but rather that Sa’id was referring to the practice and/or fatwa of Zaid ibn Thabit who was one of the learned companions of the Prophet. See Al-Khidhari's, pg 93.

\textsuperscript{29} Al-Khidari, 94.
The same is true for legal authorities in Iraq in that not all of them were of *ahl al-ra'y* even when that was the dominant school there. The first century legal specialist of Kufa (Iraq) al-Sha’bi had an aversion to the use of *ra’y* (discretionary opinion) in his legal work. In this regard, it has been reported that he once posed the question: if an adult male were (accidently) killed and a child with him, would their indemnities be different for the adult because of his maturity or will it be the same as the child’s? When people responded that it would be the same, he retorted then using analogy (i.e. rational consideration in legal cases) is worthless.30 The report illustrated how this famous Iraqi legal specialist viewed issues of *ra’y* in legal matters and how his legal approach was closer to that of the Medinan legal authorities.

The second point that we can conjecture from the Sai’d’s debate with Rabi’ah is that those who advocated *ra’y* at this early stage in the legal debates did not necessarily have a definite legal method worked out that would determine legal cases. Instead, their approach merely consisted of applying most generally rational or pragmatic consideration to the legal cases that they were confronted with on a case by case basis. Rabi’ah did not appeal to any clearly stated principles in objecting to Sa’id’s fatwa other than to appeal to common principles of rationality to that would forbid Sa’id’s conclusion being a logical one. In particular, his argument demonstrates his use of *a fortiori* (*bil-awla* argument) to expose the absurdity of Sa’id’s position, but he does so in a way that he is appealing to common sensibility and not any outlined legal principles.

Yet another fatwa from the late first century AH which is indicative of *ahl al ra’y* approach to law is a fatwa by the premiere Kufan (Iraqi) jurists Ibrahim al-Nakha’i (d. 30

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30 Al-Khidari, 94.
94Ah/714CE), a contemporary of the Madinan Sa‘id ibn al-Musayyib, who we just mentioned. Ibrahim pronounces a fatwa that if a ring is made of silver and it contains a stone, then it could be bought at any price whether lower or higher than the cost of the content of silver in it.\textsuperscript{31} The contention here is that there is an unequivocal saying (i.e. \textit{hadith}) of the prophet that indicates that transactions involving silver must be traded with equal measure of silver (i.e. its exchange value) and that any subtraction or addition to the price of the silver constitutes usury. In his fatwa, Ibrahim seems to be contravening this economic principle that the Prophet had established, since selling the ring at any price as if it was any commodity whose price determined by market mechanisms. This would mean that you can buy the ring at lower cost than the value of the silver in it.

We are not told by the source why Ibrahim came to such a decision, but from the scenario presented, we can assume that Ibrahim was of the opinion that once the stone was conjoined to the silver, the product could no longer be subsumed under the rubric of items considered usurious, which according to the Prophet’s injunctions, could only be exchanged at equal value. Instead Ibrahim must have considered this new product as a commodity (i.e. jewelry), and not strictly silver per se whose exchange was governed by the rule of ‘like for like’. Ibrahim’s fatwa was then nullifying the specific rules governing the exchange of silver in this case and subjecting this product to the rule of commodities instead. This fatwa seemed to go against the conservative legal precedent of always exchanging gold and silver in equal measures even with these metals were fashioned into products. \textsuperscript{32}

\textsuperscript{31} Al-Shaybani, \textit{Kitab al-Athar}, V.2, 733.

\textsuperscript{32} See Malik ibn Anas’ \textit{al-Muwatta} (Bewely translation), section 31.16, pgs. 290-293: ‘Selling Gold and Silver, Minted and Unminted’ for reports on how previous legal authorities, including the Prophet
Yet, in another fatwa that Ibrahim al-Nakha’i employed his legal rationale and went against the precedent established legal authorities in Medina like the Caliph ‘Umar and ‘Aisha, the wife of the Prophet Muhammad, was in the case of whether it was incumbent to take zakah (i.e. alms tax) from an orphan’s wealth. Madinan legal precedent had established that taking the zakah from the orphan’s wealth was incumbent. Ibrahim, on the other hand, said that it was not incumbent to take the zakah from the orphan’s wealth until it was incumbent upon him to perform salah (i.e. prayer).

In other words, since one can argue that both salah and zakah are fundamental pillars of Islam and it was recognized by all religious authorities that an individual was not held accountable for performance of his salah until he reached the age of maturity/majority, likewise s/he should not be held accountable for paying their zakah until they reached the same age. Ibrahim was making a legal argument by analogy (i.e. qiyas) to legitimate his position. As we will see later, analogy (i.e. qiyas) become one of the widely accepted fundamental methodological tools of deriving Islamic law in Islamic legal theory.

At the same time it can be argued that Ibrahim was following the Kufan school’s precedent instead of merely going against precedent through the use of his own legal rationale. This is because there is a narration that indicates that the companion of the Muhammad, practiced the exchange of these two metals. Also, see Al-Shaybani, Kitab al-Athar, V.2, 733 for how later Iraqi legal authorities like Abu Hanifah disagreed with Ibrahim’s fatwa and reverted to the established legal precedent on the exchange of gold and silver.

33 See Malik ibn Anas’ al-Muwatta (Bewely translation), section 17.6, pgs. 123-124: ‘The Zakat on the property of Orphans…..’

34 Al-Shaybani, Kitab al-Athar, V.1, 324, #297. Also, see Ansari, 1966, n.121.

35 Ansari, 1966, 105.
Prophet Muhammad Ibn Masud, whose legal decision influenced the legal doctrine of the Iraqi legal school, is said to have given the same fatwa as Ibrahim that zakah was not obligatory on an orphan’s wealth. This is why I claimed that Ibrahim was opposing the precedent of the Madinan legal authorities and not all authorities since he was certainly in line with the legal precedent of his own region. Yet, his use of analogy (i.e. qiyas) to justify his position, not solely relying on legal precedent set by his predecessors, illustrates nicely ahl al-ra’y were willing to use rational means to justify their legal positions and were not solely dependent on observing tradition as was the case of ahl al-athar.

These two fatwas by Kufan proto-jurist Ibrahim al-Nakha’i and the previous fatwa/debate by the Madinan Sa’id ibn al-Musayyib illustrate the contentions in legal approach that existed between the various regional centers in the Muslim world at the end of first century AH, especially the methodological differences that existed between ahl al-ra’y and ahl al-athar, which led to variations in legal doctrines in these different regions. This rivalry between the regional legal school in Iraq, which represented the legal approach of ra’y and the regional school in Hijaz, which represented the legal approach of athar continued well into the second century AH and further advanced the sophistication of Islamic legal theory.

Yet it must not be overstated in this representation of these opposing camps that they were polar opposites of one another where ahl al-ra’y were thorough going rationalists who did not take into account prophetic traditions (i.e. hadith) or the religious

36 Al-Sayyis, ND, 86.
37 Al-Shaybani, Kitab al-Athar, V.1, 325, #298.
and legal practices of Muslim predecessors as represented by the term *athar*. At the same time, neither should *ahl al-athar* be viewed categorically as those who completely shunned reason or considerations due to pragmatism in their legal productions or who were blindly committed to scriptural sources (like reported prophetic practice) and matters that had been established by previous precedent. In fact, in both schools, it was not a matter of either *ra’i* or *athar/hadith*, but rather it was a matter of the degree to which either one of these approaches was relied upon that gave the schools their distinctions.38

For example, there was a debate that took place towards the middle of the second century AH between Abu Hanifah (d. 150AH/767CE), the premier jurist representing the Iraqi school and *ahl al-ra’i* during his time, and al-Awaza’i (d. 157AH/773CE) the premier jurist in Syria at that time and a representative of the *Ahl al-Hadîth/athar*. The legal issue of debate was about the correct manner in which the ritual prayer (i.e. *salah*) is to be performed. Al-Awaza’i asks Abu Hanifah why don’t they (i.e. practitioners of the Iraqi school of law) raise their hands in the *salah* during the transitions into and out of prostrations. Abu Hanifah responds that no authentic report (i.e. *hadith*) that the prophet Muhammad had practiced such exists.39

Al-Awaza’i retorts by narrating a *hadith* with a chain of narration that contained Madinan authorities that indicated that the Prophet did indeed engage in this practice. Whereupon, Abu Hanifah responds with a *hadith* of his own narrated by Kufan authorities that the Prophet did not engage in that practice. A debate ensues between the

38 Ansari, 1966, 113.
39 Al-Khidari, 94; Al-Sayyis, ND, 87-88.
two jurists about the greater authoritativeness of the opposing *ahadith* (pl. *hadith*) based on the authority of those who transmitted them. Abu Hanifah at this juncture argues for the greater authoritativeness of his *hadith* based on the fact that his transmitters had a greater understanding of law than al-Awaza’i’s transmitters.\(^{40}\)

This is but one illustration that the proponents of *ra’y* (discretionary opinion/rationale) relied on *hadith* to justify their positions. Yet, as this example illustrates, when they did rely on scriptural sources or the legal precedent of those who preceded them for their judgments or their fatwas, they seemed more circumspect about the source and usage of *hadith* and tended to rely on those normative sources and precedent that were prevalent in their region\(^{41}\) even when the diffusion of *hadith* in their region was less than that in other regions like the Hijaz.

As this case illustrates, for the proponent of *ra’y*, it was not question of whether *athar/hadith* was an authoritative source of the law, but rather when and how to use *hadith* that distinguished the proponents of *ra’y* from the proponents of *hadith*.\(^{42}\) For Abu Hanifah, the authoritativeness of the *hadith* that was to influence religious practice was to be based on the narration of those who understood the aims of the law. Here is where the proponents of *ra’y* where more guarded and/or critical in utilizing *hadith/athar* than their counterparts and were not reluctant to employ their rational faculties and practical sensibilities when they felt the need to.

But at the same time, the movement towards traditionalism at the end of the first century, as represented by those who were proponents of the practices of the earlier

\(^{40}\) Al-Khidari, 94-95; Al-Sayyis, ND, 87-88.

\(^{41}\) Al-Sayyis, ND, 86.

\(^{42}\) Abu Zahra, 260.
predecessors, became stronger. *Athar* discourse continued to gain momentum well into the second century. More precisely, this movement developed a narrower focus than in the past. Its new legal doctrinal focus was to insist that there was only one type of practice/precedent that was to be seen as ultimately authoritative in the formulation of Islamic law and that was the practice of the Prophet himself as represented in *hadith* discourse. So those who advocated *athar* in contrast to *ra‘y* at the end of the first century became known as *Ahl al-Hadîth* in the second, and they continued to oppose the use of *ra‘y* in matters related to the formulation of the religious law.

**Fatwa in the Age of the Madhhab-Makers**

The contentious legal issues that arose in the latter part of the first century (i.e. regional and methodological differences) continued to influence the legal debate during the second century A.H. Yet there were important legal developments in this century that gave the fatwas made by legal authorities a more permanent place in Islamic legal doctrines than previous fatwas had ever been before. It was in this century that jurists arose whose legal doctrines and methodologies became the basis for the construction of Islamic legal schools (i.e. *madhahib*) in the following two centuries. Moreover, it was from these jurists that these newly forming legal schools took their names. It is the fatwas of these jurists that I will examine in this section so as to determine how these legal edicts influenced the evolution of legal ideas in Islam.

In this section, I will focus on the fatwas of three leading jurists of the second/eight century AH/CE for whom three of the several Sunni schools of Islamic law
(i.e. madhahib)\textsuperscript{43} were named: Abu Hanifah (d. 150AH/767CE) for whom the Hanafi school of law is named after, Malik (d. 179 AH/795CE) for whom the Maliki school of law is named after, al-Shafi’i (d. 204AH/819CE) for whom the Shafi’i school of law is named after.

In addition, I will deal with the rulings of one other leading jurist of the second/eighth century AH/CE who’s legal opinions were just as crucial to the formation of the Hanafi school as the opinions of Abu Hanifah himself: Muhammad ibn Hasan al-Shaybani (d. 189 AH/804 CE), the protégé of Abu Hanifah. It may be even argued that this jurist is more important to the formation of Hanafi school of law than Abu Hanifah since he was the one of the earliest collectors of the legal opinions of the Iraqi school of jurists, which the Hanafi school of law emerged from, as well as a jurist in his own right who issued fatwas along the lines consistent with the Iraqi legal tradition.

Let us begin by looking at some of the fatwas of Abu Hanifah. One position where Abu Hanifah goes against the majority of opinion is in regards to the stipulation requiring a female to have/appoint a male guardian (i.e. \textit{wali}) to procure a marriage and validate the marriage contract. Abu Hanifah’s position is that this is not mandatory and his rationale is that if it is agreed upon that a woman has complete guardianship over her wealth, then she also ought to have complete guardianship over her right to marriage.\textsuperscript{44} This fatwa is interesting in that it appears to make an analogical argument (i.e. \textit{qiyas}) that draws on the legitimacy of another recognized legal rule and ignoring the scriptural text

\textsuperscript{43} At this stage of the investigation, I will not discuss the formation of Islamic legal schools that took place in the third AH/ninth CE and fourth AH/tenth CE centuries and their role in shaping fatwas. This discussion will be reserved for the upcoming chapter.

\textsuperscript{44} Abu Zahra, 276.
(i.e. *hadith*) that makes the presence of a guardian a pre-condition for the validity of the marriage contract.\(^{45}\)

This fatwa has several interesting features. One of these is that Abu Hanifah draws upon established economic practice (i.e. women’s complete guardianship of her wealth) to legitimize practices in the social sphere (i.e. granting women complete guardianship in marriage). Yet Abu Hanifah uses the same type of analogical reasoning as well to legitimize practices in the economic sphere based on recognized and established practices in the social sphere. Take for example his opinion on the whether the validity of sale transactions is compromised by the fact that the transaction process included an element that was prohibited by the scriptural sources such as a clause in the contract containing usury. Some scholars were of the opinion that such a contract was completely invalid and nullified the exchange of merchandise between the buyer and seller.\(^{46}\)

Abu Hanifah and his protégés, on the other hand, were of the opinion that the contracted sale was not completely null and void although the transaction was unsound (i.e. *fasid*), and that the exchange of merchandise was still legitimate so long as the prohibited condition in the contract was rectified/nullified. The rationale that he used to legitimate his legal position was built upon the prophetic practice of validating the occurrence of a divorce even when all of the correct stipulations of invoking the divorce were not kept. Hence, Abu Hanifah uses analogical reasoning to legitimize practices in the economic sphere based on established legal practices in the social arena.\(^ {47}\)

These examples of Abu Hanifah’s fatwas, and similarly those of Ibrahim al-

\(^{45}\) Al-Tirmidhi, 2007, Hadithno. 1103, pg. 461.

\(^{46}\) Al-Khidhri, 137.

\(^{47}\) Al-Khidhri, 137.
Nakhai’ before him, demonstrate that utilization of analogical reasoning in juristic
decisions was rife among those jurists who belonged to Iraqi school. In fact it is within
their circles that the term for legal analogical reasoning, *qiya*s, as a specific form of the
more general applications of rational reasoning (i.e. *ra’y*), as opposed to authoritative
precedent (i.e. *athar*), became coined. Ahmad Hasan asserts that the early Iraqis used the
term to mean a more systematic reasoning about the law and drawing legal parallels
between legal cases than the more general application of legal opinion signified by the
term *ra’y*. 48 At the same time, the Iraqi circle of jurists did not employ by the term *qiya*s
during this period in the very same way as the very structured legal reasoning that was
later defined by al-Shafi’i and post-Shafi’i legal theorists.49

Yet as much as Abu Hanifah and his protégés Abu Yusuf and al-Shaybani
employed *qiya*s to justify their legal edicts, they often employed other forms of legal
reasoning to validate their fatwas that ran counter to *qiya*s, because they felt that for
certain cases analogical reasoning produced undesirable legal outcomes. Among the early
counter-*qiya*s legal instruments used by them was the notion of *istihsan*, where the jurists
makes a judgment based on his juridical preference consciously going against what the
*qiya*s (analytical argument) would require. The Iraqi school was (in) famous for
employing such a legal device in many of their rulings much to the irritation of those in
the *athar/hadith* circles who felt that this was a form of legislation that was based on
sheer caprice.

It is not clear what criteria legitimated the employment of *istihsan* by these Iraqi

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48 Hasan, 140-141.
49 Hasan, 144. More will be said about development of *qiya*s this in the following chapter.
jurists, but Ahmad Hasan seems to think that public interest was the motive for its employment. An example of istihsan is the case of Abu Hanifah disapproving of the practice of ish'ar (making an incision in the flesh of the sacrificial animal) on the occasion of Hajj, because he viewed it as cruel disfiguration of the animal. This was his judgment despite hadith which approved of the practice of ish'ar. Al-Sarakhsi explains that Abu Hanifah was opposed to it because the way in which this custom was practiced was extreme thereby causing the animal harm and so Abu Hanifah, in a sense, despite the evidence of hadith saying otherwise, made that counter-judgment on the basis of istihan (i.e. preferability).

Among other forms of legal reasoning that were employed by second/eighth century jurists was Malik’s frequent use of legal reasoning without scriptural warrant, like the ‘practice of the people of Medina’ (i.e. amal ahl al-Medina), to validate his fatwas which constituted the main pillar in his approach to formulating law. As Dutton states, the ‘practice of the people Medina’ was a composite term that represented the given practice and opinions of the people and jurist of Medina and was informed by Qur’anic norms, Prophetic practice (i.e. sunnah), practices and opinions of the predecessors, and the legal opinions (‘ray) of the leading jurists of Medina. This was because he believed that people of Medina, given their context, were better in touch with Islamic norms since the early development of Islam took place in this geographic location; hence, their practice constituted an authoritative practice.

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50 See his book The Early Development of Islamic Jurisprudence pg. 146.
51 Hasan, 146-147.
52 Dutton, 35.
53 Dutton, 37.
For example, Malik took the position that a married women whose husband had disappeared, so that it was not known whether he was dead or alive might remarry someone else after a period of four years. Both the Qur’an and Prophetic practice are silent on this issue, yet Malik adopts this position because it constitutes the opinions of the leading jurist of Medina and he shows that the Caliph Umar (a resident of Medina) was the first one who adopted this position. Yet, at the same time, others see Malik’s taking this position as displaying another form of legal reasoning known as (maslaha mursala (i.e. public interest/utility ) which they attribute to Malik’s legal approach to jurisprudence even when he does not explicitly justify his fatwa in these terms. This is so because Malik’s fatwa prioritizes the interests of the wife to move on with her life over the rights of the missing husband to retain his wife lest she be harmed by his prolonged absence.

Yet another fatwa by Malik perhaps better illustrates his usage of the principle of public interest/utility is his position on eating carrion out of necessity when there is edible food that does not belong to the person in question. It is prohibited to eat carrion meat in Islamic law as a result of a specific injunction stated in the Qur’an, but necessity would obviate this injunction. But where there is edible food that does not belong to the individual who is in need, what should be done in this case? Malik states that if this person believes that eating from the foods (fruits, crops, sheep) which belongs to others would get him prosecuted as a thief then he should eat carrion, but if s/he thinks that the owners would recognize the dire situation and not prosecute him/her, then s/he should eat

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54 Malik ibn Anas, 1982, 29.20, pg. 266
55 See Al-Sayyis, ND, 115, makes this argument.
from the edible food.\footnote{Malik ibn Anas, 1982, section 25.7, pg. 227.}

One can see that Malik had to take into account several legal/moral considerations when pronouncing this fatwa: How should one reconcile between two Qur’anic injunctions (i.e. prohibition against theft\footnote{Qur’an, 5:38; 60:12.} and prohibition against eating carrion\footnote{Qur’an, 2:173; Also, Qur’an 16:115.}) when the situation demands that one of the two injunctions be broken? Is the law of prohibiting theft in this situation a priority over the law prohibiting the consumption of carrion or vice versa? In which case would the person in question bring more moral/physical harm to himself/herself: in violating the law of eating carrion or violating the law against stealing other’s properties? Would the possibility of being prosecuted for theft outweigh the religious and bodily harm in eating carrion?

The Qur’anic injunctions do provide an annulment of the prohibition against eating carrion when necessity calls for it by an absence of edible food\footnote{Qur’an, 2:173. Also, Qur’an 16:115.}, yet the scenario in this fatwa is different in that there is edible food yet it does not belong to the starving person. For this case, the scriptural injunctions (Qur’an or prophetic tradition) are silent, hence forcing jurists like Malik to produce a ruling that is consistent with overall moral and legal norms prescribed by scripture. So, in this case in light of the silence of authoritative Islamic judgments, it seems that Malik must resort to a form of legal reasoning known as \textit{istislah} (i.e. seeking the public interest [i.e. \textit{maslaha}] based on presumed universal legal norms\footnote{See Hallaq, 2005, 208 for a precise definition of this term.}). This is where he engages in a sort of legal calculus to
arrive at a conclusion on what sort of action should be taken.

Malik’s fatwa gives no definitive course of action that would be sanctioned by Islamic law and places the burden of responsibility on the starving individual to decide which of the two alternatives presented in the fatwa best suites his/her case. Malik conditioned his judgment based on what he thought may be in the interest (i.e. maslahah) of the starving person in this case. He provides no established substantive legal evidence whether scriptural or explicit stating legal precedents to support his argument, which gives an indication that he arrives at his conclusion based on legal reasoning that draws on presumed universal principles even when these principles are not explicitly spelled out.

What should be clarified at this point is the similarity that exists between the legal principle of istislah that Abu Hanifah employed in his fatwa against branding sacrificial animals and the principle of istislah that Malik used to justify his fatwa on the legality of eating carrion. Their point of similarity is that they are both forms of legal reasoning which are employed to validate legal opinions independently of any scriptural legal injunction or legal derivation (i.e. qiyas) and/or forms of legal precedent or consensus. Yet where they diverge in their position with respect to direct scriptural evidence or scripturally derived evidence that has bearing in their case.

In the case of istislah (i.e. seeking public interest/utility), there is a complete absence of scriptural injunctions or scripturally derived injunctions that have bearing on the case, hence forcing the jurist to resort to this form of independent reasoning to solve his case, as was the case in Malik’s fatwa on eating carrion. On the other hand, in the case of istihisan (i.e. juridical preference), there exists scriptural evidence or scripturally
derived evidence (i.e. *qiyaṣ*) that has bearing on the case in question, yet the jurist acts independently to annul the legal implication of that evidence presumably to avoid what the jurist sees as an undesired outcome. Such was the case in Abu Hanifah fatwa on the branding of sacrificial animals.

If Abu Hanifah and Malik were more liberal in their use of extra-scriptural legal methods like *istihisan* (juridical preference) and *istislah* (seeking public interest) in making legal derivations, al-Shafi’i, the younger contemporary of these two jurists, was much less inclined to employ extra-scriptural legal methods other than *qiyaṣ* (i.e. legal analogy) for social situations that were not explicitly addressed in scriptural sources. This is because he advocated restricting jurisprudence to matters found in the scriptural sources (i.e. Qur’an and Prophetic practice) or those legal opinions which had unanimous consensus (*ijma*). Those situations on which these legal sources were silent were to be dealt with by the strict use of analogy (i.e. *qiyaṣ*) according to scripturally-established norms.⁶¹

An illustration of al-Shafi’i’s use of *qiyaṣ* or analogical legal reasoning is to be found in his fatwa that establishes financial liability of children towards their father if the parents are unable to support themselves. In presenting his case, he initiates his argument in reverse by citing the scriptural passages in the Qur’an and prophetic traditions (i.e. *hadith*) that support the idea that the father is obligated to support his children so long as they are young.⁶² Once he establishes this position, he then proceeds to argue by

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⁶¹ See al-Shafi’i’s treatise entitled *al-Risala* [Translation by Khadduri 1987] which is written to make this mentioned methodological argument. See, for example, page 306 in *al-Risala* where he restricts jurisprudence to those sources just mentioned.

⁶² Al-Shafi’i, 1987, 309-310
analogue deduction that the father is entitled to the same right so long as he has no means to support himself. This is because his circumstance now falls within the rubric of the legal principle that was operative in the scripturally mandated obligation of the father to support his children: direct lineage and incapacity to support oneself. Once these very same conditions apply to the father—that he shares the same lineage and is financially incapacitated—then the father is entitled to the same rights from his children as the obligation he had towards them.63

What is interesting about this fatwa and the analogical reasoning that al-Shafi’i displays in it is his identification of legal principles that are operative in scriptural injunctions. It is those legal principles that are anchors for legal injunction pronounced by the scriptural sources even when these legal principles are not necessarily explicitly mentioned in the scriptural sources. It is by the same token that scriptural injunctions can be analogically extended to different cases if these cases share the same operative legal principle of the original case. He recognized that in order for analogical legal reasoning to be valid, it has to meet a certain condition; that condition being that both the original case and the case in question had to share an essential attribute (what he called ma’na)64 for the legal judgment of one to be carried over by the other.

In this way, al-Shafi’i further methodologically grounded *qiyas* as a legitimate legal tool by which to derive law. Although *qiyas*, as a term and device, was employed and developed by the Iraqi regional school best represented in the second century AH by the jurist Abu Hanifah and his protégés, it was refined and elevated by al-Shafi’i as the

63 Al-Shafi’i, 1987, 310.
64 Al-Shafi’i, 1987, 309.
premiere methodological tool by which new laws for situations that had no precedents might be derived. As such, al-Shafi’i, even in his opposition to the overall approach Iraqi regional school with their notoriety of being *ahl al-ray’* (advocates of opinion), accepted certain methods of their legal reasoning that he saw as being in consonance with the scriptural sources.

At the same time, his rejection of other non-scriptural sources of law, like the employment *istihsan* (i.e. juridical preference) for example, and his restriction of legitimate means of deriving new jurisprudence to legal devices such as *qiyaṣ*, shows how the arguments of Ahl al-Hadîth (the advocates of hadith), as a faction who were opposed to any non-scripturally based legal opinions, was gaining traction amongst jurists in the second century. Although *qiyaṣ* was not accepted as a legitimate source of deriving law by Ahl al-Hadîth, restricting legal reasoning to direct derivation of law from scriptural injunctions or by analogical reasoning (i.e. *qiyaṣ*) to them, al-Shafi recognized the main argument of Ahl al-Hadîth because *qiyaṣ* itself was scripturally based reasoning and was not independent of scripture in the same was *istihsan* or *istiṣlah* were.

At this stage of my fatwa analysis, I want to cross-examine the fatwas of Abu Hanifah, Malik, and al-Shafi’i on one common theme: i.e. on the type of exchanges that constitute usurious (i.e. *riba*) transactions. By looking at their legal pronouncements on one subject, we gain a better perspective on the types of legal reasoning and hermeneutical strategies each uses to justify their edicts. This is because we are more capable of assessing their points of convergence and contrast in the legal strategies they employ because if each jurist is speaking about a different subject, then it can be presumed that their divergences may be due to the variance in the subject matter. But if
each jurist is addressing the same issue, then their divergences are a result of other factors.

To start with, their legal edicts on this issue are stated with reference to the prophetic tradition (i.e. *hadith*) that stipulates that six types of goods (wheat, barely, dates, salt, gold and silver) when exchanged (bartered) for the same type, must be in equal quantities and must be exchanged so on the spot or else the transaction is considered usurious.\(^6\) So there are two ways in which transactions in these goods can be considered usurious: first, if any one of these goods is exchanged for the same type in unequal measure; second, if any one of these goods is exchanged for its same type in different time periods (i.e. there is a delay in the delivery/exchange of the one item for the other).

As will be made clear, each of the fatwas of these three jurists expanded the scope of usurious transactions to include other types of goods not specifically mentioned in the prophetic tradition (i.e. scriptural sources) about usurious exchanges. Each of their fatwas was an attempt to interpret the legal norm that the Prophet had established and based on their understanding of its aims, they tried to extend or limit the reach of this norm. In examining the actual content of their fatwas I will only consider those fatwas that address one of the two types of usurious transactions: namely those regarding an unequal exchange of the same type of item, while disregarding the other element of their being exchanged on the spot or not.

Let us begin with the fatwas of Abu Hanifah regarding this issue usurious

\(^6\) Al-Shaybani, *Kitab al-Athar*, V.2, 736. Also see Malik ibn Anas, 1982, 31.17, pg. 292 (although this report does not mention salt) and al-Shafi’s *Kitab al Umm*, V.4, pg. 32 for similar prophetic tradition (i.e. *hadith*).
transactions that has its roots in the prophetic tradition that was mentioned. For example, he is of the opinion that the exchange of two loaves of bread for one is a legitimate exchange and non-usurious.\textsuperscript{66} On the surface, this is completely in line with the prophetic tradition in that bread is not one of the goods that are addressed in that *hadith* and hence is not directly subject to the prohibition of being exchanged in equal quantities. On the other hand though, when rendering his opinion about the unequal exchange of iron or copper, Abu Hanifah is of the opinion that these types of items, when exchanged within the same category, must be exchanged on an equal basis or else the transaction is considered usurious,\textsuperscript{67} although they were not included in the Prophet’s prohibition.

The question arises, why would the unequal exchange in bread be considered differently than the unequal exchange of iron or copper in fatwas of Abu Hanifah? The answer lies in the rationale he gives in both fatwas. In the case of bread, he says that this category of goods is not sold by measurement of weight or volume;\textsuperscript{68} while his rationale for his opinion in the case of steel and copper is that it is sold by weight measure.\textsuperscript{69} Hence, Abu Hanifah’s legal position expands the prophetic prohibition on usury to include all products/items that are sold by measure of volume or weight. For Abu Hanifah, all types of goods whose exchange takes place by means of volume or weight measure must be exchanged in equal measure or else the transaction is usurious.\textsuperscript{70} So the six items that were stipulated in the *hadith* were seen by Abu Hanifah as just specific

\textsuperscript{67} Al-Shaybani, *Al-Hujjah ‘ala Ahl al-Madina*, V.2, 659.
\textsuperscript{68} Al-Shaybani, *Al-Hujjah ‘ala Ahl al-Madina*, V.2, 619.
\textsuperscript{69} Al-Shaybani, *Al-Hujjah ‘ala Ahl al-Madina*, V.2, 659.
\textsuperscript{70} Khin, 496; Wheeler, 21.
examples of a more general category of things that are exchanged by measure of volume or weight. So, volume and/or weight represent the attribute that is the common ground for all of those six goods mentioned and are the basis for extending the verdict on those items to other items not specifically mentioned in the prophetic tradition.71

Malik, on the other hand, has a different set of criteria by which he extends the prophetic prohibition of usurious exchanges and what he considers the base cause for considering things usurious or not. For instance, Malik says in one fatwa that foods of the same type are not to be exchanged except in equal measure.72 Yet on another occasion, he gives the fatwa that certain kinds of fruits like watermelon and cucumbers can be exchanged in unequal measure since they are not the food that can be dried and stored (i.e. they are perishable).73 In another fatwa, Malik says that it is legitimate to exchange metals of the same type other than gold or silver which are overtly stipulated in the prophetic tradition, like copper or iron in unequal measure.74

So what are we to deduce from these cases about how Malik has understood the principle stemming from the normative statements of the Prophet Muhammad that determines usurious transactions? Like those of Abu Hanifah, Malik’s fatwas indicate that the principle of usurious transactions is not to be limited to the six goods mentioned by the hadith. He too expands the range of usurious transactions, yet judging from his fatwas, the criterion which he seems to believe is the modus operandi behind usurious transactions is different from that of Abu Hanifah. We can see this by the fact that he

71 Khin, 496.
73 Malik ibn Anas, 1982, section 33.15, pg. 290.
74 Malik ibn Anas, 1982, section 43.21, pg. 300.
allows things that are measured by volume or weight (e.g. copper and/or iron) to be exchanged in unequal, measure contrary to Abu Hanifah’s position.

But on the other hand, he stipulates that foods are not to be exchanged in unequal measure unless they cannot be dried and stored (i.e. they are perishable). So, for Malik the legal attribute that seems to underlie the prophetic prohibition on what constitutes usurious exchanges seems to be that category of goods that consists of non-perishable foods (except for the gold and silver which have their own principle of prohibition: i.e. metals used for valuation of all things). In other words, Malik saw the Prophet’s mentioning of those four food items as specific examples of a more general category of foods that were non-perishable; hence, deriving the principle that non-perishable foods of the same category should be exchanged in equal measure or else the transaction would be considered usurious.

Malik’s fatwas on usurious transactions are narrower in scope than that of Abu Hanifah’s since Malik stipulates that the in order for the transaction to be usurious it must be an unequal exchange of only non-perishable food items, exempting gold and silver from this condition. While Abu Hanifah’s view is that it is an unequal exchange of any good that is measured by volume or weight excluding only those things that are not subject to these conditions such as things that are exchanged by counting. So for Abu Hanifah, whether it is a food or non-food item is immaterial. It is only the means by which it is assessed that is considered.

Moreover, Malik also bifurcates the legal principles (or attributes) that he thinks

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75 Khin, 498.
76 Khin, 498-499.
lay behind the prophetic statement that govern usurious transactions by asserting a separate standard for gold and silver (i.e. because they are means by which the value of things is determined) and another standard for foods (i.e. because those foods that were mentioned were non-perishable). Abu Hanifah, on the other hand, asserts one principle that he thinks governs usurious transactions: i.e. all things exchanged by measure of volume or weight; not paying heed to the substantive differences of goods but rather looking at the outward characteristics that tie various goods together (i.e. measure by volume or weight).

In lieu of these legal opinions, al-Shaf‘i‘i adds his own perspective as to what exchanges constitute usurious transactions. He is of the opinion that all things that are eaten or drunk (foods and/or medicines)⁷⁷ along with gold and silver, must be exchanged in equal quantities when exchanging goods of the same kind or else the transaction would be considered usurious.⁷⁸ Whatever is eaten or drunk, regardless their capability of being stored as is the case for Malik, are subject to the rules governing usury.⁷⁹ Moreover, whether the exchanged goods in question are measured by volume or weight, as in the case of Abu Hanifah’s position, is of no consequence so long as they are eaten or drunk.⁸⁰ If they are not eaten or drunk, and are other than gold and silver, then they are not subject to the principle of usurious exchanges in the eyes of al-Shaf‘i‘i.⁸¹

His rationale for interpreting the prophetic injunction on usurious transactions in

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⁷⁷ Al-Shaf‘i‘i, V. 4, 34.
⁷⁸ Al-Shaf‘i‘i, V. 4, 37.
⁷⁹ Al-Shaf‘i‘i, V. 4, 33.
⁸⁰ This is implied from his discussion on selling foods/drinks in countable quantities as opposed to measure by weight or volume. See Al-Shaf‘i‘i, V. 4, 33.
⁸¹ Al-Shaf‘i‘i, V. 4, 37.
this way has several levels of explanation. In terms of al-Shafi’i’s stipulations on gold and silver, this is just a literal reading of the prophetic injunction, which in the case of these two metals, he believes, like Malik, that no analogies to other goods/item can be made with gold and silver because of the fact that they are substances by which all other products are assigned values. On the other hand, the restriction of the principle of usurious transactions on the other four food goods that are explicitly mentioned in the prophetic injunction is expanded by al-Shafi’i to include all those products that are edible (food, drink, medicine, etc). His justification for expanding the circle of items subject to the principle of usurious transactions to include all items that are eaten or drunk is because of his belief that the four items that are cited by the Prophet are just examples of things that are widely consumed for people’s benefit, and if any product contains the same core attribute (i.e. edibility) as those items that are explicitly mentioned, then they should be treated by analogy in a legally similar way.

What is interesting about the fatwas of Abu Hanifah, Malik, and al-Shafi’i on what constitutes usurious transactions is that each of their positions starts from a scriptural position (in this case prophetic practice) and tries to move beyond the specific injunctions found in the scriptural sources to a more universal rule that could be applicable to situations that extend beyond the immediate circumstances that might have given rise to those injunctions. In doing this, each jurist tried to find a unifying legal principle, deduced from the scriptural particulars, from which to draw in other cases under its legal rubric. This extension of authoritative legal norms to new cases became

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82 Al-Shafi’i, V. 4, 32.
83 To see the full extent of his argument on this issue see Al-Shafi’i, V. 4, 33-34. Also see Khin, 499.
one of the hall marks of the fatwa process in particular and Islamic law in general.

For a final look at fatwas issued by second century AH Muslim jurists, I want to look at one more set of legal decisions not so much for their discursive peculiarities, but for the sake of assessing their non-discursive effects. One may wonder whether the discursive legal activity of these jurists had any real socio-historical impact especially given the fact that most of the prominent jurists in the first and second centuries AH were non-state actors which would make one assume that the legal activity of these jurists was more or less an academic pursuit with no proven real world consequences. It is then instructive to examine what historians have to say about the confluence of this sort of legal activity with the social facts on ground.

In this respect, the economic historian Maya Shatzmiller shows that there was indeed a convergence between the discursive legal activities of second century AH Muslim legal jurists and the economic practices of Muslim civilization of the time. She mentions that in *kitab al-asl*, a work of the second century AH jurist Muhammad ibn Hasan al-Shaybani, the writer elaborated on the legal rulings for two types of trade investment partnership contracts (*mufawada* and *mudharaba*). She says that al-Shaybani stipulated three legal conditions for the legitimacy of these partnerships: “no partnership might take place using copper coins; all partnerships should be formed using cash (*mal hadir*); and the coins should be ‘intermingled’”\(^{84}\).

Shatzmiller indicates that numismatic evidence--the North-Eastern European hoards-- from the approximate period of al-Shaybani’s time indicates that these rulings might have indeed been followed. She says that no copper coins were used in trade since

\(^{84}\) Shatzmiller, 2011, 171.
none were ever found in the North-Eastern European hoards.\textsuperscript{85} Moreover, the hoards show a large number of different coins, which according to her, explains the need for al-Shaybani’s second ruling that required cash only investments of coins of recognized value. She says that “this rule intended to eliminate the mixing of coins, since verification was not always possible.”\textsuperscript{86}

The point I want to emphasize here is that there was a reflexive relationship between this type of discursive legal activity as represented in fatwas and the non-discursive social world where these activities took place. As much as fatwas and other legal activities in general were a consequence of social facts that spawned their existence, they also in turn shaped social practices that gave rise to new socio-historical configurations. This issue will be dealt with in greater depth in the next section.

**The Implications of Discursive Legal Activity on the Formation of Muslim Society.**

As can be concluded from the forgoing discussion, law has been a critical institution in the formation of Islamic society. From the very inception of the Islamic community in Medina, a legal constitution was established to govern the relationship between the various groups constituting that community and between it and non-Muslim community there. So from the very beginning the Islamic vision saw a connection between law and society mediated by the agency of the state. Over the course of time, the Muslim state began to lose its legitimacy amongst the nascent Muslim community as a result of civil wars and usurpation of power by agents who were less inclined to pursue that Islamic vision, which led to a crisis amongst those groups of Muslims who were

\textsuperscript{85} Shatzmiller, 2011, 172.

\textsuperscript{86} Shatzmiller, 2011, 172.
committed to that original vision.

As the hope for establishing politically legitimate agencies of governance faded amongst those pietists, it became clear to some that alternative methods had to be resorted to in order to salvage what remained of that vision and reconstitute the unity Muslim community in spite of the political division and the sociological challenge of cultural heterogeneity that were brought in by early and rapid expansion of the Muslim state. For this group, the elaboration of legal norms was the way by which unity of the Muslim community would be maintained. By legitimating and advocating certain socio-religious practices that would be commonly adhered to, they were forging a religio-legal basis for social cohesion.

But what precisely was the vision that they had sought in light of the seemingly insurmountable political challenges and the disunity that had become endemic in the community? The hallmark of this vision is epitomized in the Qur’anic phrase ‘People of the Book’. This notion is used in the Qur’an as an epithet in reference to Jews and Christians to show that which they have in common with Muslims, i.e. possession of a revealed scripture that was the authoritative basis of the community. Moreover, this terminology symbolized that these communities were based on learning and not necessarily on political supremacy.

The fact that a people were distinguished by reference to books meant that their communities were modeled on a framework of textual authority. This new conceptual framework is what guided the actions of those pietistic groups who sought to engender an alternative model of civilizational (i.e. ummatic) unity in the midst of political illegitimacy and the prevailing cultural heterogeneity. In essence, what these groups
attempted to do was to reconstitute the social milieu in Muslim-controlled lands in light of the new sources of knowledge and values as represented in the textual authority of the Qur’an and in later times more definitively by the prophetic practice.

In trying to establish a community based on a model of textual authority, what I have called here ‘the People of the Book’ model, these pietistic groups were projecting the text (i.e. the Qu’ran) onto the social world. This projection took the peculiar form of law as the primary embodiment of the values propounded by the text and the sort of social mechanism that could forge a basis for this new society in contradistinction to the order that was being imposed by the political establishment. Moreover, by linking community to textuality, this model affirmed that the primary mode of rationality displayed by this society was what I will call hermeneutical in nature (i.e. a type of rationality that is tempered by an established body of knowledge whose main role is to interpret this knowledge linking it to peoples’ social world) and not solely based on pure reason or social convention.

The importance of hermeneutics in its mediating role of interpreting the implications of this textual authority gave rise to another form of authority that would play this mediating task: hermeneutical authority as represented by the early religious specialists and proto-jurists. Their precise function was to act as custodians of these textual authoritative sources by preserving and explicating the religious ramifications of these texts. As far as law was concerned, two hermeneutical approaches/parties

87 It should be understood that when textuality is invoked here, I simply mean a set of ideas that are ascribed to a definitive author(s). As is known, the Qur’an, for example, was not primarily transmitted in the form of a text in its early history; instead, it could be described initially as an oral document. Yet despite this oral form of transmission, the Qur’an describes itself as a book, hence expanding the definition of book (i.e. text) to fit definition that I outlined above.
developed early on representing this hermeneutical authority: the advocates of *ra’y* and the advocates of *athar*.

The advocates of *ra’y* were the more reason centered and innovative group of proto-jurists that approached legal issues using pragmatic and rational grounds when no explicit injunctions were found in the Qur’an or the prophetic practice or when injunctions in these textual sources where applied to different circumstances that seemed to them to run counter to the broader aims of the norms advocated by those textually authoritative sources. One can say that the general interpretative approach of this party was inclined towards an intentional theory hermeneutics\(^88\) where they sought to discover and implement whenever possible the intent behind the textual legal injunctions rather than stick to the formal letter of the text. Hence, this approach represented a heterogeneous approach to the formation of the legal corpus given that rationality and pragmatics are culturally determined and hence varied from one region to another in the nascent Muslim world.

On the other hand, the advocates of *athar* were the more tradition centered party that approached legal issues from the point of view of precedents set by previously established religious authorities, like the practice of the Prophet, the early caliphate and the Companions of the Prophet and those who came shortly after them. Their general interpretive approach inclined towards a formalist theory hermeneutics\(^89\) where a more literal understanding of the textual sources and precedential practices were favored over

\(^{88}\) See Lentricchia and McLaughlin *Critical Terms for Literary Study*, 1990, pg.123 for more on intentionalist theory hermeneutics.

\(^{89}\) See Lentricchia and McLaughlin *Critical Terms for Literary Study*, 1990, pg. 123 for more on formalist theory hermeneutics.
the functionalist approaches of their adversaries. This approach was more conservative given that there was a specific and given body of knowledge to draw from in the formation of the legal corpus.

The tensions between the two parties created by their varying approaches eventually created a marked transformation in the Islamic legal discourse. It was perhaps understood that the position of advocates of \( ra'y \) (pragmatists/rationalist) would not engender the uniformity sought by the pietistic groups within the diverse cultural milieu of the early Muslim state because of the naturally heterogeneous production of legal edicts that was inherent to the \( ra'y \) approach. The perceived advantage of the ‘\( atharist’\) (traditionalist) approach was that it would produce a more uniform code of law that would foster cultural unity amongst the heterogeneous ethnic and class groups within Muslim society. In due time, the debate began to turn in the traditionalist favor and the notion of \( ra'y \) came under increasing attack by its opponents.

Although the advocates of tradition, who increasingly distinguished themselves as advocates of the traditions of the Prophet and were now called Ahl al-Hadîth, were gaining ground on their rivals, this did not mean that the \( ra'y \) approach was being completely abandoned. Some within this new reconstituted traditionalist camp saw some elements of the rationalist approach as being beneficial to the project of creating the new legal discourse that was to act as the foundation of the nascent Muslim community.

For instance, al-Shafi’i, as a self-proclaimed traditionalist albeit with rationalist tendencies, argued for the validity of \( qiyas \) (analogical reasoning), which was employed by the advocates of \( ra'y \), as a valid legal method for generating laws for situations that were not directly legislated by the Qur’anic text or the prophetic traditions (i.e hadith) as
we saw illustrated in our previous explications of his fatwas. In making his argument for *qiyas*, al-Shafīʿi used the traditionalist approach by appealing to Qur’anic text for its validity; nonetheless, this does not take away from the fact that *qiyas* was one of the main legal devices used by the advocates of *raʿy*, and in arguing for its validity he was accepting some of the rationalist methods into his own traditionalist approach. Yet, there were other legal methods employed by the advocates of *raʿy* which al-Shafīʿi criticized as being capricious such as *istīḥsān* (i.e. juristic preference).

My point here is that the *raʿy* (rationalist) approach just didn’t disappear as a result of the criticism by the advocates of *hadith* (traditionalists), instead it underwent a transformation by becoming more differentiated (*qiyas, istīḥsān*, etc) whereby some elements of it became absorbed in the new synthesized legal discourse as seen in the case of al-Shafīʿi. It is my contention that even other elements of the *raʿy* approach, which were seemingly rejected by the traditionalist camp, were actually reconstituted and adopted by them. Take for example, the element of *istīḥsān* that al-Shafīʿi criticized in his work *Al-Risalah* as being capricious adjudication that does not explicitly link legal opinion to authoritative text. One can say that it was explicitly rejected outright by the traditionalists; on the other hand one can argue that the concept of *istīḥsān* underwent a metamorphosis which made it more acceptable to the traditionalist camp in the new form of *ijmaʿ* (consensus).

More precisely, *istīḥsān*, a legal device which did not require formal reasoning to legitimate its legal conclusions, was readapted by the traditionalist to become *ijmaʿ* (consensus) by recognizing the legitimacy of that process of juristic preferences when

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90 See al-Shafīʿi’s *Al-Risalah*, 1987 pg. 304 for more on this point.
carried out collectively by a group of jurists and not just the individual jurist. So *ijma’,* the consensus of a group on a legal opinion without explicitly linking that opinion to any authoritative text, can be seen in some ways as the universalization of *isthisan* by making that seemingly intuitive and individual procedure a collective one; thereby transforming it into a socio-rational process which grants it a greater degree of legitimacy amongst the opposing camp due in large part to its new communicative form which allows for the input of a culturally and regionally diverse group of individuals.

As can be seen from this interpretation, the fragmentation of the *ra’y* legal approach and the reorientation of its constituent elements allowed for a transformation of the legal discourse creating the conditions for a legal synthesis that would foster civilizational unity sought by pietistic groups. But the transformations of the in the discourse did not only occur in the *ra’y* approach. Similar transformations occurred in the advocates of *hadith* approach.

I mentioned earlier that advocates of *athar* (i.e. tradition) were later renamed into the advocates of *hadith* and that name change was indicative of a transformation in their approach. The denotation of the earlier term *athar* connoted a group that advocated the past established precedent and practice (i.e. *sunnah*) of the learned members of the Muslim community as a source of legitimation for Islamic jurisprudence. But the notion of *sunnah* became more differentiated; one particular practice emerged as the primary form *sunnah* that trumped all other types, which served as precedent in the formation of Islamic law among the advocates of tradition: i.e. the *sunnah* of the prophet Muhammad. Thus the *sunnah* of Muhammad became increasingly differentiated from other *sunan*
Furthermore, this sunnah which had earlier been propagated as stories, reports, and the living practice of particular regions, increasingly began to take the form of hadith: i.e. individual reports about the prophet which are accompanied by a chain of narrators.

This differentiation process in the concept of sunnah was probably an important historical step in facilitating the cultural galvanization sought by the pietistic groups for two reasons: one, the sunnah of Muhammad was universally accepted among all of the different groups, whether from the advocates of ra’y or hadith, merely because of the special place that he held in Islam even though they applied its ramifications differently; while the other sunnah did not have such universal appeal. Second, the type-casting of the sunnah (i.e. practice) of the prophet Muhammad into atomized hadiths further helped in the universalization of the sunnah because this format of the sunnah made it easily transferable from one region to the next in the then known Muslim world.

To elaborate further on this last point, the isnad (i.e. chain of narration/genealogy) of the hadith provided a mechanism for de-centering the prophetic sunnah from particular regions by creating networks of hadith reporters, which spanned across space, so that information (i.e. hadith in this case) was made more accessible across regions. In other words, hadith, as an ‘atoms of information’, was able to traverse regional limitations through isnad (i.e. genealogy) networks. The sunnah (practice) of the Prophet in this atomized form (hadith) was easier to transfer than whole regional traditions (e.g. the ‘amal ahl-al-Medina for example) across regions. So not only was the differentiation of

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91 See Hallaq, 2005, pg. 69 for more on this point.
sunnah of the Prophet apart of this universalizing cultural trend, but its type-casting into hadith helped to facilitate the universalization process of that sunnah.

The increasing differentiation of the notion of sunnah (past established practices) into the specific sunnah of the prophet as the practice which stands apart from other practices (i.e. sunan) as an authoritative source of Islamic law and the remaining sunan, which at best can be a guide to interpreting the sunnah of the Prophet but not a source of law, led to other transformations in the legal discourse.

One such transformation is consolidation of the concept of ijma’ (i.e. juristic consensus) as legal mechanism for interpreting and legislating law. I have already mentioned how ijma’ from one angle can be viewed as a universalization of the notion of isthisan through collectivization of juristic opinions or preferences. This collectivization of opinion was seen as legitimate within traditionalist quarters because inherent in their notion of sunnah of the previous generations was the notion of the legitimacy of collectivity and consensual nature of established practice. Given this background, ijma’ can be seen as a new form by which old legal devices that had been previously espoused by both rationalists and traditionalists as legitimate sources of law could be reconstituted in a new legal form that was mutually accepted by both sides.

All in all, this epistemological fragmentation and reduction of previous legal concepts and methods was an attempt to create a legally uniform discourse that would be a social basis for a cultural unification of the various ethnic and class groups that were found in early Muslim society. The conceptual basis for this legal consolidation is one which attempted to posit a specific relationship between community and text by which
the both community and text are reflexively defined and bound through the hermeneutical authority of the emerging group of religious specialists.

**Conclusion**

The legal activity of the religious specialists of the first and second century of Islam generated much difference among them on how they should go about this legal enterprise and out of that tension a legal discourse dialectically began to emerge. However, there was a common thread running through their differences and debates and that thread was: the past is normative. It did not matter whether you were a jurist who advocated *ra’y* (opinion/reason) or one who advocated *athar/hadith* (tradition/prophetic tradition) or whether you were an Iraqi-based jurist or a Hijazi-based jurists, the past, in one way or another, served as a source of standards for the promulgation of legal opinions.  

Of course, various parties had different views on how and what aspects of the past were to serve as normative standards for the contemporary situation, yet all were unanimous in agreeing that the revelatory period of Islam, as represented in the discourses of the Qur’an and prophetic traditions (*hadith*), was to play a paramount role in informing a jurists legal outlook and to a good extent substantively regulate their legal decisions. Where they differed in this respect was on how to interpret and apply the norms found in these past discourses to their own conditions.

This is where these jurists and proto-jurists applied their *phronetic* wisdom (i.e. *phronesis*), to use Aristotelian terminology, to understand and apply the normative

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92 See Edward Chase’s chapter entitled ‘Law and Theology’, Chapter 29, pg. 3, in *A Companion to Law and Legal Theory* for his elaboration on Harold Berman’s notion of historical jurisprudence for more on the idea that the past is a source of norms.
principles found in these historical and authoritative discourses and traditions to their peculiar circumstances. What emerged out of these exercises of practical reasoning is not just a mass of legal doctrines but also a repertoire of legal techniques and hermeneutical methods which would shape the future of the Islamic legal discourse. Moreover, these early jurists, perhaps by virtue of existing in the normative past, became the authoritative references from which a legal tradition would emerge in the subsequent period. These issues will be explored in greater details in the next chapter.
CHAPTER 4
FATWA AND THE FORMATION OF THE ISLAMIC LEGAL TRADITION

Introduction

In the conclusion of the last chapter, I mentioned how all of the contending legal groups and approaches had one common theme that gave unity to their desperate messages, which was the authoritateness of the past in terms of formulating present religio-legal practice. This attitude would serve as a starting point for the formation of an Islamic legal tradition that had its own peculiarities based on its own unique past. If the past is a fundamental starting point of any tradition, the past played a very determinative role in Islamic tradition in general and in the Islamic legal tradition in particular. One of the objectives of this chapter is to define the precisely nature of the relationship of the past to Islamic legal tradition by looking at the ideas and institutions that came to embody that tradition and how they came about.

My analysis of the Islamic legal tradition will be done in light of T. Asad’s notion of Islam as a discursive tradition and I will develop this notion and explore its implications specifically with reference to the evolution of Islamic law. T. Asad defines traditions discursively by claiming: “A tradition consists of discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established has a history.”¹ More particularly T. Asad defines the Islamic discursive tradition as: “simply a tradition of Muslim discourse that addresses

¹ Asad, 1986, 14.
itself to conceptions of past and future, with reference to a particular Islamic practice in
the present.”

Our previous discussion of Islamic legal discourses gives some indication of how
Islamic law fits this model. It will be my attempt to take this seminal idea of how to think
about the enterprise of Islam and develop this idea within the framework of the history of
Islamic legal practice. But before initiating this discussion, it is important examine the
historical developments in the Muslim world that led to the development of Islamic legal
institutions and brought about the formation of an Islamic legal tradition.

Socio-Political Developments 3rd/9th -4th/10th Century AH/CE: The Demise of the
Caliphate and the Rise of the ‘Ulama.

In the previous chapter, I mentioned the ambivalence developed at the end of first
century AH between the ruling elite and those pietistic circles from which the scholarly
class of Islam arose including the jurists we examined in the last chapter. Despite this
ambivalence, most groups within this scholarly class managed to reach a grudging
acceptance of the ruling elite by the second century. This is because they realized that any
attempt to bring back the ‘pristine’ order of earlier period was futile as historical
experience showed that political attempts to do so brought about great upheaval with
little political success.

Instead, both sides reached a sort of an implicit compromise whereby they would
tacitly cooperate with each other and each camp would have its own prerogatives and
independent social spheres where they would operate. The ruling elite as represented by

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2 Asad, 1986, 14.

3 Hodgson, V.1, 349.
the institution of the caliphate persistently suffered a lack of legitimacy among the wider public especially in terms of this ruling elites attempts at cultivating absolutist tendencies of power for this institution.\textsuperscript{4} Hence, this crisis of legitimacy of the caliphate, as a Muslim political institution, resulted in many rebellions against its assertion of power. For this, they needed the pietistic groups,\textsuperscript{5} who enjoyed great legitimacy with the people, not to call for rebellion if not to quiet the people altogether.

On the other hand, the pietistic scholarly circles—to be eventually dubbed the ‘ulema (i.e. those who possess knowledge or ‘ilm) from which the jurists were a subset—had their intellectual independence from the political system. This meant that they could cultivate the theological and the juridical dimensions of the faith with little interference from the political establishment which on the whole did not try to assert its absolutist tendencies in the religious domain.\textsuperscript{6} As we saw in the last chapter, this is what this scholarly class of ‘ulema preoccupied themselves with in first two centuries of Islam especially cultivating Islamic law that would become the normative basis of Islamic society. In this way, there would be concord between these ruling elite and the scholarly circles so long as one camp did not encroach on the domain of the other.\textsuperscript{7}

By the middle of the second century with the coming to power of the ‘Abbasid dynasty, the appeasement between the caliphate and the ‘ulema became more overt when the caliphate attempted to woo the support of the ‘ulema for their rule by attempting to

\textsuperscript{4} Hodgson, V.1, 348-349.
\textsuperscript{5} Hodgson, V.1, 349.
\textsuperscript{6} Hodgson, V.1, 349.
\textsuperscript{7} The sole exception to this non-interference policy was the in short period in first half of the ninth century known as the Mihna when the ‘Abbasid caliphate attempted to impose certain rationalist theological dogmas on the public in general and the ‘ulema in particular. This ended in failure with the repeal of the inquisition (i.e. Mihna) and the triumph of traditionalist theology.
appoint them as judges in state courts so as to gain even more legitimacy with the public. Even with the ‘Abbasid’s open support, most of the ‘ulema never did overcome their ambivalence of the ruling elite as evidenced by the fact that most major jurists among the ‘ulema refused to accept juridical appointments by the new regime even at the pains of being imprisoned and persecuted (e.g. Abu Hanifah). Yet they did see that the institution of the caliphate as a symbol of Muslim political unity despite its corruptness, hence having a role to play in the functioning of Muslim society. So, they reluctantly gave recognition to it in their juristic discourse adding to its legitimacy in the eyes of the public.

At the same time though, by their cultivation of law as the normative basis of Muslim society, the ‘ulema were circumscribing the attempts of the caliphate at asserting its absolutism because it would have to accept the supremacy of the law at least in principle. For example, Ibn al-Muqaffa’, the wazir of the first ‘Abbasid Caliph, argued in his famous letter “Risālah fī al-Sahābah” to the caliph urging him to bring the independent Muslim jurists, who were the agents of legal production with their fatwas, under the formal jurisdiction of the caliphate. This attempt to reign in the independent jurists ended in abysmal failure.

The most the ‘Abbasid’s were able to do in terms of asserting their legitimacy on the law was woo a few jurists to become officials of the state as judges (e.g. the famous Hanafi jurists Abu Yusuf) and have the caliphate as an institution officially recognized in

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9 Hodgson, V.1, 349.
10 See Hallaq, 2005, 183 and Hodgson, V.1, 349.
11 Hallaq, 2005, 184; Zaman, 5-7.
their legal discourse as a legitimate body in Muslim society whose main role was administrative in nature: that is as implementers of the law that ultimately was produced by the independent jurists and not the state.\textsuperscript{12}

The slow demise in the 3\textsuperscript{rd}/9\textsuperscript{th} century AH/CE and subsequent collapse of ‘Abbasid power in the middle of the 4\textsuperscript{th}/10\textsuperscript{th} century coupled with the slow but steady rate of conversion to Islam of non-Muslim citizens of the ‘Abbasid state\textsuperscript{13} probably left the masses of Muslims looking for alternative arrangements for social order in the chaotic political fragmentation that ensued in the post-‘Abbasid period. The dual factors of increased conversion to Islam and the weakening of the caliphate might have opened doors for people to imagine alternative arrangements to respond to the political vacuum.

By the tenth century, it is clear that the political unity of the trans-regional Muslim state as symbolized by the ‘Abbasid caliphate was crumbling into smaller parochial states that were ruled militarily in some cases by foreign generals and troops who lacked not only legitimacy in eyes of the local public but did not even relate to their urban populations because of their more often than not nomadic backgrounds (e.g. the Seljuk Turks).\textsuperscript{14} The demise of the caliphate probably lent an increasing prestige to the ‘ulema because they represented a consistent and stable grouping in Muslim society throughout all of the political upheaval that was taking place during this period. This is not to say the class of the ‘ulema did not have their own rivalries and were not divided

\textsuperscript{12} Hodgson, V.1, 349-350.

\textsuperscript{13} See for example Richard Bulliet’s article “Conversion to Islam and the Emergence of a Muslim Society in Iran” in Levitzion’s Conversion to Islam, pg. 31, where Bulliet asserts that 40\% of the Iranian population converted to Islam in the years between 770 CE-865 CE.

\textsuperscript{14} Hodgson, V.2, 13, 17; Lapidus, 1973, 37-38.
amongst themselves on doctrinal lines. Yet their epistemic and ethico-legal authority with the larger public remained intact.

The other historical factor that impacted on people’s social imagination in the post-‘Abbasid state was the increase in the Muslim population through conversion.\textsuperscript{15} This social flux meant that peoples loyalties towards previous worldviews and institutions were shifting and new allegiances and associations were being formed. In the end, new forms of organizing society must have arisen under these conditions to meet the needs of the changing social and political order. These historical factors cultivated an environment where new social institutions could form to replace the old and outmoded institutions already in existence.

For instance, it could be surmised that those who had been previously a part of non-Muslim communities who had well-established institutions prior to the arrival of Islam and continued to thrive to some extent under the new Islamic political order, must have felt the need to establish equally viable Islamic social institutions in accordance with their new allegiance.\textsuperscript{16} This drive must have been given further impetus by the almost complete fragmentation of the political situation in the post-‘Abbasid period. The political upheaval would have likely left people socially disoriented and seeking new ways to give their lives security and stability.

\textsuperscript{15} Lapidus, 1973, 40.

\textsuperscript{16} See for example Richard Bulliet’s article “Conversion to Islam and the Emergence of a Muslim Society in Iran”, pg 36, in Levitzion’s Conversion to Islam, where Bulliet asserts a positive correlation between the increased conversion to Islam and the growth of Muslim institutions like 	extit{sufi tariqahs} (i.e. spiritual orders), 	extit{madrasas} (Islamic colleges), and 	extit{futuwwa} organizations and guilds (i.e. social and occupational fraternities) in the fifth/eleventh century AH/CE (i.e. post-caliphate period).
According to Lapidus: “In the absence of strong central governments and the presence of alien elites unfamiliar with local tradition, the ‘ulema emerged as the new local elite. Religious prestige, recent conversion to Islam and judicial authority made the ‘ulema the focus of a new social order.”17 Although the scholars (‘ulema) always enjoyed prestige with the populace, the historical circumstances further perpetuated their prestige until they were looked at as the sole vanguard for Muslim society now that the last universal caliphate and its institutions had deteriorated.

The Genesis of Legal Theory, Legal Doctrines and Institutions in the Late Caliphate and Post-Caliphate Period

During the late third and fourth centuries and well into the fifth century AH, a more precisely defined Islamic legal discourse began to emerge and take shape, building on those legal discourses of the first and second centuries. Out of the debates and legal decisions of those early jurists and the legal reasoning employed in those decisions, later jurists began to construct more systematic legal doctrines and methodologies that came to represent Islamic legal tradition.

In next several sections of this chapter, I plan to discuss the formation of Islamic legal tradition as it is represented in the genesis of legal schools (madhhab), the establishment of legal doctrines and the development of an Islamic legal theory (usul al-fiqh), and how fatwas played an integral role in the realization of these legal institutions. I will demonstrate how the activity of ifta’ and its legal product fatwas are least partly responsible for the emergence of these legal methodologies and institutions.

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But prior to getting into such an analysis, it is important outline the legal historical developments of this period so as to contextualize my discussion. In his recent book *The Evolution of Islamic Law*, Hallaq describes the post-Shafi’i era of classical Islamic legal discourse as the period of ‘Great Synthesis’ between the major two trends in Islamic law: the advocates of *ra’y* (rationalist/pragmatist) and the advocates of *hadith* (prophetic tradition). There are several historical factors which contributed to the process of synthesis between the two approaches of legal jurisprudence:

1-By the end of the second/eighth century AH/CE, there was an increase in the mobility of Muslim scholars enabling them to travel to the various regions of the Muslim world in pursuit of Islamic knowledge.\(^{18}\) This increased mobility, Hallaq argues, increasingly exposed Muslim scholars to the religious and legal practices of different regions (what Hallaq calls the living sunnaic practices).\(^{19}\) This greater exposure to different ideas and methods created an atmosphere of consolidation and synthesis. This trend is probably best represented by the second/eighth century jurist al-Shafi’i whose fatwas we dealt with in the previous chapter. Al-Shafi’i was born in Palestine and at very young age went to study in the cities of Mecca and Medina in Arabia. He would later go on to study in Yemen and Iraq, later settling in Egypt where he developed a following for his jurisprudence.\(^{20}\) Thus, al-Shafi’i illustrates this growing cosmopolitanism amongst Muslim

\(^{18}\) This increased mobility of Muslim scholars during this period is documented in the works of later Muslim writers such as the fifth/eleventh century AH/CE Muslim scholar al-Khatîb al-Baghdadi’s (392/1002—463/1071 AH/CE) *al-Rihlah fi talab al-hadîth* (*Traveling for the Pursuit of Hadith*), which documents the travels that many scholars undertook in pursuit of prophetic traditions.

\(^{19}\) Hallaq, 2005, 120.

\(^{20}\) For more on the life of al-Shafi’i, see Abu Zahra, 422-437; al-Khidari, 156-158; and al-Sayyis, ND, 117-119.
scholars as he traversed most of the major centers of Islamic learning at his time. This cosmopolitanism was a necessary ingredient that spawned the sort of synthesis of legal ideas in which al-Shafii himself would play a large role. More will be said about al-Shafii’s contribution to this movement towards synthesis and consolidation later in this chapter.

2-The growing proliferation of hadith provided a unified rubric to consolidate all of the variant legal practices in different regions under the banner that law should only be derived from sacred text and not from independent rational or pragmatic judgments which vary from one region to another. This is why later jurists like Muhammad al-Shuja al-Thalji (d.267/880), prominent Iraqi Hanafi jurist, try to derive the positive law of the Hanafi legal school through recourse to hadith, although those who belonged to the circle of Abu Hanifah were traditionally considered as ahl al-ra’y. More will be said about al-Thalji’s efforts later in this chapter.

3- Some traditionists (i.e ahl al-hadith), including certain later Hanbalites, accepted some elements of the ra’y hermeneutical methods, such as the use of qiyas (analogy and even the use non-textually based methods like isthisan

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21 Hallaq couches his argument in terms of the growing authority of hadithin the Islamic discourse (see Hallaq, 2005, 122). To be consistent with my statements about hadithin the last chapter, I prefer to say here that it is the proliferation of hadithrather than the growth of its authority that facilitated this process.


23 Hallaq, 2005, 126-127.

24 Followers of Ahmed ibn Hanbal, one of the leading figures in the hadith(traditionist) movement in the 3rd/9th century AH/CE who was ambivalent about qiyas (analogy) as a means of determining practice and preferred to restrict himself to follow what was in the corpus of haditheven when some of them were weak in their authenticity. See Abu Zahra 514-515 and Vickor, 101-102.
(juridical preference). This may mark the beginning of the shift in the traditionist camp’s attitude towards non-textually (i.e. non-hadith) based inquiries into the law. Their adopting rationalist tools like qiyas and istihsan meant they were accommodating the mainstream project towards synthesis instead of exclusion.

Towards the end of the last chapter, I already identified the sort of discursive transformations that eventually occurred in many of the legal hermeneutical concepts and the legal rationales that were developed in the first two centuries of Islam, especially with reference to the non-discursive implications of these transformations for Islam’s societal project. There I pointed out how a number of legal concepts and methods from the early period ultimately underwent a process of dialectic development by which many of these earlier concepts became differentiated and synthesized into newer legal concepts in the process of trying to resolve the scripturalist and extra-scripturalist approaches to the law. Let me now revisit some of those legal changes with the explicit purpose of showing how those conceptual transformations eventually led to a synthesis of an Islamic legal theory.

Before I talk about the theoretical and historical processes that led to the formative development of Islamic legal theory (i.e. usul al-fiqh) as distinct discourse between third/ninth to fifth/eleventh centuries AH/CE, I must note that theorization about the law was already taking place at the end of the second/eighth century AH/CE. In this respect, I want to deal with the particular contributions of al-Shafi’i to the formation of legal theory. In his treatise known as Al-Risalah, al-Shafi’i defines the legitimate sources of Islamic law (i.e. Qur’an, hadith, ijma’, qiyas, istihsan, etc) and charts a course on the
proper means for how this law is to be derived from its sources and reconciled when the sources seem to lead to conflicting legal ends.\textsuperscript{26}

So, it is for the first time in his era that we find a jurist who writes about the law abstractly, in the sense that his objective in this work is not trying to resolve actual legal cases, but to define a methodology of how to approach legal issues. Thereby, \textit{Al-Risalah} represents the first conscious discursive effort to theorize about Islamic legal discourse\textsuperscript{27} and thus represents a watershed in the history of Islamic law. What must be said here is that his \textit{Al-Risalah} does not expound the full-fledged Islamic legal theory (\textit{usul al-fiqh}) that was developed by later theorists, but his work certainly handled in broad strokes most of the major themes that comprised the more fully developed theory of the later periods and the relations of those themes to Islamic legislation including \textit{ijtihad} (legal reasoning) and \textit{naskh} (abrogation for example).

All of these themes constituted core issues of a completely evolved Islamic legal theory as we will come to know later in this chapter. Moreover, his systematic, albeit basic, treatment of these issues abstracted from the actual process of \textit{ifta’}, allows us to describe his efforts as an embryonic stage of the formation of Islamic legal theory. This is why when I speak of the development of Islamic law, I speak of a pre- and post-Shafi’i era because his period represents an era where explicit theorization of the law begins to take place and hence a turning point in Islamic law.


\textsuperscript{27} This is different from saying that \textit{al-Risalah} represents the first work on \textit{usul al-fiqh} (Islamic legal theory). What is being asserted here is that his efforts in this work represent rudimentary steps to the development of an \textit{usul} discourse. Modern Western scholarship disagrees on whether al-Shafi’i is considered the founder of \textit{usul al-fiqh} (Islamic legal theory). See Hallaq’s article “Was al-Shafi’i the Master Architect of Islamic Jurisprudence” and Joseph Lowry’s “Does Shafi’i have a Theory of ‘Four Sources’ of Law?”
Moreover, it is worthy to note that al-Shafi’i’s theorizing about the law was born out of the great legal debates between the various second/eighth century AH/CE jurists and the legal methodologies they employed as well the overarching approaches to the law that was represented by the different factions such as the *ahl al-ra’y* (advocates of reason/opinion) and *ahl al-hadith* (advocates of hadith). When examining his *Al-Risalah*, one would recognize that al-Shafi’i was trying to reconcile these opposing camps by synthesizing of what he felt were the best legal methodologies and approaches to the law in each of these opposing factions.

For example, as much as he espoused *hadith* as an exclusive substantial source of Islamic law along with Qur’an to the pleasure of the *hadith* faction, at the same time he accepted key elements of the *ra’y* faction such as *qiyas* (analogy) as legitimate legal methodological procedures that would tie human rationality to revelatory truth. In this way, we can also see that the embryonic stages of consolidation and synthesis of the law had begun taking place by the end of the second century. More will be said about these points in the subsequent section.

The Transformation of Key Islamic Legal Concepts and the Creation of Islamic Legal Theory:

One of the early legal concepts that was used by Islamic legal jurists is the concept of *ijma’* (consensus). In the pre-Shafi’i era, *ijma’* was understood as being the agreement of a particular region of the Muslim world (for example Kufa or Medina) on a religious/legal practice/issue. This was often expressed in the early legal literature in the following type statements: “the people of Kufa agree on this matter” or in the case of
Medina “this is matter on which we agree”. Later, *ijma’* became redefined as the consensus of the whole Muslim community as represented by its *mujtahids* (i.e. jurisprudents). Moreover, any matter resolved through *ijma’* was now seen as providing certain (*qat’i*) knowledge about the authoritiveness of the legal judgment in question and not just speculative (*zanni*) knowledge.  

It is worth noting here that *ijma’* (consensus), operationally speaking, came to be comprised of essentially of two types: what I would call *ijma’* of interpretation and *ijma’* of innovation. *IJma’* of interpretation essentially meant scholars and jurists of the Muslim community (i.e. *ummah*) had reached an agreement in interpreting the implications of scriptural texts which in turn gave rise to unanimity on certain religious beliefs and religio-legal practices. So, *ijma’* of interpretation had its fundamental basis in scriptural texts (*Qur’an* and *hadith*) in that these scriptural sources were the starting point from which a legal consensus of this type was reached. In other words, this type of *ijma’* was not an agreement reached on a legal issue not addressed by the scriptural sources, but rather it was an agreement about how to understand what the scriptural sources were telling Muslims about how to perform their religious practices.

A very basic example of *ijma’* of interpretation is the consensus of Muslim scholars across the board about the absolute necessity of the religious practice of the five pillars of Islam (*shahada, salah, zakat, saum, and hajj*) by all Muslims. All of these practices are born out of actual scriptural injunctions and not out of any independent opinion of jurists about what constitutes the fundamentals of Islam, yet their unanimous

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28 Hallaq, 2005, 110.
consensus that these practices are fundamental, constitutes an agreement of interpretation of how to understand the implications from those scriptural injunctions. This *ijma’* of interpretation makes up the vast majority of cases of consensus that has been reached by jurists in the history of Muslim jurisprudence.

On the other hand, there is the *ijma’* of innovation, where scholars and jurists reach a consensus about a religious belief or religio-legal practice about matters not directly addressed by the scriptural sources. In this type of *ijma’*, the religio-legal matter that is presented to the jurists is completely novel in that it has no explicit scriptural mention and yet jurists are able to reach unanimity about the sanction or lack thereof for such a belief or practice in the religion.

This type of consensus, which did not have a direct scriptural basis although it is said that it indirectly has its roots in scriptural injunctions, occurred with much less frequency in the history of Islamic jurisprudence than the *ijma’* of interpretation. If it occurred at all, then it was certainly confined to a unanimous agreement between jurists ascribing to a certain school of jurisprudence (i.e *madhab*), rather than a consensus reached by all of the jurisprudents of Islam. This point is evident from the fact that each school has issues for which jurists of a particular school converge upon have the same opinion, while jurists from other schools hold a different opinion on those same issues.

The second major concept critical for the development of the synthesis in the Islamic legal discourse that took place in the 3rd/9th and 4th/10th centuries AH/CE is the transformation of the legal concept of *qiyas* (analogy). In the pre-Shafi’i period, arguments from *qiyas* were undifferentiated and those types of arguments were subsumed
under the all-inclusive category of *ra’y* (legal opinion) or *ijtihad* (legal effort/reasoning). These categories included all juridical conclusions that were not directly stated by authoritative texts and/or established religio-legal practices of particular regions, but were based on personal reasoning instead.\(^\text{30}\) We can see that *qiyas* was employed in the first century of Islam in the form of the *a fortiori* argument seen in the following legal judgments: Wine is prohibited to drink, therefore, although less offensive, it is also prohibited to sell.\(^\text{31}\)

In the middle of second/eighth century AH/CE, the Iraqi school [read Abu Hanifah and his protégées] began to use the term *qiyas* to mean a more systematic reasoning about the law and drawing legal parallels between legal cases\(^\text{32}\) as we saw in case of Abu Hanifah’s legal reasoning in his fatwas that I examined in the previous chapter. The manner of usage of *qiyas* in this period shows that it was becoming more differentiated than the more general application of legal opinion signified by the term *ra’y*.\(^\text{33}\) Still at this stage, Iraqi jurists did not mean by the term *qiyas* the very structured operation that it would go on to indicate when later defined by post-Shafi’i legal theorists.\(^\text{34}\)

One example of this rudimentary understanding of *qiyas* comes from the Iraqi jurist al-Shaybani, one of the protégées of Abu Hanifah. The Medinan school critiqued Abu Hanafih’s legal position that laughter not only invalidates ritual prayer (i.e. *salah*),

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\(^\text{32}\) Hasan, 1970, 140.  
\(^\text{33}\) Hasan, 1970, 140-141.  
\(^\text{34}\) Hasan, 1970, 144.
but also invalidates the state of ritual purification (i.e. \textit{wudu'} ) that is a pre-condition for prayer. Al-Shaybani seems to agree with the Medinan position, against his own school, that laughter does not invalidate ritual purification by saying that even if there was no \textit{athar} (authoritative precedent) on this issue that would decisively decide the case, \textit{qiyas} (read reason) necessitated that one adopt Medinan legal position.\textsuperscript{35} We can see from this usage that \textit{qiyas} was still a far cry from the very formal operation it would go on to be in later legal theory.

By the time of al-Shafi’i towards the end of the second/eighth century AH/CE, as \textit{qiyas} was becoming more distinguished from other forms of \textit{ra’y/ijtihad} , it gained greater acceptability from some members of the traditionist camp, as we saw in the case of the Hanbalis. For those who were more \textit{hadith} conscious like al-Shafi’i, \textit{qiyas} became an acceptable form of \textit{ra’y}, as opposed to other forms of legal arguments considered in the category of \textit{ra’y} that were rejected by this group (e.g. \textit{istihsan}).\textsuperscript{36}

Shafi’i’s conception of \textit{ijtihad} was that it was reduced to \textit{qiyas} as unequivocally stated by him in his famous treatise \textit{al-Risalah}.\textsuperscript{37} This reduction of \textit{ijtihad} was an obvious move to narrow the scope of \textit{ra’y} (reason/opinion) and specifically as practiced in the form of \textit{istislah} (i.e. private/public interest or good) and \textit{istishan} (i.e. juristic preference) which did not directly rely on textuality (i.e. in the form of documented scriptural knowledge). This emphasis on textuality was the new paradigm that al-Shafi’i wanted

\textsuperscript{35} Hasan, 1970, 143.
\textsuperscript{36} Hallaq, 2005, 117.
\textsuperscript{37} See Abu Zahrah, pg 455, where he quotes a passage from al-Shafi’i’s \textit{Al-Risalah} stating this point; Also see Hallaq, 1999, 23.
the law to solely rely on and *qiyaṣ* was the means by which to extend textuality's scope, relevance, and jurisdiction on new socio-legal issues.

Al-Shafī’i provides a justification for this stance on *ijtiḥad* in *al-Risalah* where he says that one cannot pursue *ijtiḥad* (i.e. independent reasoning) without seeking the proper means (i.e. *dala’il*: indications/proofs) by which that reasoning can take place and *qiyaṣ* is exactly that form of proper reasoning. This is because al-Shafī’i believed that one cannot rationalize without some established principle (i.e. reasoning does not take place in a vacuum; it has established premises) and based on those original principles one extends a judgment onto something else that shares characteristics (i.e. *ma’na*) with the original principle (premise/case).³⁸

More figuratively put, al-Shafī’i likens the behavior of the jurist in his legal reasoning to that of a buyer/seller in the market, by saying that just like the purchaser's need to assess at least two things (lit. qualities: *ma’nayn*) before making a purchase from the market: the intrinsic worth of the product and the value of similar products on the market before determining its value, the jurist needs to assess the case presented to him and seek its likeness in other cases that have been already established before determining his judgment on it.³⁹ So it seems for al-Shafī’i, all reasoning (i.e. *ijtiḥad*) has its basis in analogical reasoning (i.e. *qiyaṣ*) where there is something that is already established [in this legal scenario: either scripture or an original legal case based on

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³⁸ Abu Zahrah 457.

³⁹ Abu Zahrah 457.
scripture] and what applies to that established case by analogy (i.e. *qiyas*) gets extended to other cases that share characteristics (*ma’na*) with it.

In the post-Shafi’it period, with the exception of the ultra-traditionists like the Zahiris, we see greater acceptance of *qiyas* as a valid way to derive Islamic law among traditionists. But its greater acceptance as a valid means of employing rationality in the derivation of law becomes limited only to two cases: when there is a new case that revealed texts are silent about or when there is new case where no *ijma* (consensus) has been reached by the scholars.40

Yet even after the acceptance of *qiyas* by most camps of the debate in the early period, it still underwent an evolution. For example, al-Shafi’i established that the operation of *qiyas* was based on a rationale, which he called *ma’na* (i.e characteristic/attribute), shared between the scenario that had a textually established legal injunction and the new situation which did not. But during the transformation of the legal discourse since al-Shafi’i, I argue that this rationale was no longer dubbed *ma’na* and was later denoted by the term ‘*illah* (i.e. legis ratio). Moreover, *qiyas* become more technically defined in this post-Shafi’i period, as later legal theorists insisted that *qiyas* must contain four essential elements in order to be *qiyas* proper:

1) A new legal case not addressed by sacred scriptures (Qur’an and *hadith*) or *ijma* (consensus).41

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40 Hallaq, 2005, 141.
41 Hallaq, 2005, 141.
2) An old legal case that was resolved by recourse to sacred scriptures or *ijma’* (consensus).\(^4\)

3) The legal attribute (‘*illa*) shared by both cases which ties them conceptually together.\(^3\)

4) The legal inference from the old case is now applied to the new case based on their shared legal attribute (‘*illa*).\(^4\)

In this way, *qiyaṣ* became the premier analytic procedure that helped mediate the tension between human rationality and revelation/tradition that had existed between the more rationally inclined *ahl al-ra’y* and the more scripturally inclined *ahl al-hadith*. *Qiyaṣ* delineated the proper role rationality would play in respect to the established scripture/tradition in the socio-legal sense: i.e. interpreting and extending the relevance of scripture to new situations. Through this device the dichotomy between reason and revelation was bridged.

In essence then, what was being asserted by the religious specialists who advocated the concept of *qiyaṣ* was a notion of a text based rationality that defined the types of choices that were available to the newly emerging Muslim community. This is because the concept of *qiyaṣ* was not only used as a device for generating law, it was also used in other emerging yet related disciplines such as *kalam* (philosophical theology) and *nahw* (Arabic linguistics) for generating new propositions in those branches of

\(^4\) Hallaq, 2005, 141.
\(^3\) Hallaq, 2005, 141.
\(^4\) Hallaq, 2005, 141.
knowledge in respect to already established texts and traditions, even when the concept of qiyas was formulated differently in all these three disciplines.

Moreover, qiyas was the quintessential concept that made an explicit link between textual authority and community in the wider civilization project of Islam of defining a people through their sacred text (i.e. ‘People of the Book’), as was argued in the previous chapter. This is because as a developed legal procedure it explicitly tied every new situation faced by the newly emerging community to the authoritative textual-legal corpus which was based on the sacred texts, hence extending the reach of the texts. In addition, this concept helped keep the authoritative texts and traditions relevant to changing times.

However, unlike al-Shafi‘i who felt that qiyas was the only legitimate source of law after scripture (Qur’an and hadith) and consensus (‘ijma’), some jurists, while accepting qiyas, felt nevertheless that the procedure of qiyas was too limiting to the legal possibilities that could be produced. Hence, they advocated the inclusion of other legal concepts that would rectify in their opinion undesirable legal conclusions reached from qiyas and would expand the scope of the production of legal judgments that would be too narrow if jurists were restricted to the textual hermeneutics of qiyas (i.e. analogical reasoning) as al-Shafi‘i had advocated. Among the two main legal tools that this latter group of jurists advocated were the legal concepts of istihsan (juristic preference) and istislah (private and public interest or utility).

I mentioned in the previous chapter how al-Shafi‘i reproached those Iraqi jurists as represented by Abu Hanifah and his protégés who were known for liberally applying
the legal concept of *istihsan* (juristic preference) in fatwas. Al-Shafi‘i asserted that *istihsan* was a methodology of establishing rulings (i.e. fatwas) in an arbitrary way because, by definition, it supported rulings that ran counter to *qiyaṣ* (analogical reasoning). Later advocates of Hanafi rulings, wanting to preserve the integrity of the rulings of their earlier predecessors that were based on *istihsan*, had to reply to this charge that was initially leveled by al-Shafi‘i.

Hanafi jurists in fourth and fifth centuries AH retorted that *istihsan* as used by second century jurists of the Iraqi school was not a form of arbitrary judgment based on the whimsical preferences of particular jurists.\(^\text{45}\) Rather, it was legal mechanism for departing from a less desirable ruling that was based on *qiyaṣ*\(^\text{46}\) to another ruling that seems better even when it lacked explicit textual (i.e. scriptural) evidence or formal reasoning.\(^\text{47}\) The idea is that on some occasion *qiyaṣ* produced undesirable results, hence necessitating that jurists make adjustments in their rulings, so as to mitigate these undesired consequences when strictly adhering to *qiyaṣ*.

But to alleviate the charge of arbitrariness, these later Hanafid argued that *istihsan* did not arbitrarily obviate the consequences of *qiyaṣ*, but particularized (*takhṣis*) its scope. As we mentioned above, at the very heart of analogical reasoning of *qiyaṣ* was the *ratio legis* (‘illah) that was shared by both the original case (i.e. text) that established the legal ruling and the new case that required a judgment (i.e. *hukm*). The ruling (i.e. *hukm*)

\(^{45}\) Zysow, 400.
\(^{46}\) Zysow, 399.
\(^{47}\) Zysow, 399-400.
of the original case was analogically extended to the new case based on their shared attribute (i.e. ‘illah) as well as all other cases that shared this attribute.

An example where istihsan would modify a ruling reached by qiyas (analogy) is the case of predatory animals and predatory birds. Textual evidence establishes the flesh of predatory animals is ritually impure therefore its consumption is prohibited. By analogy then, Muslim jurists prohibited the consumption of predatory birds because they share the same ratio legis (i.e. illah) of being predatory beasts and thus are ritually impure to consume. Also, food left behind by a predatory bird should by analogy be considered ritually impure and prohibited for consumption, since that was the case for a carcass left behind by a predatory animal. But according juristic preference (i.e. istihsan) the food left behind by predatory birds is lawful to consume. 48

The reason is, when predatory animals eat, their impurity is transmitted to the food through the saliva in their mouths. Predatory birds, on the other hand, eat by means of their beaks that are made of bone which remain dry while they eat; hence, no bird saliva is transmitted to the prey. Hence, jurists modified the legal conclusions that would have been reached by qiyas (i.e. the prohibition of consumption of food that had been touched by predatory birds) to reach another conclusion that was reasoned through istihsan (i.e. the lawfulness of eating food touched/eaten by a predatory bird). 49

So, what the proponents of isthisan claimed was that istihsan did not obviate any qiyas in question, it merely particularized the scope of its ratio legis (‘illah), so that its

consequences (i.e. the ruling or *hukm*) would apply in certain situations and not to others, due to some impediment (*mani‘*) that prevented consequences of that *ratio legis* from being transposed to the case in question. This operation was dubbed as *takhsis al-‘illah* (particularizing the *ratio legis*), and it was seen as what lay at the core of the concept of *isthisan*. Hallaq summarizes the operation of *takhsis al-‘illah* (particularization of *ratio legis*) in the following manner:

“Limitation occurs when the reasoned argues that the ratio of a case X and the rule generated by X is Y, but due to an impediment (mani‘) existing in the case, X is restricted in its scope; the resultant being the rule that is not Y but Z.”

It was in this way that later Hanafis were able to argue for the legitimacy of the notion of *isthisan* as a reasonable legal hermeneutical device and not an arbitrary practice as al-Shafi‘i had alleged. Of course, they had to argue why such a legal tool needed to be resorted to in light of its counter balancing of the legal conclusions reached by *qiyas* (i.e. analogy), which by this period was emerging as the quintessential form of legal reasoning amongst many jurists and legal theorists. So, *istislan* was reformulated not as the arbitrary negation of *qiyas* as its opponents had portrayed it, but rather a measured particularization of some of the legal implications of *qiyas* as result of some circumstances that could not be taken into consideration in the logic of *qiyas* and would lead to less desirable legal consequences if the *qiyas* was left unmodified.

*Istislah* (private/public good or utility), on the other hand, was less controversial than *isthisan* amongst the early jurists and legal theorists largely because it was not

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50 Zysow, 403. Also see Hallaq, 1997, 109.
51 Zysow, 404.
52 Hallaq, 1997, 110.
defined as counter-*qiyas* in the same way that *istihsan* had been, hence leaving less of a debate about its legitimacy amongst the *qiyas*-favoring jurists and theorists. Nevertheless, the legal concept of *istihsal* (arguments of utility) also needed some legitimation since it too seemed like a form of non-scripture based legal reasoning, which was coming under increasing scrutiny by later generations of jurists, especially those jurists who wanted to maintain scriptural/textual hegemony over the law (i.e. those who inclined towards this orientation were the advocates of *hadith*).

The point here is that the advocates of the legal principle of *istihsal* (sometimes referred to as *maslaha mursala*) propose the new legal rulings can be generated by reference to this principle without explicitly relating (i.e. *qiyas*) the law to some pre-established scriptural based injunction.\(^{53}\) The basis of the newly proposed ruling would be an appeal to general legal principles that are rationally deduced and are purported to be the aims of the law (i.e. *maqasid al-Shari’ah*).\(^{54}\) The idea is that the whole enterprise of Islamic law is based on a set of legal principles that are inferred from the details of scripturally based legal rulings, and it is these general legal principles that the law is said to be serving.

Even when most jurists and legal theorists agreed that the purpose in the promulgation of Islamic laws was for the sake of achieving some utility or public good, still many of them were not completely comfortable with idea that legal injunctions could be legislated entirely from general legal principles without some direct or indirect

\(^{53}\) See Hallaq, 1997, 112; and Zysow, 394-395.

\(^{54}\) See Hallaq, 1997, 112.
reference to text/scripture. This was especially the case given the growing domination of
the textualist paradigm on the outlook of Muslim jurists.55

Nevertheless, *istislah* did not suffer from the same stigma that *istihsan* suffered
from in that it was not explicitly defined as a counter-balancing mechanism to *qiyas* and
hence did not seem to directly oppose legal conclusions reached through *qiyas*. This
helped *istislah* to achieve greater acceptability among later Muslim jurists and theorisst
than did *istihsan*, but because of the lack of formal structure in this type of argumentation
and the open-ended juridical possibilities that could be reached by its implementation, it
never won explicit universal recognition as an independent legal methodology to
establish laws.

Ultimately, it would be only *qiyas* (analogical reasoning) and *ijma’* (consensus) that
gained universal acceptability amongst the surviving Sunni schools of law and some
Shiite sects like the Zaydi school as extra-scriptural means/sources of deriving law.56

Other forms of legal reasoning like *istihsan* and *istislah* never reached the same level of
acceptability as *qiyas* and *ijma’*, but were never the less legitimated by some juristic
schools like the Hanafi and Maliki schools and legal theorists and not by others. Islamic
legal theory or what was termed *usul al fiqh* (lit. the sources of law) came to be
comprised of some universally accepted elements and other methodologies which were
disputed amongst different camps of law.

In the end, Islamic legal theory was comprised of a blend of scriptural and extra-
scriptural sources and methodologies for deriving Islamic law. On a scriptural level, all


56 Abu Zahara, 663.
schools of law whether Sunni, Shi’ite, or otherwise, accepted that the Qur’an and prophetic practice (sunnah) represented the undisputed substantive sources of Islamic law. On the extra-scriptural level, all surviving Sunni schools of law also accepted ijma’ (juristic consensus) and qiyas (analogical reasoning) as being legitimate methodologies (i.e. sources) from which Islamic legal injunctions might be produced. All other forms of legal reasoning that were developed beginning in the second/eighth century AH/CE were rendered as partial and secondary in the mature formulation of Islamic legal theory (i.e. usul al-fiqh) that was completed by the fifth/eleventh century AH/CE.

Yet this whole excursion into the conceptual development of these legal principles was to show the very dialectic manner in which Islamic legal theory was formulated. It was out of the rudimentary legal concepts that began to circulate in the legal discussions of the second/eighth century AH/CE and were differentiated and developed over the next several centuries with other legal concepts that this legal theory was formulated. But even more important than recognizing the differentiation process which took place in the evolution of Islamic legal theory, is to recognize the discursive origins of the formation of Islamic legal theory.

I argue that the discursive origin of Islamic legal theory is the process of ifta’ and its by product, the fatwa. Islamic legal theory, despite its influence by other factors, grew organically out of the practice of fatwas in the first three centuries. If we recall our discussion in the previous chapter about the fatwas in the first two centuries of Islam and how juristic practice during this period employed embryonic legal concepts in their legal reasoning in issuing such edicts, we recognize that it was out of the fatwas of these early jurists that discussion of a legal theory began. It was the methodologies that were
employed by those early jurists that came to dominate the discussion of the proper means by which Islamic law could be pronounced. So, it was from the discursive activity of fatwa that elements of a legal theory were extracted and articulated.

Hence, we conclude from this that theoretical speculation about the law was an afterthought of actual legal practice as quintessentially represented by the practice of ifta’ (i.e. the art of making fatwa). In other words, Islamic law was not formed as a product of explicitly articulated legal principles; rather it was the legal practices that ultimately determined the course of the law. This fact highlights the critical role that fatwas and ifta’ played in the formation of Islamic law and how the very roots of this legal formation have their origins in this legal practice.

The Construction of Islamic Legal Doctrines and Schools:

As much as second/eighth century AH/CE legal activity played an integral role in the eventual establishment of a more sophisticated legal hermeneutics in the subsequent centuries, it also played an integral role of supplying many of the authoritative legal figures that would act as the starting point for the construction of Islamic legal schools known as madhahib (sing. madhhab). What do we mean by Islamic legal schools or madhahib? A “school”, in the intellectual sense, represents “persons who hold a common doctrine or accept the same teachings or follow the same method”. In the legal sense, Hallaq defines the legal madhahib of Islam as each consisting of the following: “a group of jurists and legists who are strictly loyal to a distinct, integral, and most importantly,

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57 See Hallaq’s article: “From Regional to Personal Schools of Law? A Reevaluation”, 2001, pg. 5 where he quotes this dictionary definition of an intellectual school. Also, see Makdisi, 1981, 1, who defines a school in a similar manner.
collective legal doctrine attributed to an eponym, as master-jurists, so to speak after whom the school is known to acquire particular, distinctive characteristics”.

In other words, persons belonging to a madhhab were those who followed a common legal doctrine that had its roots in the legal activity of a person or group of independent Muslim jurists. These master-jurists for whom the legal schools or madhahib were named were those jurists who had offered legal opinions in the second century like Abu Hanifah, Malik and al-Shafi’i amongst Sunni legal tradition and Jafar al-Sadiq and Zayd ibn Ali amongst Shi’is. There were schools that were formed around the figures of third/ninth and fourth/tenth century AH/CE jurists like Dawood al-Zahiri and Ibn Jarir al-Tabari; yet all of those legal schools did not survive for reasons that are probably too complex and not well understood to get into here. What is clear is that schools that were formed around the figures of second-century jurists did have a lasting impact on the way the jurisprudence and the legal tradition of Islam developed, and this would have an impact on the way fatwas were issued from there on in as I will come to show. Western academics dispute whether the eponyms of these schools can indeed be considered true founders of the schools of law as Muslim tradition asserts, but this debate is immaterial to our discussion here, as what is important is that schools of law in their final development became the fundamental institutions that determined the course of Islamic jurisprudence for the next millennium.

Nevertheless, one may assert that the authority that has been ascribed to these master-jurists may not have been totally capricious and may have been a result of the

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58 Hallaq, 2005, 152.
59 See Hallaq, 2005, 158-161; Hallaq, 2003, 62; also Melchart’s *The Formation of Sunni Schools of Law* for an elaboration on this point.
distinctive methodological awareness that they displayed in their legal activity that was recognized by later jurists. This methodological distinctiveness served as the fundamental pillar from which the schools of jurisprudence were later constructed. This can be seen from the legal methodologies and concepts employed in the fatwas of second century jurists and the legal debates whereby these jurists explicitly employed such concepts to legitimate their fatwas, as I pointed out in the previous chapter.

Let us examine the process of authority construction and the formation of legal schools in one particular case to see how a legal school arose from the embryonic discourses of earlier reputed master-jurists. The way in which I will do this is by outlining the construction process of the Hanafi madhhab from third/ninth to the fifth/eleventh centuries AH/CE as an illustration of how these schools came into being.

Starting in the third/ninth century AH/CE, the Hanafi jurist Muhammad Shuja’ al-Thalji began to ground legal opinions of the second-century predecessors of the Hanafi school (i.e. Abu Hanifah, Abu Yusuf and Muhammad al-Shaybani) within the discourse of sunnah/hadith (prophetic practice) as a way of legitimating these opinions within the newly synthesized (ra’y and hadith) legal paradigm that was beginning to take hold after al-Shafi’i. This is because not all legal opinions in the second century were necessarily rationalized or legitimated through the explicit use of scriptural sources such as the Qur’an and the prophetic traditions (i.e. hadith). In many cases it was just assumed that the jurists were indeed grounding their legal opinions within the scriptural sources and/or legal precedent (i.e. athar). With the growing ideological push towards hadith, these assumptions were no longer acceptable; hence, bringing about a growing need for legal

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60 Hallaq, 2005, 126-127.
specialists who leaned towards certain master-jurists to explicitly ground the legal
opinions and practices of these master jurists within the discourse of hadith.

This movement towards grounding legal opinions within the universalizing
discourse of sunnah/hadith (prophetic practice/tradition) was greatly facilitated by the
appearance of compilations of prophetic traditions (hadith) in the third/ninth century
AH/CE (e.g. the collections of Bukhari and Muslim). The existence of these compilations
allowed for the legal opinions which were prevalent in certain regions (Kufah and
Madinah for example) to now be grounded in the recently proliferating discourse of
hadith instead of their own local legal practices and precedents, which had access to
certain prophetic practices and not others.

But at the same time the proliferation of the prophetic sunnah in the form of
hadith, in contradistinctions to other forms of traditions and precedence, itself was
reflexively caused by the growing ideological prestige of hadith as the ultimate source of
law after the Qur’an among second-century jurists such as al-Shafi’i. Because of people
like al-Shafi’i, hadith was now becoming the sole substantial source of Islamic legislation
aside from the Qur’an. I mentioned in the previous chapter that the growing appeal of the
position of advocates of hadith (i.e. ahl al-hadith) was possibly due to the fact that
prophetic sunnah was something that was universally accepted amongst all legal
authorities in the different regions of the then Muslims world in contradistinction to other
forms of sunnan (i.e. practices/precedence) that might have been authoritative in one
place and not another (e.g. Malik’s notion of ‘amal ahl al-Medinah i.e. the practice of the
people of Medina).
Hence, the prophetic *sunnah* as discursively embodied in *hadith* was seen as an attractive epistemological starting point from where the variant legal practices and doctrines that were prevalent in various places could converge to create a more universal legal doctrine that would unify Muslim religious practice. In other words, the ideological push towards *hadith* fed the growing movement of *hadith* compilations, which in turn fed the growing movement towards *hadith* conformity.  

But the idea behind this push towards coalescing legal opinions within the discourse of *hadith* was not to necessarily completely reformulate the juristic opinions of second/eighth century AH/CE jurists to fit the letter of the *sunnah/hadith*, but to show how the diversity of legal opinions were consistent with this prophetic practice (i.e. *sunnah*) as represented in *hadith* and that the divergence found in these legal opinions as pronounced by these second/eighth century AH/CE master jurists stemmed from a different understanding and application of the *sunnah/hadith* to the various legal scenarios. Hence, in this way, the various legal factions could legitimately claim to have a consensus on what constituted the basis of the law (i.e. *usul al-fiqh*) and at the same time have divergent views about its implications.

Let me now examine how this legal reformulation played out in the construction of the Hanafi school of law. If the push towards grounding and consolidating legal opinions of master jurists within the discourse of *hadith* was started in the third/ninth century AH/CE by jurists who had Hanafi leanings like al-Thalji, this process was continued by figures like al-Tahawi in the fourth/tenth century AH/CE. Wheeler states:

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61 See Hallaq, 2005, 76 who concurs with the final point.
62 Wheeler, 72.
63 Wheeler, 74-75.
“According to al-Tahawi the conflict of opinions is due either to authorities extracting different principles from different texts (read hadith) or differently applying the same principle to new circumstances.”

Al-Tahawi’s work Sharh Ma’ani al-Athar and Ikhtilaf al-Fuqaha tru to do just that by illustrating how the second/eight century AH/CE jurists like Abu Hanifah, Malik and al-Shafi’i interpreted and applied hadith differently to arrive at their divergent legal conclusions. In addition, al-Tahawi usually attempted to persuade the reader to the soundness of the position of the Hanafi jurists so as to show the legitimacy of their legal reasoning and interpretive scheme of the sunnah and thereby the legal authoritativeness Abu Hanifah and his protégés as founders of a legal school. In the same vein, the fourth/tenth century AH/CE Qur’anic commentator with Hanafi leanings al-Jassas carried out a similar program to al-Tahawi’s by demonstrating in his work Ahkam al Qur’an how the legal opinions of second/eighth century AH/CE Hanafi jurists were consistent with the intent of the legal injunctions of the Qur’an.

If third/ninth and fourth/tenth century AH/CE jurists like al-Thalji and al-Tahwi focused their attention on showing how Abu Hanifah’s and his protégés Abu Yusuf’s and al-Shaybani’s legal opinions were both grounded in and consistent with hadith, fifth/eleventh century AH/CE Hanafi inclined legal theorists like al-Dabusi (d. 430/1039 AH/CE) and al-Sarakhsi (d. 483/1090 AH/CE) had a different focus. They instead attempted to show how, on epistemological and methodological grounds, second/eighth century AH/CE Hanafi jurists could diverge in their legal opinion from their counterparts

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64 Wheeler, 101. With parenthesis indicating additions by the author.
65 See Wheeler, 100-109 for illustrations.
66 See Wheeler, 109-112 for details.
like Malik and al-Shafi’i despite sharing the same authoritative basis of the law (i.e. Qur’an, sunnah/hadith, ijma’ (consensus) and qiyas (analogy)). In this way, these legal theorists were giving theoretical and methodological legitimation for the authoritativeness of Hanafi legal opinion and by extension legitimating the distinctiveness of this school of law.

For instance, al-Dabusi states that the three foundational figures of the Hanafi madhhab-- Abu Hanifah, Abu Yusuf and al-Shaybani-- methodologically held that a hadith of the prophet with a single chain of transmission (khabar ahad) was to be preferred to an injunction reached through qiyas (analogy) to a more established scriptural source. While Malik held that qiyas (analogy) to a more established scriptural source (i.e. mutawatir) has greater authority than a prophetic hadith with a single chain of transmission.67

This argument revolves around the epistemological principle that a prophetic report with a single chain of transmission only leads to speculative/indefinitive (zanni) knowledge; while a report that is transmitted recurrently (mutawatir) leads to definitive (qat’i) knowledge. So the central focus of the debate is whether to accept the legal implications of hadith whose epistemological basis is less certain than it is to accept the legal implications derived indirectly through analogy to a textual source (e.g. Qur’an or hadith with a recurrent chain of transmission) that has a sounder epistemological basis. Although we stated in the previous section that sunnah/hadith is on a whole of greater authority in determining law than qiyas; nevertheless, not all hadith were considered of equal epistemological value in determining law. Moreover, what this shows is that,

67 Wheeler, 134.
among some of the jurists analogy to a better established scriptural source can be given greater authority than some hadith.

Al-Dabusi illustrates how this methodological difference between the Hanafis and Malik leads to variant conclusions in the law even when they are in agreement with regard to the authoritative sources of the law: “Our companions (i.e. Abu Hanifah and his protégés) say that semen is a physical impurity which must be purified by rubbing the [affected] cloth when it [the semen] is dry. We take this from a report (i.e. hadith). According to Malik, it is not purified except by washing with water, like [is the case with] urine.” As Wheeler points out: “The differences between Hanifis and Malik, in this case, are explained in terms of disagreement over the evaluation of the relative authority of the different sources.”

What this shows that even when a unified legal theory (usul al-fiqh) had been accepted amongst the Sunni legal factions, which gave a hierarchy to the authoritative sources of the law (i.e. Qur’an, sunnah/hadith, ijma’, qiyas), later jurists and theorists believed that the legal differences that existed amongst second/eighth century AH/CE jurists like Abu Hanifah, Malik, and al-Shafi’i came down to the legal approach and manner of application of these foundational sources of law rather than a genuine differences on what constituted the sources of the law.

These divergent approaches and methodologies that later legal theorist deduced from the earlier legal opinions ended up acting as the foundational principles of the different legal schools. So, as much as usul al-fiqh (Islamic legal theory) was formulated

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68 As quoted in Wheeler, 135. Materials in parenthesis are my additions to the text/translation.
69 Wheeler, 135.
70 Large portions of this legal theory were also accepted amongst some Shi’ite groups like the Zaydi school.
to show the foundations of Islamic law in general, the methodological variations of how to approach those sources of the law is what constituted the foundations of the Islamic legal schools (i.e. *usul al-madhhab*). The core principles of these methodological foundations were seen as have been instituted by these second/eighth century AH/CE jurists who became the eponyms of the Islamic legal schools.

The point here is these second/eighth century AH/CE jurists showed a methodological clarity and innovativeness in deriving Islamic law from the various scriptural and extra-scriptural sources which gave them an aura of authoritativeness in subsequent generations that previous jurists had never acquired despite their tremendous contributions to cultivating the law. Examples of their innovativeness were their appeals to legal concepts such as *qiyas, istihisan, istislah, ijma, ‘amal*, etc., which were explicitly defined by them even when such concepts had been established and employed in earlier periods. But even beyond this is the way in which they approached and applied these principles, which gave each of them a distinctiveness that was perhaps less clear in their predecessors jurisprudence, hence, earning them the merit of being founders of legal approaches which culminated into the legal schools.

If Islamic legal theory (*usul al-fiqh*) was the source of unity of Islamic law for jurists, the foundational principles/practices of the schools (*usul al-madhhab*) was definitely a source of distinction and legitimation of the divergent legal practices and judgments. Rationalizing these differences allowed for diversity within the law that could accommodate manifold situations without constricting legal possibilities. I have yet to explore in any detail what those foundational principles and methods of the Islamic legal schools are in this section because my purpose here is to show the historical and legal
factors that gave rise to these schools. In the next chapter, I intend to give a fuller presentation of what these legal approaches and methodological considerations were that defined the different legal schools.

As a final note, I want to assert here that in the same way that Islamic legal theory (*usul al-fiqh* lit. foundations of the law) was derived from the actual jurisprudential practices of earlier Muslim jurists, the foundational legal principles/practices (*usul al-madhhab* lit. foundation of the school) and legal doctrines that came to comprise and define the legal schools (*madhahib*) were also products of the same jurisprudential practices of which fatwas were the discursive traces. The preservation of these fatwas allowed later generations of jurists and legal theorists to abstract these general legal principles even when earlier jurists did not always explicitly articulate them in their own jurisprudential rationalizations.

So, fatwas were crucial to the formation of Islamic law and its institutions. But even if fatwas were the discursive source of these disciplines and institutions, once they came into being they altered the course of fatwas ever after. Because of the formation of the legal institutions such as legal theory and legal schools, the process of *ifta*’ (i.e. fatwa making) took on a slightly different character in that its ad hoc character in the previous period became much more structured once this legal tradition became fully formed and operative in the later period. This will be examined in greater detail in the following chapter.

Fatwa as the Substantive Basis of Islamic Legal Doctrines

In the last two sections, I charted the development of Islamic legal theory (i.e. *usul al-fiqh*) and Islamic legal schools (i.e. *madhahib*) and how fatwa played an integral
role in those two formations. In this section, I will map the process of how Islamic legal
doctrines came to be established from the raw materials of previous fatwas especially
those that were pronounced by the second/eighth century AH/CE jurists for which the
Islamic legal schools were named.

It is apparent by now that Islamic law was not simply an outgrowth of official
legal institutions like the activity of judges and courts, but primarily the growth of
independent activities of Muslim jurists (faqihs or muftis) who tried to address people’s
day-to-day problems in terms of the ethical precepts of Islam. So unlike Western case
law, legal judgments of the courts do not comprise the substantive portion of Islamic law.
Islamic law was not produced by government sanctioned activity of adjudicating legal
problems conducted by representatives of the state such as judges and legal
pronouncements of courts. Rather, juridical production in Muslim history on a whole lay
outside the confines of the state.71

Instead, independent jurists elaborated Islamic law by providing their legal
opinions (fatwas) on disparate social and religious matters. When a critical mass of these
fatwas was amassed, the jurists were able to synthesize these disparate fatwas into a legal
doctrine that would regulate Muslim religious practice, ranging from ritual to economy.72

Historically speaking, the classic Islamic legal corpus as represented in legal (i.e., fiqh)
compendiums did not just spring up at once early in this history of Islam, as we have no
legal text dating back to the first or early second century of Islam as we do in the case of
fatwas dating back to these periods. Furthermore, logically speaking, it is presumed the

71 Hallaq, 1994, 56-57.
72 Hallaq, 1994, 55.
corpus of Islamic legal literature must have been constituted from primordial legal matter that served as its substantive source. The legal compendiums which later came into being were a result of the increasing sophistication of Islamic civilization and the need for more standardized sources of information that could answer peoples’ religious/legal questions.

Fatwas are the logical and historic link to the growth of Islamic legal literature in the form of *fiqh* compendiums. This is because when a critical mass of fatwas was reached and those fatwas became legally established amongst Muslim jurists, they must have felt a need to synthesize these disparate fatwas into coherent legal texts for didactic purposes of teaching and disseminating the law. This indicates that the very substance of Islamic law arose from the activity of producing fatwas, which indicates a relationship of dependence of standardized law on this type of juridical activity (i.e. *ifta’*).

Yet the argument for a relationship between fatwa and the growth of Islamic legal doctrine is not solely based on logic; there is historical evidence that Muslim jurists incorporated fatwas in their authorship of Islamic law compendiums. Here is some of the evidence:

1- The famous Hanafi jurist al-Nasafi stated that he included fatwas in his legal manual *Kanz ul-Daqa‘iq*.\(^{73}\)

2- The Maliki jurist al-Hattab included hundreds of fatwas of Ibn Rushd al-Jadd\(^{74}\) and Burzuli in his commentary on the foundational Maliki text *Al-Mukhtasar* of Khalil Ibn Ishaq.\(^{75}\)

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\(^{73}\) Hallaq, 1994, 40.

\(^{74}\) The grandfather of the Muslim philosopher and jurist Ibn Rushd.

\(^{75}\) Hallaq, 1994, 41.
3-The Shafi’i jurists al-Nawawi also reported to have included fatwas in his commentary on *Al-Muhadhdhab*.

Not all aspects of fatwas were fit for inclusion in the legal corpus of Islamic law (i.e. *fiqh* compendiums) because of the didactic and reference-like quality of these legal manuals. So an assimilation process was established where fatwas would be formatted to accommodate the structure of these legal texts. There were two ways by which fatwas were synthesized into an Islamic legal corpus: *tajrid* and *talkhis*. This two fold process is as follows:

1-*Tajrid* (abstracting): stripping of the fatwa of elements that were not necessary for the works of legal doctrine. This might include the reasoning of a *mufti* (jurist consult) would have given to support the fatwa or the names of the parties mentioned in the fatwa. These things were extraneous details not appropriate to include in legal compendia that represented the various legal doctrines.

2-*Talkhis* (abridgement): summarizing important elements of the fatwa such as documents that were included in the fatwa and are integral to understanding its context.

But not all fatwas of jurists finally ended up in the legal compendiums that codified the doctrines of the legal schools; so which fatwas were included in this legal literature? Generally speaking there were several criteria which helped jurists decide that certain fatwas should be universally accepted and included in the *fiqh* compendia. The medieval Muslim jurist Awazajandi listed some of these criteria:

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76 Hallaq, 1994, 41.
77 Hallaq, 1994, 44-45.
78 Hallaq, 1994, 45.
1-Relevance: whether the fatwas were relevant to the society in which the jurist authoring the *fiqh* compendium was writing for.\(^\text{79}\)

2-Need: if it was determined that the issue handled by the fatwa needed to be known by ordinary people for their religious practice.\(^\text{80}\)

3-Frequency: This point is a product of the other two criteria, but the way in which jurists can determine whether a group of fatwas were needed and relevant to the context was by the frequency in which fatwas were issued on a particular matter.\(^\text{81}\)

Through such legal processes of inclusion, conversion, and synthesis of the fatwas of early master-jurists and subsequent major jurists, later Muslim legists established legal doctrines which guided and informed the religious practice of the Muslim community. These legal doctrines took the pedagogic form of legal compendia that codified the major doctrines of the legal schools. So we can see from this that fatwas formed the substantive basis of Islamic law by providing the basic legal material from which Islamic legal doctrines became formulated.

**The Formation of an Islamic Legal Tradition**

The foregoing discussion has highlighted the importance of the past in Islamic law. Past experiences and events were integral to the formation of Islamic law where those experiences and events were transmitted to subsequent generations. These later generations viewed those past experiences as having an aura of authority which

\(^{79}\) Hallaq, 1994, 49.

\(^{80}\) Hallaq, 1994, 49.

\(^{81}\) Hallaq, 1994, 49.
normatively shaped their contemporary practices. Hence, it can be said that Islamic law is a legal tradition. But what is tradition and what makes Islamic law a legal tradition? More importantly, what sort of legal tradition is the Islamic legal tradition? Tradition is not merely a transmission of ideas from the past, but a belief in their present value.\(^{82}\) In this sense tradition is distinct from habituated custom in the fact that it consists in some ways of conscious recognizing and choosing.

Krygier notes three fundamental characteristics of any tradition. First, its \textit{pastness}: the belief of the participants in that tradition that it originated at some point in the past. Second, its \textit{authoritative presence}: although it originated in the past, it has significance for the lives and activities of those who participate in it in the present. Thirdly, \textit{transmission}: traditions are not merely discontinuous projections of the past on the present. There is continuity in their conveyance from one generation to the next whether this transmission was deliberate or otherwise.\(^{83}\) So a necessary consequence of this third characteristic is that traditions are fundamentally social\(^{84}\) because they are born and sustained through the constant interactions of groups.

It should be apparent from the history that I have outlined and the legal practices that I have surveyed in this investigation that the Islamic legal discourse and its practices can be construed as a tradition, perhaps like many other legal systems, because its characteristics meet the definition of tradition as delineated by Krygier. Firstly, as I have pointed out, the substance of these discourses and practices indeed originated in the past, starting with the fact that their normative bases are found in textual sources from the past,

\(^{83}\) Krygier, 240.
\(^{84}\) Krygier, 240.
such as Qur’an and *hadith*, as well as the formulation and formalization of the law coming from authoritatively recognized jurists of the past. Secondly, those legal discourses that were formulated in the past were viewed as authoritative in subsequent generations as evidenced by the formation of Islamic legal schools, legal theory, and public practice around the legal doctrines, practices and principles of second and third century jurists. Lastly, the opinions of passed legal authorities were continually passed down and transmitted to later generations either orally, as was primarily the case with first-century legal authorities, or through writing as was predominately the case for jurists starting in the second century.

But more importantly, if Islamic law represents a legal tradition, what sort of tradition is it? In a seminal article written nearly three decades ago, the anthropologist and social theorist Talal Asad stated that Islam, more broadly, should be viewed as a discursive tradition. Asad gives a peculiar definition of tradition as consisting of “discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, it has a history.” So, what is unique about Asad’s understanding of tradition is that it centralizes discourse as a mediating principle between past and present. For Asad, traditions are comprised of discourses that link the past, present, and future through the medium of continuously transmitted pedagogic instructions on the purpose and correct form of particular practices.

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87 T. Asad, 1986, 14-15; Also see Mahmoud, 114-115 for an interpretation of how to understand T. Asad’s notion of tradition.
For Asad, Islam is a discursive tradition precisely because it is related itself to certain foundational texts such as the Qur’an and Hadith. It is this concept of discursive tradition that I seek to employ in describing the Islamic legal tradition. If the entire enterprise of Islam can be described as discursive tradition then its legal tradition, which is a subset of it, may be described as a discursive legal tradition. This is because as much as the Qur’an and hadith are the starting points of the religious tradition of Islam itself, they are also the starting point of the legal tradition as has been demonstrated in previous chapters.

Aside from establishing certain legal injunctions, the Qur’an was the substantial origin of Islamic law, providing the ethical/legal norms from which the principles of this law were extracted (e.g. the commanding of virtue and the prohibition of vice). It also discursively established ethical consciousness (i.e. taqwa) as the psychological motive for observing its ethical-legal norms. As I have previously pointed out, these twin pillars of moral consciousness and ethical-legal norms were crucial to the formation of this legal system as they were the mental and social impetus for creating the structure of obligations and sanctions that was required for the law to operate as well as being foundational elements in creating the Muslim legal subject.

Moreover, the dialogical manner of the Qur’anic discourse initiated the establishment of mechanisms (e.g. ifta’) by which many of those ethical-legal norms would be transmitted. Ifta’ (i.e. the Islamic legislative process) was both encouraged and employed in the Qur’anic discourse inaugurating a practice that would be the

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89 The notion of legal subject will be dealt with in greater detail later in this chapter.
quintessential method of promulgating Muslim law and extending the reach of those Qur’anic norms. In addition, the Qur’ans dialogical approach, especially with regards to seeking fatwas (Qur’an: 2:189; 2:217; 2:219; 2:220; 2:222; 4:127; 4:176; 5:4; 8:1) facilitated the practice of its ethical-legal norms, as the practitioners of the Qur’an’s injunctions were in some ways active participants in the formation of those norms. At the same time the gradual manner in which those norms were introduced (over a period of twenty three years) enabled the transformation of both individual and community, fostering the evolution of Muslim legal subjects and society.

The prophetic practice (i.e. sunnah) played a supportive role in this process of forming this discursive legal tradition. The Prophet Muhammad was the legal authority who enforced Qur’anic legal norms over the nascent Muslim community, and his practice became the framework for how these norms would be understood and implemented. Moreover, the legal rationale and interpretive tools which he employed to extend the scope of these Qur’anic norms paved the way for later generations to understand how to derive the law from both the Qur’anic norms and his example. Later, the prophetic practice would be discursively embodied in what would be known as hadith. The corpus of hadith would be a secondary source from which legal norms and injunctions would be derived in the Islamic legal tradition as established by Islamic legal theory (i.e. usul al-fiqh).

So the basis of the Islamic legal discursive tradition was the textual authority that was exerted by Qur’an and hadith as the core discourses which defined this tradition. At the same time, it is because of this textual authority of the Qur’an and hadith that the Islamic legal tradition can be described as a discursive tradition, because they were the
reference points for the legitimation of any statements or practices within it. So this Islamic discursive tradition in general is, as Saba Mahmoud has pointed out: “a mode of discursive engagement of sacred text,”\(^{90}\) and its legal tradition is the quintessential example of this mode of discursive engagement.

But just as these foundational texts stand at the core of the discursive tradition of Islam in general and Islamic discursive legal tradition in particular, they are not the only discourses that comprise this tradition. Charles Hirschkind asserts that T.Asad’s notion of Islamic discursive tradition ought to be understood as a “historically evolving set of discourses, embodied in the practices and institutions of Islamic societies…”\(^{91}\) Historically speaking distinct legal discourses that were based on these foundational sacred texts did evolve giving rise to a discursive legal tradition. To use Anjum’s words in describing the Islamic discursive tradition, this legal subtradition likewise “would be characterized by its own rationality and styles of reasoning” in that “certain theoretical considerations and premises emanating from the content and form of the foundational discourses (the content and context of scripture, the historical experience of Islam in its formative years, etc.)”\(^{92}\), which I have shown in previous chapters.

The aim of the legal discourses would be hermeneutical in character, largely disposed to explicating the legal implication of the foundational sacred texts of Qur’an and Hadith. The textual authority of the Qur’an and Hadith, in terms of providing the substantial and normative basis of the law, would eventually necessitate the growth of

\(^{90}\) Mahmoud, 115.

\(^{91}\) As quoted in Ovamir Anjum’s: “Islam as a Discursive Tradition: Talal Asad and His Interlocutors,” pg. 662, in *Comparative Studies of South Asia, Africa and the Middle East*, Vol.27, No. 3, 2007

\(^{92}\) Anjum, 662.
hermeneutical discourses that would interpret those texts. This would eventually give rise to specialists whose epistemic function was to hermeneutically mediate between the larger public and these foundational sacred texts thereby giving rise to authoritative discourses that would supplement the content and implications of the foundational and authoritative discourses of scripture.93

These hermeneutical legal discourses developed the rational and interpretive tools (e.g. *qiya*s/analogy, *istihisan*/utility and other linguistically-based hermeneutical devices) that would both clarify the intent of scriptural norms and extend their reach to new legal domains. From these legal discourses, a body of authoritative legal doctrines and legal theory (i.e. *usul al fiqh*) arose which would become the bedrock of the Islamic legal tradition. Moreover, out of the legal opinions and methods of this class of authoritative legal specialists, the institution of Islamic legal schools (i.e. *madhahib*) came into being. These doctrines, theories, and institutions would give shape to a peculiar legal tradition that was in some ways unique to the Islamic legal tradition94 which most likely evolved as a result of the peculiar historical experiences of Muslim peoples. But more importantly, these discursive formations and their resulting practices would become the determinative matrix which would shape all future Islamic legal discourse in general and fatwa in particular as the subsequent chapters will illustrate.

Saba Mahmoud asserts Talal Asad’s notion of Islam being a discursive tradition because its “pedagogical practices articulate a conceptual relationship with the past,

93 This statement can be said of any of the subtraditions within the larger Islamic discursive tradition not just its legal tradition.
94 See Hallaq, 2005, 164-165 on this point.
through an engagement with a set of foundational texts (the Qur’an and the hadith), commentaries thereon, and the conduct of exemplary figures.” 95 Moreover, she interprets Asad’s concept of Islamic discursive tradition as representing a particular modality of Foucault’s notion of discursive formation where “reflection upon the past is a constitutive condition for the understanding and reformulation of the present and the future. Islamic discursive practices…link practitioners across the temporal modalities of past, present and future through pedagogy of practical, scholarly, and embodied forms of knowledge and virtues deemed central to the tradition.” 96

This conception of tradition is a most apt description of the Islamic legal tradition. Islamic legal tradition is a discursive formation in that it was spawned from a series of past discourses and discursive practices that were always related to existing realities. The Qur’an and hadith legitimated legal principles and practices (e.g. Qur’anic dialogical fatwa engagement, prophetic use of qiyas, as well as substantial legal norms from which legal doctrines were formulated), which were employed by later jurists to legitimate their own jurisprudential views and practices.

These foundational discourses gave impetus to those legal principles and practices that were elaborated and expanded upon by jurists who constructed a system of rules (i.e. legal rationales and hermeneutical tools such as the science of usul al-fiqh or the formulations of legal doctrines based on the rules of the legal schools or madhahib) that would regulate the legal understanding and implications of those texts as to how they should inform the religious practices of the Muslim community.

95 Mahmoud, 115.
96 Mahmoud, 115.
These secondary discourses and discursive practices of the earlier generation of jurists and theorists mediated between these foundational sacred texts and the community and hence established the hermeneutical authority of those early jurists whose ideas and views shaped the future course and practice of Islamic law. This hermeneutical authority was later institutionalized in the form of Islamic legal schools and doctrines (*madhahib*) and Islamic legal theory (*usul al-fiqh*), whereby future generation would formulate the law and establish religious practice in reference to these past legal authorities and their institutionalized legal discourses. This authoritativeness of these past legal discourses and the personalities associated with them became the constitutive condition for the understanding of Islamic law and how it should be formulated in the present and future.

**The Discursive Islamic Legal Tradition, the Formation of the Legal Subject, and Fatwa**

So far, I have restricted my discussion to the evolution of the Islamic legal tradition and what kind of tradition it represents. Very little has been said about the formation of legal subject of this tradition. By the legal subject I mean most generically the practitioner of Islamic law and the constituents of its discursive legal tradition. In Islamic legal theory, the legal subject is known as *al-mukallaf*. What I intend to do in this section is to phenomenologically describe the formation of the legal subject within the context of this discursive legal tradition and how this subject fits in within the larger scheme of this tradition. In addition, I want to show the role of fatwa in the formation of the legal subject and how fatwa represents the Islamic legal subject’s active participation in the formation of the Islamic legal tradition that I have just described.
Early on in this investigation it was established that Muslim religious practices are regulated by the discursive rules/norms established in the foundational scriptural texts of Qur’an and hadith. Compliance with these rules/norms is preconditioned by the formation of a Muslim religious subject, yet at the same time the Muslim religious subject is shaped by the practice of those norms. I have pointed out in the first chapter of this study that at the very core of this ethical-religious subject is the state of taqwa which is the ethical consciousness which impels a person to act ethically and in this case in compliance with scripturally-mandated morals.

If taqwa is the seat of ethical-religious obligations, Islamic legal theorists identified what may be considered as taqwa’s legal counterpart, the psychological seat of legal obligation known as dhimmah. The term in its basic meaning denotes the idea of a covenant and this is how the Qur’an uses the term. Yet most Muslim legal theorists (i.e. usuliyyin) have given the term a more specialized meaning with reference to Islamic law (i.e. Shari’ah). For example, the eighth/fourteenth century AH/CE Muslim legal theorist Sadr al-Shari’ah (d.747/1346/6 AH/CE) defined the notion of dhimmah in the context of legal philosophy as “a quality by which a human becomes fit for what he is entitled to (rights) and what he is subject to (obligations).”

Sadr al-Shari’ah sees that this human capacity to incur legal obligation, denoted by the term dhimmah, arises from Qur’anic passages that imply human legal obligation.

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97 See Qur’an 9:8-10. Also see Ahmed Hassan, 1993, 298 for a linguistic definition.
98 See Reinhart, 197 who shows that even classical legal theorist such as the fifth century AH Muslim Hanafi Legal theorist al-Sarkhasi, had posited the existence of the notion of dhimmah.
99 As quoted in Ahmad Hassan’s Principles of Islamic Jurisprudence: The Command of the Shari’ah, pg 298, 1993; with slight modifications in the translation by the author after referencing the original source. See al-Taftazani, V.2, 348.
(in the terminology of Islamic legal theory: taklif) towards God such as the following passage testifying to the pre-historic covenant that God took from humanity: 100

“And when thy Lord brought forth their offspring from the loins of the children of Adam, He [thus] called upon them to bear witness about themselves: "Am I not your Lord?" - to which they answered: "Yea, indeed, we do bear witness thereto!" [Of this We remind you,] lest you say on the Day of Resurrection, "Verily, we were unaware of this." 101

Sadr al-Shari’ah asserts, in reference this Qur’anic passage, that it is not only proof of humanity’s obligation to render the rights of their lord, but also a testimony to human capacity to fulfill this right which is denoted by the term dhimmah. According to him, this passage vindicates both the linguistic and legalistic meanings of the term dhimmah in the sense that the passage speaks of a covenant which is its linguistic meaning, but also implies the human capacity (i.e. quality) to fulfill this covenant which is the legalistic sense of the term. 102

Al-Taftazani (d. 791/1389 AH/CE), the eighth/fourteenth century AH/CE Muslim legal theorist who wrote a commentary on Sadr al-Shari’ah’s work on legal theory, elaborates on this conception by saying that the fact that, of all animals, humans have been selected for such obligations is a clear indication that they possess a special attribute or faculty by which they comprehend the compulsory nature of these divine obligation. He says this is what is meant by the term dhimmah and that this attribute/faculty is like the (formal) cause that makes humans obligated in front of the divine commands. 103

100 Sadr al Shari’ah also references other Qur’anic passages that he claims give indications of a dhimmah. See Qur’an 17: 13 and 33:72.
101 Qur’an 7:173. Translation of verse by M.Asad, 284; with modification in the translation by the author.
102 See al-Taftazani, V.2, 348-349.
103 Al-Taftazani, V.2, 348.
Hence, since divine legal obligations are formally dependent (i.e. muta‘alliqah) on this faculty, it is as if this faculty called dhimma is the psychological place in which obligations reside. 104

Drawing on the notion of dhimma from Islamic legal tradition, some contemporary scholars have defined dhimma as “the legal quality which makes the individual a proper subject of law, that is, a proper addressee of the rule which provides him with rights or charges him with obligations. In this sense the dhimma may be identified with the legal personality. It is for this reason that every person is endowed with a dhimma from the moment of birth. Equally it follows that the dhimma disappears with the person at death.”105

From the foregoing discussion, dhimma in Islamic legal theory is the psychological core of its legal subject, and it is through this faculty that the subject has the capacity to carry out and the motivation to conform to the divine obligations that s/he are in charged with. Islamic law presupposed a legal subject who would adhere to these laws even when they were not imposed by political authorities. As we have pointed out previously, Muslim jurists were not agents of the state and their legal efforts in cultivating the law were not necessarily sanctioned in all periods by Muslim states. Hence, Islamic law had to operate on a different set of assumptions about its legal subject than those in other legal systems. This is where the notion of dhimma as a psychologically emotive force comes into play.

104 Al-Taftazani, V.2, 348-349. Also, see Ahmed Hassan’s Principles of Islamic Jurisprudence: The Command of Shari’ah pg. 298 for dhimma being [psychological] repository of legal obligation in the person.

105 Chafik Chehata, “Dhimma”, EI2, Vol, 2, pg. 231; 1965. Also see Imran Ahsan Nyazee’s Theories of Islamic Law: The Methodology of Ijtihad pg.76 for the identification of dhimma with legal personality.
Yet how does this faculty of *dhimmah* come into being? Sadr al-Shari’ah’s allusion to the prehistoric covenant between God and humans may imply that this capacity may be innately built into humans, and some Muslim legal theorists have tried to argue that.\(^{106}\) Nevertheless, divine communication (*khitab*) through revelatory discourse, and specifically divine commands, is a necessary condition for the positive formation of this *dhimmah* and its actualization, even though human beings may be essentially endowed with the capacity/faculty to be receptive and responsive to divine obligations as has been argued by some theorists.\(^{107}\)

Yet, divine commands and discursive rules or norms of scripture and their legal implications are not always recognized by most humans so as to bring their legal subjectivity into full realization. It is here where pedagogy plays a role in cultivating this legal subjectivity. The primary pedagogic approach to cultivating the legal subject in the history of Islamic law was through the process of pursuing fatwas. In addition, it is here where the Muslim legal subject takes an active role in the formation of their own legal subjectivity by seeking to understand the divine legal obligations, which are an indication of their *dhimmah*, yet at the same time these divine obligations are formally recognized by the *dhimmah*.

*Ifta’* (the method of fatwa generation) then was more than a procedure to generate legal rulings. It was a pedagogic procedure not only to inform the Muslim legal subjects of the discursively-based regulations that would regulate their religious practice, but also

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\(^{106}\) See Reinhart, 197 who claims that the fifth century AH Muslim Hanafi legal theorist al-Sarkhsı argued that.

\(^{107}\) See al-Taftazani, V.2, 348-349. Also see Reinhart, 197-198 for the different theories of Muslim legal scholars on the origins of *dhimmah*.
a process by which their legal subjectivity is shaped so as to make them comply to Islamic legal injunctions. In other words, the pursuit of fatwa is a function of their dhimmah (i.e. their legal subjectivity) as demonstrated in their want or need to fulfill their divine obligations through the seeking of fatwa. Yet at the same time the activity itself represents a sort of discursive practice which in turn reshapes their dhimmah to heighten their sensitivity towards these obligations and increase their observance of them.

To illustrate this phenomenological process as it played out historically in Islamic legal tradition, one may observe that members Muslim public submitted their religious questions to Muslim jurist-consults (i.e. muftis) whose status as religio-legal authorities was seen to be legitimated by the Qur’anic passages such as these: “Are those who know equal to those don’t know?”108 and “Ask the people of remembrance (i.e. knowledge) if you don’t know.”109 Jurists for their part, utilized a set of hermeneutical tools (i.e. usul al-fiqh) as well as recognized legal precedents and methodological considerations (i.e. usul al-madhab)110, which were previously established legal discourses and practices, to interpret the sacred textual sources (i.e. Qur’an and hadith) from which they rendered their judgment (i.e. fatwa).

These religious and legal judgments are then taken by the Muslim public and incorporated into their discursive-based practices. These practices both reflect of the Muslim subject’s religious disposition as well as influence their disposition to further observe these judgments. Hence, the Muslim legal subject contributed to these legal discourses (i.e. fatwas) and discursive formations (i.e. Islamic legal tradition) by his/her

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110 More will be said about usul al-madhab in the following chapter.
continued practice of *ifta*. Moreover, the Muslim subject was both a consumer and producer of these Islamic legal discourses through his/her practice of *istifta* (seeking of fatwas).

In essence, the formation of the Muslim legal subject was combination of pursuit and acquisition of fatwas, as well as practice in the form of observance of these religious and legal rulings. Both elements played their constructive role in creating a legal subject who would be consumer and producer of religious and legal discourse. Moreover, pedagogy and practice were reflexive processes in that one activity fed on the other in their shaping the Muslim legal subject. They were coextensive conditions for the formulation of a religious and legal disposition that would allow Islamic law to operate even when political sanction was non-existent.

**Conclusion:**

The first four centuries of Islam were the foundational period in which the Islamic legal tradition evolved and when many of its defining characteristics were conceived and refined. This is why this formative period came to occupy a special place in the collective memory of participants in this legal tradition, and the legal ideas and experiences emerging from this period became memorialized by the discourses (e.g. legal theory) and institutions (e.g. legal schools) that were established by later generations. There is no doubt that the idealization of this period in the history of Islam in general and the history of Islamic law in particular is a result of the construction of later generations who looked at their past with a growing sense of grandeur because the achievements of their predecessors whether those achievements were real or imaginary. Yet it was those
achievements that later generations did not forget and felt an urgent need to emulate that ultimately brought about the growth of an Islamic tradition.

The Islamic legal tradition was a result of slow discursive and dialectic processes which gave this tradition its peculiar qualities. This tradition was discursive in the sense that it emerged from a set of foundational discourses and sub-discourses that were a starting point for its legal discourses and practices. Yet it was the dialectic and dialogic engagement of those foundational discourses by the participants and specialists of this tradition which produced a legal structure that gave this tradition the form by which it shaped the legal activity in subsequent generations.

As a final note, my presentation of the Islamic legal tradition is somewhat self-contained in that I have tried to show how it emerged from some early discourses and practices. In reality, though, what has been mentioned here are not the only elements that went into building this tradition, and neither was this tradition insulated from the outside influence of other cultures and legal traditions. Islamic tradition and civilization of as whole is an original synthesis of ideas, experiences and practices from within the religion itself and those elements which in the onset were outside of it, but later were assimilated within the particular rationality of its tradition. This is what made all those elements Islamic, whether they actually were initiated by the practices of the Muslims themselves or were borrowed from other cultures and heritages. But what I have tried to show is that if not all aspects of the tradition come from within the religion itself, at least the fundamental pillars of this tradition come from its primary scriptural sources, and Muslim communities’ experience and engagement with those foundational texts.
In the next chapter, I will examine how the activity of fatwa was carried out for over a millennium within the confines of the Islamic legal tradition which fatwas played a crucial role in forming. As we will see, fatwas in this phase became more structured than they had been in the past by the limitations that the Islamic legal tradition imposed on them. We will come to explore in greater detail those structuring mechanisms that we only touched upon theoretically in this chapter. In this way, the reader will gain a greater appreciation of the peculiarities of the Islamic legal tradition in how it differs from other legal traditions.
CHAPTER 5

FATWAS, MUFTIS, AND MADHHABS: THE FORMALIZATION OF IFTA’ WITHIN THE LEGAL SCHOOLS

Introduction:

In the previous chapter, I charted the formations of Islamic legal theory and Islamic legal doctrines/schools and how the activity of fatwa was integral to these legal formations. In this chapter, I intend to show how the process of fatwa construction was influenced as a result of the establishment of the Islamic legal schools (madhhabs). Even as fatwa was an integral element in the establishment of these legal practices and institutions, once these legal institutions were configured they in turn regulated the process of fatwa formation by governing the manner by which these fatwas would be produced as well as constraining the range of legal possibilities of fatwas.

Max Weber characterized fatwas in the following way: “The authoritative response obtained, in just the same way as with Roman law, from authorized legal experts, Muftis, with the Sheikhu’-l islam at the top, by a Qadi or by the interested parties as the case might be, are to a remarkable degree the opportunistic products of particular situations, varying from person to person, are issued in the manner of oracles without any rational grounds being given, and have not in the least contributed to a rationalization of law, on the contrary, in practice they have further increased the irrationality of the sacred law”1 Weber often described this informal law-making process as Khadi-justice, by

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1 As quoted in d’Avray, pg. 154. Please see an alternate translation of same passage in Max Weber on Law in Economy and Society ed. M. Rheinstein and E. Shils, 229.
which he meant a rather personal and arbitrary manner of lawmaking containing few or no rules for how the law is to be formed and administered.²

It is hoped that the discussion of the formation of legal principles (*usul al-fiqh*) and legal institutions (*madhhabs*) in the previous chapter has gone some ways to dispel this caricature of the process of *ifta’* (the practice of generating fatwas) and Islamic law. However, this chapter will go further in calling into question this representation of the process of *ifta’* as an irrational (without rules)³ process is misconceived. I will do so by showing that after the establishment and maturation of Islamic legal schools, the process of *ifta’* became even more a structured activity governed by a set of discursive rules and procedures that contributed to the greater formalization of this legal practice.

But prior to engaging in these issues, in the next section of this chapter I will synchronically map the discursive process of *ifta’* in a social field model. This didactic digression is for the sake of determining the structure of this legal practice and its non-discursive religio-legal effects on practitioners. This mapping will define the structure of the practice of *ifta’* and recapitulate the essential features of this practice that have been covered so far in this study.

**The Process of *Ifta’* and the Islamic Jurisprudential Field**

In mapping the practice of *ifta’* into a socio-legal field model, I will employ Bourdieu’s concept of social field to chart the dynamics of this activity. Hence, I will give a brief presentation of Bourdieu’s social theory in general, with a focus on the notion

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³ A procedure without impersonal rules is what I understand Weber to mean by irrational. See Weber, 1946, 282 for an understanding of what Weber meant by his notion of rationality.
of social fields, in order familiarize the reader with theoretical tools I will employ in this analysis. My reading of Bourdieu’s social theory reveals that there are three essential elements that comprise society:

1-Social World: Consisting of the social structures that exist objectively and shape the mental world of the individual.

2-Mental World: consisting of structures that exist in the individual's mind that are formed under the influences of the social structures and which determine ones behavior in the social world.

3-Symbolic system: the symbolic means by which the social world and the mental world of the individual interface. e.g. religion, language, art, etc.

The relationship between these three components can be diagramed as follows:

Figure 1: The General Structure of Bourdieu’s Social Theory.

For Bourdieu, the social world consists of various fields (social structures) which define its operations. A field: represent various arenas (social spaces) in the social world where various groups or individuals interact/compete with one another so as to meet their needs (e.g. religious, economic, political, etc.). The use of the field metaphor as the context that describes social interactions implies that there are social forces at work in the social world and that social fields are not free places of social interaction but they are structured by relations of power. Therefore, a field is something that exerts a force on the

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4 This model was extrapolated by the author while reading Bourdieu’s article “Genesis and Structure of the Religious Field”, see especially pg. 5. Also my reading of his work Outlines of a Theory of Practice gives support to this model, see pgs. 72-73.

5 Rey, 41.

6 Rey, 41.
agents that participate in it and structures them in certain positions within the social world. Individuals occupy certain positions (classes) in the field based on the social capital they possess. Also, individuals based on their social standing, struggle for the production, administration, and/or consumption of the capital in any given field; so all fields function on the basic economic logic of supply and demand for social capital.

But what is social capital and what is its relationship with the social fields? Capital forms the basis of the exchange/interaction between individuals and the social world or the various groups within any given social field. Essentially, what Bourdieu means by capital is the symbolic and/or material resources in the various social fields and based on the type and amount of social capital one possesses determines their position (power) in any given social field; thereby influencing the types of actions and interactions they will make in any given social field.

In other words, capital can be viewed as the force (symbolic power) exerted by the field on the different agents occupying it so as to structure their relations to the field. In another way, it can viewed as a metaphor used to represent the archetypical medium of exchange (symbolic system) which facilitates the types of actions in the social field. Different fields have different types of capital (e.g. religious capital and political capital) that is sought by the various individuals in any given social field based on their individual

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7 Rey, 44.
8 Rey, 44.
9 Rey, 41, 44.
10 Both symbolic and material capital are convertible to each other in Bourdieu’s view. See Bourdieu, 1977, 178-179, 183.
11 Rey, 51.
12 Rey, 52.
So it is like the denomination of the symbolic system (e.g. religion is a symbolic system containing religious capital that mediates the interactions of individuals/groups in the religious field).

So, all fields function in terms of the economic logic of supply and demand of capital that is produced by some agents in the field and consumed by others. The field is viewed as an arena where there is a competition for the production, administration and consumption of capital. The type of capital one seeks in any given field reflects what Bourdieu call their habitués. Habitués is the matrix of perception (mental structure) and behavioral disposition of the individual that forms the foundation of individual's actions and practices in the social world. It is formed by the structuring forces of the various fields that the social agent participates in. Yet, there is a reflexive (generative) relationship between habitus and the social fields, in that it is the habitus induced practices (actions) of the individual in any given field which regenerate the field and by extension perpetuates the whole social structure. In other words, habitués is an internal faculty that is structured by the social order and at the same the social order is structured by the types of attitudes and actions one undertakes in the social world.

These are the fundamental elements in Bourdieu’s social theory: habitus, capital, field, and all of these components combined are the factors that determine human action in what Bourdieu calls ‘practice’. Bourdieu has represented this conglomeration of factors that produce practice in the following mathematical formula: Habitus (Capital) +

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13 Rey, 51.

14 Bourdieu, 1977, 72, 82-83; also see Rey, 47.

15 Bourdieu, 1977, 82-83; also see Rey, 46-47.
Field = Practice. Even as this formulation captures the conglomerate dynamic of practice, this equation-metaphor fails to articulate the reflexive and generative relationship existing between practice and its various constituent elements (habitus, capital, and field) as well as the reflexive and generative relationship between the very constituents of practice themselves. So a more comprehensive formula would capture the inter-reflexivity and inter-generative relationship existing between habitus, capital and field showing how fields shape habitus and in turn how habitus influences the regeneration of the field for example. And at the same time it would express the reflexive and generative relationship between habitus, capital, and field on the one hand and practice on the other. Perhaps a more dynamic representation of the topology of Bourdieu’s theory of practice than the static (additive) equation listed above could be as follows:

**Figure 2: Reflexive Representation of Bourdieu’s Theory of Practice.**

Bourdieu views the entire arena of social interaction and structure as being

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16 Rey, 50.
inherently one of domination, and hence oppression, by certain groups/classes that possess the right power (capital). Hegemony and social conflict lay at the very core of every social relationship as evident in his own application of his theory of practice to different human spheres.\footnote{See for example his \textit{Outlines for a Theory of Practice}, or his articles entitled: “The Force Law: Toward a Sociology of the Juridical Field” or “Genesis and Structure of the Religious Field.”} I should make it clear to the reader that although I find Bourdieu’s theory of practice and concept of social fields as a useful tool to describe various forms of social interaction and their limitations, I do not necessarily subscribe to the skeptical spirit of Bourdieuan social analysis, his hermeneutics of suspicion. Hence, my analysis of jurisprudential field of \textit{ifta’} will utilize Bourdieu’s form of field analysis, but will exorcise its spirit of hermeneutics of suspicion. In other words, interaction between different human classes or groups may be hegemonic or emancipatory depending on the types of exchanges (exchange of symbolic capital) that take place between them as I will try to show in my application of this model.

Now that I have sufficiently described the elements of Bourdieu’s social analysis, I am in position to use those elements to construct a representation of an Islamic jurisprudential field as its relates to the practice of \textit{ifta’}. This model does not purport to describe the entire Islamic legal field, but that component particularly pertaining to the practice of \textit{ifta’}. This is why Bourdieu’s analysis of the juridical field\footnote{See Pierre Bourdieu’s “The Force Law: Toward a Sociology of the Juridical Field.”} is not as pertinent here because the focus of that study is about judges, lawyers and courts, while the jurisprudential process in the Islamic legal tradition, as has been shown, is different than other legal traditions since it has been largely a product of legal activity outside of the confines of state sanctioned legal circles.
The Islamic legal tradition is as I have shown earlier a discursive legal tradition where a set of foundational discourses shape the jurisprudential field where legal activity takes place thereby making it a discursive field where the symbolic capital being traded in this field is fatwa discourse. This discursive field is structured with hierarchies of authority. The first and foremost authority in this hierarchy is the textual authority of the foundational discourses of the Qur’an and hadith. The authoritative discourses are mediated through a second tier of authority in this field and that is the hermeneutical authority of the jurists, whose discourses (fatwas) interpret the legal implications of the foundational discourses to the larger Muslim public.

Hence, this discursive jurisprudential field is structured through a dialogical exchange of discourses that are hierarchically arranged with respect to the various agencies that occupy the field depending on the type of symbolic capital they possess. It is this symbolic capital (legal discourses and/or injunctions) that mediates between the various agents in this discursive field. Textual authority (Qur’an and hadith) is the ultimate source of the primary symbolic capital (goods of salvation) that is exchanged and hence scripture occupies the highest form of authority in this religio-juridical field. The jurists, as occupiers of legal hermeneutical authority in this field, change the symbolic capital of sacred text into the symbolic capital of fatwas because this form of symbolic capital facilitates (elucidates) proper methods of religious practice for the Muslim public (religio-legal subjects).

Yet the Muslim legal subject is the one who initiates the exchange of sacred scriptural discourses with the capital of fatwas through the act/practice of inquiry so as to seek elucidation (istifta’). So the Muslim legal subjects are not only consumers of
symbolic capital in the form of the legal discourses of jurists, but also generate their own symbolic capital in the form of religious-legal inquiries that are both exchanged by the legal subjects as consumers for the symbolic capital of jurists by the legal subjects fatwas and simultaneously their inquiries give rise to the fatwa discourse.

So the Muslim legal subjects in their exchange of the forms symbolic capital existing in this jurisprudential field play a generative role in shaping the sort of capital that is exchanged regenerating the religio-juridical field through their legal practice of inquiring about religio-legal matters. Moreover, when the Muslim legal subject acts upon this religio-legal discourse (the symbolic capital of fatwa), s/he shapes their religio-legal habitus (dhimmah) and thereby internalizes the structure of the Islamic discursive legal field in their religio-legal constitution. This internalized religious disposition is manifested in their religious practice further fostering the social conditions for the reproduction of this religio-juridical field

In directing their inquiries to a group of specialist on the foundational discourses (Qur’an and hadith) of this discursive legal field, the Muslim legal subject confers hermeneutical authority on the jurists. This is because the Muslim legal subject exchanges their ordinary capital in the form of questions for the more prized symbolic capital of Muslim jurists in the form of legal discourse, specifically a fatwa. In return for the unequal exchange of capital, the Muslims jurists are granted social prestige by the Muslim legal subject where this social prestige fosters the jurist’s socio-legal authority.

We have already mentioned how these jurists play the hermeneutical role of elucidating scriptural injunctions through their production of the symbolic capital of fatwas, which is consumed by the laity. In the process of producing this symbolic capital,
jurists employ various legal and hermeneutical tools such as qiyas, istislah, ijma’ to convert the scriptural currency into a form of capital that is more readily consumed by the laity, the fatwa. It is through these means that jurists obtain their epistemic legitimation as purveyors and mediators of the textual authority vested in the Qur’an and hadith. This textual authority is the source of legal norms that provide the matter/substance of the jurisprudential legal capital in their fatwas.

Hence, in the Islamic religio-legal discursive field there exists a definite hierarchy based on symbolic power that determines what positions the different agents occupy in that field. The textual authority of the discourses of Qur’an and hadith exerts power over the religious laity because it meets their religious interests as it represents the source of their salvation goods. The hermeneutical authority of the jurists exerts power over the religious habitus of the laity because of their epistemic ability to convert by elucidation the symbolic capital of scripture into the symbolic capital of fatwas, which is more easily consumed by being understood and put into practice by the religious laity. So it is through the symbolic capital of legal discourse that the Islamic discursive legal field exerts its power over the various agents/practitioners among both jurists and laity. So it is these discourses that are the field vectors by which the power and the structure of this religio-juridical field is generated. The entire operations of the discursive religio-legal field of ifta’ can be summed up in the following diagram:
Figure 3: The Islamic Legal Discursive Field.

I should make it clear that my presentation of this Islamic legal tradition in the format of social fields does not seek to negate the agency of the practitioners who occupy the field by displaying the power of social structures. Agents, all along, play a role in reproducing the field by engaging in the exchange of the symbolic capital that eventually fosters the production of their religious and legal practices. Yet the idea of the field is that these interactions and practices are structured.

Discursive Rules of Fatwa, Classes of Muftis, and the Authoritative Structure of Madhhab:

As I alluded to in the introduction of this chapter, fatwas after the 5th/11th century
AH/CE became increasingly restricted to the established legal schools (*madhahib*), in that the fatwas issued now had to be consistent with the legal doctrines that were the discursive embodiment of those schools. Muslim jurists within each school now began to lay down rules by how fatwas were to be issued within the confines of the legal schools and the rules of their schools in particular. The literature that attempted to define these rules became known as *adab al-fatwa* (the etiquette of fatwa). As will be shown later in this section, these writings attempted to define the qualifications and categories of *muftis* who could issue fatwas, what legal doctrinal rules they must observe in issuing their fatwas, and the procedures that muftis must observe in issuing their fatwas.

I want to explore those discursive rules for fatwa production as found in what is known as *adab al-fatwa* literature. This type of literature started to come into being in the late 5th/11th century AH/CE around the time when the development of the institution of legal schools (*madhahib*) had matured. These kinds of works describe the different levels of muftis and the types of fatwas that each rank of mufti may legitimately issue within the rules established by the legal schools. My aim in detailing these typologies is to define the discursive rules that were set by jurists and legal theorists of this period as to how fatwas were to be issued and who had the right to issue them. This discussion will contextualize my discussion in the next chapter which aims to determine how muftis of this period maneuvered in and around these discursive rules when producing their fatwas.

The Early Phase of Formalization of Fatwas and the Structuring of Madhhabs c.1100-1300:

Up until the 5th/11th century AH/CE Muslim legal theorists affirmed that any jurists who sought to give fatwas must be at the level of *mujtahid* by which they meant a
jurist who had the legal capacity to derive his legal opinions directly from the sources of
the law and hence had the same level of juristic competence as those who are considered
founders of the legal schools. As late the 5th/11th and early 6th/12th century AH/CE jurists
and legal theorists like al-Ghazali (d. 505/1111 AH/CE) were still affirming in their
works on Islamic legal theory that there was only one true level of a mufti and that was to
the mufti who was a mujtahid (independent jurist).19

Later this level of ijtihad (legal competence) would be designated as mujtahid
mutlaq (absolutely independent jurist) to distinguish this level of jurisprudential activity
from newer categories of muftis were being introduced as the Sunni Islamic legal schools
(madhhab) were becoming ever more differentiated in their structure by the end of the
5th/11th century AH/CE. This movement towards greater differentiation of categories of
muftis and levels they occupy within the structure of the institutions of the Islamic legal
schools began to formalize how fatwas were to be issued within the boundaries of the
doctrines of these legal schools and by whom they can be issued.

In Authority, Change and Continuity of Islamic Law, Hallaq traces the early
beginnings of formalization of fatwa and muftis to the early 6th/12th century AH/CE with
the fatwa of Ibn Rushd al-Jadd (d. 520/1126 AH/CE) who responds to a question posed to
him about the classes of muftis in the Malaki madhab. I will examine the inquiry posed
to him and his fatwa in detail later in this section. However, my investigation revealed
that the beginning process of the classifications of muftis and their fatwas, can actually be
traced back a half a century earlier to the late 5th/11th century AH/CE with the Shafi‘i
jurist and legal theorist Abu Al-Ma‘ali Al-Juwayni (d. 478/1085 AH/CE) who discusses

19 Hallaq, 1996, 35.
this matter in his work entitled *Ghiyath al-Umam*.

Ironically, this work is about Islamic political theory and not legal theory per se, yet it contains a discussion of how Islamic law fits into his Islamic political scheme. His discussion about jurists/muftis is a result of his assertion that they are the carriers and guardians of the law\textsuperscript{20}, which is a central aim of Islamic political theory, and hence no discussion of law and political theory is complete without defining who these guardians of the law are and their respective status. By the 5\textsuperscript{th}/11th century AH/CE, legal schools or *madhhabs* had been firmly established legal institutions in Muslim society and hence, a theoretical discourse about *muftis/jurists* and their relationships to the already established *madhhabs* in that era is pertinent. In respect to classes of muftis, al-Juwayni delineates what explicitly appears to be a three tier scheme for muftis.

At the top of the scheme is the class of mufti who is designated as a *mujtahid*. The *mujtahid* is the mufti who has encompassed all of the legal capacities to make *ijtihad* (in this context it means independent legal reasoning to make assertions about the law without reference to established legal doctrines).\textsuperscript{21} Al-Juwayni says that to achieve this legal capacity, the *mujtahid* must have the following six attributes: First, competence in the Arabic language because the sources of the law stem from Arabic literary sources (Qur’an, *sunnah*, and previous legal judgments) and so there is no recourse other than to be highly proficient in Arabic as it is the means to comprehending the Shari’ah or law.\textsuperscript{22} Second, knowledge of verses in the Qur’an that deal with legal injunctions as well as

\textsuperscript{20} Al-Juwayni, 285.
\textsuperscript{21} Al-Juwayni, 285.
\textsuperscript{22} Al-Juwayni, 286.
knowing those that are abrogated and whether those verses have universal or particular implications.\textsuperscript{23} Third, to have knowledge of the \textit{sunnah} (prophetic practice) because most legal injunctions come from this corpus; moreover, the \textit{mujtahid} should know how to navigate through this literature by possessing knowledge of the various sciences of \textit{hadith} as well as distinguishing between those aspects of the \textit{sunnah} that have legal implications from those that do not.\textsuperscript{24} Fourth, the \textit{mujtahid} must have knowledge of legal doctrines of past \textit{mujtahids} so as not promulgate fatwas that go against an established \textit{ijma’} or consensus of previous jurists.\textsuperscript{25} Fifth, he must possess comprehensive understanding of the means of \textit{qiyas} (legal reasoning) and the level of authoritativeness of legal proofs.\textsuperscript{26} Lastly, the \textit{mujtahid} must be pious in order for his fatwas to have currency,\textsuperscript{27} although that this is not an absolute pre-condition for the legitimacy of his \textit{ijtihad} with reference to himself even though others should not take from him unless he is pious.\textsuperscript{28}

Al-Juwayni goes on to say that this \textit{mujtahid}-mufti need not follow the previously established doctrines of the \textit{madhhabs}, but should issue fatwas in accordance with his own legal reasoning that may be followed by others even when there are established legal doctrines,\textsuperscript{29} even though al-Juwayni asserts that this type of \textit{mujtahid} probably no longer exists in his age.\textsuperscript{30} Therefore, he goes on to spell out the description of the second class of

\begin{thebibliography}{9}
\bibitem{juw1} Al-Juwayni, 286.
\bibitem{juw2} Al-Juwayni, 286-287.
\bibitem{juw3} Al-Juwayni, 287.
\bibitem{juw4} Al-Juwayni, 287.
\bibitem{juw5} Al-Juwayni, 287.
\bibitem{juw6} Al-Juwayni, 288.
\bibitem{juw7} Al-Juwayni, 291.
\bibitem{juw8} Al Al-Juwayni, 298.
\bibitem{juw9} Al-Juwayni, 300.
\end{thebibliography}
mufti who are more or less followers of already established legal doctrines as represented by the madhahib (sing. madhhab). Their main function is to transmit those doctrines through their fatwas to the laymen.\(^{31}\) So this type of mufti is not autonomous in his fatwas since he does not have the capacity for independent legal judgment directly from the sources of the law (Qur’an, hadith, qiyas, etc.).\(^ {32}\)

Furthermore, that this type of mufti would be faced with two types of situation: one where he is asked about the legal status of situation that has been addressed by the established doctrines and the other where he is asked about a situation that has not been explicitly addressed by previous doctrine.\(^{33}\) As for the first case, he must transmit the teachings of the madhhab with regards to the case at hand.\(^{34}\) As for the second case, when this type of mufti is faced with situation that has not been previously addressed in the legal doctrine of the madhhab, then al-Juwayni affirms that this class of mufti, who is not autonomous from the legal doctrines of the school, is of two kinds. One who is capable of transmitting the explicit legal doctrines of the school and the legal implications of those doctrines as well as being able to sort out and select (tahreer wa taqreer) the proper positions of the school, but does not have the legal capacity to decide legal cases that are not explicitly determined by the legal doctrine (ghayr mansus) based on cases that are explicitly decided by the doctrine (mansus)\(^ {35}\) because he lacks the means of legal reasoning (masalik al-aqyisah) and the capacity to deduce legal implications (from the

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\(^{31}\)Al-Juwayni, 300-301.  
\(^{32}\)Al-Juwayni, 300-301.  
\(^{33}\)Al-Juwayni, 301.  
\(^{34}\)Al-Juwayni, 301.  
\(^{35}\)Al-Juwayni, 303.
established doctrines).\textsuperscript{36} However, al-Juwayni is quick to assert that this level of mufti may deal with some legal cases which are not explicitly dealt with by the doctrine of the madhhab if such cases are unambiguously implicit in the stated doctrine (\textit{fi ma’na al-mansus}).\textsuperscript{37} On the other hand, there is a level of mufti within a madhhab, whom he calls the independent jurist within the madhhab of an absolute jurist (\textit{al-faqih al-mustaqill bi-madhhab imami}), who comprehends the legal rationale and methodology (\textit{aqyiasiah wa-turuq}) underlying the doctrines of his madhhab and hence is able to decide legal cases that are not explicitly stated in the doctrine based on those that are stated.\textsuperscript{38}

In summary, it seems that al-Juwayni’s classification of muftis is of two main types: one who is a mujtahid (an absolutely independent jurist) who does not follow an established doctrine, and is capable of independently forming his own legal opinions. Examples of this type are the purported founders of the legal schools in the 2\textsuperscript{nd}/8\textsuperscript{th} and 3\textsuperscript{rd}/9\textsuperscript{th} centuries AH/CE. Moreover, it is completely legitimate for lay persons to follow such a mufti-mujtahid, if one actually exists, at the expense of following an established doctrine of a legal school of a past mufti-mujtahid (one of the eponymous of the four madhhabs). The second type of mufti is one who is not completely independent of the established doctrines of the legal schools and issues fatwas that must be consistent with the doctrines of the particular madhhab that he subscribes to. Under this second type of mufti, there are two sub-types: one is the mufti who is capable of dealing with legal cases that are not explicitly dealt with in the legal doctrine of the madhhab by inferring their solutions from cases that have been determined in the doctrine, while the other sub-type

\textsuperscript{36} Al-Juwayni, 306.
\textsuperscript{37} Al-Juwayni, 303-304.
\textsuperscript{38} Al-Juwayni, 306.
of mufti is only able to issue legal opinions that transmit the explicitly-stated doctrines of the school and cannot render legal decisions based on new cases.

If such proposals for stratification of muftis within the confines of *madhhab* were taking place among Shafi‘i jurists in the Near East, a similar discussion was taking place amongst Malikis in the North Africa and the Iberian Peninsula. The Maliki jurist Ibn Rushd al-Jadd (d. 520/1126 AH/CE) was asked, in the form of letter that was written to him, for a fatwa to provide the criteria for the categories of muftis that are eligible to make the various levels of fatwas in the Maliki school. Here are a few aspects of the fatwa question/letter posed to Ibn Rushd that are relevant for our discussion on the discursive rules of fatwa:

1- In Ibn Rushd’s fatwa collection, the date the letter or question sent to Ibn Rushd was preserved and says that the letter was dated about halfway through the year 519/1125 AH/CE, which is the year prior to Ibn Rushd’s death.³⁹ So, this debate takes place after the establishment and maturity of the institutions of *madhhab* (legal schools) in the 4th-5th century AH which is a pre-requisite for such a debate about the place of levels of *muftis* in a *madhhab*. Secondly, Ibn Rushd’s exposition of the problem occurs late in his life indicating that his response was not superseded by some more developed notion later in his life.

2- The letter written to Ibn Rushd gives the context to the questions by saying that the question was a result of an unresolved debate which took place between two parties in Tangiers in *al-Maghrib*.⁴⁰ Given that Ibn Rushd was jurist who resided

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³⁹ Ibn Rushd, V.3, 1494.
⁴⁰ Ibn Rushd, V.3, 1494.
in Granada in Muslim Spain (Andalusia) at the time shows that he was a highly-regarded Muslim jurist, especially within the Maliki school for them to reach across the sea in search of a decisive answer to the debate.

3- Third, the letter/question claims that a debate ensued between two parties. One party asserted that there were two levels of muftis or types of fatwas while the other party insisted that there was only one level of muft. The first party who asserted two levels of fatwa claimed that one type of fatwa comes from an absolute/independent mufti-mujtahid (al-faqih an-nadhhar lit. legal theoretician) who is able to extract the ruling directly from the foundations of the law (usul al-fiqh): The Qur’an, sunnah (Prophetic practice), ijma’ (consensus), and qiyas (analogy), and this type of fatwa is not derived from the existing legal doctrines (al-fiqh al-mashhour) but rather is a consequence of his jurisprudential capacities.\footnote{Ibn Rushd, V.3, 1497.}

On the other hand, the second type of fatwa is a derived from the already-established legal doctrines of the recognized schools of law, and this type muft is one who is considered a dependent/relative mufti (al-faqih al-muqallid) because he only has knowledge of the legal doctrines of his particular legal school (madhhab), in this case the Maliki madhhab, and is well grounded in its legal principles/methodology (usul madhabihi); hence, his fatwa is considered a relative/dependent fatwa (fatwa al-taqlid)
since it does not derive from the ultimate sources of the law: Qur’an, *sunnah* (prophetic practice), *ijma’* (consensus), and *qiyas* (analogy).\(^{42}\)

4- The questioner interjects at this point in the letter and asserts that his understanding of the Maliki *madhab* is that this second type of fatwa, that is one issued from a dependent/relative mufti (*al-faqih al-muqallid*), is not allowed in the Maliki school. Furthermore, this is claimed to be the position of the majority of scholars/jurists except Ahmad Ibn Hanbal (the eponym of the Hanbali *madhab*).\(^{43}\)

5- The questioner goes on to explain, that the other party in this debate, who happens to coincide with the questioner’s point of view, asserts that there was no legitimacy in the Maliki *madhab* for the second type of fatwa or *mufti* and that there is a scarcity of absolute/independent *muftis/mujtahids*.\(^{44}\) Hence, concludes the questioner, the position of the second party, as well as his own position, leaves the lands where the Maliki *madhab* predominates in a perilous situation, given that they have no absolute *mufti/mujtahid* and hence no legitimate means to acquire a valid fatwa that would address their concerns. Hence, the questioner asks Ibn Rushd to clarify the matter for them and tell them of the legitimate position of the Maliki *madhab* on this issue of the categories of accepted *muftis/mujtahids*.\(^{45}\)

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\(^{42}\) Ibn Rushd, V.3, 1497.  
\(^{43}\) Ibn Rushd, V.3, 1498.  
\(^{44}\) Ibn Rushd, V.3, 1498-1499.  
\(^{45}\) Ibn Rushd, V.3, 1499.
The significance of this fatwa question is in the fact that it shows that Muslim communities and/or regions in the lands where Islam predominated were already defining their practice of Shari’ah or Islamic law through an allegiance to a particular school of interpretation of what that law constituted at least by the early 6th century AH if not earlier. Moreover, they were trying to work out the implications of such an allegiance in terms of who has the right to speak about the law within the confines of a particular legal school or madhhab, in this case the Maliki legal school.

For the parties involved in this debate, conformity to an Islamic legal school or madhab was a point of already agreed upon. But the issue revolved around what constituted proper conformity as the questioner indicates that the implications of the position of the second party meant that the regions where the Maliki school predominated would be at loss if that were the true position of the Maliki school and one did indeed adhere to it since there was no legitimate mufti who would meet that criteria in that era and region. Furthermore, their commitment to the Maliki school is underscored by the fact that they sought out the counsel of a preeminent Maliki jurist like Ibn Rushd and not just any knowledgeable jurist who might have belonged to another school.

Ibn Rushd responds by stating that there are three categories of muftis in the Maliki madhab: first are those who assumed the validity of the Maliki madhab through imitation without seeking proofs for their position and took it upon themselves to learn the legal opinions of the jurist Malik and his associates (ashab) without understanding their legal implications (ma’aniha) thereby being incapable of distinguishing the sound from unsound legal opinions.\(^{46}\)

\(^{46}\) Ibn Rushd, V.3, 1500. Also, see Hallaq, 2004, pg.3 for a variant summery of this response.
The second group of muftis are those who also assumed the validity of the Maliki madhhab based on their comprehension of the validity of the foundational legal principles from which the school was constructed; so likewise this group also learned the legal opinions of the jurist Malik and his associates and comprehended the legal implications of those foundational legal principles of the school so that they were able to distinguish the sound opinions [of Malik and his associates] that were consistent with those principles from those that were unsound and were a breach of those principles. Nevertheless, their legal abilities have not reached the degree of verification (tahqiq) needed to derive positive legal rulings (furu’) from general legal principles (‘usul).48

The third category of muftis resembles the second category, but differs from them in that they have reached the capability of deriving positive legal rulings (furu’) using the general legal principles (‘usul al fiqh) because of their firm knowledge and understanding of the scriptural injunctions (from both Qur’an and hadith) as well as being versed in hermeneutical tools [e.g. naskh (abrogation), khass (particular implication), ‘aam (universal implication), etc.] that help them interpret those injunctions as well as because of their general awareness of the legal rulings of previous generations of scholars and the appropriate legal methodologies of arriving at legal rulings (e.g. qiyas).49

Once Ibn Rushd has delineated the three categories of muftis, he begins to describe the level of fatwas that can be produced by each category. As for the first category, he says that they do not have the legitimacy to make fatwas based on what they

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47 Ibn Rushd, V.3, 1500-1501. Also, see Hallaq, 2004, pg.3 for a variant summary of this response.
48 Ibn Rushd, V.3, 1501. Also, see Hallaq, 2004, pg.3 for a variant summary of this response.
49 Ibn Rushd, V.3, 1501. Also, see Hallaq, 2004, pg.3 for a variant summary of this response.
have learned from the legal opinions of Malik or his associates because they do not have knowledge about the validity of such positions (they do not understand how these opinions were derived from the legal principles), and it is not legitimate to issue of fatwas based on imitation (taqlid) if one hasn’t the legal knowledge to authenticate such fatwas. This group only has the right to follow its understanding of the law for its own practice so long as they cannot find a mufti who is legitimately qualified to give fatwas. So in essence this level of mufti is not really a genuine mufti despite his basic knowledge of the law within the legal school and is closer to what is known as a muqallid (a laymen follower of a madhhab).

As for the second category of muftis, he says that they have the legitimacy to issue fatwas in accordance what they know of the legal opinions of Malik and his associates and personally follow those opinions if these have been proven to be sound (in accordance with the principles (usul) of the madhhab). But it is not legitimate for this category of mufti to issue fatwas based on its own legal reasoning (ijtihad) where there is no textual evidence (nass) indicating that the fatwa is a legal opinion held by Malik or his associates. This is because this group of muftis lack all of the legal requirements to make ijtihad (independent legal reasoning), since they do not have the capacity to derive the positive legal rulings (furu’) from the general legal principles (‘usul) [ to derive legal injunctions directly from the agreed upon sources of the law: Qur’an, sunnah (prophetic practice), consensus (ijma’), or analogy(qiyas)]. So this level of mufti is one who is allowed to issue fatwas or legal rulings within the confines of the agreed-upon legal

50 Ibn Rushd, V.3, 1501. Also, see Hallaq, 2004, pg.4 for a variant summery of this response.

51 Ibn Rushd, V.3, 1502. Also, see Hallaq, 2004, pg.4 for a variant summery of this response.
principles of the madhhab he belongs to, but is unable to issue fatwas that run counter to the legal principles of his madhhab or its doctrines.

As for the third category, they have all of the necessary requirements of being able to derive positive legal rulings (furu’) from general legal principles (‘usul) [to derive legal injunctions directly from the agreed upon sources of the law: Qur’an, sunnah (prophetic practice), ijma’ (consensus), or qiyas (analogy)].\(^\text{52}\) So this level of ijtihad/ifta’ seems to be at the level of the absolute mujtahid (autonomous jurist or legal authority) who need not follow any other legal authority and who must follow his own reasoning in deriving the law.

Ibn Rushd is never quite clear on whether this last category of mufti-mujtahid are independent enough in their authority to initiate their own madhhab (to create a legal doctrine that would be followed by others), but given that the context of his statements is an answer to the question about the level of muftis within the Maliki school, it is probably safe to assume that he was speaking of a type of absolute mujtahid who has all of the legal tools to make his own ijtihad (authoritative legal judgments), yet ascribes himself to an existing legal school and follows its legal doctrine and its peculiar principles and methodologies of deriving the law. This category of mufti-mujtahid will be more well defined in subsequent typologies of the level of madhhab authorities that I will expound on in this section.

But what is more evident in Ibn Rushd’s expository fatwa, as well as al-Juwayni’s classifications of muftis, is that madhhab are framed as multi-dimensional structured entities containing various levels of muftis who, depending on their

\(^{52}\) Ibn Rushd, V.3, 1502. Also, see Hallaq, 2004, pg.4 for a variant summery of this response.
authoritative rank within the legal school, can issue fatwas of varying degrees of
daughter within the legal school. Despite these diverse authoritative gradations of
fatwas, all of these fatwas are reflective of the legal principles and doctrines of the
madhhab which that mufti subscribes to. As a final note, this fatwa shows that although
the overwhelming majority of fatwas dealt with practical matters of religious practice,
there were exceptional cases like this one where fatwas dealt with rather theoretical legal
concerns.

If al-Juwayni’s exposition and Ibn Rushd’s fatwa represented the early stages of
formalization of ranks within legal schools, later expositions of this matter became more
sophisticated in their stratifications of muftis as well as detailing the legal competence
needed to make fatwas within the boundaries of a madhhab. Take for instance the 6th/12th
century AH/CE independent Hanafi jurist (mujtahid) Qadi Khan (d. 592/1195 AH/CE).
He was from a generation of jurists that followed Ibn Rushd, and he prefaces his fatwa
collection, known as Fatawa Qadi Khan, with a description of a mufti (rasm al-mufti)
within the bounds of his Hanafi school. This represents an early attempt by a member of
the Hanafi school to circumscribe the activity of fatwa and the classifications of mufti
within their madhhab.

He says the mufti of his era (zamanina) that belongs to his madhhab/school (ashabina) is one who, when asked about a legal matter that had been addressed before
whose solution is found in the authoritative doctrines of the Hanafi school (dhahir al
riwayah), should issue a fatwa in accordance with those established legal opinions,
provided that the authorities of the school had reached a consensus reached a consensus
(consensus in the opinions of the purported founders of the school: Abu Hanifah, Abu
Yusuf and Al-Shaybani). Such a mufti must not resort to his own view even if he is an experienced mujtahid (absolute jurist).\textsuperscript{53} Qadi Khan justifies this position by claiming that the correct legal opinion most probably lies with the authorities of the madhhab/school (ashabana), and the mufti’s legal reasoning (ijtihad) probably does not match theirs.\textsuperscript{54}

Moreover, this mufti should not be concerned with other jurists who disagree with the founders authoritative positions nor should he be satisfied with his own legal proof (hujjah) for his position because they (the absolute jurists of the school: Abu Hanifah, Abu Yusuf, and Al-Shaybani), more than anyone else, understood the legal evidences (adillah) and were most capable in distinguishing those legal evidences that were sound from the ones that were unsound.\textsuperscript{55} What Qadi Khan is speaking of here is the type of mufti that reached the level of mujtahid (an independent jurist) within the Hanafi school, but not absolutely independent to go against the purported founders and absolute mujtahids of the legal school. This category is similar to the second category of Ibn Rushd and al-Juwayni’s classification of muftis.

On the other hand, if there is a difference of opinion amongst the founding authorities (Abu Hanifah, Abu Yusuf and Al-Shaybani) of the madhhab, then he should see where Abu Hanifah agreed with one of his two associates (either Abu Yusuf or Al-Shaybani), then the mufti should take this legal position because of the greater

\textsuperscript{53} Qadi Khan, V.1, 2. \textit{Fatawa Qadi Khan} as printed on the margins of \textit{Al-Fatawa Al-Hindiyyah} by Shaikh Nizam.

\textsuperscript{54} Qadi Khan, V.1, 2. \textit{Fatawa Qadi Khan} as printed on the margins of \textit{Al-Fatawa Al-Hindiyyah} by Shaikh Nizam.

\textsuperscript{55} Qadi Khan, V.1, 2-3. \textit{Fatawa Qadi Khan} as printed on the margins of \textit{Al-Fatawa Al-Hindiyyah} by Shaikh Nizam.
preponderance of legal proofs lies with the both of them. Now if Abu Hanifah’s opinion goes against the opinions of his two associates in matters regarding human transactions (mu’amat), then the mufti should take the legal opinions of Abu Hanifah’s two associates (Abu Yusuf and Al-Shaybani) in those matters, because there is consensus among later jurists in the Hanafi madhhab on this position. As for other legal arenas where there is dispute between Abu Hanifah and his associates, the mufti who is at the level of independent legal reasoning (mujtahid) within the confines of the Hanafi school should take the position that his own reasoning has led him to.

Then Qadi Khan goes on to describe the qualifications of mufti that is described as a mujtahid (independent jurist) within the Hanafi school. Here is where there seems to be a difference in opinion by the later authorities in the madhhab of what constitutes a mujtahid (independent jurist) within the school. Some said that if he is a person who exercises ijtihad (legal reasoning) on ten issues and gets eight of them right, then he is a mujtahid. Others authorities said that he must have memorized the al-Mabsut, Al-Shaybani’s work which first laid out the legal doctrine of the Hanafi school, some of the hermeneutical concepts of usul al-fiqh (legal theory) like naskh (abrogation) and must be familiar with the customs of people. Qadi Khan never quite decides on which of the two criteria mentioned would be the one to decide who is a mujtahid within the Hanafi

56 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.
57 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.
58 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.
59 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.
madhhab.

But if the legal solution to an issue that arises is not in the authoritative doctrines of the past (dhahir al-riwayah), then he should resort to the legal principles of the madhhab to resolve the issue. But if there is a legal opinion that is not found in the authoritative doctrines (dhahir al-riwayah), yet the later jurists within the madhhab are unanimous about their legal position on the issue, then the mufti should take their position. But if the later jurists disagreed on a position then the current mufti should exert his own legal rationale and take the position that seems correct to his own reasoning.60

Finally, Qadi Khan delineates the rules governing the second level of ijtihad/ifta’ within the bounds of the Hanafi school, which is the province of the mufti who is considered a mugallid (a dependent or relative mufti). He does not specify the criteria that define this type of mufti, as he does for the mufti who is a mujtahid, other than to say that he does not meet the criteria for the mufti-mujtahid. He says this category of mufti should take the answer from whomever he believes is the most knowledgeable person [mujtahid or independent jurist] in the law and attribute the opinion to him. If the most knowledgeable person is in another region, then the mufti should write to him for a response.61 This level of ifta’ is probably akin to Ibn Rushd’s first category of mufti who knows enough about the madhhab to inform his own religio-legal practice, but does not have the legal capacity to issue fatwas on his own authority.

Qadi Khan’s presentation of categories of muftis does not explicitly mention the

60 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.

61 Qadi Khan, V.1, 3. Fatawa Qadi Khan as printed on the margins of Al-Fatawa Al-Hindiyyah by Shaikh Nizam.
category of \textit{mujtahid mutlaq} (absolute/autonomous jurist), but it is very clear that there is such a category of \textit{mujtahids} for him. This category of \textit{mujtahids} are represented by the purported founders of the Hanafi School: Abu Hanifah, Abu Yusuf, and Al-Shaybani, who are, as he has implied, beyond reproach in terms of their capacity of legal reasoning. One reaches the conclusion from the tenor of his discussion, although he is not explicit about it as al-Juwayni, that such \textit{mujtahids} no longer exist and are only a part of the past. Furthermore, Qadi Khan’s presentation of the categories of muftis does not seem to directly address the \textit{mujtahid} who is independent in his legal reasoning, but is not independent enough in his \textit{ijtihad} (legal reasoning) to reach the capacity of \textit{mujtahid mutlaq} (absolute jurist) and found his own legal doctrine.

Despite the deficiencies in Qadi Khan’s presentation of the types of muftis, he nevertheless makes a significant advance in delineating the discursive rules for legitimate engagement of fatwas within the confines of a particular madhhab for the types of muftis he does describe. For example, unlike al-Juwayni’s and Ibn Rushd’s presentation which talks most generally about the what the legal capacities and tools of a mufti to make fatwas are, Qadi Khan unequivocally tries to spell out in more detail what that would mean in the Hanafi madhhab, in particular where he specifies what exactly represents authoritative doctrines in this school (\textit{dhahir al-riwayah}) and what is the relationship that later muftis have with respect to those doctrines is. Moreover, he tries to describe the criteria for a mufti/\textit{mujtahid} in the Hanafi school in exact terms (e.g. having memorized the \textit{Mabsut} or getting eight out of ten legal issues right) so we know exactly how these muftis are circumscribed by the boundaries of the school they belong to.

So far I have covered the understanding of mufti in the age of \textit{madhhabs} from
representatives of three Sunni schools, Shafi’i, Maliki and the Hanafi, during the 5th/11th and 6th/12th centuries AH/CE. As for their jurists/theorists during the 13th century, the discourse on *ifta’* during this period shows a bit of advance in further structuring the types of fatwas and muftis in comparison with the previous period. For one thing, jurists in the 7th/13th century began to treat this subject in independent treatises, unlike how jurists treated it in the previous period merely discussed it within some of their other works.

To begin, I will highlight the work of the famous 7th/13th century jurist of the Shafi’i *madhab* Abu Zakariyya al-Nawawi (d.676/1277 AH/CE) entitled: *Adab al Fatwa wa Mufti wa al-Mustafti* (*The Etiquettes of Fatwa, Muftis and those Seeking Fatwas*),62 in which Al-Nawawi handles the etiquette and rules of engaging in fatwas by muftis issuing fatwas. But what mainly concerns us about this work is how al-Nawawi presents the classification of *muftis/mujtahids* and the degree of authoritative fatwas that each category can issue.

In this regard, al-Nawawi states there are two classifications of muftis: One is an absolutely independent jurist, whom he calls *mujtahid mustaqill*, while the other is not.

First, the absolute or autonomous *mujtahid* (*mujtahid mustaqill*) has knowledge of most legal injunctions, is competent in the details of Islamic legal theory (*usul al fiqh*), and knows the legal proofs (*daleel*) for those injunctions, including knowing the sciences of

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62 Uthman Ibn Salah (d. 643/1245 AH/CE), al-Nawawi’s older contemporary and teacher, had written his own *adab al- fatwa* treatise which according to Hallaq (2004, pg. 14), al-Nawawi based his on work on. Both works are quite similar in their content. Upon a brief comparison with Ibn Salah’s work, al-Nawawi’s work is an abridged form of Ibn Salah’s; hence it will suffice for our discussion to present al-Nawawi’s classification, with some references to Ibn Salah’s work when needed.
hadith, so as to know how to distinguish between sound and unsound hadiths.\textsuperscript{63} This class of muftis do not follow any established legal doctrine advocated by a legal school, but rather should derive their own rulings from the sources of the law (Qur’an, \textit{sunnah} (prophetic practice), \textit{ijma’} (consensus), and \textit{qiyas} (analogy).\textsuperscript{64} But at the same time al-Nawawi tells us that such a level of \textit{mujtahid} is now extinct\textsuperscript{65}, meaning it existed in a previous age especially the era of the founding fathers of the legal schools in the 2\textsuperscript{nd} /8\textsuperscript{th} and 3\textsuperscript{rd}/9\textsuperscript{th} century AH/CE.

The second classifications of muftis are those who are not absolutely independent in their legal capacities and activities and are bound in their fatwas by the \textit{madhhab} legal doctrines and methods of legal proofs. He tells us that there are four levels of such muftis. The first level, consists of the mufti who has attributes of the absolute independent \textit{mujtahid} (like the presumed founders of the \textit{madhhab}s), and thus does not follow any pre-established legal injunctions nor pre-established legal proofs in giving judgments, but nevertheless subscribes to a school and its doctrines because he follows the same approach to legal reasoning (\textit{tariquhu fi al-ijtihad}) as the purported founder of the school.\textsuperscript{66} For this level, he gives, as an example, the statement of Abu Ali al-Sinji\textsuperscript{67} who states that he didn’t follow al-Shafi‘i because he wanted to imitate him, but because he has found soundness in his opinions. In other words, the \textit{mufti} of this type coincidently agrees in the soundness of the legal reasoning methods of the absolute

\textsuperscript{63} Al-Nawawi, 22-23.
\textsuperscript{64} Al-Nawawi, 23.
\textsuperscript{65} Al-Nawawi, 25.
\textsuperscript{66} Al-Nawawi, 25.
\textsuperscript{67} Al-Hussein ibn Shuaib ibn Muhammad, see pg 93.
mujtahid because he has arrived at the same legal conclusion independently and not out of imitation (taqlid).

68 The fatwa of this mufti is to be treated on par with the fatwa of the absolute/autonomous founders of the legal schools in using it to base one’s actions upon and considering it when determining ijma’ (consensus) among jurists or the lack of it on any particular legal issue.

69 The second level of mufti is the one who is bound by a madhhab legal doctrines and methodology, in that he may independently establish his own legal principles [usul] and methods of legal proof [daleel] within the madhhab, but may not overlook in his methodology the legal principles [usul] or precepts of the founding jurist (imam) of the madhhab. This category of mufti takes the established legal opinions (rulings of the founder(s) of the madhhab) as foundations to establish further rulings in the same way that the founder(s) took the sacred texts [Qur’an and hadith] and established his own legal rulings. But this level of mufti may not independently establish rulings using sacred text in the same way as the founder(s), because he lacks certain legal capacities to engage in this action. He may be seen as a mujtahid (independent jurist) in specific areas of the law that were not addressed by the founder(s), but must do so according to the legal principles [usul] established by that founder(s).

70 Al-Nawawi, 26.

71 Al-Nawawi, 27.

72 Al-Nawawi, 27.

73 Al-Nawawi, 28.

The third level of mufti bound by a madhab is the one who is capable of editing

68 See Hallaq, 2004, 9 who offers this interpretation in respects to his exposition of Ibn Salah’s typology of muftis at this level.

69 Al-Nawawi, 26.

70 Al-Nawawi, 26.

71 Al-Nawawi, 27.
(tahreer) and giving preponderance to (tarjih) certain legal opinions attributed to the founders of the madhhabs and is aware of the legal proofs (daleel) that were used by the founder(s) to establish the legal rulings; though he cannot give independent judgments [takhreej] because he lacks some of the legal tools within his madhhab such as not knowing all of the foundational principles [usul] of his madhhab.\(^7\) This type of mufti is the one who edits the opinions in the madhhab and the legal texts of its founders and their successors. The fourth level of mufti is the one who knows the legal rulings of the madhhab, but does not know the proofs [daleel] used to arrive at those rulings, so that he may depend in his fatwa in what he transmits from the madhhab, but may not issue fatwas on matters that have not already been transmitted in the doctrine.\(^7\)

Thus, a century and a half after the 5\(^{th}/11\(^{th}\) century AH/CE Shafi‘i jurist/legal theoretician al-Juwayni offered his three level stratification of muftis and fatwas, the Shafi‘i jurists of the 7\(^{th}/13\(^{th}\) century like Ibn Salah and his younger contemporary and protégée al-Nawawi were now offering a five level stratification of muftis and fatwas. So we see in this a trend toward greater differentiation between muftis, which meant an even greater structuring of madhhabs along hierarchical lines, where each level of mufti is given a certain level of legitimacy to issue fatwas.

Thus far, I have dealt with expositions of the discursive rules of fatwas and muftis from jurists of three of the four surviving Sunni legal schools (madhhabs). To further highlight the universality of this trend to structure fatwas and muftis within the confines of the doctrines and methodologies of the legal schools, I will explore one more

\(^7\) Al-Nawawi, 29.

\(^7\) Al-Nawawi, 30.
treatise on this matter from a 7th/13th century AH/CE jurist of the Sunni Hanbali
madhhab: Ahmed ibn Hamdan al Harani (d. 695/1295 AH/CE). His tract on the etiquette
of fatwa and the mufti is entitled: *Sifat al-Fatwa wal Mufti wal Mustafti (The Attributes
of Fatwa, the Mufti, and the Seeker of the Fatwa)*.

When comparing Ibn Hamdan’s exposition about fatwas and muftis with the one
authored by his older contemporaries Ibn Salah and al-Nawawi, one comes to realize that
Ibn Hamdan relies heavily on their treatises for his own presentation of the subject, to the
extent that he even uses the same words. However, he does provide more detail on the
topic covered than his predecessors. Given these similarities in exposition, I see no
reason to summarize his presentation of the subject, which is similar to al-Nawawi’s
which I have already summarized above. Instead, I want to focus on the aspects of his
treatise which talk about the peculiarities in the Hanbali madhhab that a mufti should
keep in mind. Here is where he probably makes a unique contribution.

The most unique aspect of Ibn Hamdan’s treatise on the classifications of muftis
and fatwas, compared to the works that were written before his such as Ibn Salah’s and al
Nawawi, is that he offers a hermeneutical scheme of how to understand the statements of
the purported founder of his school, Ahmed Ibn Hanbal. Moreover, he expounds the legal
implications of Ibn Hanbal’s statements for religious practice and how they define the
legal doctrine of the Hanbali school. Here is where he shows greater similarity to Qadi
Khan’s presentation of the Hanafi school, which was delineated earlier. However, the
point of similarity is not in their classifications of muftis and fatwas, but rather that both
jurists in their exposition offer information on how to navigate discursive (legal)
statements in their respective schools while al-Juwayni, Ibn Rushd, and al-Nawawi do
not. In other words, both Qadi Khan and Ibn Hamdan offer us madhhab-specific information, whereas the others suffice themselves with trying to explicate the structure of legal schools (madhhab) most generally speaking.

One thing that becomes clear from Ibn Hamdan’s presentation of the hermeneutics of Ahmad ibn Hanbal’s legal statements is that these statements are treated by the same hermeneutical devices spelled out in usul al-fiqh (Islamic legal theory) of how to interpret the legal implications of the statements of the prophet Muhammad. For example, Ibn Hamdan says that if Ibn Hanbal says “this should not be (la yanbaghi) or it is not valid (la yasihh),” then this should be interpreted as a legal prohibition by him, and hence the matter ought to be treated as prohibited in the legal doctrine.76 This is the same hermeneutical approach by which usul al-fiqh or Islamic legal theory in general interprets the legal implication of prophetic statements and so demonstrates that by this time the Hanbalis were following the other legal schools on this point.

The probable reason why Ibn Hamdan includes this hermeneutical scheme for understanding the legal implications of Ahmad Ibn Hanbal’s (d. 241/855 AH/CE) statements, while no other adab al-fatwa treatise has such a scheme, may have to do with the peculiar manner in which the Hanbali madhab developed that necessitated such a hermeneutics in order for the Hanabli madhab to operate like other Sunni madhhab. Ibn Khaldun, the 8th/14th century AH/CE Muslim historical sociologist and Maliki judge, tells us in his famous Mugaddimah (Prolegomena to History) that the Hanbali madhab, unlike other Sunni madhhab, was antithetical (bu’dihi) to ijtihad (legal reasoning) due to its affinity (asalatihi) to supporting established authoritative

76 Ibn Hamdan, 90.
precedence (*mu'adhadathi al-riwayah*).  

This statement from Ibn Khaldun is revealing because it tells us of Ahmad Ibn Hanbal’s approach to law in that he was more a narrator of traditions (*hadith* and *akhbar*), than a jurists in (like other *madhhab* authorities Abu Hanifah, Malik, and Al-Shafi‘i) were. Hence, he had no explicit legal doctrine to speak of and it was later advocates of his legal authority, like al-Khallal (d. 311/923 AH/CE), who collected his statements regarding religious practice and was the first to attempt formulate a madhhab (a legal doctrine) around those statements even when many scholars of the Traditionsist (*ahl al-hadith*) track of Ibn Hanbal tried to resist al-Khallal’s innovations.  

These statements were probably not strictly legal judgments per se, as can be seen from the language in the examples mentioned above, but had to be interpreted so as to render legal judgments (fatwas). Hence, the utility of Ibn Hamdan’s hermeneutical scheme of how to understand the import of Ahmad ibn Hanbal’s statements so as to instruct would-be jurists on how to derive his legal doctrine and to construct a *madhhab* around his authority.

In conclusion, what may be surmised from this whole discussion about the discursive rules of fatwas and the ranking of muftis that was being formulated by Muslim jurists between the 5th/11th to 7th/13th centuries AH/CE is that fatwas were no longer free exercises in legal reasoning where a jurist was expected to look at the textual sources (Qur’an and *hadith*) of the law so as to seek the legal norms from which they could formulate responses to deal with ever new cases that they were confronted with. Instead,

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77 Ibn Khaldun, 419.

78 For more on this see Vikor, 102-103.
fatwas became ever more confined to transmitting or extending the legal implication of already existing legal doctrines and/or legal methodologies defined by classical Muslim jurists and legal theorists. This conservative approach to ifta’ would become the uncontested manner, with few exceptions, in which fatwas would be issued during period of madhhab preponderance (c. 1100-1800), which I will try to demonstrate in the next chapter. But in the meantime, I want to deepen our understanding of the development of the discursive rules of fatwa and the structuring of madhhab by examining adab al-fatwa literature from later periods of the age of the preponderance of madhhab.

The Later Phase of Formalization of Fatwas and the Structuring of Madhhab: To c.1800 CE.

In the previous sub-section, I outlined the early phase in the formalization of fatwas and classification of muftis within the matrix of madhhab formations. In this sub-section, I want to look at the later efforts at formalization of fatwas within the structure of madhhab so as to see how much of an evolution this process had undergone since the early phase and determine how far the paradigm of madhhab were configuring the activity of fatwa and the levels of muftis. For this, I will look at some of the formulations of how legal activity within the madhhab would be structured in period that would mark the end of the preponderance of the paradigm of madhhab in Islamic law: c.1800. For the sake of space, I will restrict myself to sampling in detail the discourse of one Sunni madhhab on this matter as a way of illustrating the advancements that had taken place. I will look at a Hanafi formulation on how fatwas and muftis are organized in their legal school.

I will examine the ideas of the famous 12th/18th-13th/19th century CE Hanafi
jurists Ibn Abidin (d.1252/1836 AH/CE) on this issue. He represents the last generation of traditional Muslim jurists who formulated Islamic law within the confines of madhhabs prior to the call for modern reforms that were to shake the foundations of Islamic law in the 19th century CE. So in a way his thoughts represent the pinnacle of the systemization of Islamic law before the modern challenge. More particularly, I will look at his treatise Uqud Rasm Al-Mufti where he describes how fatwa in the Hanafi madhab is regulated. As a part of this description he is fact laying down the structure of the Hanafi madhab as whole and how a fatwa would fit into that overall structure.

First, Ibn Abidin starts his treatise with a rule that any mufti should follow: he must give a fatwa in accordance to the legally established position (rajih) of his madhab. Ibn Abidin claims that there is an ijma’ (consensus) among Muslim jurists about this position. Moreover, he states that it is not permitted for a mufti to issue fatwas based on weak legal opinions (marjuh) within his madhab. So already we get a sense of how fatwas became confined to the doctrines and legal methodologies that had been established by the legal schools.

He then goes on to outline a configuration for jurists who occupy different authoritative levels of muftis/fuqaha within the Hanafi madhab. This structure that Ibn Abidin lays out consists of seven levels (tabaqat). The first, and at the very top of this

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79 Ibn Abidin, 2000, 5.

80 It must said here that Ibn Abidin’s typology of muftis within the Hanafi madhab is not original. In fact this typology was already outlined three centuries earlier by the Ottoman Shaykh Al-Islam Ahmed Ibn Kamal Pashazadeh (d. 940/1533 AH/CE). See Hallaq’s exposition of Ibn Kamal’s typology in Authority, Continuity and Change in Islamic Law pgs 14-17. Nevertheless, Ibn Abidin’s treatise represents one of the last efforts to expound the nature of fatwa within the confines of a madhab before the advocacy of modern reforms for Islamic law and institutions; hence, it gives a good indication for the endpoint of the evolution of this traditional institution prior to the modern challenge. Moreover, there will be other aspects of this treatise that will highlight the operations of fatwa within a madhab which makes this treatise a good reference for our discussion.
classification, is the level of the absolute independent jurists of Islamic law (what he calls
*al-mujtahideen fi shar’*), which consists of the purported founders of the four Sunni legal
schools81 (Abu Hanifah, Malik, Al-Shafi’i, and Ibn Hanbal). If we recall, these were the
2\textsuperscript{nd}/8\textsuperscript{th} century AH/CE jurists (with exception of Ibn Hanbal) whose legal opinions I
examined in a previous chapter. His claim is that this class of jurists established original
legal principles and extracted doctrine from the sources of the law without imitating other
jurists in their legal principles or their doctrines.82

The second level of jurists/muftis within the Hanafi School consists of those
whom he claims are independent jurists but within the limits of the Hanafi *madhhab*
(*mujtahideen fil madhhab*). Examples of such figures in the Hanafi school are Abu
Hanifiah’s two protégées AbuYusuf and Muhammad ibn Hassan Al-Shaybani. Ibn
Abidin claims what makes them independent jurists within the madhhab was their ability
to deduce rulings in accordance to the legal principles (*qawai’d*) established by their
mentor Abu Hanifah. Thus, even when they extract different legal rulings then him, they
nevertheless confine these deductions in accordance to the legal principles that Abu
Hanifah established.83

At the next (third) level, we have the subsequent generations of Hanafi jurists
from the 3\textsuperscript{rd}/9\textsuperscript{th} to 5\textsuperscript{th}/11\textsuperscript{th} centuries AH/CE (e.g. al-Tahawi, al-Jarrah, al-Bazdawi, al-
Sarakhsi, etc.), who are what he calls the independent jurists in particular legal cases
(*mujtahideen fil masa’il*). These are cases where there is not established legal doctrine (*la
riwaayah* lit. no narration) from the founder of the *madhhab* (Abu Hanifah and his

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81 Ibn Abidin, 2000, 6.
82 Ibn Abidin, 2000, 6.
83 Ibn Abidin, 2000, 6.
protégées). We are told by Ibn Abidin that this level of mufti may not go against the fatwas of the founders of the madhhab, but may select from those opinions that seem most keeping with the principles of the madhhab and promote those as the official position of the madhhab.\(^{84}\) They may also establish new legal rulings (fatwas) on new cases based on the legal principles purported to have been established by the founders.\(^{85}\)

These first three levels of jurists/muftis are seen to one extent or another by Ibn Abideen as mujtahids (independent legal reasoners). On the other hand, jurists at levels four through seven are no longer viewed as independent jurists (mujtahideen), or those who can make ijtihad (deducing new rulings through independent legal reasoning). Instead, these levels of muftis are in the realm of what is known as taqlid,\(^{86}\) which may be defined as the opposite of ijtihad in the sense that those who make taqlid do not arrive at legal rulings independently, but depend on and follow those rulings that have been established in the legal doctrine of the madhhab. So from this level onward is what I will call the level dependent or limited muftis as their legal activities are restricted to legal principles and rulings established by previous three levels.

Level four muftis consist of those jurists whose task is to engage in the activity of what is designated as takhrij (extrapolation) and are known as mukharrijun. Their capacity to make takhrij of rulings is a result of their competence in legal principles (of the madhhab) and hence they are tasked “to resolve juridical ambiguities and tilt the scale

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\(^{84}\) Ibn Abidin, 2000, 7.

\(^{85}\) Ibn Abidin, 2000, 7.

\(^{86}\) Ibn Abidin, 2000, 7.
in favor of one of two opinions that govern a case… by virtue of their skills in legal reasoning and analogical inference.” An example of Hanafi jurists in this category is al-Razi (al-Jassas). The fifth level consists of those jurists who are considered in *murajjihun* (those who give preponderance to one opinion over another). Examples of jurists that fit this category are those Hanafi jurists from the 5\(^{th}/11\(^{th}\) and 6\(^{th}/12\(^{th}\) centuries AH/CE, like al-Qaduri and al- Marginani who task is to take conflicting legal opinions that have been established by their predecessors and give preponderance to some over others using the established standards of the madhhab to do so.

The sixth level consists of those limited or dependent muftis who have the capacity to distinguish (*mutamayizeen*) between strong and weak opinions, and those opinions that make up established doctrine (*dhahir al-riwayah*) from those legal opinions that are considered fringe (*nawadir*). Examples of this type are those post 6\(^{th}/12\(^{th}\) century AH/CE author-jurists who compiled legal compendia of the doctrines of the Hanafi school like al-Fasih (d. 680/1281) and al-Musili (d. 683/1284) the authors of al-Kanz and al-Mukhtar respectively whose task in these legal compendia is to present the established legal doctrines of the school and keep out of their works those legal opinions that are considered weak. The seventh and final level of jurists are not real jurists or muftis at all; they are poorly trained jurists who are incapable of issuing sound fatwas.

Before I proceed to further outlining Ibn Abidin’s treatise on the discursive rules
governing fatwas and muftis, I want to make a few observations on what I have expounded of his schema so far. The first observation I would like to make is that by his time, more precisely by the 10th/16th century AH/CE as Ibn Kamal’s typology of muftis and mujtahids shows, the Hanafi madhab, and other madhhab in general, had increased in the structural complexity since the early period of their formation. This is evidenced by the fact Ibn Abidin’s configuration of muftis contains twice as many levels or categories of jurists (6:3) as the one expounded by the 6th/12th century AH/CE Hanafi jurists Qadi Khan which I outlined in the previous section.

Secondly, the lower the level a jurist/mufti occupies in the madhhab, the lesser is the extent of his legal activities and his potentials to establish legal opinions or fatwas. Moreover, the increasing stratification of muftis/jurists was in some ways a function of time. The farther in time that jurists seemed to be from the founders of the madhab, the lower the status they occupied in the juristic typology. All of these observations point to the notion that the scope of fatwa became much more confined and structured the more that the institution of madhhab became established and differentiated in Islamic history.

Now let me return to Ibn Abidin’s treatise on the discursive rules of fatwa. In this treatise, Ibn Abidin does more than just outline a hierarchy of jurists/muftis; he goes farther in spelling out rules of how navigate that hierarchy of jurists and their legal opinions when issuing a fatwa. For example in level one and two of the hierarchy containing the three grand jurists (Abu Hanifah, Abu Yusuf and Al-Shaybani), whose legal positions are seen as the foundation for the Hanafi’s madhab’s doctrine, Ibn Abidin gives the prospective mufti a set of rules on how to navigate their opinions when

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92 See Hallaq, 2004, 15-17 for more on this.
they hold different positions on a particular case.

In this regard he asserts that if the madhhab makers (Abu Hanifah, Abu Yusuf, and al-Shaybani) disagree, there is a preferred order of opinions that becomes preeminent. He tells us that the overall consensus among Hanafi jurists (those who are murajjihs) is that if there is an established legal position of Abu Hanifah on a case, then that should be taken as the position of the madhhab over the opinions of his two protégées, even when the other two associates have a consensus on the same legal position. But that is only if the proof [daleel] for the position is strong; otherwise the murajjihs of the madhhab should choose the opinions of the other two associates if they have the stronger proof (daleel).

But this selection process should only be carried out by the mujtahids in the madhhab who are capable of distinguishing between the strength of different proofs. If the person is not a murjih, then the final position of the mujtahids of the madhhab is that the person should go with opinion of Abu Hanifah. Furthermore, he quotes from an authoritative source that claims the most general authoritative sequence of legal opinions proceeds as follows when all founding jurists of madhhab disagree: Abu Hanifah, then Abu Yusuf, then Al-Shaybani, then Zufur and Al-Hasan.

This structure or hierarchy is designed to maintain consistency within the madhhab despite the variety of opinions which exist between the various jurists. The rationale that Hanafi jurists give for this systemization is that since Abu Hanifah is the

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93 Ibn Abidin, 2000, 21.
95 Ibn Abidin, 2000, 21.
founder of the *madhhab*, and his two companions are his followers at least in regards to most of the legal principles if not in the case of actual legal dicta, then it only makes sense that when there is disagreement between the two camps, the opinion of the primary founder of the *madhhab* should be taken as the authority above all others, since he is considered the foundation of the school.\textsuperscript{96}

As Ibn Abidin continues to delineate the chain of authority of legal opinions, he states If there are legal matters for which no legal positions exist from this group of founding figures of the Hanafi school, then one should take the legal position of the later shapers of the *madhhab* if there is unanimous consensus between these later jurists.\textsuperscript{97} If there is disagreement between later jurists, then one should take the position of the majority of the more noted members in this group such as Abu Hafs, Abu Jafar, Abu Laith, and al-Tahawi. Then if one does not find a position held by them in some issue, then the mufti should undertake *ijtihad* (independent legal reasoning) on the issue.

On the other hand, Ibn Abidin claims that in another authoritative source of the *madhhab*, *al-Khaniah*, says that if there is no established legal opinion (*dhahir al-riwayah*) attributed to the founders on an issue, then one should take the legal positions that are attributed to them but are not found in *dhahir al-riwayah* (established doctrines) as long as those positions are consistent with the foundational legal principles (*usul*) established by the founder or the school. If there is an absence of legal positions from the founders of the school on certain cases, then one should take the legal positions of the

\textsuperscript{96} Ibn Abidin, 2000, 21-22.

\textsuperscript{97} Ibn Abidin, 2000, 28.
later authorities of the *madhhab* if there is consensus amongst them on the issue. If there
is no consensus amongst the later authorities, then the *mujtahid*/*mufti* should make *ijtihad*
and arrive at his own legal conclusion. If he is a mufti who is not of the rank of *mujtahid*,
then he should take the opinion of the one he believes is the most knowledgeable
authority.\(^9^8\)

After establishing the authoritative ranks of jurists within the Hanafi school and
how a mufti should navigate through the maze of legal opinions, Ibn Abidin lists general
standards that were collected from authoritative books of the Hanafi madhhab, which
instruct a mufti on how to determine the preeminent legal position in various sub-fields of
Hanafi law. They are as follows: Firstly, in the field of *‘ibadat* (religious rituals), the
positions of Abu Hanifah are the accepted position (*rajah*) except in the cases of
*tayammum* and the cleanliness of used water.\(^9^9\) Secondly, in terms of *qada’* [court
judgments], Abu Yusuf’s opinions are the accepted position because of his added
experience in that venue.\(^1^0^0\) Thirdly, in terms of inheritance, the opinions of the al-
Shaybani are the accepted positions.\(^1^0^1\) Fourthly, whenever there is a ruling on an issue
based on *qiyas* (legal analogy) and another ruling on the same issue based on *isthisan*
(juridical preference), then the ruling based on *isthisan* becomes the accepted position
except in eleven cases.\(^1^0^2\) Fifthly, whatever legal position attributed to one of the
founders and is not *dhahir al-riwayah* (an authoritatively established position), then it is a

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\(^9^8\) Ibn Abidin, 2000, 28.
\(^9^9\) Ibn Abidin, 2000, 30.
\(^1^0^0\) Ibn Abidin, 2000, 30.
\(^1^0^1\) Ibn Abidin, 2000, 30.
\(^1^0^2\) Ibn Abidin, 2000, 30.
position that has been retracted and cannot serve as the basis for religious action.\textsuperscript{103} Sixth, when there are conflicting reports about the legal opinion of Abu Hanifah on a case such as whether an action is obligatory (\textit{wajib}) or optional (\textit{sunnah}), then the conflict should be settled in accordance with the position that has the strongest proof (\textit{daleel}).\textsuperscript{104} Seventh, one cannot declare a Muslim a \textit{kafir} (non-muslim) if it is possible to interpret his sayings (actions) as within the bounds of Islam.\textsuperscript{105} Eighth, the retracted legal position of any of the foundational jurists of the \textit{madhhab} is likened to abrogation (\textit{naskh}) and cannot be accepted as a basis for actions.\textsuperscript{106} Ninth, and lastly, if there are contrary legal positions that are both stated as the valid [\textit{sahih}] opinion of the \textit{madhhab}, then the one that is found in the \textit{madhhab}’s basic texts [\textit{mutun}] should be elevated over what is found in the fatwa books, because those who wrote these texts restricted themselves to narrating what is the valid position of the \textit{madhhab}, while what is found in the fatwa books are mere selections from muftis in the madhhab and may not be definitive.\textsuperscript{107}

There is one more issue which is relevant to the process of \textit{ifta’} and muftis and which Ibn Abidin addresses in his treatise that I would like to address here, as it will arise in the next chapters investigation of fatwas in the post-formative period of Islamic law. This is the issue of custom/culture (‘\textit{urf}) and how it comes into play in the muftis’ fatwa at least in the Hanafi madhhab. Ibn Abidin states the position of the Hanafi madhhab in regards to ‘\textit{urf} (custom) is that customs and cultural considerations must be considered

\begin{flushright}
\textsuperscript{103} Ibn Abidin, 2000, 30.
\textsuperscript{104}Ibn Abidin, 2000, 30.
\textsuperscript{105}Ibn Abidin, 2000, 31.
\textsuperscript{106}Ibn Abidin, 2000, 31.
\textsuperscript{107}Ibn Abidin, 2000, 30.
\end{flushright}
while issuing fatwas, and he lays down the rule for how customs are treated in the Hanafi school.

General customs, those that are universally practiced in a specific age, can only legally restrict (*takhsis*) the rulings of a proof text (an injunction arising from a Qur’anic verse or *hadith* of the prophet) or *qiyaṣ*, but may not cause permanent abandonment of these rulings; while a specific custom which is found in one region and not another may neither legally restrict the proof text nor allow us to abandon it, but ought to be considered only in the case of the groups/regions that keep these customs, even when those considerations violate the accepted legal position of the *madhab* (*dhahir al-riwayah*). He then gives examples for this second case (when it is a specific custom) by saying that the terms that are used for oaths and the customary considerations used in contracts are what are considered legally binding, even when these customs go against what the legal scholars have said about the terms and customs that are binding.\(^\text{108}\)

He references a clarification from *Al-Dhakirah*\(^\text{109}\) about what is meant by the abandoning the legal implications of the proof text in the case of a general or universal custom. He does this by giving an example of where one scenario would be considered abandoning the proof-text and the other would only be considered restricting the proof-text. The case of *īstisna’* (manufacturing contracts) illustrates where the legal implications of proof-texts are restricted, because the directives of the proof-text command a ban on selling things that are not owned, as is the case when things have yet

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\(^{108}\) Ibn Abidin, 2000, 43.

to be manufactured (istisna’). It is to be understood from this case, by exempting istisna’ from the general prohibition of selling un-owned merchandise we are only restricting the legal implications of the proof-text and not abandoning its implications.\footnote{Ibn Abidin, 2000, 42.}

Ibn Abidin gives another example where an instance of ‘urf, one that is not universally practiced, if legally considered, would be a case of abandoning the legal implications of the proof-text. This is case of the qafeez, a unit of measure, of the one who grinds grain. In a hadith, it is prohibited to give payment to the one grinding the grain because he is already given a certain portion [\# of qafeez] of the very portion of grain s/he is grinding. Although, Ibn Abidin does not give the rationale for this ruling, it is presumed because there is a certain degree of gharar (ambiguity) in this transaction since no one can know what volume of flour will be produced by the grinding beforehand so as to stipulate the number of qafeez the person should get as payment for his labor. So he says that if there is a custom in a particular place that undertakes this type of transaction, it should not be legalized according to the legal justification for ‘urf because that would be a case of abandoning the implications of an explicit proof-text.\footnote{Ibn Abidin, 2000, 42.}

At the same according to the Hanafi principles for applying ‘urf, one cannot say that we can make restrictions (takhsis) on this proof-text (the hadith mentioned above) and allow for this practice since it is only an ‘urf (custom) of a particular area and not widespread. Ibn Abidin states that this type of ‘urf may be allowed for cases that have no mention in the proof texts (Qur’an and Hadith) such as paying a weaver a portion of the
materials that he weaves for a customer because this is the ‘urf of the people of Balkh, and the ‘urf is a definitive legal proof [hujjah] that allows one to abandon qiyas (the rule established by analogy) and at the same time restricts the legal implications of proof-texts. This is so, although it is similar to the transaction with qafeez, because this type of transaction with woven material has not been mentioned explicitly in the proof-text, so we can restrict the qiyas that would be required on the basis of the qafeez hadith based on the ‘urf of the region of Balkh for the people of Balkh only.\textsuperscript{112}

What we can conclude from this discussion is that although ‘urf (custom) may supersede the ruling of legal texts in certain cases, it can never lead to their abandonment because the ‘urf is seen as a temporary measure that is always in flux while the norms of the sacred proof-text are seen as permanent. Moreover, the norms of the sacred texts are the origin of all legal principles, and it is those principles that always take precedence when the ‘urf changes.

In conclusion, it is hoped that the foregoing discussion has created a better understanding of how Islamic legal schools (madhhabs) operated in shaping Islamic law and the role they played in formalizing the process of fatwa making. In short, one can say that a madhhab consists of several layers of precedented legal opinions which are canonized in certain texts whereby some of those texts [kutub al-furu'] structure those legal opinions in such a way that greatest priority is given to the legal opinions of the earliest founders followed by the opinions of subsequent generations of jurists who purportedly followed the legal methods of the supposed founding masters in introducing

\textsuperscript{112} Ibn Abidin, 2000, 42-43.
new aspects to the legal doctrine of the school. Another way to view a madhhab is to see it as a legal field where a set of interdependent relationships exists between a constellation of legal opinions/texts and people/scholars all of which are stratified in a hierarchical matrix. This matrix aimed to preserve, generate and disseminate Islamic law in a systematic fashion which would insure its continuity over space and time.

A Note on the Formation of Shi’ite Legal Thought and Institutions

So far in my investigation, I have said very little about the development of law and legal institutions within Shi‘i Islam, which is because the development of a distinctive Shi‘i law, legal theory, and institutions did not occur until centuries after their Sunni counterparts. This is despite the fact that they had undergone in some respects a similar process of legal evolution like Sunni law but at later periods.\textsuperscript{113} This lag is partly due to the distinctiveness of Shi‘i Islam, which followed the teachings of charismatically inspired leaders (Imams) from the descendants of the Prophet Muhammad, seeing them as a continuation of the his religious legacy and hence leaving little need for this community to develop a law when they had direct religious guidance from such leaders.

There are two main legal schools (madhhabs) in Shi’ite Islam: Zaydi and Imami (or Jafari), which developed independently of one another because of their variant historical trajectories in the formative period.\textsuperscript{114} Moreover, as Vikor notes, they do not have “a common original Shi’ite legal theory” and they each independently emerge out of a “common source of Muslim legal thought.”\textsuperscript{115} Despite their different paths of historical development, they share a common ground in the theological sphere, in that they both

\textsuperscript{113} Vikor, 126-128

\textsuperscript{114} Vikor, 122.

\textsuperscript{115} Vikor, 122
believe that the religious teachings of the descendants of the Prophet carry greater
authority than those of other Muslims.

The adherents to the Zaydi school claim their lineage goes back to the teachings
of Zayd ibn Ali (d. 122/740 AH/CE), a descendent of the Prophet Muhammad. Yet a
distinct Zaydi school of law did not begin to take shape until the 3rd/9th century AH/CE
when a Zaydi polity was established in northern highlands of Yemen by Yahya Ibn Al-
Hussain (d.298/911), whose legal teachings and judgments, as documented in two works
Kitab al-Ahkam and Kitab al-Muntakhab, became the basis of the Zaydi madhhab’s legal
doctrines in Yemen where this sect continues to survive despite its disappearance in other
regions of the Muslim world.\footnote{Haykal, 6. Also see Vikor, 122.} According to Zaydi theological doctrine, the Zaydi
community was to be led by a descendent of the prophet Muhammad although from no
particular hereditary line and his religious authority is not as absolute as is the case for
Imami Shiism; however, this leader (Imam) had to be a mujtahid\footnote{Haykal, 6-7.} (absolute
independent jurist). This stipulation probably led to a lesser degree of Zaydi madhhab
structure than found in Sunni schools, given that in every generation they would have
access to such a mujtahid who not only would lead the community but also shaped their
law. The legally distinguishing attributes of the Zaydi madhhab include that they opposed
the validity of ijma’ (consensus of Muslim jurists) as jurisprudential means of
establishing law, although they accepted the legitimacy of qiyas (legal analogy).\footnote{Vikor, 123-124.} In
terms of legal doctrine, the Zaydi madhhab is closer to the four Sunni schools than the
Imami Shi’ites are.
The Imami (or Jafari) school (*madhhab*), on the other hand, had an even later development than the Zaydi school, as their distinct legal teachings did not mature until about the 8th/14th century AH/CE. After the disappearance of the Twelfth Imam in the 3rd/9th century AH/CE, who was the last in a hereditary line of divinely inspired religious authorities for Shi‘i Islam, the Imami community settled on the religious authority of Shi‘i scholars who would be representatives of the Imam in his absence. During the post-Imamate period of Shi‘i Islam, there were two paths that Shiites followed in terms of religious legal practice: One was to attach themselves to an existing Sunni school of law; the other was to form their own distinct school of law (*madhhab*) whose main thrust came after the formation of the Safavid state in Iran in the 10th/16th century AH/CE which adopted Shi‘ism as state ideology, even though the legal works of 8th/14th century AH/CE Shi‘i jurist Allamah Al-Hilli (d. 726 AH) can be seen as a concerted effort for the development of a distinct code of Imami law.

During the initial formation of the Imami *madhhab* there was not the stratification of muftis/*mujtahids* as was the case in the Sunni schools. This is evidenced by the lack of such classifications of muftis in their legal works. For example, in his work on Shi‘i (Imami) legal theory entitled *Mabadi’ al Wusul*, Allamah al-Hilli lists the qualities of the person who has the right to make *ijtihad* (legal judgments or fatwas). The qualities of such a *mujtahid* are similar to those described of the *mujtahid mustaqill* (absolutely independent jurists) within the Sunni schools. There is nothing in his work about the sort of hierarchical stratifications of muftis who can issue fatwas at different

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119 Vikor, 127-128.
120 Al-Hilli, 240.
levels of authority that was already a trend within Sunni madhhabs of that period. In al-Hilli’s presentation of the subject of *ijtihad*, there is only the *mujtahid*-mufti and non-*mujtahid* layman or learned man both of whom ought to follow a *mujtahid*-mufti. Even as late as the 10th/16th century AH/CE, the Imami madhhab may not have developed a stratified matrix of muftis in their school, as is shown in the absence of such discussions in their *adab al-fatwa* discourse. For example, in his work *Munyat Al-Murid*, the famous Imami scholar of the 10th/16th century AH/CE known as al-Shahid al-Thani (d. 966/1558-1559 AH/CE) discusses the qualities of the mufti who has the right to make *ijtihad* (legal innovation through issuing of fatwas). Once again in this discussion, the mufti is described like an absolute *mujtahid* and there seems to be no secondary or tertiary levels of *ijtihad* as there was in the *adab al-fatwa* literature amongst Sunni scholars centuries earlier.121 This may give a strong indication that a structuring of Imami madhhab did not occur until later.

Once a distinct Imami school crystalized after the 10th/16th century AH/CE, they too developed a hierarchy and structure for their legal institution that is somewhat different than the Sunni schools. The tri-partite system of muftis/*mujtahids* went as follows: *mullah*, *hujjat al-Islam*, and *ayatollah*. At the lowest level were the *mullahs* who were not legitimized to make *ijtihad* or issue fatwas at all, as they were simply to act as religious guides to laymen in the community.122 In the middle comes the *hujjat al Islam*, who can infer legal opinions when the *ayatollahs* have not taken a legal position on the

122 Vikor, 134.
issue. At a higher level of *ijihad* are the *ayatollahs* from whom arises highest level of religio-legal authority in Imami school: the *marja’s*. The *marja’s* are in a sense absolute independent *mujtahids* (jurists) whom all lower authorities must follow. The *marja’s* achieve their special rank through the recognition of other *ayatollahs*. 

In terms of legal theory, where Imami law stands distinguished from their Sunni counterparts is their refutation of the validity of *qiyas* (legal analogy) as a legitimate legal device for deriving law. This is despite the fact that they affirm *qiyas’* corollary *ta’diyat al-hukm* (transitiveness of the rule), which allows the ruling of one case to be transferred to another because of their similarities. On the other hand, they do not oppose *ijma’* (consensus) as a legitimate means of arriving at a legal injunction, but narrow its scope to jurists within the Imami fold.

This concludes our brief presentation of the development of law and legal institution in Shi‘i Islam. More will be said about Shi‘i legal thought when we address some of the fatwas from Shi‘i legal schools in the following chapter, yet the main point of this brief discussion is to show that points of convergence and divergence between Sunni and Shi‘i based *madhhabs*. Moreover, it is to be inferred that Shi‘i legal schools developed in conversation with the legal discourses (*usul al-fiqh*) that were influenced by earlier Sunni legal thought and hence, they did not have a completely independent path of evolution even when there are clear marks of distinction between Sunni and Shi‘i legal schools.

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123 Vikor, 135.
124 Vikor, 135.
125 Vikor, 130-131.
126 Vikor, 134.
Conclusions

I take this opportunity to clarify that the classification of muftis and systemization of fatwas that came into being with the maturation of the legal schools is not the same as saying that there were actual formal ecclesiastic bodies in each madhhab that supervised the activity of ifta’ in accordance with the rules that were spelled out in the adab al-fatawa literature. The categorization of muftis and levels of ifta’ merely meant that there was a set of mutually recognized rules among jurists that would govern how fatwas were to be issued and who was entitled to do so. In other words, there were no formalized and elected groups of muftis in each madhhab who would administer the activity of fatwa and ensure that such rules were observed. Instead, these ranks and rules were observed through the consensus of these later jurists which was forged by their shared recognition of different levels of epistemic authority.

We will see in the following chapter, when I examine actual fatwas from this period, how these constraints were observed and how muftis had to navigate through and around them to issue their fatwas. These madhhab constraints by no means closed off innovation in Islamic law, but they did circumscribe the aspects of the law that received fresh attention. These ranks and rules in a sense produced continuity in the law that was perhaps necessary for the law to develop further. But as will notice in the next chapter, change was inevitable, which brought muftis under pressure keep up with these changes while observing the already established laws and the discursive rules that governed them.
CHAPTER 6

FATWA IN THE AGE OF PREPONDERANCE OF LEGAL SCHOOLS

Introduction

In the last chapter, I illustrated how Islamic legal schools became the paradigm through which Islamic law was articulated. This was seen in the discursive rules that were developed during the period of madhhab hegemony that regulated the manner in which fatwas were to be issued and the rank of those muftis who would be issuing them. In this chapter, I intend to illustrate more concretely how those rules were applied in actual fatwas of this period. The manner in which I intend to accomplish this task is by sampling and analyzing fatwas from the period about 1100 CE to 1800 CE, as this was the period when legal schools/doctrines (madhhabs) and legal theory (usul al-fiqh) were fully established and firmly rooted in Islamic legal practice so that they exerted the most influence on Islamic legal production. More broadly though, this period in the lands of Islam represents a unity from the perspective of the maturity, continuity and influence of Muslim religious institutions on Muslim society such as Muslim theological schools, Sufi tariqahs (mystical orders), and futuwwa organizations (social and guild fraternities).

I say here that I will sample some of the fatwas because it is impossible to cover the entire gamut of essential fatwas and the respective muftis/mujtahids of this period in this chapter. Nevertheless, in my selection I will try to choose representative samples of major fatwas so as to show the nature of the activity of ifta’ during this era and how this activity had been transformed since the classical age of fatwa. The criteria for such selections will be revealed in later sections of this chapter. The approximate period that I intend to cover in the chapter is the same as the last chapter (1100-1800 C.E.) except in
this chapter I deal with actual fatwas from this period rather than the theoretical rules of fatwas that I dealt with in the previous chapter.

Yet it is not the only goal of this chapter to show the discursive activity of *ifta’* during this period. This chapter aims to indirectly demonstrate how fatwas helped Muslim society keep pace with social change by modifying the legal corpus that governed it. What will become clear in this demonstration that the impetus for fatwas stems from socio-historical circumstances, yet at the same time these fatwas influence the human practices that shape social reality. It is this dialectic phenomena between law and society that this chapter will attempt to bring to light. In order to achieve this objective, I will sketch a general portrait of the socio-political circumstances of this period so as to historically contextualize the fatwas of this period.

**Socio-Historical and Political Situation in Muslim World in the Age of Madhhab Preponderance I: c.1100-1500.**

From the point of view political and social developments the period of madhhab preponderance may be more conveniently divided into two phases: 1100-1500 CE and 1500-1800 CE. In this section I will address the socio-political situation in the first phase and address the later phase in a subsequent section of this chapter. Most generally speaking, the phase between 1100 CE-1500 CE, especially in its first half (1100 CE-1300 CE), witnessed greater political fragmentation of the heartlands of Muslim society (between Nile to Oxus rivers) than what had existed in the earlier post-Caliphate period (900-1100 CE) and during which the region came under the control of independent
princes rather than the larger political polities including the Seljuks and Ghaznawids who controlled most of the Muslim heartland after the demise of the caliphate.¹

Moreover, the period between 100-1300 CE was also known for the specter of foreign threats such as the Crusades and the Mongol invasions in the heartlands of Islam, and the Reconquista in Spain that brought large swaths of Muslim lands under foreign control.² These invasions of Muslim lands had their lasting effects as in the case of the Crusades, because of which there was a disruption of Muslim commerce in the Levant. Even when the Crusaders were eventually eliminated from the area the Syrian coastal cities never recovered their prosperity.³ But the impact of Muslim political fragmentation and foreign invasions was not entirely negative as the political upheaval may have hastened the establishment and development of Muslim religious and social institutions such as Islamic legal schools (madhahib), mystical orders (i.e Sufi tariqahs), and social fraternities (futuwwa brotherhoods) as a way of remedying the grave political turmoil and disunity.

Nevertheleess, the political fragmentation of previous Muslim states in the Muslim heartlands (Seljuks and Fatimids) spurred alternative political movement which brought about the formation of new centralized states like the Zengid and Ayyubid dynasties which gained ascendancy in Syria and Egypt during the 12th century and slowly restored the lands lost to the Crusaders. This dynasty supported Sunni Muslim orthodoxy and tended to patronize the ulema’ (Muslim scholars) and Muslim religious institutions like

¹ Hodgson, V.2, 263.
² Hodgson, V.2, 263.
³ Hodgson, V.2, 268.
mosques and *madrasas* (Islamic colleges). During the 12th and 13th centuries, ‘ulema from all over the Muslim world flocked to the centers of the Zengid-Ayyubid state and then the Mamluk state that was centered in Cairo. This was in part due to the financial support of scholars by these dynasties, but one must also consider the factor that many of these scholars were more likely driven out of their homelands in Iran, Iraq, and Central Asia as a result of the Mongol invasions of those areas during the 13th century as well from Spain and Palestine as result of the Reconquista and the Crusades. Gilbert shows that nearly half of the resident ‘ulema of 12th and 13th century Damascus were immigrants. For example, Ibn Taymiyya, a scholar whose fatwas we will address later in the chapter, was one such immigrant scholar to Damascus from Haran, which is now in Turkey, whose parents fled because of the Mongol invasions.

The influx of Muslim scholarship into newly invigorated political and cultural centers like Damascus spurred the growth of *madrasas* (Islamic colleges) and *waqfs* (religious philanthropic foundations). Between the late 11th and middle 13th century one hundred and twenty one religious institutions were established, ninety five of which were *madrasas* (Islamic colleges), and there were 400 hundred new job openings in professorships at these institutions, as now Muslim scholars as never before became endowed by state funded institutions.

As a result of this state patronage, this period witnessed a shift in the relationship between the ‘ulema and the Muslim political elite. In the age of caliphate, the ‘ulema

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4 Hodgson, V.2, 266.
5 Gilbert, 112-113.
6 Gilbert, 114.
7 Gilbert, 118-119.
maintained an overall economic and political independence from the governing elite. Towards the end of the 5th/11th century AH/CE, the relationship between the Muslim scholarly elite drew closer to the Muslim political elite because of their patronage. This increasing trend towards state support for scholarship took greater hold under the Seljuk Dynasty of Iran, Iraq, and Syria in the late 5th/11th century with the establishment of the Nizamiyya colleges, and this patronage continued throughout the period of the 12th to 15th centuries under the Ayyoubid and Mamluk states of Syria and Egypt and the Il-Khanid and Timurid dynasties of Iran and Iraq. Moreover, in the same period, there was a greater number of ‘ulema who were employed in state service. This closer cooperation between the ‘ulema and the rulers and the patronage of the ‘ulema by the political elite signified a greater loss of economic and political independence for the ‘ulema during this period, which may have helped to reduce them to instruments of the Muslim state to increase the legitimacy of those in power.

The apogee of cooperation between political elite and the religious establishment during this period was reached under the Mamluk Dynasty which took over from the Ayyoubid Dynasty in ruling over Syria, Egypt and parts of the Arabian Peninsula during 1250-1500 CE. In their bid to draw nearer to the Muslim religious establishment, they recognized and gave equal status to all surviving Sunni schools of law or madhhab and appointed high judges or qadis from all four schools in their judiciary. Moreover, during

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8 Arjoumand, 269-276.
9 See Gilbert, 126 who documents this fact for the Ayyoubid state.
10 See Arjoumand, 279—283 and Gilbert 132-133 for more on this point.
11 Vickor 169-170.
their reign, an ‘Ifta’ Dar al-Adl’ was established which was a special council of muftis, selected from all four Sunni schools, to advise the sultan on the Shari’ah legitimacy of his policies.\textsuperscript{12}

Despite this growing collaboration between the political rulers and the religious establishment, the Mamluks also set up non-Shari’ah courts known as mazalim courts, to deal with matters of administrative governance that were not directly addressed by Shari’ah law. The Shari’ah high judges (qadis) and muftis were present in these courts, even when these courts were presided over by the ruler or state functionaries like provincial governors rather than a Shari’ah trained qadi.\textsuperscript{13} The presence of qadis and muftis in these non-Shari’ah courts were presumably to insure that the spirit of Shari’ah law was being observed. However, in the Mamluk period, these mazalim courts began to expand their legal jurisdiction to the larger public and hence began to encroach on the jurisdiction of Shari’ah courts.\textsuperscript{14}

As we will see in subsequent sections of this chapter, this trend of the religious establishment drawing closer to the circles of the political elite becomes even stronger in later periods especially under the Ottoman Dynasty. Although the reason why the ‘ulema moved into closer cooperation with the political elite after the formative period of Islam needs further scrutiny, but one may speculate that increasing attack on the house of Islam by foreign elements may have led to a spirit of consolidation and conservatism. Whatever the reason may have been, it is clear that prime objective of all institutions was

\textsuperscript{12} Vikor, 145-146.
\textsuperscript{13} See Hallaq, 2009, 200-201; and Vikor 191-192 for more on mazalim courts.
\textsuperscript{14} Hallaq, 2009, 209.
preservation of what had been achieved rather than development of anything new, as was exemplified by the establishment of rules for maintenance of madhhab legal doctrines that we presented in the last chapter.

Despite the onslaught on the abodes of Islam during this period and the contraction of Muslim dominance in this age, there was a great deal of expansion on other fronts, including new territories not previously governed by Muslim state. These included the invasion of Muslim armies into Northern India and the eventual establishment of the Muslim governance in the form of the Delhi Sultanate in the 1206. Also, in the 12th century, there was the Muslim expansion in the Anatolian plateau, at the expense of Byzantine Empire, with the establishment of the Rum Seljuk dynasty, which later paved the way to the establishment of the Ottoman Empire in that region in the 14th and 15th century. These expansions carried the political-legal traditions of Islam into these territories as well as an influx of Muslim immigrants from the heartlands of Islam who were both fleeing the political turmoil in their native lands as well as looking for new opportunities that awaited them in these newly established Muslim realms.

In the end, according to Hodgson, Islamic lands and Muslims were dominant both politically and culturally more so than other nations or regions because of their geographic centrality in the Afro-Eurasian land mass and their cosmopolitanism with respects to social and cultural mobility. Muslim preponderance was not strictly a function of the moral appeal of Islam, but as Hodgson claims was also complemented on

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15 Hodgson, V.2, 330.
16 See Levitzion 59-61 for more on these points.
17 Hodgson, V.2, 331.
the social level by a “contractualistic pattern of legitimacy in social organization.”18 For Hodgson, “‘Contractualism’ suggests status by achievements rather than status by ascription.”19 That is, there was a greater emphasis on the legitimacy of personal achievement, so that relations were arranged by contract rather than custom,20 as symbolized for example in the Islamic practice of bay’ah (pledging allegiance as an explicit recognition of one’s authority).21

Hodgson argues that ultimate legitimacy in Islam was found in egalitarian contractual responsibilities where legitimate authority was attributed to actions that were consequences of responsibilities that would be personally executed in the various roles and arenas of life. What defined public duties in terms of personal responsibility was the Shari’ah principles that classified all social actions to fard ‘ayn, a duty incumbent on every individual, and fard kifayah, a collective duty incumbent on as many persons as required to fulfill the responsibility.22

Moreover, roles and responsibilities were exercised under a single set of fixed legal standards that was universally applicable. Shari’ah law was applicable wherever there were Muslims as it did not depend on territorial establishment nor official continuity of personnel, but rather on the minimum of Muslims who were committed to it, of those who were versed in it and would see to its application.23 Muslim social

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18 Hodsgon, V.2, 340.
19 Hodsgon, V.2, 342.
20 Hodsgon, V.2, 342.
21 Hodsgon, V.2, 348.
22 Hodsgon, V.2, 346.
23 Hodsgon, V.2, 349.
mobility among social milieus and across geographic and political boundaries was facilitated by the Shari’ah which insured a high degree of personal freedom. Although Shari’ah law was not the only law practiced by Muslims, as customary rules always came into play, the Shari’ah maintained a central position and was made always relevant to changing conditions through the fatwas practiced by jurists who were respected by Muslims throughout the lands of Islam.24

Yet the pace of change in Shari’ah that was facilitated by fatwas in the pre-modern period was evolutionary and organic in that there were no major breaks in the way the law was conceived or practiced. There were only piecemeal and particular modifications of the law when circumstances necessitated those changes.25 Madhhab, or Islamic legal schools, influenced this conservative pace of change in Shari’ah through their established legal doctrines that now confined the scope of fatwas to those matters that not directly addressed those doctrines.

To comprehend how fatwas were integral to the cultivation and maintenance of Shari’ah law, one only need to look at the practice of Muslim judges (qadis) in their court proceedings. Fatwas, which reflected the authoritative doctrines of the madhhab, were often requested by judges from muftis in hard cases and these fatwas “normatively constituted the basis of the qadi’s ruling”.26 As Hallaq notes, this phenomenon explains why court decisions in themselves were not deemed authoritative or binding precedents in Islamic law as was the case in common law legal systems. This also explains why the

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24 Hodson, V.2, 351-352.
26 Hallaq, 2009, 177-178.
decisions of Muslim courts were never kept and published as was the case for common law courts.  

Hence, Shari’ah law, on a whole, was not a product of state machinery and was cultivated by muftis who were agents of civil society, that is, “separate and self-conscious networks or institutions independent of the state or in opposition to the state” and not agents of the state. So, Shari’ah law had relative independence from the state and was somewhat impervious to the changes of dynasties and political rule. Although Shari’ah law was relatively autonomous from the state, the state sponsored courts and qadis (judges) who were enforcing these rules were not. While the mufti derived his authority from the public based on his epistemic standing, the qadi, on the other hand, acquired his authority from the state. So, Shari’ah courts were an apparatus of the state, but were based on laws that were “outside the state’s domain.” So while the qadi was a state official, the mufti was a member of civil society so long as he was able to play his role as an explicator of the law apart from state apparatuses such as the courts. This relationship would change in the future as some later Muslim ruling dynasties like the Ottomans incorporated the office of mufti into the state machinery.

In closing, one can assert that despite this conservative pace of change in Shari’ah law and its relative stability in the face of chaotic political change during this period, it

27 Hallaq, 2009, 178.
28 Vikor, 185-186.
29 Vikor, 188.
30 Vikor, 187.
31 Vikor, 187.
32 Vikor, 187-188.
was not impervious to accommodating socio-historical realities, and it was through the legal mechanism of fatwa that the changing realities could be addressed. So in the next section of this investigation, we will see how fatwas continued to transform and cultivate the Shari’ah law in spite of its crystallization around madhhabs and their legal doctrines.

The Systemization and Structuring of Islamic Law: Ifta’ within the Confines of Madhahib in the Age of Political Upheaval.

My goal in the remainder of this chapter is to illustrate how fatwas were issued under such rules and restrictions from the 6th/12th century AH/CE all the way to the 12th/18th century AH/CE when the legal schools and the rules of legal methodology (usul al-fiqh) were preponderant. In selecting the fatwas that would illustrate this point, I used the following criteria to determine which of the many thousands of fatwas from this period would serve the objectives of this investigation: First, the selected fatwa is one that was issued by a famous jurists/mufti of a particular legal school (madhhab). This would better insure that the fatwa was in some ways looked at as having greater authority and thus put into practice, given the stature of the jurist in question. Secondly, the rationale used in the fatwa should in some ways reflected the need to navigate through the discursive rules and structure of the madhhab that the mufti issuing the fatwa adhered to or at least tried to reconcile some established legal precedent to current circumstances. Third, the selected fatwa in some ways advocated a change in the religio-legal practices or precedent. Fourth, the fatwa chosen should be of sufficient length to demonstrate the types of legal rationale that were developed in that particular period. Fifth, the fatwa should have been precipitated by a change in social or historical circumstances and conditions. Hence, I will not deal with fatwas that are concerned with ritual or strictly
religious matters, as those types of practices tend to show more continuity over time than they do change. Lastly, the fatwas should be concerned with socio-historical issues of universal significance or scope and not be confined to the concerns of individuals or particular groups.

The last two criteria were included to ensure that we take our discussion of fatwas out of the strict realm of legal discussion into the realm of social reality, which I claim that fatwas influence and are influenced by. It should be noted that not all of the fatwas selected for this investigation met all of the criteria mentioned above as it was a difficult task to sift through thousands of fatwas and find ones that would simultaneously meet the all standards that I set. Nevertheless, if a particular fatwa met most of the criteria and was particularly illustrative of some of the criteria in some salient way, then it was seen as a good choice as an example of fatwas from this period.

I have chosen fatwas that represent various subdivisions in the long period covered in this part of the investigation so as to illustrate points of continuity and change over time in methods of issuing fatwas. Moreover, I have chosen fatwas which were issued by muftis from varied geographic locations around the known Muslim world during this period, which will also demonstrate patterns of uniformity and diversity of the practice of *ifta’* in different cultural and regional settings. In addition, the breadth of fatwas chosen for this analysis will represent a broad spectrum of fields dealing with social, economic, and political issues as well as fatwas that emerge from muftis who represent various ideological and sectarian strands. So the idea here is to be inclusive in my fatwa selection as far as practically possible for this investigation so as to get an accurate representation of the fatwa activity of this period.
Ibn Rushd Al-Jadd’s Fatwa on Pardoning or Punishing for Murder: c. 6th/12th Century AH/CE:

In this last chapter, I dealt with the Andalusian Maliki jurist Ibn Rushd al-Jadd (d. 520/1126 AH/CE) with reference to the fatwa he issued with regard to outlining the topology of jurists within the Maliki school. In this chapter I will deal with a fatwa that he issued with reference to a criminal case of murder that takes place in Cordoba in the year 516/1122 AH/CE. This particular fatwa of Ibn Rushd Al-Jadd is found in the collections of Ibn Rushd’s fatwas and a non-abridged version of this fatwa has been translated in its entirety by Hallaq in his book Authority, Continuity and Change in Islamic Law. I will also use this translation and his commentary on it in my analysis. The case involves a father who was murdered by an intoxicated person where the deceased is survived by three minor children that become the centerpiece of the debate in the fatwa. Moreover, the agnates in this case are the victim’s brother and his adult children who were demanding the execution of the murderer.

The fatwa adjudicates whether the agnates of a murdered victim have the right to call for the immediate execution of the murderer or rather whether the minority children of the murdered victim have the right to pardon the murderer once they reach the age of majority. Although this fatwa does not meet all of the criteria established earlier, since

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33 See Ibn Rushd, V.2, fatwa # 385, page 1196. Also see Hallaq, 2004, 195 for translation of this fatwa.
34 See Ibn Rushd, V.2, fatwa # 385, page 1196.
36 Ibn Rushd, V.2, fatwa # 385, page 1197. Also, see Hallaq, 2004, 206.
37 Ibn Rushd, V.2, fatwa # 385, page 1197. Also, see Hallaq, 2004, 200.
the subject matter is not of universal socio-historical significance because it is about resolving a problem about a particular murder, nevertheless, it does satisfy all of the other criteria I have established to make a good case for analysis.

The question posed to Ibn Rushd was whether the fact that the minority children of the murdered victim had the right to pardon the murderer once they become of age and bar the agnates from seeking punishment. Ibn Rushd’s stance is that minority children should be allowed to attain the age of majority and be given the choice to pardon or punish the perpetrator, thus barring the entitlement of the agnates from exacting immediate punishment.³⁸ It should be noted that this position that he takes is counter to the established position of the doctrine of the Maliki madhhab which gives the agnates the authority to exact immediate punishment.³⁹ So here Ibn Rushd’s fatwa goes against the established doctrine impelling him to give a full argument to justify his point of view.

Once he establishes that his view goes against the school’s accepted ruling, Ibn Rushd decides to correct what he believes is a widespread misperception that no mufti should go against established doctrine of his adopted school. Ibn Rushd retorts to this assertion by claiming instead that no mufti should follow or issue legal opinions according to an existing doctrine unless he knows that it is sound.⁴⁰ This clears the way for him to argue his case against the established legal ruling of the school. What he asserts in this fatwa necessitates that the mufti know more than just the doctrine itself, including the legal rationale which establishes its soundness. In asserting this condition,

³⁸ Ibn Rushd, V.2, fatwa # 385, page 1198. Also see Hallaq, 2004, 195.
³⁹ Ibn Rushd, V.2, fatwa # 385, page 1197. Also, see Hallaq, 2004, 195.
⁴⁰ Ibn Rushd, V.2, fatwa # 385, page 1197. Also see Hallaq, 2004, 195-196.
he was being entirely consistent with the fatwa he gives nearly three later, which I analyzed in the previous chapter, where he delineates the conditions for issuing fatwas. It may be recalled that there he asserts that anyone who knows the doctrines of the Maliki School, but does not have knowledge about the validity of such positions has no right to issue fatwas. It is only those who understand both the doctrines and the legal rationale for their validity who have the true capacity to issue fatwas. So in this particular fatwa regarding the rights of the family and agnates of the murdered victim, Ibn Rushd applies the discursive rules for ifta’ that he himself has set for the Maliki madhhab, consistently with his own practice of ifta’.

After establishing his right to disagree with established Maliki doctrine, Ibn Rushd attempts to give justification for his legal position by quoting the relevant proof texts that support his position. On this point, he quotes relevant passages of the Qur’an (2:178, 17:33) and several hadiths that establish the right of the heir of the victim to seek punishment or pardon the killer. Citing and interpreting the relevant Qur’anic and hadith passages is an important step in his strategy to establish his legal opinion in lieu of the counter position held by Maliki doctrine. After all, it is those passages that are the starting point of the legal rulings on this issue and he must show that his position is line with the implication of those proof texts if he is achieve anything by his counter argument. Ibn Rushd is aware that the discursive legal tradition is grounded on the sacred text of Qur’an and hadith and hence the importance of offering an interpretation of these sources that would legitimate his point of view and avoid the point of view of Maliki

41 Ibn Rushd, V.2, fatwa # 385, pages 1198-1200. Also, see Hallaq, 2004, 196-197.
tradition, which he believes is inconsistent with the implications of those sacred texts as well as with the Maliki madhhab’s own legal principles for arriving at valid rulings.

Ibn Rushd claims that some jurists who interpret the stated Qur’anic passages claim that it is not for the agnates to pursue punishment before the minor children come to age because it would negate the children’s right to pardon and receive the blood money. He also claims that this last stated opinion is analogous to the legal rights of minor children in non-penal cases that are not transferred to the closest relatives such as cases of preemption where the child is allowed to attain the age of majority and claim his/her rights. Ibn Rushd tries to situate these opinions among jurists of his own school like the Ashab and jurists of other schools like al-Shafi’i knowing that in order advance his argument he needs to show that there is precedent for his position.

Once he shows that some of the preceding jurists held his view, thereby giving his opinion greater legitimacy, Ibn Rushd then begins to undermine the legal basis of the established legal position of the Maliki doctrine. The Maliki school relegates the right of punishment to the agnates if the victim’s heirs are minors, and they established this legal position through legal hermeneutics of istihsan (juristic preference) obviating the conclusion based on qiyas (juridical inference or analogy), which preserves the minor children’s right to attain age so that they may determine whether they want to pardon or punish.43

The point that Ibn Rushd is trying to make here is that legal rulings that are established by the legal rationale of qiyas (juridical inference) are stronger than those

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42 Ibn Rushd, V.2, fatwa # 385, page 1199. Also see Hallaq, 2004, 197.
43 Ibn Rushd, V.2, fatwa # 385, page 1201. Also see Hallaq, 2004, 198.
opinions established by other legal rationales, because *qiyaṣ* is one of the four unanimously accepted means of establishing law in Islamic legal theory while *istiḥsān* is not. It should be recalled from previous discussion that the legal ruling that is established through the hermeneutics of *istiḥsān* by definition is one that annuls an opposite legal ruling that has been established through *qiyaṣ* for some overarching reason necessitating such an invalidation. Hence, for those who advocate *istiḥsān*, it is only used in rare occasions where the conclusions reached by *qiyaṣ* have created odd situations that jurists believe run counter to the spirit of the law.

So what is the justification for this *istiḥsān* (juristic preference) that legitimizes the legal opinion of those who advocate the right of the agnates to punish and at the same time obviates the seemingly stronger legal rationale of *qiyaṣ* that gives the right to minor children to attain their majority and be able to pardon the murderer? Ibn Rushd claims that the justification for those who base their judgment on *istiḥsān* is their belief in the greater value of punishment over that of pardoning. Ibn Rushd states that this is because punishment is seen as a deterrance from committing crime and those who argue for the greater value of punishment find support for their view in the Qur’anic verse which encourages punishment by stating: “There is life in retaliation”44. Ibn Rushd disagrees with this point of view and claims that the value of pardoning overrides that of punishment and finds support in another set of Qur’anic passages (3:133-134; 42:20; 42:43;) which speak to the merits of pardoning wrongdoers.45 He also quotes a hadith of

44 Qur’an: 2:179.
the Prophet which indicates that he encouraged the heirs of victims to pardon murderers.\footnote{Ibn Rushd, V.2, fatwa # 385, page 1202. Also see Hallaq, 2004, 199.} Therefore, he concludes that since pardoning is recommended, the minor children should be allowed to attain the age of majority so as to be given the opportunity to practice the greater of the two rights of pardoning.\footnote{Ibn Rushd, V.2, fatwa # 385, page 1201-1202. Also see Hallaq, 2004, 199.}

Ibn Rushd goes further in his fatwa by claiming that the call for clemency is even greater in this case since the murderer was intoxicated,\footnote{Ibn Rushd, V.2, fatwa # 385, page 1202. Also see Hallaq, 2004, 200.} but we already see thus far in his argument that there are several legal strategies employed in this fatwa that we need to take note of. We have already mentioned his situating his argument within the context of Qur’an and hadith passages that are supportive of his point of view and further situating his position within the opinions of preceding jurists who agree with his position. In the latter part of the argument for his position, he handles those elements of legal theory (\textit{qiyas} and \textit{istihsan}) that are relevant to the case at hand and tries to show that the theoretical basis of his opponents position (\textit{istihsan}) is weak given that the rationale (greater value of punishment which would necessitate a speedy verdict) for this basis is not supported by his hermeneutics of Qur’anic values which give greater weight to clemency. Moreover, Ibn Rushd argues that rulings based on \textit{qiyas} have the preponderant position in the legal principles of the Maliki madhhab, hence this ruling based on \textit{istihsan} is in violation of those principles.\footnote{See Hallaq’s interpretation of Ibn Rushd’s argument in Hallaq, 2004, 200-201.}

As was shown in previous chapters, fatwas prior to the established of legal doctrines of \textit{madhhab}s were a matter of debate between jurists and the legal positions
they espoused. Once some of these personal legal positions evolved into doctrines of the legal schools the debate about legal opinions (fatwas) was no longer strictly a matter of one independent jurist advancing the legal rationale for his position against the opinion of another. The matter now became much more complex and restricted, as Ibn Rushd’s fatwa shows, where jurists now had to deal with established legal doctrines which they adhered to and had to situate their own legal opinions within the crafted opinions of preceding jurists in their legal school.

Hence, the character of the fatwa process (ifta’) had changed during the period when the doctrines of madhhab s were becoming established and accepted. Now the debate about legal opinions and their validity was not strictly a function of independent jurists’ legal rationale legitimating their opinions, but rather the debates were now anchored in the doctrines of the legal schools and took place between an associations of relatively dependent jurists who were affiliated with these madhhabs. The purpose of these intra-doctrinal debates was to work out the proper legal doctrines and opinions in accordance to the legal principles and precedent of each school separately so that they were less concerned about the legal doctrines and opinions of opposing schools and their respective jurists.

This, in some respects, added complexity to the fatwas in that a sustained argument had to be made of why established doctrines needed modification, alteration, or even progression. This is evident in Ibn Rushd’s fatwas, in that he had to argue for the legitimacy of his opposition to the established legal view, had to situate his legal opinion within the opinions of some of the preceding jurists in his own school, and then had to argue why his legal opinion represents a truer reflection of legal principles that the Maliki
school espouses even when the school had adopted a legal opinion that was different. Moreover, as Hallaq notes, Ibn Rushd argues that the accepted ruling of the Maliki school on this issue runs contrary to its hermeneutical principles because the legal position is derived through the less authoritative method of *istihsan* (juristic preference) instead of the more commonly accepted method of *qiyas* (juridical inference or analogy).\(^{50}\)

How did the political authorities and the Maliki School receive Ibn Rushd’s fatwa? The authorities seem not to have paid heed to Ibn Rushd’s fatwa and executed the murderer on the request of the agnates, keeping with the legal position found in Maliki doctrine.\(^{51}\) Moreover, later Maliki jurists viewed Ibn Rushd’s contrarian fatwa with mixed reactions. Some felt that Ibn Rushd was within his rights as a high-ranking scholar in the Maliki *madhhab* to issue such a fatwa that opposed the official position of the school, but nevertheless considered his opinion to be weak, and hence the fatwa was never incorporated subsequently in the legal doctrine of the Maliki school, as evidenced by the absence of his ruling in the legal compendia that represent the official, established legal doctrines of the school.\(^{52}\)

Regardless of the failure of the conclusions of this fatwa in influencing the verdict in the case or ultimately impacting Maliki legal doctrine, this fatwa is an important indicator of how fatwas in the age of preponderance of legal schools had to be rationalized within the limits of the school if they were to be accepted at all. Although Ibn Rushd was probably considered a *mujtahid* (independent jurists) within the Maliki

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\(^{50}\) Hallaq, 2004, 201.

\(^{51}\) See Hallaq, 2004, 200 for this information.

\(^{52}\) For more on this point see Hallaq, 2004, pgs. 202-204.
school who had the proper authoritative rank to issue such a fatwa that opposed the
previously established precedence of the Maliki School, not all fatwas that were issued by
such high ranking jurists were necessarily accepted as authoritative positions of the
madhhab. These fatwas had to be scrutinized by later high ranking jurists (murjihs) who
had the authority to select or reject such legal opinions that would be incorporated in the
official ruling of the school.

Ibn Taymiyyah’s Fatwas on Mongol Incursions into Syria (c. 1300):

In this section, I will analyze several fatwas issued by the great Hanbali jurist and
theologian Taqi al-Din Ahmad Ibn Taymiyyah (d. 726/1328 AH/CE), who was a resident
of Damascus, Syria during the reign of the Mamluks. He was born in the town of Harran,
in what is now Turkey, but his family fled the town before the approach of the Mongols
seeking refuge in Damascus which was under Mamluk rule. He was a prominent and
popular scholar of the Mamluk period who was pressed into the service of the dynasty
only later to come to be at odds with it over some of his theological views and legal
opinions.

Although he was an adherent of the Hanbali School of law, he was less inclined
than his contemporaries to show complete observance of the rulings that had been
established in his own school of law. He was critical of the legal doctrine of taqlid
(strict observance of particular school of law) that had become established by his time.

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53 Laoust, 951. Also see Bonney, 113.
54 For more on this see Henri Laoust’s article on Ibn Taymiyyah in EI2, V.3, pgs. 951-955.
55 See Ibn Taymiyyah’s fatwa invaliding the repudiation of marriage when a husband divorces his wife
three times in one sitting in Fatwa Ibn Taymiyyah Al-Kubra, V.3, pg. 224.
56 See Laoust, 954 for more on this point. Also Hodgson, V.2, 471.
This did not mean that he rejected the authority of the rulings of the madhhab, as will be demonstrated by the fatwas we will analyzes in this section, but he did not feel that a qualified mujtahid (jurist) ought to be confined to the rulings reached through consensus by the schools of law. Ultimately, it was the textual authority of the Qur’an and Sunnah that held supremacy, which either affirmed or rejected the rulings reached by the early mujtahid madhab-makers and the consensus reached after them. Nevertheless, he was solidly in the Hanbali tradition, as most of his views abide by the rulings in that school of law.

However, what is most important here is to spell out the political context in which these fatwas of Ibn Taymiyyah were composed. The fatwas of concern here are those which he issued regarding the three invasions of the Tatars or Mongols into Syria that took place in the years 699/1299-703/1303 AH/CE under the Ilkhanid Tatar ruler of Iran, Ghazan (r. 694/1295-704/1304). The subject of these fatwas was whether it was legitimate for the Muslims in the regions of Syria to take up arms to resist the Tatars, given that the Tatar leadership had become Muslim. The fact that the invaders were Muslims created confusion in the ranks of the Muslim populace of region probably because they were not sure whether the events signified an inter-dynastic rivalry between the Tatars and Mamluks, which the Muslim populace had witnessed many times in the history of Islam and had stayed aloof from or whether this was genuine foreign invasion that required the resistance of all Muslims. This much can be surmised from the questions

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57 Laoust, 954.
58 Hodgson, V.2, 471.
59 Bonney, 113. Also see Laoust, 951.
that were posed to Ibn Taymiyyah asking him to clarify matters for them. Let us look at those questions to have a greater appreciation of the gravity of the problem and the response of Ibn Taymiyyah to those issues.

There were two similar questions posed to Ibn Taymiyyah regarding the legitimacy of fighting the Tatars. Let us take a closer look at those questions. The first question, which elicits a shorter reply from Ibn Taymiyyah, indicates that the questioner is asking for directives about the Tatar invasion that took place in 699 AH (1299CE). So the questioner already gives a date for which the fatwa can be presumed to have been issued after situating this particular fatwa in particular time in history. Moreover, the questioner remarks on the on the atrocities that the Tatars committed: They had killed, enslaved, plundered Muslims, and desecrated Muslim holy sites like Al-Aqsa Mosque (in Jerusalem). Despite this, the questioner continues, they claim to be Muslims because they pronounced the declaration of faith (shahadah) so that it is forbidden to fight against them because of their Islam. So the questioner wants Ibn Taymiyyah to speak about the permissibility of fighting them and the religio-legal basis of the ruling.

The second question regarding fighting the Tatars that is found in Ibn Taymiyyah’s fatwa collection is more detailed in other respects and elicits a more detailed response from Ibn Taymiyyah. In this question, the questioner first wants to know what is the stance of the scholars on the Tatars who have made multiple incursions into Syria but who have now made the Muslim declaration of faith, have associated

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60 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, 274.
61 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, 274.
themselves with Islam and no longer hold allegiance to their previous infidelity (kufr)?

This question gives even more context about the events taking place in that it situates the conflict in a particular place (Syria) and states that these invasions have happened repeatedly while in the first question talks only about one conflagration that took place in 699 AH (1299 CE). So we can presume that the second question takes place after the first one and that the issue of the Tatars continued to cause confusion amongst the Muslim populace, who were in need of religious directives on how deal with that quagmire.

Moreover, in the second question, the questioner not only wants to know the legal stance on fighting the Tatars, but also wants to know religio-legal legitimacy of doing so and the stance of the various scholars and schools (madhhab) on this issue. So it seems that the questioner will not be satisfied with just Ibn Taymiyyah’s position nor that of his legal school, the Hanbali madhab, but rather wants to know all of the variant scholarly and school positions so that he may formulate his response based on the greater consensus. This also indicates that the questioner may have been looking for more than satisfying his own religio-legal inclinations and wanted legal response that would speak to the greater Muslim public who came from a broad spectrum of legal schools (madhhab). Beyond the immediate questioner, the form of the question may indicate that the larger Muslim public may also have been confused on the right course of action and thus felt a need for directives that would speak to their own religio-legal proclivities or madhab allegiances.

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63 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, 278.
64 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, 278.
The questioner continues by asking about the fate of Muslims who deserted the Muslim armies and joined Tatars and the fate of Muslim scholars who joined the ranks of the Tatars. This part of the question is very revealing in that it shows the level of confusion that the Muslim populace must have had about this issue, particularly because some Muslim scholars, who presumably the populace held in high esteem were joining the Tatars. The questioner further elaborates on the complexity of this problem in that s/he indicates that there are those whom assert that both the Tatars and those who fight against them (presumably the armies of the Mamluks) are both Muslims yet both are oppressors, so that Muslims should not fight for either of them. Yet there are others who assert that the Tatars are merely renegades (bughat) and should be fought as such. So the questioner ultimately asks Ibn Taymiyyah to give him/her a definitive response on this issue since it has confused many.65

Before I spell out the details of Ibn Taymiyyah’s response to both questions I want to make some general observations about the structure of Ibn Taymiyyah’s fatwas because those two fatwas, and especially the second (later) fatwa contains many digressions and allusions to historical events in his arguments that could make the reader lose sight of the purpose of my analysis of these fatwas, which is to determine the method of his arguments and their possible impact on both the legal discourse and Muslim society. The first point to be made is that Ibn Taymiyyah begins his responses by situating the entire argument on a single criterion and that is what the religious status of the Tatars according to Shari’ah law is and according to that status it could then be

65 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, 278.
determined whether they should be resisted by the Muslim community or not. Ibn Taymiyyah recognizes here that those seeking the fatwas are seeking a religiously legitimated course of action to the problem that faces them and Ibn Taymiyyah’s strategy is to frame responses within the parameters of the religiously legitimated discourse of Shari’ah. So at the very beginning of his two fatwas he establishes this standard as the only motive underlying his response and not any other considerations.

Second, his arguments, especially in the second (later fatwa), employ three types of authoritative evidence to prove his point of view: firstly, the discursive (textual) authority of Qur’an and hadith; secondly, the hermeneutical authority of the early jurists (Abu Hanifah and his protégées, Malik, Al-Shafi’i’, and Ahmed ibn Hanbal and his protégés), who in Islamic tradition are said to be the originators of the Sunni legal schools. Thirdly, Ibn Taymiyyah invokes the historical precedents of early Muslims and their responses to similar predicaments. So, these evidences represent the three levels of authority that Ibn Taymiyyah recognizes in these fatwas as the proper grounds by which to outline his response.

Third, the three levels of authority that are evident in Ibn Taymiyyah’s fatwas are in essence what Shari’ah law has been constructed from historically. So by employing these types of evidences, he is precisely indicating how the Shari’ah would judge this matter. In other words, establishing the Shari’ah as the standard by which these matters are to be decided and then utilizing these three levels of authority to determine his position in these fatwas amounts to one and the same thing. It is by evaluating the discursive, the hermeneutical and the authority of historical precedent and what they imply in regards to the issue at hand that are we going to determine what the Shari’ah
instructs Muslims to do in this case. However, Ibn Taymiyyah does not try to subsume his interpretation of what the Shari’ah implies in this case under the rubric of any particular school of law (madhhab) like so many muftis of his era.

But why doesn’t Ibn Taymiyyah structure his response to this pressing issue according to the Hanabali School of which he is an adherent? There are three explanations that come to my mind as to why he does not do this. First, the questioner, in the second fatwa, asks for the diverse positions (madhahab) of the scholars on this issue presumably to look for a fatwa that would appeal to diverse groups of Muslims. Secondly, the very issue of concern in the fatwa is of universal concern to all the Muslims of that region irrespective of their legal affiliations with any particular school; hence, the response needed to cross the boundaries of madhhab so as to appeal to the larger audience of Muslims who must face this threat. This is all the more true in light of the fact that the questioner indicates that some Muslims scholars are crossing over to the Tatars, which created more confusion amongst Muslims on who to side with. One can only presume that the Muslims scholars who did so were from diverse madhhab affiliations, creating confusion within their own ranks as to what the Shari’ah point of view on this issue may be. Therefore, Ibn Taymiyyah responds in a way that appeals to transcend madhhab considerations. Lastly, it must pointed out that Ibn Taymiyyah’s own proclivity with regards to fatwas was not to restrict himself to his own school of law when the matter he was addressing was of general concern to the whole community even though he more often than not adhered to the legal possibilities afforded to him by his own Hanbali School. This madhhab, of all the Sunni schools, harbored the most diversity
in terms of legal positions held and was the least structured in terms of juristic hierarchical authority.  

Now that I have laid out the preliminary meta-observations about Ibn Taymiyyah’s fatwas on the Tatars, I can turn to the content of his fatwas. Although I will try to restate some of his arguments in the two fatwas that are under consideration, I do not intend to follow the arrangement of his arguments in both fatwas. There are points of convergence and divergence in both fatwas with respect to content and arrangement of arguments as well as details that are found in one fatwa that is not found in the other. So it is best to present his view and rationale in a way that coheres with what I am attempting to investigate here.  

Ultimately, what Ibn Taymiyyah tries to prove in his fatwas is that the Tatars cannot be considered legally Muslims even when the declare the profession of faith (shahadah) so that the need is to resist them as foreign invaders who will bring great harm to Islam and Muslims if they are not resisted. His main argument in both fatwas to prove this point is to illustrate the Tatars’ utter disregard for the Shari’ah by citing numerous examples of their contravention of it, including their complete contempt for the sanctity of Muslims in the Tatars’ transgressions against Muslim lives, properties, and sacred places. In addition to the monstrosities they committed against Muslims, their total neglect of performing fundamental Islamic practices such as prayer (salah) and charity (zakah), and their equating the religion of Islam with other religions really call

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66 Recall Ibn Khaldun’s statement in the last chapter of how the Hanbali school least resembled the other Sunni legal schools in terms of organizational structure.

67 See for example, Ibn Taymiyyah’s *Majmu Fatawa Ibn Taymiyyah*, V.28, pgs. 275-276 for where he says this in his first fatwa and pg. 283 where he states this in the second fatwa.
their faith into question.\textsuperscript{68} Moreover, the motives behind the Tatars’ aggression is not to fight for the sake of Islam, but to do so for the sake of Mongol glory and supremacy along with their scrupulous observance of their codified Mongol traditions (the Yasa’) and not the Shari’ah of Islam.\textsuperscript{69}

Ibn Taymiyyah states his arguments against the Tatars mostly in the latter part of his fatwas, because he spends the earlier portions of the fatwas appealing to Muslim normative and historical sensibilities, so as to establish good grounding for his arguments. One senses that Ibn Taymiyyah feels that there is real confusion and tension amongst the Muslims about this situation, which is obvious from the very questions posed to him. So, no direct fatwa would suffice to remove this ambiguity and hence he constructed elaborate fatwas that would make it decisively clear to the public that fighting the Tatars was not only permissible, but obligatory. Ibn Taymiyyah’s recognition of the severity of this difficulty is evident in his strategy to frame these events according to the authoritative precedents of early Muslim history and the normative discourses of Qur’an and hadith. He feels that by showing that there are precedents from the past for his position he can convince the ones in doubt about the course of action that he is proposing against the Tatars.

So he starts his argument by showing how the Qur’an does give license for Muslims to fight those groups of Muslims who make professions of faith, yet try to circumvent fundamental practices of Islam. In this regard, in the second fatwa he quotes Qur’anic passages to prove his point. One such passage is Qur’an 2:277-279, which

\textsuperscript{68} Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, pgs. 283-284.

\textsuperscript{69} Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, pgs. 283-284.
instructed those Muslim groups engaging in the practice of usury to desist from doing so or else risk being fought against by the Prophet Muhammad. He remarks that this passage was revealed in reference to the people of al-Ta’if who had become Muslims yet insisted on engaging in their practice of usury. Yet the verse gives sanction to fight against the likes of people of al-Taif even if they are Muslims. It is clear that Ibn Taymiyyah wants to find precedents for the obligation of contemporary Muslims to fight the Tatar even though the latter may outwardly claim to be Muslims.

But for Ibn Taymiyyah it does not suffice to quote Qur’anic passages that aid his point of view. He takes his argument to another level by quoting hadiths of the Prophet Muhammad that in his view foretold the coming of deviant Muslims groups like the Kharijites and their destructive effects on the Muslim community. These hadiths give license for Muslims to militarily oppose these groups. Moreover, he shows that when such groups like the Kharijites and those factions of Muslims who reneged on paying the alms tax (zakah) after the death of the Prophet Muhammad arose during the time of the early caliphate, the Muslims justifiably took up arms against them because they had transgressed against the Shari’ah or rulings of Islam. These episodes provide the historical precedents to legitimize Ibn Taymiyyah’s view about the Tatars.

After detailing the response of the early Muslim caliphate to renegades against its authority and/or against the Shari’ah in the second fatwa, Ibn Taymiyyah proceeds to discuss the stances that the early madhhab-making jurists took with regards to these rebellions against the early caliphate and the legal legitimacy of each group fighting in

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these conflicts. He says that Abu Hanifah and his protégés, al-Shafi’i and some of the
protégés of Ahmed ibn Hanbal claim that all groups opposing the Muslim caliphate
during the first civil wars are to be considered renegades (bughat) whether it was the
camp of al-Siffeen, al-Jamal, or Haroura. After a long digression about the legal stances
of the madhab-making jurists on how to deal with renegades, he proceeds to assert that
Malik, the advocates of hadith, and the majority of subsequent jurists of the madhhab
 distinguish the rebellions of the Khawarij and the tribes involved in the wars of apostasy
from the rebels in the case of the battles of al-Jamal and Siffeen. He claims that the latter
groups may be seen as renegades against the political authority, while the case of the
Khawarij and the camps involved in the wars of apostasy were renegades against the very
religion of Islam and its Shari’ah.

The purpose of this historical digression into early Muslim conflicts, one
presumes, is that Ibn Taymiyyah is trying to situate his argument for fighting the Tatars
in the context of the early civil wars, which would put in perspective the current
confusion that is taking place in the Muslim community. In other words, his strategy is to
have the contemporary Muslims conceive of their problem in terms of the early Muslim
history that they readily understand and have a definite position towards. If he can strike
an analogy between the current situation which is ambiguous for his Muslim audience
and the past situation which presumably they have a clear position on, then Ibn
Taymiyyah feels he can frame his opposition to the Tatars in a way that would be

72 Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, pg. 280.
accepted by his audience no matter what their particular Sunni *madhhab* affiliations may be.

Recalling the historical and legal precedents along with the normative principles of the sacred texts is central to Ibn Taymiyyah’s argument, because he recognizes that the Muslims view that early history of Islam as normative, and so much of that history determines how Muslims over time have interpreted the norms that are found in their sacred texts. In a sense this early history is intertwined with Islam’s scriptural norms in a way that made it a sacred history for which the acts that took place in that history also become normative. It is this interweaving of norms with history that animates the historical consciousness from which the Muslims constantly evaluate their present. Ibn Taymiyyah’s recognition of this Muslim historical consciousness provides a powerful backdrop from which he can frame current issues in a way that he feels would inspire definitive and desirable action to solve the imposing problems that were contemporaneous to him.

Even though Ibn Taymiyyah invokes historical precedents to convince his audience of his point of view on the legality of Muslims acting against other peoples who are either genuinely Muslims or merely profess it in name, he realizes that the argument still falls short because of the differences of opinion amongst early jurists about the early Muslim civil wars and their stances on the groups who participated in those wars. He recognizes that the lack of unanimity among the early jurists on those issues undermines his argument for decisive action against the Tatars. So, he minimizes those differences by claiming that they do not apply to case of the Tatar invasions because of the Tatars’ actual status of not really being genuine Muslims at all for the reasons I have already
stated earlier. Hence, Ibn Taymiyyah construes their the interaction of the Mamlûk Muslims with the Mongol Muslims not as a civil war amongst Muslims where some Muslims may straddle the fence, but as a foreign aggression against Islam and Muslims that must be resisted by all true Muslims at all costs.

Ibn Taymiyyah’s second fatwa deals with other issues, such as the Islamic legitimacy of the Mamluk regime with which he is siding with in this case, a political stance of his that I will not delve into here so as not to unnecessarily prolong this discussion. But looking at the structure of Ibn Taymiyah’s argument in his two fatwas, we see that as a Hanbali jurist-consult, he appealed far less to the authoritative hierarchy of his own madhhab, or any other madhhab for that matter, than other jurists of his time. I have already explained possible reasons for why that might have been so. Even though he did not confine his argument to the authoritative juridical structure of his school of law or any other school, he is careful to include the juridical stances of all four schools about the events and groups of early Muslim civil wars so as to extrapolate from that what would be their position in the case of the Tatars. The point here is that Ibn Taymiyyah knows that the authority of the madhhabs cannot be ignored even when he chooses not to confine himself to their possibilities when arguing his point of view because he is well aware the power that madhhabs were exerting on the legal discourse of his period.

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74 See this discussion in Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, pg. 289-293.

75 See for example in the second fatwa where Ibn Taymiyyah accepts Ahmed ibn Hanbal’s legal position that captured property of the Khawarij is to be considered war booty, hence, Ibn Taymiyyah infers from that Khawarij were to be viewed as non-Muslims and likewise the Tatars by analogy. See Ibn Taymiyyah, Majmu Fatawa Ibn Taymiyyah, V.28, pg. 281.)
It is hard for us to measure the political impact of Ibn Taymiyyah’s two fatwas against the Tatar invasions into Syria during the years 699/1299-703/1303 AH/CE the period for which these fatwas were issued. What can be said, though, is that the Mamluk authorities of this period did employ to Ibn Taymiyyah to exhort Muslims of Syria to engage in jihad both against the Mongols and the remaining crusading states in the area.76 Perhaps, the Mamluk authorities recognized the influence he exerted on many of the Muslim peoples in Syria and hence solicited him for the task. His influence amongst the peoples of Syria no doubt emanated from his courage and charisma, because he often practiced what he preached. Ibn Taymiyyah not only exhorted people to jihad against the perceived enemies of Islam he also engaged in acts of jihad. For example, he participated in fighting against the Shi’ites of Kasrawan who were alleged to have aided the Mongols and the Franks.77 Moreover, he went with a delegation of ‘ulema to Ghazan, the Il-Khanid ruler of the Tatars during the time of their invasions into Syria, to convince him to stop his attacks on the Muslims of Syria. During this encounter, he courageously rebuked Ghazan for what Ibn Taymiyyah interpreted as hypocritical action coming from a supposed Muslim leader.78

Whatever the real impact of Ibn Taymiyyah’s fatwas against the Tatars, the outcome of the Mamluk and Tatar conflicts turned in favor of the Mamluks as both the Tatars and the Mamluks signed a truce79 and Syria remained under the Mamluk Dynasty’s control, at least until Tamerlane invaded almost century later. So what Ibn

76 See Bonney, 113 and Laoust’s article about Ibn Taymiyyah in EI2, Vol.3, pg. 951.
77 See Laoust’s article about Ibn Taymiyyah in EI2, Vol.3, pg. 951.
78 See Bonney, 114 for further details on what Ibn Taymiyyah said to Ghazan.
79 Abu Lughud, 206.
Taymiyah desired in his fatwas did come to pass and peoples of Syria were able to put forth an effective resistance to the Tatars. Ibn Taymiyyah’s fatwas must have played a role in that resistance as they clarified a highly contentious issue raging in the Syrian public and exhorted them to decisive course of action.

There is one more of Ibn Taymiyyah’s fatwas concerning the Tatars that I would like to deal with here, and this is his fatwa on the city of Mardin. At the end of the 7th/13th century AH/CE, Mardin was a Turkish town at the crossroad of major trading routes in the region of upper Mesopotamia known as al-Jazeera80 sitting between present day Iraq, Syria and Turkey. The ethnic composition of its population consisted of Turkomans, Arabs, Kurds and Arameans and their religious composition of Muslims and Syriac Christians.81 Although it was ruled by Muslim rulers it was a protectorate of Ilkhanid Tatar (Mongol) Dynasty controlling Persia and Iraq, which made it a subject of a fatwa by Ibn Taymiyyah concerning its status as being Muslim or non-Muslim territory.82

The fatwa was solicited by a questioner who wanted to know whether Mardin ought to be considered an abode of war or peace83, probably because of the ruler of Mardin’s alliance with the Tatars. Moreover, the questioner wanted to know whether it is obligatory for Muslims to emigrate from the city and if so, are Muslims sinning by remaining there and assisting the enemy, the Tatars?84 In addition to all this, the

80 Michot, 1.
81 Michot, 3.
82 Michot, 7-8.
83 Ibn Taymiyyah, Al-Fatawa Al-Kubra, V.3; pg. 532. Also see Michot, 63 for translation into English of the entire fatwa, which I have also relied on here in my presentation of it.
84 Ibn Taymiyyah, Al-Fatawa Al-Kubra, V.3; pg. 532. Also see Michot, 63.
questioner wants to know that whether by charging the Muslim residents of Mardin with being hypocrites and would other Muslims be engaging in a sin by calling them such.  

To understand the legal context of this question, I will introduce a few notions of the world order in classical Islamic political theory. In Sunni classical formulations of Islamic law and political theory, the order was divided into the two realms of *dar al-silm/islam* (domain of peace/Islam) or *dar al-harb/kufr* (domain of war/unbelief) in the same way in which the questioner about the status of Mardin had phrased his question.  

*Dar al-silm/islam* (the domain of peace/Islam) was considered Muslim territory where Muslims were required to reside and where Shari’ah law was principally enforced.  

*Dar al-harb* (domain of war), on the other hand, represented non-Muslim territories where Shari’ah law was not enforced and Muslim residence was prohibited. Some scholars developed further a tripartite system by adding a third category to this world order denoted as *dar al-sulh/ahd* (domain of covenant/truce), where a non-Muslim polity signed a peace treaty with a Muslim polity thereby creating a state of neutrality and that Muslims may at least seek temporary residence.  

In his response, Ibn Taymiyyah proposes certain legal innovations that would modify the existing doctrines of Islamic law regarding international relations. Ibn Taymiyyah begins his response by claiming that it is illicit to insult Muslims or their properties whether they be in Mardin or elsewhere. Furthermore, to give assistance to people who depart from the Shari’ah (read the Tatars) is prohibited whether those actions

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85 Ibn Taymiyyah, *Al-Fatawa Al-Kubra*, V.3; pg. 532. Also see Michot, 63.

86 For more on these notions of world order in classical Islamic law and political theory, reference the following: Davutoglu, 186-187; Hamidullah, 295-298; Kelsey, 33.
come from the people of Mardin or elsewhere. Thus far in his response to the specific query about Mardin, Ibn Taymiyyah wants to go beyond the question and establish general principles that should apply for all cases whether in Mardin or otherwise.

Ibn Taymiyyah continues his response by stating that if the Muslims of Mardin are unable to properly practice their religion, then it is incumbent on them that they emigrate to Muslim controlled territories, but if that is not the case then it is only preferable for them to do so. Even more importantly, if the Muslims of Mardin choose to remain there, they must abstain from giving the enemy aid by any means possible, but if it is not possible for them to avoid assisting the enemy then it is incumbent upon them to emigrate. In this part of the fatwa, Ibn Taymiyyah seems to be addressing more narrowly the issue of Mardin as presented in the question and seems less categorical in his condemnations then he was in the two fatwas we investigated earlier. But the real nuance in Ibn Taymiyyah’s response comes when he answers the critical question of whether Mardin is to be considered an ‘abode of peace’ that should left to stand as is, or is an ‘abode of war’, thus making it a proper object of a Muslim jihad (military campaign) according to the classical formulation of Islamic law regarding the Muslim affairs of state.

Here Ibn Taymiyyah eschews the classical partition of the world into a domain of peace and war and instead claims that Mardin is neither of two, but it is a composite (murakkab) of the two. He states that it is not a domain of peace by which the legal

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87 Ibn Taymiyyah, *Al-Fatawa Al-Kubra*, V.3; pg. 532. Also see Michot, 63.
88 Ibn Taymiyyah, *Al-Fatawa Al-Kubra*, V.3; pg. 532. Also see Michot, 64.
89 Ibn Taymiyyah, *Al-Fatawa Al-Kubra*, V.3; pg 533. Also see Michot, 65.
institutions (*ahkam*) of Islam are being properly observed, even though some of its inhabitant and soldiers are Muslims. Nor is it a domain of war whose inhabitants are unbelievers. In other words, Mardin has some hybrid legal status, which makes it neither completely subject to the rules that govern the ‘abode of peace’ nor the ‘abode of war’. Because of this hybrid status, Ibn Taymiyyah proposes that the Muslims of Mardin should be treated in accordance with their (Shari’ah) rights accorded to them, while those who among them who violate the Shari’ah should be combatted in accordance with their misdeeds.  

The novelty of Ibn Taymiyyah’s response about the hybridity or the compositeness of the status of Mardin from the point of view of Islamic law and its classical formulations of the world order is that he does not try to reductively impose any of the bipartite (or tripartite) categories formulated to compartmentalize the political world. For him, Mardin is neither a domain of peace/Islam because it is a territory that is under the control of what he considered the enemies of Islam (the Tatars), nor is it a domain of war entirely as Muslims reside there and in some respects are able to practice their religion freely. Although he does not address this directly, he would like argue that it is not a domain of truce (‘*ahd*) either because it was a staging ground of military struggle between what he considers the legitimate Muslim polity of the Mamluks and the non-Muslim polity the Tatars.  

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90 Ibn Taymiyyah, *Al-Fatawa Al-Kubra*, V.3; pg 533. Also see Michot, 65.  
91 For more on this point, see Michot, 4-5.  
92 For more on the legitimacy of the Mamluks, see Ibn Taymiyyah’s second fatwa which we analyzed here in his *Majmu Fatawa Ibn Taymiyyah*, V.28, pgs. 289-293.
Ultimately, Ibn Taymiyyah recognizes that none of these classical politico-legal formulations suit the case of Mardin and the contemporary circumstances that were facing Muslim societies and polities in the 7th/13th century AH/CE with the invasions of the Mongols and the Crusaders. What was needed were new politico-legal concepts that would address the current circumstances which were more blurred for Muslim society at the time, as evident in the questions posed to him, then when those classical notions were formed. Ibn Taymiyyah’s notion of domain hybridity addresses the complexity of the scenario facing the Muslims during that period. This is because even though regions like Mardin were now dominated by what he alleged to be non-Muslim regimes such as the Tatars, these regions and polities were once Muslim domains with a substantial number of established Muslim inhabitants who could not be seriously expected to easily emigrate to domains of peace/Islam.

Ibn Taymiyyah’s notion of hybridity of political domains adds further complexity to classical Muslim politico-legal theory. Although his notion is somewhat ambiguous since he never went into fully in explaining what he meant by the ‘compositness’ (murakkab) status of Mardin, it was nevertheless a legal concept/device by which Muslims could come to reconciliation with the highly complex scenario that was facing their communities in the era that the classical Islamic model of the world order could not. Yet an explanation of Ibn Taymiyyah’s hybridity model of political domains can be extrapolated from elements in the fatwa he issued on Mardin. It may be surmised that the legal condition for defining a hybrid political domain in which Muslims may reside in is: the Muslims’ ability to practice basic Islamic institutes, not explicitly aiding the enemies of Islam during their residence there, and keeping their Muslim integrity.
The legitimation of Muslim presence in non-Muslim polities that had never been explicitly justified under the classical formulation of Islamic law93 was an attempt by Ibn Taymiyyah to adapt to the new political realities that were imposing themselves on Muslim domains leading to their contraction in the face of multiple foreign invasions (Reconquista, Crusades, and Mongols). This legitimation may have caused some comfort to those Muslims, such as the person who posed the question, who felt that Muslim residence under such conditions would be clear contravention of Islamic law. Based on Ibn Taymiyyah’s fatwa those Muslims who faced such conditions would be able to carry on their lives with complete legitimacy from the perspective of Islamic law.

When looking back at Ibn Taymiyyah’s three fatwas concerning the Tatars that we analyzed in this section, we realize that his legal discourse represents a kind of integrative jurisprudence where politics, morality and history coalesce to cope with realities of the present without necessarily disregarding the legal precedents that had been established before him nor confining itself to the conclusions that were reached by those precedents. It was this sort of flexibility that allowed the Islamic legal discourse to continue to evolve even when this discourse took on a particular stamp during the age of madhhab. Fatwas, like those of Ibn Taymiyyah, were legal practices that were crucial to that process of adaptation.

93 Although it needs to be stated that history records Muslims having lived in non-Muslim territories that did not necessarily meet the criteria of the classical formulations of Islamic law. So in reality, the classical formulation to some extent remained a theoretical construct that was observed in varying degrees by Muslim communities. See for example al-Masudi’s (d. 956) history Muruj adh-Dhahab wa Ma'adin al-Jawhar for details on Muslim communities living in non-Muslim lands in the classical age of Islam.
Socio-Historical/Political Situation in Muslim World in the Age of Madhhab
Preponderance II (c.1500-1800): With Special Emphasis on the Role of the Religious Establishment vis-a-vis the State.

If the previous period represents the height of political fragmentation of the pre-colonial Muslim world, this latter period represents a period of greater political integration and consolidation around three major empires that arose in the Muslim world: The Ottomans in Anatolia, South-Eastern Europe and the Middle East and North Africa; the Safavids in Persia; and the Mughals in India. During this period, there was even greater rapprochement and integration between government institutions and the ‘ulema and religious institutions.94 During the previous period, the ‘ulema had lost some degree of their autonomy and became somewhat subordinated to the military regimes that came into ascendance in the Muslim world, but in this age of great Muslim empires they lost even more of their autonomy as many of the religious institutions and cultural forms were brought into closer relation to these imperial institutions.95

In the Ottoman Empire, “the ‘ulema came under state control, but in doing so they brought the Shari’ah into the center of state life.”96 The sultan achieved greater authority over Shari’ah aspects of society, but at the same time the Shari’ah and ‘ulema were more recognized in the operations of government.97 The ‘ulema came to have great power and prestige in the Ottoman state. Training and testing were required to acquire their official

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94 Hodgson, V.3, 5.
95 Hodgson, V.3, 105.
96 Hodgson, V.3, 105.
97 Hodgson, V.3, 106.
ranks as qadis (judges) and muftis, and they were well organized and had a considerable degree of impunity to the extent that the chief mufti (shaiykh al-Islam) was given the authority to issue a deposition the sultan if he was deemed unfit. 98

Unlike other regimes such as that of the Mamluks, who previously ruled over the Near Eastern regions, the Ottomans abolished non-Shari’ah courts such as mazalim courts and now even political and military personal who had previously been subject to these mazalim courts were now placed under the jurisdiction of Shari’ah courts. The qadi of the Shari’ah courts became the only government official with the authority to adjudicates cases and to decide on the legality of conduct even of governmental high officials. 99

Yet, there were imperial policies and administrative ordinances known as qanun, which were legislated by the ruler and were not the product of the jurists’ discourses, but were nevertheless Shari’ah legitimated by the ‘ulema through various Shari’ah principles such as ‘urf (custom) and/or siyasah shar’iyah (expedient policy in line with the Shari’ah). The purpose of these imperial qanun ordinances was to address those aspects of public order that had not been addressed by Shari’ah law directly because they were specific to that particular political framework of whatever imperial court was issuing them. These policies and ordinances were certified by the appointed ‘ulema as long as they were not inconsistent with the Shari’ah. 100

On the other hand, the Safavid Dynasty of Persia was an exception to the trend of close collaboration between religious establishment and imperial court. The Safavid

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98 Hodgson, V.3, 108.
100 For more on qanun, see Hallaq, 2009, 200 and Hodgson, V.3, 109.
Dynasty was driven by its religious zeal to propagate Twelver Shi’ite Islam (Imami or Jafari Shi’ites) among its majority Sunni subjects and patronized many Twelver Shi’ite ‘ulema so as to achieve its ideological goals,¹⁰¹ and many foreign Shi’ite scholars were invited to Persia.¹⁰² The Safavids nevertheless “continued to operate on the earlier model of maintaining a degree of separation between the military/political sovereign and the Shari’a establishment.”¹⁰³

Part of the reason why there was a more tenuous relationship between the Twelver Shi’ite religious establishment and the imperial court in the Safavid state was due to the fact that Twelver Shi’ite ‘ulema were not accustomed to cooperating with the political establishment, since for the first time in the history of Islam there emerged an independent state¹⁰⁴ that openly professed the ideology of Twelver Shi’ism.¹⁰⁵ Twelver Shi’ites were a minority group and most ruling dynasties in the Muslim world up until that time had been Sunni; hence, the Twelver Shi’ite religious establishment developed an overall negative view of political power whose inertia was hard to overcome even when the new Safavid state actively promoted Twelver Shi’ite doctrine.

¹⁰¹ See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pgs. 777-780.

¹⁰² For more on this point see S.H. Nasr, pg. 162 and Hourani pg. 187 in Dabashi, S.H. Nasr and W. Nasr’s Expectations of the Millennium: Shi’ism in History. Also, see Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777.


¹⁰⁴ This excludes the Buyid Dynasty in the 5th/11th century Iraq and Persia who were Twelver Shiite in their orientation and supported Shi’ite causes yet remained under the suzerainty of Sunni Abbasid Caliphate at least in name.

¹⁰⁵ See R.M. Savory’s article on the dynastic, political and military history of the Safavids in EI2 V8, pg 765.
Moreover, the religious establishment was suspicious of the imperial court’s Shi’ite messianic ideology and remained somewhat distant from it.\textsuperscript{106} For example, the military elite of Safavid state, the Kizil-Bash, had little interest in the doctrines and practices of Twelver Shi’ism aside from their antinomian Alid loyalism.\textsuperscript{107} In addition, the first ruler of dynasty, Shah Ismail (r. 1501-1524), attempted to cast his rule as something that was divinely ordained, which for most Twelver Shi’ite ‘ulema seemed to compete with the representation of the Twelve Imams of Twelver Shi’ism. \textsuperscript{108} These tendencies aroused the suspicions of Twelver Shi’ite ‘ulema and made most of them remain aloof from the new Shi’ite state at least in the early period.

Yet, most reservations that the Twelver Shi’ite religious establishment had about the Safavid state were eventually overcome as subsequent Safavid rulers in Persia moved away from the millenarian tendencies of the early regime into accepting a more orthodox form of Twelver Shi’ism.\textsuperscript{109} With continued Safavid patronage of Shi’ite ‘ulema and the building of Shi’ite institutions like religious schools and mosques, by the early 17\textsuperscript{th} century many of the Twelver Shi’ite ‘ulema came to support the Safavid dynasty’s legitimacy and drew closer to the imperial court by accepting official state religious

\begin{footnotes}
\item[106] Hodgson, V.3, 35.
\item[107] See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777.
\item[108] See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777.
\item[109] See Arjoumand, 184-185 in Dabashi, S.H. Nasr and W. Nasr’s \textit{Expectations of the Millennium: Shi’ism in History}.
\end{footnotes}
positions\textsuperscript{110}. One such position was that of the \textit{sadr}, an appointed religious state official who was to act as liaison between the court and the religious establishment.\textsuperscript{111}

The office of the \textit{sadr} was an institution that was inherited by Safavids from the previous dynasty ruling Persia, the Timurids.\textsuperscript{112} Amongst the responsibilities of the \textit{sadr} was to supervise the administration of religious endowments by ensuring that its revenues were distributed to students, \textit{ulema}, and charitable projects as well as oversight of the state judiciary through the appointment of \textit{qadis} and official religious dignitaries like \textit{shaykh al-Islam}, both of whom came from the class of \textit{ulema}.\textsuperscript{113} Even as the Twelver Shi`ite religious establishment did eventually draw closer to the Safavid state, they were never integrated into the state the same way as the Ottoman \textit{ulema}. This was not only due to their persistent ambivalence towards government but also partly because they were able to keep a measure of economic independence due to their control of certain religious taxes (\textit{khums}), that were mandated by Shi`ite legal doctrine, which they could use for their own support.\textsuperscript{114}

The third major Muslim dynasty in this period were the Mughals in India. Unlike the Ottoman and Safavid dynasties whose rulers had fairly uniform policies towards Islam and Islamic institutions, in Mughal India this varied significantly according to the ruling emperor. For example, towards the earlier stages of the empire during the reign of

\textsuperscript{110} For more details see Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pgs.778-779

\textsuperscript{111} Hodgson, V.3, 53.

\textsuperscript{112} See Arjoumand, 177 in Dabashi, S.H. Nasr and W. Nasr’s \textit{Expectations of the Millennium: Shi`ism in History}.

\textsuperscript{113} For more on the office of \textit{sadr}, see Arjoumand, 177-178 and S.H. Nasr 163 in Dabashi, S.H. Nasr and W. Nasr’s \textit{Expectations of the Millennium: Shi`ism in History}.

\textsuperscript{114} Kiddie, 17.
Emperor Akbar (r. 1556-1605), traditional Muslim ‘ulema for example were more alienated from the courtly circle as result of Akbar’s religiously syncretic positions, while during later stages of the empire in the reign of Emperor Aurangzeb (r. 1658-1707), Islam and the traditional ‘ulema establishment were given greater authority in the state

But regardless of the court’s stand on matters of religion, there were nevertheless official state mechanisms that mediated the relationship between the state and the religious establishment. Similar to the Safavids in Persia, the Mughals of India continued the system of bureaucratic religious administration of the preceding Indian Muslim regime the Delhi Sultanate.\textsuperscript{115} Through the office of the sadr, who was a chief qadi (judge) appointed by the ruler, the judiciary was administered. The provincial sadr appointed and managed the local qadis, muhtasibs (government regulators), muftis, preachers, and administrators of pious endowments (waqfs) and was the liaison between the court and the ‘ulema and determined their state provided salaries.\textsuperscript{116} So, like other Muslim empires of the period, the Mughals maintained state relations with the religious establishment.

During the rule of Emperor Aurangzeb (r. 1658-1707), in the latter part of the life of the empire, the ‘ulema had greater influence in the imperial court and during his reign Shari’ah law was more strictly adhered to in running the Empire. One of the major contributions to Shari’ah law in India was his commissioning Hanafi legal compendium known as Fatwa-i ‘Alamgiri (Al-Fatawa Al-Hindiyyah).\textsuperscript{117} The Hanafi madhhab had been

\textsuperscript{115} Hallaq, 2009, 202; Hodgson, V.3, 65; Lapidus, 374.

\textsuperscript{116} Hallaq, 2009, 202; Lapidus, 374.

\textsuperscript{117} Guenther, 212.
the predominant legal school in Muslim India since the earlier period of the Delhi Sultanate. Hanafi school became so indigenized in India that major Hanafi fatwa works eventually were being produced there, such as Fatawa Tatar Khani (8th/14th century AH/CE),\textsuperscript{118} which gained universal acceptance among Hanafites all over the Muslim world.

The name of Aurangzeb’s commissioned work, \textit{Fatawa-i Alamgiri}, implies that it is a book of fatwas, but it is not. It is a legal compendium that was composed through a synthesis of rules found in earlier Hanafi law manuals. The challenge that was posed to Indian Muslims was that earlier Hanafi legal compendiums contained many variant legal positions that had different grades of authority. In addition, the number of Hanafi legal manuals to be referenced for rulings was large and made researching them for court verdicts rather cumbersome. This state of affairs gave impetus to the commissioning of \textit{Fatawa-i Alamgiri} so as to extract the most authoritative rules from previous works that would fit the context of Indian Muslims and assemble those rules in one work.\textsuperscript{119}

The compilation of the \textit{Fatawa-i Alamgiri} spanned a period of eight years (1667-1675)\textsuperscript{120} and was carried out by forty to fifty Indian ‘ulema who were drawn from all over India.\textsuperscript{121} The organization and content of the work followed closely what was found in previous legal compendia like \textit{Al-Hidaya}, yet there were some original sections not found in earlier works that had to do with applying the laws in the context of the state, such as

\textsuperscript{118} Guenther, 210.
\textsuperscript{119} Guenther, 212.
\textsuperscript{120} Guenther, 212.
\textsuperscript{121} Guenther, 216-217.
sections on judicial proceedings and decrees (*muhadir wa al-sijillat*). But the work did not solely rely on established Hanafi legal compendia that were authored elsewhere. It also synthesized legal rulings found in authoritative fatwa works that were produced in the Indian subcontinent such as the 13th century *Fatawa Qara Khani*, 14th century *Fatawa Tatar Khani*, and the 16th century *Fatawa Bahraniyyah*.

*Fatawa-i Alamgiri* did influence the policies of the empire as shown in some of Aurangzeb’s directives to some of his governors. For example, his directives to an official of Gujarat province on land revenue administration reflected the work’s treatment of the subject. Moreover, the fact that the work was translated into Persian, the official language in courtly circles, soon after its completion shows that it was intended to be used by judges at all levels of the government. Yet, the impact of *Fatwa-i Alamgiri* went beyond the Indian subcontinent, and was used as an authoritative text in Hanafi law even in the Ottoman Empire and by Hanafi adherents outside of India.

**Notes on the Development of Twelver Shi’ite Law during the Safavid Period:**

Before analyzing fatwas from the 16th Century CE, it is crucial to take account of an important evolution in Twelver Shi’ite (Imami) law that took place during the reign of the Safavid Dynasty, which is in some respects a direct result of its ascension as a Shi’ite political order. The Safavid Dynasty’s patronage of Twelver Shi’ite Islam and Shi’ite institutions may have catalyzed the process of bringing to the forefront latent religio-legal

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122 Guenther, 214.
123 Guenther, 214.
124 Guenther, 223.
125 Guenther, 225.
126 Guenther, 216.
movements that were found in the Twelver Shi’ite community. Two Shi’ite camps, as related to Shi’ite law, emerged during the Safavid period: the Usulis and the Akhbaris. The difference between these two camps revolved around Twelver Shi’ite legal theory and methodology by which Shi’ite law ought to be derived. Essentially, those differences can be reduced to one issue: the issue of exercising *ijīthad* (legal reasoning to derive law).127

The Usulis advanced the position that the law may be derived from four sources, similar to what is found in Sunni legal theory. These four sources are the Qur’an, *akhbar* (reported practice of the Prophet and the Twelver Shi’ite Imams), similar to the notion of hadith in Sunni legal theory, *ijma’* (consensus of the Twelver Shi’ite jurists), and ‘*aql* (reason or intellect)128 as opposed to *qiyas* (analogy) as found in Sunni legal theory, which the Twelver Shi’ites repudiated. On the other hand, the Akhbaris opposed the validity of ‘*aql* as source of law and posited that only *akhbar* (being an extension of the Qur’an) can be a source of law.129 Essentially, the Usulis wanted to interpretively subject the scriptural discourse of Shi’ism (Qur’an and *akhbar*) to rationalist principles;130 while the Akhbaris opposed this approach to the sacred texts.

The debate between the Usulis and the Akhbaris took on epistemological dimensions as the issue about the valid sources of law revolved around the principles of

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127 See Hallaq, 2009, 117; Vikor, 128.
129 See Hallaq, 2009, 118; Hodgson, V.3, 54; Vikor, 128.
certainty and doubt. The Akhbaris maintained that *akhbar* (reports from the Prophet Muhammad and Twelver Shi’ite Imams) produced certain knowledge and hence were to be seen an absolute source of authority in terms of the law. For them, if the legal answer was not found in the textual sources (*akhbar*) then the jurist should exercise caution (*ihtiyat*) and desist from giving judgment,\(^ {131} \) because rational judgments would only yield probable (*zanni*) knowledge. On the other hand, the Usulis recognized that reason (‘*aql*) only produced probable knowledge in legal ruling, yet accepted that as legitimate; hence, they encouraged the use of *ijtihad* (legal reasoning) and legal methodologies to deduce legal judgments that the scriptural sources of Shi’ism were silent about.\(^ {132} \)

As for their opposing positions on the place of human reason and the law, the Usulis took a more positive view of *ijtihad*, deriving law through intellectual effort, and hence like the Sunni legal tradition assigned the Muslim community into those who are capable of making some form of *ijtihad* in the law and those were the *mujtahids*; and those laypersons (*muqallids*) who are to submit themselves to the authority of those *mujtahids*.\(^ {133} \) On the other hand, the Akhbaris ambivalence towards human reason (‘*aql*) led them to the position that everyone should simply submit to the authority of *akhbar*, without making *ijtihad* and hence there was no need for the authority of a *mujtahid*, since everyone one in this scheme would be a follower of religious/legal teachings found in the *akhbar*. So for the Akhabris, a layperson could act on the basis of his/her understanding of a soundly transmitted report from the Prophet or the Twelve Shi’ite Imams. As for the

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\(^ {131} \) Vikor, 128.

\(^ {132} \) Hallaq, 2009, 118 and 121; Vikor 129.

\(^ {133} \) Hallaq, 2009, 122.
Usulis, they did not accord such privilege to laypersons, who must submit themselves to hermeneutical authority of a mujtahid in getting guidance with respect to their religio-legal practice.\textsuperscript{134}

Socio-political dimensions to the Usuli-Akhabri debate

I have already mentioned the suspicion that the Twelver Shi’ite ulema held of the political establishment and that suspicion did not subside with most of them even with the establishment of the first independent state that was openly supportive of Twelver Shi’ism, the Safavid regime.\textsuperscript{135} Nevertheless, some of the first Shi’ite ulema that broke ranks with this policy came from the Usuli camp like the 10\textsuperscript{th}/16\textsuperscript{th} century Ali bin al-Husayn al-Karaki (d.940/1534), whom I will deal with in more detail in the later part of this chapter. Usuli ulema like al-Karaki permitted a greater degree of interaction between the religious establishment and the political court so as to further the interests of the broader Shi’ite community. Moreover, al-Karaki went a step further by saying for the religious legitimacy of the Safavid dynasty by arguing that its rulers can be seen as delegates (\textit{na’ib}) to the Twelfth Imam in his absence,\textsuperscript{136} the only legitimate leader of the Muslim community in Shi’ite political theology.

Many prominent Akhbari ‘ulema in the early period of the dynasty such as Ibrahim ibn Sulayman al-Katifi (d. after 945/1539) rejected this rapprochement between

\textsuperscript{134} See Hallaq, 2009, 122; also see Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777.

\textsuperscript{135} This criteria excludes the Buyid Dynasty in 5\textsuperscript{th}/11\textsuperscript{th} century that was Shi’ite in its orientation yet very much tied to the Sunni Caliphate that was still in existence at the time.

\textsuperscript{136} See Newman’s article on the Religious Trends of the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777.
the religious and political establishments and advanced traditional Shi’ite arguments for why the religious establishment should remain aloof from the affairs of the political court.  

137 Many prominent Usuli Shi’ite ‘ulema throughout the 10th/16th century, the first century of the Safavid Dynasty, also continued their policy of remaining aloof from political affairs even when some of those amongst their circles like al-Karaki broke ranks with that political disposition.  

Yet by the 11th/17th century AH/CE, the continued patronage of the Safavid court for Twelver Shi’ite establishment gradually thawed relations between the court and the Twelver Shi’ite ‘ulema especially those ‘ulema in the Usuli circles whose theological and legal inclinations permitted them to have a more positive relationship with political circles. For instance, members of Usuli circles during this period like Mir Damad (d. 1630) and Shaykh Baha’i built on al-Kharaki’s pronouncements for the legality of the establishments of Friday prayers during the occultation of the Twelfth Shi’ite Imam, thereby giving implicit recognition to the Safavid court as a legitimate Islamic political establishment when traditionally Twelver Shi’ite law did not require the establishment of the congregational Friday prayers if the political establishment was seen as illegitimate. Moreover, the continued association of prominent Usuli ‘ulema with the court gave further recognition to the Safavid political establishment which was legitimized by the theological-legal doctrine that was developed in Usuli circles known as al-niyabah al-

137 See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 778.
138 See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 778.
139 See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 779.
'amma (general deputyship of the Twelvth Imam), which was first proposed by al-Karaki, where the scholars who held this post were justified in interacting with the political establishment for the welfare of the community.140

The Safavid court’s backing of Usuli ulema who supported it secured the latter’s ascendancy in key religious institutions which gave them the material support to carry out their intellectual activity. In addition, the further development of Twelver Shi’ite Usuli concepts such as marja’ al taqlid (the supreme jurists whose legal opinions are to be followed) helped enhance their clerical authority within the Twelver Shi’ite population.141

These factors eventually led to the triumph of the more innovative Usuli interpretation of Twelver Shi’ism over their more conservative Akhbari associates by the end of the 12th/18th century AH/CE long after the collapse of the Safavid dynasty in 1725. This became the dominant outlook of Twelver Shi’ism.

The Systemization and Structuring of Islamic Law II: Ifta’ within the Confines of Madhahib in the Age of Empire.

Abu al-Sa‘ūd’s Fatwa on Cash Philanthropic Foundations (Waqf al-Nuqûd): c. 10th/16th Century:

In order to analyze major fatwas from this period and show their impact on both Islamic law and society. For this task, I have chosen a fatwa issued by Abu al-Sa‘ūd (d. 1574 CE), an eminent jurist and judge in the history of Islam. Abu al-Sa‘ūd (sometimes

140 See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 777 and 779.
141 See Newman’s article on the Religious Trends in the Safavid Dynasty under the entry “Safawids” in EI2, v.8, pg. 780.
spelled Ebu’s- Su’ud) was the Ottomans’ Shaykh al-Islam (1545-1574 CE) at the height of Ottoman power during reign of Sultan Sulaymân the Lawgiver (al-Qanuni) and as such was the top state-sanctioned religious jurist of his time. He was one of the greatest muftis in the Ottoman Empire and his major accomplishment was harmonizing Shari’ah law with the laws/policies issued from the sultan known as qanun.  

The issue that confronted Abu al-Sa‘ûd was the question concerning the legality of what was known as cash waqfs (waqf al-nuqûd). In Islamic tradition there had developed philanthropic foundations that were known as awqaf (sing. waqf), which consisted of permanent properties that were endowed for philanthropic purposes such as schools, mosques, farms whose produce was donated, etc. According to the Hanafi madhhab, the official Islamic legal doctrine of the Ottoman Empire, these waqfs had to be permanent and immovable properties, although there were several exceptions to these rules such as weapons and farming tools that had been deemed as waqf worthy properties by prophetic tradition (hadith).

In the 9th/15th century Ottoman lands there had developed a practice of taking cash money and designating it as a waqf where the endowed cash would be loaned or invested for a return that would eventually be utilized for philanthropic purposes. By the first half of the 16th century, these cash waqfs grew in number to the point that they

142 Vikor, 213.
143 See Hodgson 110-111 and Vikor 213-214 for more on this.
144 For more on the description of a waqf, see Mandaville, 293.
145 MS (Abu Sa’ud). pg.212.
146 Cizakca, 2000, 45. Also, see Mandaville, 290.
147 Cizakca, 2000, 46.
began rival even traditional landed property *waqfs*. \(^{148}\) What complicated matters for this practice was that one of the most highly respected judges of the Ottoman Empire, Çivizade Muhittin Mehmet Efendi, issued a fatwa around the middle of the 16\(^{th}\) century opposing the practice of cash *waqfs*. \(^{149}\) This ruling threatened the legitimacy of this newly established and popular institution that was source of finance around the western portions of the empire.

The issue had also been dealt with in a fatwa given by the predecessor of Abu al-Sa‘ūd, the previous Shaykh al-Islam of the Ottoman Empire Kamal Pasha, who legalized this practice in a fatwa he had issued earlier. \(^{150}\) Yet the issue must have remained contentious as shown by Çivizade’s prohibitionary fatwa, which in turn pressured Abu al-Sa‘ūd to issue a response fatwa \(^{151}\) arguing for the legality of cash *waqfs*. One of the early strategies that Abu al-Sa‘ūd adopted in this fatwa is to attempt to broaden the scope of the legal opinion of the 2\(^{nd}/8^{th}\) century AH/CE jurist Muhammad Ibn Hasan al-Shaybani (750-804 CE), one of the foundational figures in the Hanafi School, on what properties can actually constitute a *waqf*. \(^{152}\) One supposes from this strategy that Abu al-Sa‘ūd did not want to be seen as being openly opposing the doctrines of his school and felt compelled, at least initially, to situate his argument within in the scope that had been outlined for *waqfs* by grand jurists such as Muhammad ibn Hasan al-Shaybani. This

\(^{148}\) Mandaville, 292.

\(^{149}\) Mandaville, 297.


\(^{151}\) The fatwa Abu al-Sa‘ūd is found in manuscript form in the Haci Selim Ağa library in Istanbul, Turkey. I had obtained a copy of the manuscript during my research in Istanbul in the summer of 2011. It is based on this copy, that I extract this data for my presentation of Abu al-Sa‘ūd’s fatwa.

shows the centripetal pull that madhhab had on legal arguments of this period. Fatwas that were issued contrary to these doctrines had to at least address the preceding opinions and why they needed modification.

I have already mentioned that the understanding of a waqf in the Hanafi School was, with few exceptions, to consist of those properties that are immovable and permanent. According to Abu al-Sa‘úd, al-Shaybani allowed for non-stationary or physically transferrable [manqulat] properties as waqfs based on the appeal to peoples custom ['urf]; on the legal grounds of isthisan (juristic preference).\footnote{MS. Ebussuud, \textit{Risale fi vakfi'l-menkul}, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b. pg. 212.} Al-Shaybani cites examples of non-stationary things that have been designated as waqfs based on ‘urf or custom; those are things like saws, picks, and written Qur’ans [masahif]. But al-Shaybani excludes non-stationary things that custom ['urf] has not accepted such as cloths and animals. Abu al-Sa‘úd tries to argue that just because al-Shaybani lists certain moveable properties as being allowed to be made into waqfs and excludes others, it does not mean that he meant to limit the types of things that can be made into a waqf to these specified examples. Rather the allowance of moveable things to be made into waqfs depends on his general argument that whatever the ‘urf (custom) of a particular place or time allows for then that is the criterion for determining and not the specific examples that were pointed out by al-Shaybani.\footnote{MS. Ebussuud, \textit{Risale fi vakfi'l-menkul}, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b. pg. 212.} The point here is that Abu al-Sa‘úd wants to use this as a launching point to argue for the legality of cash waqfs that have been prohibited by previous jurists including by some of the founders of the Hanafi madhhab, namely, Abu Yusuf and al-Shaybani. He wants to do this based on the legal principle of juristic...
preference (*istihsan*); thus, legally sanctioning the custom (*‘urf*) of instituting cash *waqfs* in his own era.

After having addressed the physically transferrable aspects of money and why that may not be a sufficient reason to exclude it from being a *waqf*, Abu al-Sa‘ûd deals with the second condition of why money or cash could not be made into a *waqf*, namely the stipulation of permanence (*baqa’*) of the property that is being made into a *waqf*. This second stipulation is a corollary of the first because immovability of the thing in question, like land or a building, is also an indication of its permanence. The issue that confronts Abu al-Sa‘ûd is that opponents of cash *waqfs* say that the actual items that make up cash *waqf* [the cash in terms of dirhams and dinars] become spent in the process of transacting with them. That is, the usual items made into *waqfs* like land or a buildings when utilized do not lead to those very items being dispersed or effaced, hence satisfying the legal stipulation of permanence of the item that is made into a *waqf*. On the other hand, with cash *waqfs* the very items made into a *waqf* [cash] gets dispersed in the very process of utilizing this type of *waqf* leading to the violation of the permanence clause for *waqfs*.

To clarify this matter a word must be said to how cash *waqfs* are to operate: the donor donates money as *waqf* whereby the cash is given to the poor to be invested [*mudarabah*] in profitable ventures, whereby the poor keep some of the profits of that venture and return the original capital to the *waqif* (the administrator of the *waqf*) to be lent to another poor person repeating this process. The contention here is that the ‘very’ [*‘ayn*] cash [principal] that is made into a *waqf* is spent during the investment leading to loss of the item being made into a *waqf*; hence violating the stipulation of permanence for *waqf* items. Abu al-Sa‘ûd replies to this argument by saying that although the ‘very’
[‘ayn] property of the waqf [in this case cash] is dispersed in its utilization as a waqf, what remains of it in this case is its likeness [mithl] and that suffices to meet the stipulation of permanence.\textsuperscript{155} In other words, the actual property made into a waqf does not have to be preserved so long as its essence is equally replaceable by another property that shares its exact qualities as in the case of money.

Abu al-Sa‘ûd tries to further support the argument he makes above by appealing to other legal positions in the madhab that seem to corroborate his argument by analogy. He cites the case where it is allowed to sell a land waqf in order to buy another land waqf of equal or greater value that is more useful than the previous one, claiming that in this case the very [‘ayn] property of the original waqf is spent (the initial cash in this case), yet the what the mujtahids in the Hanafi madhab considered in this case was the likeness [mithl] and not ‘concreteness’ [‘ayn] of the property.\textsuperscript{156} This parallel paved the way by analogy for his argument that what is considered in the cash waqfs is the likeness [mithl] of the property and not its actuality [‘ayn]. As is clear from this argument, Abu al-Sa‘ûd is still situating his argument for cash waqfs within the bounds of precedents set by Hanafi masters by providing his own legal hermeneutic on how to interpret the legal precepts that they laid down as relevant to this case.

After overcoming the difficulty of cash waqfs not meeting the two conditions of for property being made into waqfs, permanence and immovability, Abu al-Sa‘ûd must now deal with the tougher task of going up against the opinions of the grand jurists of the madhhabs on the legitimacy of this type of operation. He begins to deal with the fatwa of

\textsuperscript{155} MS. Ebussuud, \textit{Risale fi vakfi'l-menkul}, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b. pg. 213.

\textsuperscript{156} MS. Ebussuud, Risale fi vakfi'l-menkul, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b. pg. 214.
the Hanafi master jurists Abu Yusuf and Muhammad al-Shaybani as well the fatwa of al-Shâfi‘î, outside of the Hanafi madhhab, against the permissibility of cash *waqfs*. The explicit opinions of these master jurists present a real obstacle towards Abu al-Sa‘ûd's objective to legitimize cash *waqfs* because after all he cannot go against the opinions of the founders of the madhhabs and have his fatwa be considered seriously at the same time. Abu al-Sa‘ûd strategically handles this challenge by looking at the rationale of each of these three master jurists in order to present his argument later of why the fatwa of permissibility of cash *waqfs* would not necessarily go against their legal principles although it may go against the letter of their fatwa against cash *waqfs*.

In his analysis he shows that although Muhammad, Abu Yusuf, and al-Shafi‘i unanimously agreed on the prohibition of cash *waqfs*, Abu al-Sa‘ûd claims that the rationale for each of them in their consensus is different. For the case of al-Shafi‘i, he says that the principle that al-Shafi‘i relies on in determining the legality of a *waqf* is its beneficial quality along with the permanence of the very property made into a *waqf* and as I showed earlier, cash *waqf* do not meet this criteria. Abu al-Sa‘ûd says in reply that this criterion is not considered in the Hanafi madhhab because he has already shown [see previous entry] that the permanence of the very [*‘ayn*] of property of the *waqf* is not a condition for the Hanafi's so long as the likeness[*mithl*] of the property remains.157 So what he is saying here essentially is that al-Shafi‘i’s opinion does not ultimately matter, because Abu al-Sa‘ûd is speaking to those adherents of the Hanafi madhhab, which

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happens to be the official legal doctrine of the Ottoman Empire, and the only legal opinion of consequence for these adherents are those that arise from the Hanafi school.

On the other hand, the rationale of Abu Yusuf, one of the three original master jurists of the Hanafi school, sticks to the original rule on *waqfs* in that they must not be properties that are physically transferable (*manqulat*) unless there is an explicit proof-text (*nass*) [Qur’an or hadith], such as in the case of weapons and beasts of burden, which then makes a legitimate exception to the rule. This proof-text then becomes the grounds for *isthisan* (juristic preference) against the legal conclusions reached by *qiyas* (juristic inference) about the legal norms defining *waqfs*.158

However, al-Shaybani’s rationale, another one of the three original master jurists of the Hanafi school, makes an exception for *waqfs* that consists of physically transferable properties in cases where ‘urf (custom) establishes a movable thing as a *waqf*. This ‘urf then becomes the basis for his *isthisan* against the *qiyas* that would otherwise make physically transferable property not eligible to be a *waqf*. Both the proof-text (*nass*) for Abu Yusuf and the ‘urf (custom) for al-Shaybani serve as the basis of the *daleel* (legal argument) for *isthisan* and that *isthisan* is what allows for the permanency clause for *waqfs* to be rendered dispensable claims Abu al-Sa‘ûd.159

Before we continue our discussion of Abu al-Sa‘ûd’s fatwa, I should take note of certain salient points found in the text of the fatwa. Both Abu Yusuf and al-Shaybani, as Hanafi master jurists, are not hesitant to circumscribe through *istihsan* (juristic preference) the conclusions reached through *qiyas* (juristic inference or analogy), unlike

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al-Shafi‘i, the master jurist of the Shafi‘i school, who does not employ *istihsan* at all in his legal arguments. Al-Shafi‘i was adamantly opposed to *istihsan* (juristic preference) as a method legal argument to support legal opinions. The Hanafite early *mujtahids* (the master jurists) supported the use of *istihsan* as a way of avoiding what they considered as undesirable or confining legal conclusions. We see that the use of *istihsan* in their legal arguments is consistent with their *madhhab’s* legal precepts and at the same time al-Shafi‘i’s rejection of cash *waqfs* has its basis on *qiyas* (juristic inference), the stipulations for which cash waqfs do not meet.

Abu al-Sa‘ûd represents the argument of each of these master jurists, whether for or against cash *waqfs*, in a way that is consistent with the legal principles (*usul*) that they claimed to have supported. Here, Abu al-Sa‘ûd I believe was trying to set up an argument whereby he can use the very same rationale used by the master jurists (at least the Hanafi ones) to argue for the permissibility of cash *waqfs*. After having shown that ‘*urf* [custom] was used to establish the permissibility of certain illegitimate practices, from the point of view of regular Islamic norms, in certain eras and regions, Abu al-Sa‘ûd argues based on ‘*urf* (social practice/custom) of his era that cash *waqfs* should be seen as legitimate even if it had not been permitted previously by the master jurists because it was not the customary practice of their period.⁶⁰⁰

Finally Abu al-Sa‘ûd concludes his argument for the legitimacy of cash *waqfs* by dealing with objection that ‘*urf* of his era cannot be used as the basis to go against the *qiyas* because that type of ‘*urf* must be established by the *mujtahid* imams (the master

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jurists of the legal schools). Abu al-Saʻûd responds to this objection by saying that the ‘urf itself does not have to be established by a mujtahid imam because it is an empirical matter known by all. Abu al-Saʻûd says what needs to be established by the mujtahid imams (the master jurists) is whether ‘urf has legal ramifications for this case, and they have already done so as is apparent in al-Shaybani’s fatwa allowing for movable things to be considered waqf's so long as there is ‘urf for that practice. Hence, as far as establishing the legal basis of ‘urf (custom) to act as a basis of a legal judgment to be rendered by isthisan (juristic preference), this is what must be established by a mujtahid. But as far as applying these legal precepts to various situations, Abu al-Saʻûd claims that is the prerogative of any mufti and need not be done by the mujtahid imams.\footnote{MS. Ebussuud, \textit{Risale fi vakfi’l-menkul}, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b, pg. 216-217.}

The remaining portion of Abu al-Saʻûd’s fatwa deals with issue of irrevocability of cash waqfs since, to him, they were like any other waqf that had the characteristic of a permanently established institution. What he might have had in mind was to counter the arguments of those who opposed waqfs and wanted them annulled which would have significantly disrupted the capital investment schemes throughout the Ottoman Empire.\footnote{See MS. Ebussuud, \textit{Risale fi vakfi’l-menkul}, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b; Also see Mandaville, 299-300.} The arguments in this part of his fatwa should not concern us here. What is of more of concern is that Abu al-Saʻûd’s fatwa legitimated cash waqfs (waqf al-nuqûd) which undoubtedly increased the attractiveness of this practice as it became extremely popular
by the end of the 10th/16th century in Anatolia and European provinces of the Ottoman Empire.\textsuperscript{163}

This popularity persisted despite the fact that their continued to be resistance from some Ottoman Hanafi jurists, like al-Birkawi\textsuperscript{164}, who opposed the legality of cash waqfs. Yet the form that cash waqfs took on in Ottoman Anatolia were different from their conception in the historical legal debates. Cash waqfs were originally conceived by some early Hanafi jurists (Zufar) as running on the business partnership model of what is known in Islamic law as mudarabah. The way this model would work is that the cash waqf as the financier would take the endowed cash and transfer it to a would be entrepreneur who would utilize the cash in a business venture and then would return the principle cash after a period of time to the cash waqf with additional amount of cash, presumably the shared profit of the business venture, that would be utilized by the waqf for pious social purposes.\textsuperscript{165}

Historical evidence shows that many cash waqfs in the 11th/17th century Ottoman Empire worked on the constant profit return model of istiglal rather than the profit and loss sharing partnership of mudharabah that was worked out by those early Hanafi jurists who legitimated this practice, which was more likely what Abu al-Saʿûd had in mind in endorsing this practice.\textsuperscript{166} Despite the different forms these institutions took on in practice, fatwas like the one issued by Abu al-Saʿûd alleviated the inhibitions that some

\textsuperscript{163} Cizakca, 2000, 45.

\textsuperscript{164} See al-Birkawi’s fatwa against cash waqfs entitled ‘Risalat Butlan Waqf al-Nuqûd.’

\textsuperscript{165} Cizakca, 2000, 45-46.

\textsuperscript{166} See Cizakca, 2000, 46-47 for more on the business model of istiglal.
sectors of Muslim society felt about cash \( \textit{waqfs} \) as result of the legal positions held by most legal schools against its practice. Fatwas like Abu al-SA’UDs were very instrumental in changing traditionally held legal positions that were established in \textit{madhhab} doctrines to open up new possibilities of change in Muslim society.\footnote{For the historical influence of Abu Sa’ud’s fatwa, see Imber 144-146, where he states that the Ottoman Sultan eventually decreed the legality of cash \( \textit{waqfs} \) in 1548 shortly after the fatwa of CIVIZADE against cash \( \textit{waqfs} \) and the counter fatwa of Abu Sa’ud. Thereby settling the matter in favor of Abu Sa’ud’s position at least from point of view of the Ottoman Empire’s policies.}

Even though Abu al-SA’UD’s fatwa grew out of the social reality in Ottoman lands, given his position of authority, his fatwa was instrumental in endorsing that social institution in the face of strong opposition by conservative minded jurist-consults who tried to undo this practice. Had the conservative opposition of muftis like CIVIZADE and al-BIRKAWI had their way, this relatively new social institution would have been banned and dismantled with all of the severe socio-economic consequences that action might have produced. Instead, cash \( \textit{waqfs} \) flourished in subsequent periods partly due to the legitimation they received from eminent mufti-jurists like Abu al-SA’UD. As we can see from the case study of Abu al-SA’UD’s fatwa that fatwas were key instruments in both legal and social change in Muslim society and they allowed the established Shari’ah rulings to accommodate the vicissitudes of socio-historical reality.

\textbf{Al-Karaki’s Fatwa on Kharaj (Land Tax) c. 10\textsuperscript{th}/16\textsuperscript{th} Century:}

Another fatwa that I will examine here also dates from the 10/16\textsuperscript{th} century, but this fatwa comes from Shi’ite circles and not Sunni ones. The Safavid court at the beginning of its reign in 10\textsuperscript{th}/16\textsuperscript{th} century was recruiting Twelver Shi’ite scholars from outside of Persia to help propagate Shi’ism among its newly conquered majority Sunni...
Persian population. One of the first important Twelver Shi’ite scholars it was able to recruit from the Jabal ‘Amil Shi’ite region of Syria was Ali Ibn Husyan al-Karaki (d. 940/1532). Being a forerunner of the Usuli movement that would take hold of Twelver Shi’ism in Persia, he emphasized the role of ‘ulema as successors of the Twelfth Imam of Twelver Shi’ism in the latter’s absence and advocated that competent scholars might practice *ijtihad* (legal effort and reasoning) to draw appropriate legal conclusions from the valid sources of the law (Qur’an, *akhbar*, *ijma*, and *aql*). Moreover, he claimed the *mujtahid* (the absolute jurist) was the deputy (*na’ib*) of the Imam as far as providing legal decisions.\(^{168}\)

Al-Karaki promoted religious policies and interpretations that attempted to overcome Twelver Shi’ite reticence about the political establishment and tried to create harmony between the Twelver Shi’ite religious establishment and the Safavid court. For example, al-Karaki issued a fatwa allowing for the establishment of Friday (*jum’ah*) congregational prayers amongst Twelver Shi’ites who have long held that it could not be held in the absence of the Twelfth Imam of Shi’ism. Moreover, he issued a fatwa, which is the topic of our discussion in this part of the investigation, allowing collection and distribution of the land tax (*kharaj*) by the ruler (read the Safavid Shahs) even in the absence of the Twelfth Imam.\(^{169}\) Through these pronouncement, he tried to get the Twelver Shi’ite Muslims to accept the legitimacy of the Safavids as the first Shi’ite

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\(^{168}\) See Hourani, 188 in Dabashi, S.H. Nasr and W. Nasr’s *Expectations of the Millennium: Shi’ism in History*.

\(^{169}\) See Hourani, 188 in Dabashi, S.H. Nasr and W. Nasr’s *Expectations of the Millennium: Shi’ism in History*.
political establishment and in turn the Safavid court made him a prominent religious figure.

Al-Karaki was severely criticized for his association and implicit endorsements of the Safavid court by conservative and prominent members of the Shi’ite religious establishment both outside and inside Persia like the Bahrayni Shi’ite cleric Ibrahim b. Sulayman al-Katifi (d. after 945/1539). To quell the criticism of al-Karaki amongst Twelver Shi’ite ulema, the second Safavid ruler Tahmasp issued an imperial directive (farman) in 939/1533 AH/CE designating al-Karaki as the deputy of the Imam (na’ib al-Imam) and granting him supreme authority in the states religious affairs. This was a milestone for the Shi’ite religious establishment because it meant that he institutionalized their involvement in political life which had not been the case hitherto. 170

Al-Karaki’s innovations continued to be opposed by many in the Twelver Shi’ite religious establishment throughout the 10th/16th century, yet his initiatives eventually bore fruit in the subsequent century when more and more of Shi’ite ulema became more involved with the Safavid court many of whose members were affiliated with him as students or students of his students.171 His initiatives eventually facilitated the recognition by the state of the Twelver Shi’ite ‘ulema as the sole authorities in matters of religious affairs thereby paving the way for the formation of a new Shi’ite hierocracy.172

170 See Arjoumand, 183-184 in Dabashi, S.H. Nasr and W. Nasr’s Expectations of the Millennium: Shi’ism in History; and see A.J. Newmans’s article on Religious Trends in Safavid Iran under the entry “Safawid” in EI2 v.8, pg. 777 -778.

171 See A.J. Newmans’s article on Religious Trends in Safavid Iran under the entry “Safawid” in EI2 v.8, pgs. 778-779.

172 See Arjoumand, 184 in Dabashi, S.H. Nasr and W. Nasr’s Expectations of the Millennium: Shi’ism in History.
But there is one aspect of the al-Karaki’s work that interests us in this investigation, that is a treatise that he wrote on the issue of kharaj. It should be remembered that in an earlier part of this research I had dealt with the issue of kharaj with respect to the legitimacy of its institution by the second caliph of Islam Umar ibn al-Khattab (d.644). In the this situation I will revisit this issue in a different context with regards to its legitimacy in Twelver Shi’ite law, where Umar was not recognized as a legitimate political-legal authority, and will reconsider the political implications for the newly established Safavid regime in Persia, to which the treatise was in some ways a response. One may argue that a treatise is not a fatwa and so why is this issue being treated here. However, it should be stated that when issues became the subject of much debate, jurists often wrote entire treatises, rather than a shorter fatwa, on the issue so as address those concerns more comprehensively. This applies to the case of kharaj that al-Karaki dealt with, as is indicated even in the title of the actual work: Qati’at al-Lajaj fi Tahqiq Hill al-Kharaj, which may be loosely translated as “Cutting Off All Commotion by Establishing the Legality of Kharaj.” Yet I will not treat the entire content of the treatise as many of the points in it merely repeat what has been already established in Islamic law. Instead, I will focus on one particular issue where al-Karaki attempts to introduce new dimensions to Twelver Shi’ite law, which makes this part of the treatise very much like a fatwa.

Why was the issue of Kharaj an important concern at this juncture in the life of the Shi’ite community? Kharaj, which is land-tax on all lands that have been taken by force by the Muslim state, was not a great concern for Shi’ite jurisprudence largely because of the disenfranchisement of Shi’ite community from the corridors of political
power did not make them inclined to devote a great deal of legal effort to those arenas of law that were of concerned to government such as the Kharaj tax. With the coming of the Safavid Dynasty in Persia, the longest lasting political authority to proclaim Shi’ite teachings as the ideology of the state, the situation changed and the disenfranchised Shi’ite community suddenly found itself within the circle of political power and Shi’ite legists now had to contend with legal issues that were of direct political concern.

What was the central issue that al-Karaki was trying to resolve in addressing the issue of kharaj? It is important to understand that issue did not solely revolve around the issue of state taxes, but was of direct concern for the ‘ulema class. Once the state began to patronize the ‘ulema, it was partly from revenues that were derived from kharaj. So it was essential for Shi’ite scholars, like al-Karaki, to legitimate the governmental practice of kharaj so as to legitimate possible sources of financial support for Shi’ite ‘ulema. This issue of kharaj had never been a concern for Sunni scholars as they had viewed Muslim governments as legitimate and the practice of kharaj to be legal ever since the second Caliph Umar (d.644) instituted the practice. For Twelver Shi’ite scholars, on the other hand, had always viewed previous Sunni Muslim governments as illegitimate and historically did not receive support from the state in the same way that Sunni ‘ulema did. But with advent of a state actively promoting Shi’ism, the Safavids, this dynamic changed and Shi’ite ‘ulema were now courted and supported by the state; hence, for the first time they had to assess the legitimacy of such financial backing.

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173 Modarressi, 47.
174 For more details on this point, see Modarressi, 48.
175 See Modarressi, 48.
Al-Karkhi, being an early recipient of Safavid financial and political support, felt the need to legitimate the practice of *kharaj* in the eyes of skeptical Shi’ite intelligentsia and public who perennially viewed the state and its practices with grave suspicion. Al-Karkhi’s response to this suspicion was to write his treatise establishing the legitimacy of *kharaj* and the right of the (Shi’ite) Muslim public in general and Shi’ite Muslim scholars in particular to benefit from endowments provided through *kharaj*. What was al-Karkhi’s strategy in convincing his Shi’ite audience of the legality of *kharaj*?

Al-Karkhi’s strategy in seeking religio-legal legitimacy of *kharaj* was built on a two-pronged approach:

1- By appealing to the historical position of the Shi’ite Imams with respect to *kharaj* that was administered by early Sunni governments. This legal approach constituted the use of a unanimously agreed upon source of jurisprudence among all Twelver Shi’ites which they called *akhbar*.\(^{176}\)

2- And also by appealing to previously established legal opinions of highly regarded Twelver Shi’ite jurists of the past, by which al-Karaki tried to establish a consensus amongst these jurists on this issue.\(^{177}\)

What is absent from al-Karaki’s legal rationalization is the use of any Qur’anic passages and passages from prophetic practice to vindicate his view. This is not surprising given the fact the *kharaj* was an issue that arose in the post-prophetic period and there were no direct references to it in those discourses. Moreover, al-Karaki’s

\(^{176}\) See al-Karaki, pgs 42, 49, 51, 73 for examples of this.

\(^{177}\) See al-Karaki, pgs 45, 46, 47, 71 for examples of this.
treatise-fatwa makes no legal reference to post-prophetic religiously authoritative figures like the second Caliph Umar who initiated the practice of kharaj, nor to any other figures that might have been involved in that initial debate aside from Ali, the fourth Caliph, who is considered the first Imam of Twelver Shi’ism. The only mention of Umar and others in the treatise/fatwa is in historical reference to making the newly conquered land of Iraq as kharaj lands.\(^{178}\) This absence from Shi‘i discourse of early religiously authoritative figures in Sunni Islam is not surprising given that such figures hold no religious authority in the Twelver Shi’ite view. Since the Twelver Shi’ite Imams are the only religiously authoritative figures and by extension those who follow them, none of the jurists that are held in high regard in Sunni Islam are referenced in the treatise/fatwa.

Also, his treatise-fatwa is remarkably devoid of rational legal principles from the science of usul al-fiqh (Islamic legal theory). He makes a passing reference to some legal principles and maxims like loosening restrictions for the sake of easing of hardships,\(^{179}\) but none of these precepts hold a central position in his line of argument.\(^{180}\) What is central in his argument is the corroborating views of the Twelver Shi’ite Imams and the established legal opinions of Twelver Shi’ite jurists who followed them.

Now that I have given an overview of his approach to argumentation, what makes al-Karaki’s treatise novel with respect to the established issue of the kharaj tax? Al-Karaki’s treatment of kharaj is a general presentation of the subject and most generally speaking in line with the view that had already been in established in Sunni legal

\(^{178}\) See al-Karaki, 63.
\(^{179}\) See al-Karaki, pg 80.
\(^{180}\) The use of these precepts will be addressed in greater detail in the later part of this investigation.
circles, other than the fact that he utilizes Twelver Shi’ite sources of authority to vindicate this view instead of Sunni ones. Yet there are unique elements to his treatment that bring nuance to the discussion of kharaj, especially in those parts where he tries to prove the legitimacy of kharaj from a religious point of view and the permissibility of the utilization of its resources by the general Muslim public even when the governing power is illegitimate from the Twelve Shi’ite perspective. This where his argument most resembles a fatwa, in that he was trying to establish a new legal position within the Twelver Shi’ite community and this is where I focus my analysis.

The point of contention in Twelver Shi’ite law is not whether the kharaj tax was a legitimate practice in theory, but whether it can be collected and utilized in the absence of the legitimate ruler, a status the Twelver Shi’ites limit to their twelve Imams and their deputies. Al-Karaki wants to argue that this practice is indeed legitimate even where there is an absence of legitimate rule in form of the Shi’ite Imams.

Karaki argues the absence of legitimate authority and even the presence of an illegitimate order does not obviate the obligation of kharaj because of two reasons: the abiding religio-legal obligation (baqa’ al-haqq) for the payment of the tax which is collected and paid for the sake of God and the existence of those who have a right to its benefits (wujud al-mustahiq)-- the Muslim public. He then forwards two types of legal proofs to vindicate his point of view: the first being reports (akhbar) from some of the

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181 See Al-Mawardi work Al-Ahkam Al-Sultaniyya, pgs 262-270 for comparison with the position of Sunni legal schools on kharaj.
182 This has already been documented above.
183 Al-Karaki, 76.
Twelver Shi`ite Imams that concur with his view and the second being the alleged
consensus of Twelver Shi`ite jurists on this point of view.

As for the first type of proof, he narrates various reports about Hasan, Husayn,
Jafar al-Sadiq, Muhammad al-Baqir and other Twelver Shi`ite Imams showing where
they endorsed the acceptance of benefits, employment, or purchasing of properties from
the contemporary ‘illegitimate’ authorities, who derived there wealth from taxes like
kharaj. The point in these reports (akhbar) from the Imams is to show they accepted
economic transactions with the wealth deriving from kharaj thereby vindicating its
legality even under situations where it is administered by a politically “illegitimate”
regime. Here is an example of one such report (sing. khabar):

Abi al-Mi’zza related that: “A man asked Aba Abdullah ( Jafar al-Sadiq-- the sixth Twelver Shi`ite Imam)-
peace be upon him- while I was with him: ‘May God benefit you I work for the ‘Aamil (for the state tax
collector) and he pays me in Darahim ( in currency), should I take it?’ He (Jafar) said: ‘yes’; then he (the
man): ‘Can I make pilgrimage with it’’ He (Jafar) said: ‘yes.’”184

The point in these reports from the Imams is to show they accepted economic
transactions with the wealth derived from kharaj, especially when there is a legal right ( haqq) to be taken, thereby vindicating its legality even under situations where it is
administered by a politically “illegitimate” regime. But al-Karaki realizes that these
reports don’t openly endorse the collection of kharaj by the illegitimate authorities even
as they may allow one to transact with those properties once they are collected. So, al-
Karaki interjects an objection that could be theoretically posed by his opponents
regarding his proof texts from the akhbar of the Shi`ite Imams. These reports endorse the

184 Al-Karaki, 77.
receiving of benefits from *kharaj* and do not necessarily endorse the collection and management of the *kharaj* by the illegitimate authorities.\(^{185}\)

Al-Karaki responds to this charge by stating that what is taken in *kharaj* from these lands is a right that has been established by the authority of Shari’ah law (and not political authority); hence, there is no objection to those taxes being collected. Since the collection of *kharaj* is dependent (*manut*) on the command of the legitimate Imam and the fact that the legitimate Imam licensed Muslim transactions with *kharaj* properties collected by the illegitimate ruler, the question of the legality of its collection by the illegitimate authority becomes moot for al-Karaki\(^{186}\) (presumably because the authorization of transaction with *kharaj* properties is an implicit endorsement of their legitimacy given that the illegitimate authority is merely a conduit for the redistribution of Muslim wealth and not someone who usurps others’ property).

The second type of evidence that he brings to support his view for the legitimacy of the practice of *kharaj* under the reigns of an illegitimate authority is when al-Karaki argues for the consensus of post-Imam period Shi’ite jurists (presumably considered the equivalent to Sunni *mujtahids*) about this issue. Al-Karaki here cites the statements of such major jurists who preceded him as Muhammad Ibn Hasan Al-Tusi (6th/12th century)\(^{187}\), Al-Muhaqqiq al-Hilli (7th/13th century)\(^{188}\), Al-‘Allamah Al-Hilli (8th/14th century)\(^{189}\).

\(^{185}\) Al-Karaki, 79-80.
\(^{186}\) Al-Karaki, 80.
\(^{187}\) Al-Karaki, 80-81.
\(^{188}\) Al-Karaki, 81.
\(^{189}\) Al-Karaki, 80-81.
century)\textsuperscript{189}, Al-Shahid Al-Awal (9th/15th century)\textsuperscript{190} and others\textsuperscript{191}. The gist of their statements is that the wealth generated from the practice of \textit{kharaj} is legitimate even though it is managed by illegitimate authority. Moreover, al-Karaki claims that he did not find any dissenting claims in the statement of previous Shi’ite jurists on this issue thereby constituting a consensus (‘\textit{ijma}’) of Shi’ite jurists.\textsuperscript{192}

In the forgoing argument, I have focused only a small portion of Al-Karaki’s argument where he goes against the prevailing view in the Twelver Shi’ite community of his period.\textsuperscript{193} By giving legitimacy to the practice of \textit{kharaj} in the absence of what the Shi’ite community viewed as legitimate authority, his treatise/fatwa on this issue represents an attempt to change Twelver Shi’ite suspicion towards Muslim governance in general and implicitly in particular the governance of the Safavids whose legitimacy as rulers he seemed to have championed. But it also represents much more than this as far as legal discourse is concerned. Let me now explore the possible impact of this treatise/fatwa on subsequent Twelver Shi’ite thought and life.

In what ways does al-Karaki’s treatise/fatwa legitimate Shi’ite governance? And how does it become a catalyst for changing the dynamics between the state and Shi’ite community? In writing this treatise on \textit{kharaj} at that juncture in the history of Shi’ite Islam, I would argue that al-Karaki was implicitly attempting to legitimate the existence of governance even in the absence of the legitimate Shi’ite political authority in the form

\textsuperscript{189} Al-Karaki, 81.
\textsuperscript{190} Al-Karaki, 82.
\textsuperscript{191} Al-Karaki, 83.
\textsuperscript{192} Al-Karaki, 83.
\textsuperscript{193} See Modarressi, 166.
of the Imams and their designated deputies. He did so implicitly by legally legitimating governmental practices such as kharaj. The Shi’ite religious establishment, which did not have close relations with Muslim governments for the most part of Muslim history till the rise of the Safavid dynasty in Persia did not give much attention to legal issues concerning the state because they viewed such states as illegitimate. Shi’ite jurists did address matters of state such as the issue of kharaj in a fragmentary way in their legal works as demonstrated by the quotations from previous Shi’ite scholars cited in al-Karaki’s treatise. Moreover, their non-comprehensive approach to issues of state like kharaj is further demonstrated by the fact that there were no separate works on kharaj written by Shi’ite scholars prior to al-Karaki’s treatise with the possible exception of one lost work from the third/ninth century which may have only been a chapter consisting of a collection of traditions on the subject and not a work on law. The purpose for even addressing issues of state like kharaj in their legal works may be presumed to be so that they can maintain parity with the law constructed by their Sunni counterparts.

In addition to this, as Modarressi points out in his work entitled Kharaj in Islamic law, when Twelver Shi’ite legal works did address the issue of kharaj, they tended to so from the perspective of duties of individuals towards the government with respect to kharaj and not the rights and responsibilities of the Muslim state with respect to kharaj in the same way Sunni sources did. This is because that even though Twelver Shi’ite law never recognized Sunni Muslim governments as legitimate, it had to accommodate these governments in practice and hence on this basis Shi’ite law works were obliged to

194 See Modaressi, 66 fn.2 for more on this point.
195 See Devin Stewarts work Islamic Legal Orthodoxy for the influence of Sunni law on Shi’ite law.
address issues of *kharaj* albeit in a fragmentary way\(^{196}\) so as to guide their Shi’ite subjects on how to deal with government policies such as *kharaj*.

So, it is historically and politically significant that the timing of al-Karaki’s treatise, which is the first extant work in Twelver Shi’ite law to deal with the issue of *kharaj* in its totality from the point of view of Twelver Shi’ite legal theory, coincides with the inception of an independent and zealous Twelver Shi’ite state (the Safavid’s). In his treatise/fatwa, he presents a legal argument to justify a governmental policy imposing *kharaj*, even in the face of strong opposition in the Twelver Shi’ite community to its legitimacy as demonstrated by the counter fatwas issued by contemporaneous Twelver Shi’ite scholars like al-Qatifi and al-Ardbili.\(^{197}\) This is because his probable aim is change Twelver Shi’ite attitudes and discourse on government, especially in the wake of the inception of the Safavid state which openly supported Twelver Shi’ite ideology. In other words, his treatise/fatwa was an implicit attempt to overcome Twelver Shi’ite suspicion of government by recognizing the historical opportunity that had been presented to the Twelver Shi’ite community in the form of a state that would openly propagate their interpretation of Islam.

This assertion is best corroborated by the part of his treatise/fatwa that I analyzed in this section: the legitimacy of *kharaj* even when paid to an illegitimate authority. It may be recalled that al-Karaki argues there that the *kharaj* tax was a right of government even when the Muslim political authorities were illegitimate because it was ultimately a

\(^{196}\)See Modarressi 41-42 for list of chapters in Shi’ite legal works that contain discussions of *kharaj*.

\(^{197}\) See for example Muhaqqiq al-Ardbili’s *Risalatan fil Kharaj* (Two Treatises on Kharaj) as an example of counter fatwas to al-Karaki’s treatment of *kharaj*. Also, see Modarressi 55-57 for more on these counter fatwas.
right of God that was only being administered by authorities who spent it on public welfare; hence, people who owed the *kharaj* tax had the responsibility to pay it and those who received benefits from such taxes are extracting their rights regardless of the legitimacy of the authority distributing it. This argument ran against the popular Shi’ite opinion of his day and was probably designed to allay Shi’ite anxieties about cooperation with the state, especially the newly formed Safavid state so that Twelver Shi’ites can reap the benefits of state patronage in the same way their Sunni counterparts had done so for centuries. Nevertheless, al-Karaki realized that ideological opposition amongst the Shi’ite community to political authority was so strong that he could not openly endorse the legitimacy of any political establishment even that of the Safavids who supported Shi’ism. Therefore, he had to couch his argument for legitimacy of the policy of *kharaj* collection and distribution even with an illegitimate regime, which most Twelver Shi’ites at his time still viewed the Safavid state.

There is probably little doubt that al-Karaki’s legal opinion was in some ways self-serving as he was a recipient of Safavid patronage in the form of land grants from *kharaj* lands that were administered by the Safavids and other gifts.\(^{198}\) Thus, he personally felt the need to legitimate government taxation policies like the *kharaj*, which he was a beneficiary of. But whatever personal benefits he may have derived from the Safavid state, it is nevertheless probable that fatwas like the one on *kharaj* acted as catalysts for changing the dynamics of the relationship between state and Shi’ite civil society even though al-Karaki garnered a lot of opposition from the Shi’ite ulema of his time.\(^{199}\) This is

\(^{198}\) See Newman, 1993, 80 for more on this issue.

\(^{199}\) See Newman’s article on the Religious Trends in the Safavid Dynasty entitled “Safawids”, EI2, V.8, pg 778.
because subsequent generations of Twelver Shi’ite scholars, some of whom were direct intellectual descendants of al-Karaki, like Mir Damad (d.1040/1630-1), closely cooperated with the Safavid court and received material patronage from it. By the 11\textsuperscript{th}/17\textsuperscript{th} century, a century after the establishment of the Safavid State, more and more Twelver Shi’ite scholars were becoming far less reluctant to cooperate with the Safavid court and this cooperation eventually produced a Twelver Shi’ite intellectual and cultural revival. Yet it was positions towards governance like those taken by al-Karaki that paved the way for this new rapprochement and cooperation between the Twelver Shi’ite civil society, in particular the Shi’ite ‘ulema, and the state.

Aside from the possible socio-political impact of his ideas and actions, al-Karaki’s fatwa expanded the scope and corpus of Twelver Shi’ite law to be more extensive to issues of governance. As I mentioned earlier, prior to his treatise on kharaj there had been no independent treatment of the issue of kharaj in Twelver Shi’ite legal compendia. But after al-Karaki wrote his treatise, no less than eleven independent Twelver Shi’ite legal works that were written about the subject of kharaj between fifteen to nineteen hundreds, as listed by Modarressi. So his work, fitting with the historical circumstances that the Twelver Shi’ite community found itself in, generated lots of interest in an issue that had been practically been neglected by the Twelver Shi’ite community prior to that.

\footnote{See Newman’s article on the Religious Trends in the Safavid Dynasty entitled “Safawids”, EI2, V.8, pg 778-779.}

\footnote{See Newman’s article on the Religious Trends in the Safavid Dynasty entitled “Safawids”, EI2, V.8, pg 778-779.}

\footnote{Modarressi, 66.}
Moreover, five out of the eleven works that were written on kharaj by Twelver Shi’ite scholars were written in the same (10th/16th) century that al-Karaki wrote and these five works were written in direct reaction to al-Karaki’s treatise/fatwa. For instance, the Arab Twelver Shi’ite scholar Ibrahim al-Qatafi (d. after 945/1539) composed a refutation of al-Karaki’s treatise, followed by another Twelver Shi’ite scholar, Ahmed al-Ardabili (d. 993/1585) who wrote three other treatises refuting al-Karaki’s point of view on kharaj, while another Shi’ite scholar, Majid al-Shaybani, wrote a refutation of Ardabili’s work, taking the same position as al-Karaki in legally legitimizing kharaj. Certainly, these other kharaj works are indications of how al-Karaki’s treatise/fatwa catalyzed many new debates in Shi’ite Islamic law and expanded the scope of its discussion.

Aside from the overall expansion of the scope of Twelver Shi’ite law, how might fatwas like al-Karaki’s have contributed to the evolution of Twelver Shi’ite law, and more particularly how was al-Karaki’s treatise/fatwa significant to the Usuli/Akhbari debates in Shi’ite legal theory that resurfaced in the 11th/17th century? Where al-Karaki’s treatise/fatwa, along with other Twelver Shi’ite fatwas that share his legal approach, might have contributed to the evolution of Twelver Shi’ite law is in its facilitation of the development of an official Twelver Shi’ite school of law (madhhab) in later periods where none had existed prior to this.

I have already mentioned how al-Karaki consistently referred to the ijma’ (consensus) of Twelver Shi’ite scholars on the issue of kharaj. This appeal to the ijma’

203 See Modarressi, 55-57 for more on this issue.
204 See Modarressi, 55-57.
(consensus) of Twelve Shi’ite scholars was a necessary element to the formation of a Twelver Shi’ite school of law that became known as the Imami or Jafari madhhab. This is because a key component to the formation of any intellectual school of thought is to identify points of agreement among members of a group that are considered to be participants of that school. Although consensus had already been recognized as a source of law in Twelver Shi’ite legal theory at a much earlier period,205 al-Karaki’s appeal in this treatise/fatwa to the *ijma’* (consensus) of previous Shi’ite jurists, in addition to other Twelver Shi’ite scholars who might have pointed out areas of agreement amongst Twelver Shi’ite jurists, built up the practical legal momentum for the establishment of the Twelver Shi’ite madhhab. This is so because the consistent practice of pointing out areas of agreement amongst Twelver Shi’ite jurists, created the conditions for consensus formation within Twelver Shi’ite law, which was a fundamental, but not sufficient, element206 to forming a Twelver school of law which the Usuli movement eventually morphed into. In this respect, al-Karaki’s treatise/fatwa might have planted some seeds for the further evolution of Twelver Shi’ite legal institutions.

At this point in my analysis, I use al-Karaki’s fatwas to compare and contrast Twelver Shi’ite law with Sunni law. In this respect, how does Karkhi’s Shi’ite fatwa resemble that of the Sunni fatwas and how does it differ? Al-Karaki’s fatwa from the Shi’ite theological-legal perspective resembles that of Sunni fatwas in several ways and differs from that of the Sunni fatwas that we have examined from this period in several

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205 See Stewart, 143-144.

206 See Devin Stewart’s work entitled *Islamic Legal Orthodoxy* which highlights the role of the legal concept of *ijma’* (consensus) in the formation of the Twelver Shi’ite madhhab. However, I feel Stewart has given too prominent a role for *ijma’* in the formation of this madhhab.
others. As far as similarities are concerned, al-Karaki’s treatise/fatwa displays the usual legal formatting that Sunni fatwas exhibit by seeking legitimacy of a particular legal position through appeal to the sacred text (discursive authority) and the legal precedence of those who interpreted those texts (hermeneutical authority). This is seen in his utilizations of reports from the Twelver Shi’ite Imams, whose practice is as legally authoritative as the prophetic practice in Twelver Shi’ite legal theory, and the legal positions of major Twelver Shi’ite jurist-consults from previous periods to support his own legal position. As I mentioned earlier, neither Qur’anic passages nor prophetic practice came into play in his legal rationalization because the issue of kharaj had never been directly addressed in those two sources of Islamic law.

Being a jurist-consult from an Usuli persuasion in Twelver Shi’ite legal theory, al-Karaki argues his position not only from the point of view of norms that are set by sacred texts, but also corroborates his understanding within the framework of the consensus (ijma’ ) of other Twelver Shi’ite jurists on the issue. Whether his claim of consensus of top Twelver Shi’ite scholars on this issue is accurate or not is not important here; what matters here is that his appeal to consensus makes his method of legal argumentation similar to his Sunni counterparts and divergent from other Twelver Shi’ite jurists with Akhbari proclivities who eschew the notion that the law may be derived through a process of consensus (‘ijma) and/or intellect (‘aql). Moreover, crucial to his project is to show that his understanding of the law on this issue is not only in line with the sacred norms as established by the Twelver Shi’ite Imams, but also has precedents with other Twelver Shi’ite jurists that both contextualize and corroborate his application
of those sacred norms to the scenario that presents itself to him. This is very much in line with how Sunni jurist-consults situated their fatwas.

Where al-Karaki’s fatwa differs from Sunni fatwas of this period is that it is not confined by the same by the legal hierarchy that came to dominate Sunni law in the form of madhhab. Although he appeals to established precedents and the consensus of Twelver Shi’ite scholars, he does not appeal to them in such a way that these opinions necessarily confine the scope of his legal decision on the issue. Rather, his approach in these appeals is that of corroboration of his own independent decision as a jurist-consult on Twelver Shi’ite law. This is one of the ways by which the process of legal rationalization and utilization of legal authority differ in Twelver Shi’ite jurisprudence from its Sunni counterpart. This independence in judgment becomes a permanent feature in Twelver Shi’ite legal practice even as their Imami (Ja‘fari) madhhab came into formation in the latter period. In other words, fatwas or legal decisions of previous Shi’ite jurists do not in themselves legitimate the means of present practice even when they can be used to support the legitimacy of the present practice. In other words, one must follow the practice of a present and not past mujtahid, as came to be articulated much later in the Twelver Shi’ite concept of marji’ al-taqlid. This became a distinguishing feature of the Imami madhhab that sets it apart from Sunni madhabs that we have explored and the fatwas that were issued through them. When citing the major Twelver Shi’ite jurists, al-Karaki does not present them in structured hierarchy in same way that Sunni fatwas from

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207 For more on following a living mujtahid in Twelver Shi’ism, see Mangol Bayat’s article on the “Usuli-Akhbari Controversy” on pg.284 of Dabashi, S.H. Nasr and W. Nasr’s Expectations of the Millennium: Shi’ism in History. For more on the concept of marji’ al-Taqlid, Lenoard Binder’s article on “Ijtihad and Marja’iyyat” pg 240 in of Dabashi, S.H. Nasr and W. Nasr’s Shi’ism: Doctrines, Thoughts and Spirituality; also see Stewart, 229-230.
this period did. There is no one Twelver Shi’ite legal authority, aside from the Imams, who are seen as sacred in Twelver Shi’ism, whom he cites in his argument, and who hold precedence over others, like we saw in our analysis of Sunni fatwas. Rather, the Twelver Shi’ite jurists are presented with a fairly equal level of juristic authority and based on the merit of their arguments even if those he mentions are presented in way showing them to be more authoritative then those he does not mention. Yet the consensus of all of these Twelver Shi’ite jurists together does represent a form of hierarchy that should not be transgressed against by an individual jurist.\(^228\)

Lastly, I want to address al-Karaki’s usage of legal concepts from Islamic legal theory in comparison to Sunni legal practice. I have already mentioned, how al-Karaki is quite sparing in his use of Islamic legal concepts in his argument for the legality of kharaj. Nevertheless, he lightly employs some of these concepts in his argument to vindicate some of his legal positions. Most notably, he employs forms of analogical reasoning in his arguments even though, as I have previously stated, Twelver Shi’ite legal theory had formally rejected analogy (qiyas) as means of establishing legal injunctions. The particular form of analogical reasoning that he employs in two arguments of his treatise is the *a fortiori* argument. The first occasion is where he tries to vindicate why deputies to the imam [whom he designates as the jurists who possesses the conditions for *ijtihad* (*al-faqih al jami’ li-al-shara’it*)] have the right to collect and administer Kharaj in the absence of the legitimate authority (the Twelver Shi’ite Imam). Here he says that although that he is not aware of any legal opinion by Shi’ite legal jurists (who he designates as *al-ashaab*) on this issue, yet it would be more incumbent (*bi tariq awla*) for

\(^{228}\) See his statement to this effect on pg. 73 of his treatise.
those jurists who allowed for such a *faqih* to execute responsibilities like punishments on behalf of the absent authorities (the Imam) to allow for the same *faqih* to administer *kharaj* because it is even less serious responsibility (*khataran*).\(^{209}\)

The other occasion where he uses an *a fortiori* argument is where he wants to show that those reports from the Imams that legalize the buying of *kharaj* properties are also an indication to the legality of receiving gifts from those sources. Here, he says the legalization of the purchase of a property necessitates with greater (*bi tariq awla*) legitimacy other forms of transfers of that property, as in the case of giving it as a gift, since the legal conditions for legitimation of transfers of properties through sales are more rigorous.\(^{210}\) It is on these two occasions that al-Karaki employs specific forms of analogical reasoning that have their basis in Sunni Islamic legal theory although he does not directly employ the full procedure of *qiyas* (*argument by analogy through the use of a ratio legis*) that was legitimated in Sunni legal theory and opposed in Twelver Shi’ite legal theory as means of deriving Islamic law.

He also appeals the legal concepts of *maslaha* (public interest) and ‘*urf* (custom) to vindicate why there is no fixed rate for *kharaj* tax since he claims that this is matter that is conditioned (*manut*) by customarily determined public interest (*bil-maslahati ‘urfan*).\(^{211}\) On another occasion he appeals to established legal maxims in Islamic jurisprudence like the maxim of easing of hardship (*zawal al-mashaqqah*) to legitimate

\(^{209}\) Al-Karaki, 74.  
\(^{210}\) Al-Karaki, 80.  
\(^{211}\) Al-Karaki, 73.
why the Twelver Shi’ite Imams allowed for the purchase of kharaj properties even from the illegitimate authorities.212

The closest point that al-Karaki comes to making an analogical argument in the Sunni formulation of qiyas is in the section of the treatise that we addressed earlier in detail about the legitimacy of imposing and receiving the benefits of kharaj under the rule of an illegitimate authority and the absence of the Imam (the legitimate authority). It may be recalled his argument there is to say that irrespective of the authority in charge that kharaj is a right (haqq) and should be collected and distributed. To prove his point he narrates a report from the sixth Imam Jafar al-Sadiq who encourages one of his followers to accept his salary from standing (illegitimate) political authorities at the time because this person, argues the Imam, has the right to the expenditures of the treasury. Al-Karaki says here that this report is scripturally based evidence (nass) in regard to his argument because it shows that Imam Jafar recognized the existence of rights that Muslims have over the state treasury.

What the reader has to infer from this report is that even when Imam Jafar (the allegedly legitimate political leader of the Muslims according to the Twelver Shi’ite view) was barred from exercising his right to political authority, there remained the right of Muslims to benefit from the state treasury, which was mainly supplied through the kharaj tax. The part in his argument where the Sunni formulation of qiyas is implied is in a statement he makes after his argument stating that in Islamic legal theory a legal judgment is transferred (ta’adi al-hukm) to new cases when there exists a scripturally

212 Al-Karaki, 80.
determined effective cause of the ruling (al-‘illa mansusah). Al-Karaki makes this legalistic statement in passing and never bothers to explain what he means by it, but what he means to say according to my understanding is that the effective cause (al-‘illah al-mansusah) for the ruling on kharaj is stipulated by Imam Jafar’s statement that his followers had a right to it and hence dealing with kharaj properties is based on the existence of this right irrespective of who is in charge of this kharaj. The ultimate point that I believe al-Karaki is trying to make is that even in his age this right to benefit from kharaj still exists because the effective cause for this ‘right’ stipulates that be the case.

But in making an argument for the extension of the right of kharaj based on the existence of the effective cause (‘illah) one is making an analogy to the original case and hence implies the legitimacy of analogical reasoning in deriving new laws. In fact, this form of argument is not seen as a qiyas (analogical) argument in Shi’ite legal theory but rather as merely an extension of the scripturally mandated legal injunction to a new case, which is called ta’diyat al-hukm (transfer of the rule). Whatever the case may be, there seems to be quite an overlap between Twelver Shi’ite law and legal theory and Sunni law and legal theory that even in a fundamental area disagreement such as the validity of formal qiyas (analogical reasoning) in lawmaking; there nevertheless remains a point of convergence that new cases may be treated through an extension of the of the norms of the sacred text. This point has been fundamental to the entire enterprise of Islamic legal tradition.

213 Al-Karaki, 76.
214 See Hallaq, 2009, 121 and Vikor, 131 for more on this concept.
To conclude, what al-Karaki’s fatwa reveals is that it engages in many of the same discursive practices that characterize fatwas that originate in the Sunni legal tradition. Despite the sectarian divide that existed between both camps, their legal discourses shared an uncanny similarity in both content and form. This similarity is a consequence of having a shared basis of legal authority (e.g. discursive and hermeneutical authority) even when there are differences with regards to details of that basis. Therefore, there was a great deal of continuity in the Islamic legal discourse even across various Islamic legal sub-traditions that existed. This continuity can be explained by the fact that these sub-traditions were a part of a greater Islamic discursive legal tradition that influences the possibilities that would be produced by the Islamic legal discourse.

Conclusion:

In the previous six chapters, I have examined the evolution of Islamic legal tradition through the practice of fatwas. I demonstrated how fatwas played a constitutive role in forming that legal tradition. Both substantively in terms of providing the matter of legal doctrine and formally in terms of harboring the legal rationale that would be prototypical of the Islamic legal discourse, fatwas were a fundamental element in the emergence of the Islamic legal tradition. Yet as this tradition emerged it exerted its influence on the jurisprudential activity of fatwas. Like all traditions, the Islamic legal tradition viewed historical legal discourses, institutions and experiences as foundational and normative. In this respect, the Islamic legal discourse and tradition represents what Harold Berman calls historical jurisprudence where the past “is the source of ‘standards’
for the interpretation and promulgation of laws, and for the normative goals of the legal system.”²¹⁵

This was clearly illustrated in the consistent appeal of Muslim jurists through the ages to the judgments that had been established through historical precedent and the institutionalized practice of previous generations of Muslim jurists (madhhabs) as guides and standards for how contemporary Islamic jurisprudence would be determined. That had been the guiding ethos of Islamic jurisprudence from the very early stages, but with the heralding of modernity into Muslim lands in the 19th century, for the first time in over a millennium of Islamic history this ethos came into question from a new Muslim elite who sought to break from this tradition. It will be the subject of the remaining part of this dissertation to assess the effects of this modern discourse on the Islamic law in particular and the Islamic legal tradition in general.

²¹⁵ Chase, 3. For more on Berman’s concept of historical jurisprudence see Edward Chase’s article entitled “Law and Theology” in A Companion to the Philosophy of Law and Legal Theory, Blackwell Reference Online.
CHAPTER 7
COLONIALISM, ISLAMIC LAW, AND THE POSTCOLONIAL FATWA

Introduction

Until now we have talked about the evolution of the Islamic legal tradition in the first twelve hundred years of Islam and how fatwa played an integral role in that development and how fatwa was at the same time effected by that development. The development of that tradition was something that was gradual and organic. This will all change towards the end of the 18th century when the rise of European power in the globe that brought about with it new set of attitudes and ways of thinking about the world. But most importantly the rise of European power in the world brought about a new world order that would change the entire global social, economic and political dynamic. Those sweeping changes would equally affect the Muslim world and in particular the developmental trajectory of Islamic law. But before I can assess those changes, it is important for us to understand the character of European power that projected itself in and on the world in the late 18th century and the effects it had on the then known global configuration.

A New European Order

The reasons for Europe’s rise to world prominence during the late 18th and early 19th century is a hotly debated topic amongst historians1, yet what is not in doubt is the effects of that prominence on Europe in the form of a new order, which some call modernity, and the effects of that order around the world in the form of a colonial formation which they established. But what were the socio-historical consequences of

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1 See for example, Braudel, Wallerstein, Frank, and Hodgson amongst many others.
this emerging new order known to some as modernity or modern life? Hodgson alleges that between the 16th and the late 18th centuries a cultural transformation took place in Western Europe, which culminated with two major and simultaneous events: The Industrial Revolution and the French Revolution. The Industrial Revolution represented the technological developments that transformed the character of human production, while the French Revolution represented political action that “established unprecedented norms in human relations.”

This transformation not only affected Europe, but eventually encompassed the world at large. But having been initiated in Europe, this transformation gave Europeans an advantage over the rest of the world because the new mode of operation allowed them to outproduce, outsell, and outdo other peoples in almost all fields. Although they were not able to immediately establish direct rule in other parts of the world, their new posture allowed them to set the terms by which they established their hegemony over the rest. The transformation that occurred changed the fundamental constitution of subsequent cultural developments in European society and not just particular social and cultural traits.

Hodgson identifies three main fields where this cultural transformation initially took place:

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2 See Frank and Braudal who dispute the validity of this duration.
• Economic: an increase in productivity because of the implementation of new techniques results in mass production of goods, which culminated in the Industrial Revolution.\(^6\)

• Intellectual: the discoveries made in the new experimental sciences broadened the horizons for independent philosophical inquiry of the Enlightenment era.\(^7\)

• Social: “breakdown of the old landed privileges….. and their replacement with a bourgeois financial power ushered in the American and French revolution.” \(^8\)

These historical changes gave rise to wealth-producing capitalist modes of production, efficient bureaucratic political administration, the organization of European society on the model of nation states, and technological advancements that gave European states greater power to impose this new political and economic order on the rest of the world for their own advantage. This new world order had been dubbed by Immanuel Wallerstein the Modern World System. According to Wallerstein, the basic characteristic of this world system was its capitalist economic dimension that put into place a global division of labor regime which fixed the economic relationships between various regions of the world. This capitalist global consisted of the following elements:

1. **Core Zones**: These are the regions that benefited the most from world system and initially consisted of Northwestern European states like England, France, and

\(^6\) Hodgson, Vol. 3, 179.
\(^7\) Hodgson, Vol. 3, 180.
\(^8\) Hodgson, Vol. 3, 180.
Holland. These states developed strong state machineries and an ideology of national culture which was a mechanism to protect disparities that arose in those societies due to their pronounced increase in wealth and as an “ideological mask for the justification and maintenance of those disparities.”

Furthermore, the core regions were able to acquire cheap raw materials from peripheral regions for their industries and accumulate large amounts of capital by exporting finished products.

2. **Peripheral Zones**: these were regions in the world that represented the opposite of the core zones, in that they had weak state machineries and that they were either non-autonomous colonies or had low levels of autonomy, as in regions that were in semi-colonial situations. Initially these regions were represented by Eastern Europe and Latin America, but by the 19th century Asia and Africa were included. These peripheral zones exported their raw materials to the core regions. Goods produced in these zones were designed to be traded abroad in the capitalist world economy and not for internal consumption. If the economies of these regions were self-sustaining prior to being incorporated in the capitalist world system, they were now rendered dependent as each region now specialized in producing one crop or kind of goods that was determined to be the most

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9 Wallerstein, V.1, 349.

10 See Duchrow, pgs. 12, 15, and 20.

11 Wallerstein, V.1, 349.

productive and profitable for trade in the world market largely determined by core states.$^{13}$

3. **Semi-peripheral Zone**: these regions/states were neither peripheral nor core although they may have been one of those two at one time in the early history of the capitalist world system, but eventually declined or rose in status to become semi-peripheral states the capitalist world system. They stand somewhere in between the political economic spectrum that defines core and peripheral regions.$^{14}$ Examples of this type of states that were core states yet declined gradually are Spain and Portugal. These states were often exploited by the core states, but were themselves exploiters of peripheral regions. For example, Spain imported gold and silver from the Americas that was extracted through forced labor, but did not use this capital to establish their own manufacturing sector and instead used it to buy manufactured products from the core regions.

Describing the Wallerstein’s Modern World System, Martínez-Vela says: “This division of labor refers to the forces and relations of production of the world economy as a whole and it leads to the existence of two interdependent regions: core and periphery. These are geographically and culturally different, one focusing on labor-intensive, and the other on capital-intensive production.” Furthermore, he says that: “A world-system is what Wallerstein terms a "world economy", integrated through the market rather than a political center, in which two or more regions are interdependent with respect to


$^{14}$ Wallerstein, V.1, 349.
necessities like food, fuel, and protection, and two or more polities compete for domination without the emergence of one single center forever.”

I have presented a truncated version of the structure of the Modern World Capitalist System from the perspective of its global impact and not from the perspective of the transformations that affected Europe and the political and economic development that had gone on there, because my purpose is to explore the impact of this new order on the rest of the world, particularly the Muslim world. This structure will be illustrated more historically when I present effects of that world system on the Muslim world in the 19th century.

At this point, I want to address a lacuna that I believe this historical theory misses with regards to the character of this world system but which is integral to understanding the full impact of that system on the entire globe. Wallerstein claims that the world system is maintained through the economic dimensions of the market rather than a political center such as an empire which was the case for previous economic systems prior to capitalism. Yet what this analysis overlooks is that the modern ‘world economy’ (i.e. Modern World System) being not politically centered in a formal or official empire, it does not preclude there being simultaneously a political order that was co-determinate of that economic order. That political order is what was known as colonialism and its surviving vestige in the form of neo-colonialism. That is, the political order of the world system has not been and is not necessarily a multi-dimensional

16 See Wallerstein, V.1, 348.
political unit in the way that Wallerstein conceives of it. In fact, this political order was and is a single unit as much as the capitalist world economy is, in that it too contains the singular logic of political domination through the political system of colonialism and more currently neo-colonialism. Similar to the economic order of capitalism, the colonial system also can be said to follow a tripartite global division of political hierarchy that is represented by the categories of colonizers, colonized, and semi-colonized.

What I want the reader to recognize is that the political order of colonialism (and by extension neo-colonialism) is as singular as the economic ordering of the world on the basis of capitalism. Moreover, the singular world colonial political order was not necessarily dependent on the logic of capitalism in the modern world system, but was indeed a complementary political driver in the world system that facilitated the worldwide economic domination of capitalism as much capitalism became the motivation for colonialism. In other words, the colonial order would not be described as ‘colonial’ if it was not for the capitalist division of labor between core (or colonial) and peripheral regions (colonized). By the same token, capitalism would not have become the heart of the modern world system without the political arrangement of the colonial order making it so. So the Modern World System can be described as either capitalist from its economic dimension or colonial when looking at the political side of things or simply both, as these two orders were indeed two sides of the same coin called the Modern World System. This will be illustrated in my historical discussion of European colonialism of the Muslim world.
European World Domination in the Nineteenth Century.

Already in the 16th century, European empires like Spain and Portugal established their political and economic dominance over the Americas and parts of Africa and Asia. Yet by the middle of the 18th century, new European states (England, France, Holland and Russia) came to the fore and eventually asserted their domination over the remaining parts of the globe in Africa and Asia, including most of the Muslim world by turning these regions into direct European colonies. In the two subsequent subsections, I will give illustrations of colonization and semi-colonization of the Muslim world in the 19th century:

I. European Colonization of Muslim Hinterlands in the 19th Century

British Colonization of Muslim-Ruled India: In the 1757, the British, in the guise of the British East India Company, defeated the local Muslim rulers of Bengal in the Battle of Plassey and gained control of the Indian regions of Bengal.17 This was the India’s richest province, and through the resources afforded to the British by the acquisition of the Bengal, they managed to gain control over all of India over the next sixty years, both the Muslim-ruled and the smaller Hindu-ruled portions of it.18 The introduction of English machine-produced textiles brought ruin to the Bengali cotton weaving industry as Indian textiles could not compete with British manufactured goods on the world market and eventually turned Bengal into an agricultural economy for the production of jute and

17 Metcalf and Metcalf, 53.
18 Metcalf and Metcalf, 55; Also see Hodgson, V.3, 213.
indigo as raw materials for the core industrialized regions of the world economy and not for local food production for its own subsistence.\textsuperscript{19}

Yet British colonialism did not simply remain within the confines of political and economic exploitation of India. As Hallaq points out, British commercials interests “were intimately connected with the particular vision of a legal system structured and geared in such a manner as to accommodate an ‘open’ economic market. The legal system was, and continued to be, the template that determined and set the tone of economic domination.”\textsuperscript{20}

Nevertheless, the British did not directly impose British law on Indians, but instead preferred a multi-tiered legal system whereby the British legal structure would be superimposed on native Indian laws, whether those laws were Hindu or Muslim, where British judges would adjudicate civil matters in accordance to Muslim and Hindu law.\textsuperscript{21}

This necessitated the eventual translation of Islamic legal compendia into English so as to give British judges direct access to Islamic legal statutes no longer relying on Muslim \textit{qadis} (judges), whom they did not trust, to adjudicate legal issues that arose amongst the Muslim population. This led the translation of the Hanafi Islamic legal compendium \textit{Al-Hidaya} into English.\textsuperscript{22}

As Hallaq asserts, the translation of \textit{Al-Hidaya} amounted to its codification, which made this legal compendium cease to function in the way it previously had, because it restricted juridical discretion of the \textit{qadi} and replaced “the native’s system of

\textsuperscript{19} Metcalf and Metcalf, 76-77; Hodgson, V.3, 211.

\textsuperscript{20} Hallaq, 2009, 371-372.

\textsuperscript{21} Hallaq, 2009, 372.

\textsuperscript{22} Hallaq, 2009, 374.
interpretable mechanisms by those of English law.”23 Furthermore, the translation/codification of *Al-Hidaya* severed its organic relatedness to the Arabic juristic and hermeneutical tradition by excluding considerations of customary norms which were essential to the functioning of Islamic law especially at the level of application.24

The superimposition of British legal structure on Islamic law in India perpetuated symbolic violence on the practice of Islamic law in India. As Hallaq states: “*Ittihadic* hermeneutics was the very feature that distinguished Islamic law from modern codified legal systems, a feature that permitted this law to reign supreme in, and accommodate, as varied and diverse cultures, sub-cultures, local moralities and customary practices as those which flourished in Java, Malabar, Khurasan, Madagascar, Syria, and Morocco. But insofar as judicial practice was concerned, the bindingness of a ruling according to the specifically British doctrine of precedent deprived the *qadi* of the formerly wider array of opinions to choose from in light of facts presented in the case. Once the determination of law in a specific case was made binding, as would happen in a British court, the otherwise unceasing hermeneutical activities of the Muslim mufti-cum-author jurist would have no place in judicial life.”25

Hence, the enshrining of British notions of precedent in Islamic law in India “transformed the sources of legal authority altogether. Instead of calling upon the school (*madhhabic*) principles and juristic authorities whose props were the dialectics of textual sources and context-specific social and moral exigencies, the Anglo-Muhammadan

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24 Hallaq, 2009, 376.
25 Hallaq, 2009, 381.
lawyer and judge were forced to look for higher courts....” which ultimately were supervised by geographically and epistemically remote British colonial administrators rather than native experts on Islamic law.  

Hallaq asserts that this replacement of Islamic legal authority by British legal structure transformed Islamic law in India into an ‘impotent hybrid’ that did not meet the ‘civilized’ standards of the colonizer nor “defended the interests of the very tradition and society that it was supposed to serve.”  

Yet even this hybrid form of Islamic law in India that was known as Anglo-Muhammadan law did not survive past the first century of British colonialism in India. Shortly after the Sepoy Mutiny in 1857, the British began to abolish aspects of Islamic law like the Islamic law of procedures and criminal law and evidence. By the end of the nineteenth century all indigenous forms of law were supplanted by British law with exception of family law and certain aspects of property transactions.

**French Colonization of Algeria:** French colonization of Algeria began in 1830 when the French invaded Algiers, and continued with the subsequent take-over of the rest of Algeria over the next forty years. French colonization of Algeria had a different character than British colonization in India in that it was a settler colonialism whose main feature was appropriation of Algerian land to be settled by French settlers who came from France seeking to exploit the new economic opportunities that were afforded to them by this

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26 Hallaq, 2009, 382.
27 Hallaq, 2009, 382.
28 Hallaq, 2009, 383
colonization.\textsuperscript{29} French colonialism in Algeria functioned by dispossessing the natives of their land, making those lands available to French colonists.

Algeria’s landholdings were divided in three broad categories: Lands that were privately owned, lands belonging charitable endowments known as \textit{habus} (\textit{waqfs}), and those lands that were collectively owned by native tribes. In 1843, the French took possession of all \textit{habus} lands and stripped these lands of their inalienable character so as to make them open for exchange to French settlers.\textsuperscript{30} Once the \textit{habus} lands were possessed and exchanged with the French settlers, the French proceeded to dispossess the tribal peoples of their remaining collectively-owned tribal lands through various guises of legality.\textsuperscript{31} For instance, a decree in 1846 by the French Domaine (Land Department) declared lands that were not in use as vacant, which included lands used for grazing, thus giving the Domaine the pretext to acquire 200,000 hectares of land to be colonized by the French, of which only 32,000 hectors went to Algerian Muslims.\textsuperscript{32}

Later policies of cantonment in the 1850s further appropriated tribal lands by declaring that lands that were not in use, usually the most fertile, were taken away for the sake of French colonizers. Now, only small and poorly cultivable portions of the tribes’ lands remained, which left them very often in financial ruin.\textsuperscript{33} Similar confiscation of lands occurred in the failed tribal rebellion against the French in 1871, after which all of the lands of the tribes that had taken part in the rebellion were sequestered and then made

\textsuperscript{29} Abu-Nasr, 252.
\textsuperscript{30} Abu-Nasr, 261.
\textsuperscript{31} Abu-Nasr, 261.
\textsuperscript{32} Abu-Nasr, 262.
\textsuperscript{33} Abu-Nasr, 262; Naylor, 6.
available to French settlers. This was in addition to the 36.5 million francs fine that was imposed on the regions participating in the rebellion which amounted to ten times their annual tribute to the French regime.\textsuperscript{34}

All in all, during the period of 1830 to 1940, the colonized Algerians lost 3,445,000 hectares of land to the French.\textsuperscript{35} These land confiscations impoverished the Algerians, as a reduction in land also meant that they could raise less livestock and produce less wheat. While the population of Algerian Muslims increased, their holdings of livestock decreased by one quarter between 1865 and 1900.\textsuperscript{36} After 1871, with increased appropriation of their lands, Algerians either became laborers for European-owned farms or turned to sharecropping of those lands for a fifth of the produce. So by 1900, according to official estimates, the Algerian Muslim population owned 37\% of the country’s wealth, even while there were eight times as many Algerians as there were Europeans.\textsuperscript{37}

What exacerbated the underdevelopment of Algeria and impoverished the Algerians was the crops that French and European colonist produced on these fields. Wheat, a basic staple, was now replaced by vineyards for the foreign export due to the phylloxera blight that struck France’s vineyards in the 1870s. It should be noted that the Algeria’s whole colonial ordeal had begun as a disagreement over France’s lack of willingness to pay its debts to Algeria for its wheat exports to the French army.\textsuperscript{38} But with

\begin{itemize}
\item \textsuperscript{34} Abu-Nasr, 268.
\item \textsuperscript{35} Naylor, 6.
\item \textsuperscript{36} Abu-Nasr, 270.
\item \textsuperscript{37} Abu-Nasr, 270.
\item \textsuperscript{38} Abu-Nasr, 249-250.
\end{itemize}
its colonization, no longer did Algeria cultivate the foodstuffs to feed its people and export a surplus to others; instead it was forced to cultivate grapes and citrus fruits for the sake of satisfying the demand the of core regions in the world market at the expense of their own needs. Naylor describes this situation as follows: “Vineyards replaced wheat fields to maximize profits as hunger haunted the colonized masses. The territorial investment devoted to viticulture expanded from 40,000 hectares in 1880 to 400,000 in 1940.”\(^{39}\) This is yet another example of how colonized countries were made dependent and underdeveloped in the capitalist/colonial world system.

The political repression of the Algerian Muslim population grew ever more intense with each passing day of colonization. For example, the *Code de l’indignat* that was promulgated by the French colonial authorities in 1881 stated that colonial administrators could enact severe penalties on the Muslim population of Algeria for any one of forty one specified offenses without any legal procedure. Outlining some of these measures Abu-Nasr says: “Civil administrators could detain Muslims without trial, place them under surveillance, and order collective penalties and the sequestration of property. Muslims, furthermore, could no longer leave the districts without obtaining a special permission from the authorities. This code was periodically administered until 1927.”\(^{40}\)

Yet if this was the political and economic devastation that was wrought on Algerian society from French colonization, the alienation of Algerians from their cultural and religious heritage was just the same. Abu Nasr claims: “Settlers, colonial

\(^{39}\) Naylor, 6.

\(^{40}\) Abu-Nasr, 269.
administrators, and metropolitan were all agreed in viewing Islam as a danger to French authority in Algeria.” The French attempted to control Algerian Muslim religious life especially from outside influence by controlling their religious leadership. The policies that were enforced for this goal included the obstacles placed in the way of pilgrimage to Mecca prior to WWI, the pursuit of some religious groups like the Sanusiyyah because of their religious reformist views and their political opposition to French colonial expansion, and the use of loyalist Muslim scholars who were paid for by the colonial administration and appointed to official religious roles in mosques and other institutions.

French control over Muslim religious institutions was facilitated by their confiscation of the properties of Muslim religious endowments (habus or waqfs) which financially supported Muslim scholarship and education. The French colonial administration allocated most of those properties to French settlers, reducing the revenue from which the Islamic establishment could be financed. The French authorities reduced the number of Muslim scholars and mosques that they would lend support to because they felt there were too many of them. This led to closure of mosques and Muslim educational institutions that “lowered the level and quality of learning among the traditional scholars of law.” The religious establishments that the French were willing to support were those who were compliant to the French colonial administration.

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41 Abu-Nasr, 270.
42 Abu-Nasr, 270.
44 Vikor, 243-244.
45 Abu-Nasr, 271.
Moreover, the French increasingly reduced the role of the Shari’ah in Algerian Muslim society by reducing the types of cases that could be settled through Shari’ah law and then reducing the number of Shari’ah courts. The qadis (judges) lost the right to deal with cases concerning landed property in 1886, and criminal cases could only be dealt with by French jury courts where the French settlers were the jurors.\textsuperscript{46} There were originally 300 Shari’ah courts in Algeria, but with the introduction of new policies that would further subdue Algerians to French domination, the number of these courts decreased from 180 to 60 in the period between 1870 and 1890. In the areas where Berber non-Arab tribes (Kabyle) resided, these courts were abolished altogether in 1874 under the guise that the Berbers were not sufficiently Muslim and ought to be governed by their own customary laws.\textsuperscript{47}

The French policy of dividing Muslim Arab from Muslim Berber Algerians also was implemented in French-sponsored schools that were established for the express purpose of enlightening and civilizing the natives. In these schools, Kabyle Berbers children were favored over Arab Muslims so as to Frenchify these mountain Berbers and culturally detach them from their Arab co-religionists. Half of the 75 French schools were found in Kabyle regions. Despite the claims by the French that they were educating native Algerian Muslims, official statistics show that in 1912 that only 4.7% of Muslim children of school age received an education in these schools.\textsuperscript{48} The dismal results of French educational efforts and policies come to light even towards the end of their period

\textsuperscript{46} Vikor, 245.
\textsuperscript{47} Vikor, 245.
\textsuperscript{48} Abu-Nasr, 273.
of colonial rule. Naylor points out that: “By 1954 more than 90 percent of the colonized were illiterate and only one out of ten Muslim children attended primary school.”

In conclusion, the areas where Muslim societies experienced direct colonial occupation in the 19th century such as Algeria, India and Indonesia, the reform efforts were much more sudden and direct where colonial governments directly imposed colonial political and economic institutions to uproot the native institutions that previously maintained the newly colonized societies. The colonial establishment used two primary institutions to re-configure traditional Muslim society into modern secular ones: education and law.

As for educational institutions, colonial governments encouraged the establishment of missionary schools that would educate the natives in European ways and languages which would enable the natives to eventually take up posts in the colonial administration and facilitate colonial governance. A prime example of this was British India, where in the beginning of their rule, the British continued to use the natives’ own laws and customs to govern their social lives, while in the political and commercial sector, as we have demonstrated above, they replaced Muslim law with European codes. This led the development of what became known as Anglo-Mohammedan law where various Islamic legal texts (e.g. *al-Hedaya*) were translated into English and were used to adjudicate problems amongst Muslims in marriage, divorce, etc.

Furthermore, the British established oriental schools by which they would train their own civil servants in the languages and customs of India so as to facilitate colonial

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49 Naylor, 8.

50 Hallaq, 2009, 375.
governance. They established their own reductionist views of Indian society and religion based on interpretations that were provided by their scholars like British orientalist William Jones. Later, both Hindu and Muslim elites either participated in these oriental schools or were affected by the representations of their own religions that were emerging from British educational institutions. This led many of these modernized, educated elite to call for reform within their own religious communities. An example of this trend in the late 19th century India was Sayyid Ahmed Khan (1817-1898) who established the Anglo-Muhammadan College based on modern European education to give Indian Muslims a modern and secular education.51

II. European Hegemony over Muslim Heartlands in the 19th Century

European pressure on the Muslim heartlands in the Near East in the late 18th and early 19th century did not come in the form of direct colonialism as in the case of the Muslim hinterlands, although by the end of the 19th century and early 20th century the same fate befell these Muslim heartlands as well. Owing to this lag, European colonialism in the Middle East began in the form of political pressure that Muslim ruling elites internalized by witnessing European technical superiority and their own military and economic weakness vis-a-vis European powers. This impotence became manifest in various wars Muslims had with these powers from the late 18th century, such as the Ottoman-Russian wars of 1768-1774, 1787-1792, and 1806-1812, the Russian annexation of the Crimea in 1783, Napoleon’s temporary conquest of Egypt in 1798-1801, and Russian wars with Persia/Iran of 1722-1735. These factors inspired Muslim rulers in

51 Voll, 112-113.
these regions to reform their militaries, government bureaucracies, and economic institutions so as to catch up with Europe, as in the case of the Tanzimat reforms in the Ottoman Empire (1839-1876). Let us take a closer look at those changes that took place in the core Muslim regions such as the Ottoman lands and Egypt.

**The Ottoman Empire** (centered in modern day Turkey): The purpose of the Tanzimat reforms was to remedy the weaknesses within the political bureaucracy, economy, and military that the empire suffered from in the face of growing European assertiveness and aggression in world affairs. The reforms first began in the political administration of the empire and its army. Government was now organized based on European models of governance with ministries and ministers, which set responsibilities and areas of governance that they managed. In addition, new legislative bodies were created, old taxing schemes and the Janissary corps of the army were abolished, and new registers of population were initiated to centralize taxation and military conscription.\(^52\) In order to achieve some of these reforms, the government had to train a new cadre of Ottoman administrators in European techniques which were only available in European language media. So the government opened up European language as well as technical schools which taught subjects like modern math and science. It is through these schools and exposure to European languages that Ottoman subjects, and particularly bureaucrats, became exposed to other aspects of European culture.\(^53\)

Yet these political reforms had their economic effects. For instance, the abolition of the traditional army corps of the Janissaries, who were also guildsman participating in

\(^{52}\) McCarthy, 292-293, 297.

\(^{53}\) McCarthy, 295.
manufacturing and were strong advocates of economic protectionism, opened avenues to the economic liberalism that was demanded by European powers. This protectionism meant that raw materials were sold to the guilds at controlled prices by local or foreign suppliers. Yet the Treaty of Balta Limani in 1838 concluded between the British and the Ottoman Sultan removed these measures that protected Ottoman manufacturers from European competition. This elimination of protectionism and the rise of the price of raw materials left most Ottoman manufacturing guilds bankrupt. The eventual extinction of Ottoman manufacturing guilds made the Ottoman economy into a supplier of raw materials whose market value was determined by European manufactures.\textsuperscript{54}

To add to the Ottoman’s economic woes, the new tax collecting scheme proved in the long run to be inefficient and did not bring in the necessary revenues for the empire to adequately finance its modernization projects, and the money that was collected had to be spent on defense against the ever-growing European (particularly Russian) aggression on Ottoman territories during the 19\textsuperscript{th} century.\textsuperscript{55} Even when a good deal of the budget was spent on defense, this was still insufficient to finance the wars that the Ottomans were drawn into in the 19\textsuperscript{th} century such as the Crimean War of 1853-1856, which meant that they had to borrow from European bankers on unfavorable terms, where they would only receive half of the contracted debt and would have to pay the full amount back with interest, which was justified by European financial circles for the supposed risk of lending to the Ottoman state.\textsuperscript{56} These actions plunged them into debts that they were

\textsuperscript{54} Hallaq, 2009, 398-400.
\textsuperscript{55} McCarthy, 300.
\textsuperscript{56} McCarthy, 301, 310.
unable to pay back, which resulted in actions by the European powers that made them lose more of their economic sovereignty.

In 1881, the Ottoman Empire was forced to turn over its finances to the European-run Public Debt Administration, which was staffed by Europeans and empowered to collect taxes and pay off the empire’s creditors from the proceeds. This administration proved to be efficient tax collectors, but lots of that income that should have gone to finance the state was siphoned off by the Public Debt Administration.57 The Ottoman state wanted to invest to develop their industry, but the Europeans wanted them develop their agriculture (read raw materials) from which Europeans received their main profits. Basically, European powers only sought to keep the Ottoman state strong enough so that it could pay its debts, not to become independent.58 Of the approximately LT 400 million that was borrowed between 1854-1914, 34% went to paying off the difference between the actual and the issued debt, 45% went to liquidate previous debt; 6% went to military expenditures, 5% to cover budget deficits, and only 5% was productively invested, while the remaining 5% was put to other uses. It is clear that the Ottoman state benefited very little from these debts.59

So it was in this fashion that European states and particularly those core states within the capitalist world system were able to economically underdevelop and semicolonize Ottoman state and society so as to keep it in a dependent position within in the new international political and economic order that European states were forging for their

57 McCarthy, 308-309.
58 McCarthy, 311.
59 McCarthy, 312.
benefit. So, the Tanzimat reforms achieved little in terms of modernizing Ottoman society and keeping it independent from foreign control, which was their official main purpose. But what the Tanzimat did do was strengthen the state’s control over civil society in form of greater government centralization.60

For instance, in the same year the Tanzimat were promulgated in 1826, *waqifs* that were administered by statesman within the religious establishment like the Shaykh al-Islam were now placed under the supervision of the new Imperial Ministry of Endowments “depriving these particular statesmen from an independent economic base.”61 In a matter of a decade, this ministry was able to take control of the incomes of most major *waqfs* in the empire by creating salaried posts for administrators who run these private endowments on behalf of the empire.62

The extent of government gains from the appropriation of these endowments was huge, given that half of the property of the empire, in the beginning of the nineteenth century, consisted of *waqfs*. This led to a decline in funding of educational and public projects that the *waqfs* could support because the government diverted some of the revenues generated by *waqfs* to military and other government projects; not to mention the corruption which existed within the new Ministry of Endowments which resulted in a loss of wealth.63 This is an example how the increasing centralizing modern bureaucratic state was encroaching and gaining greater control over the Muslim civil society even

60 See McCarthy, 292 and Voll, 92.
61 Hallaq, 2009, 402; Also see Ciszacka, 82-83.
63 Hallaq, 2009, 402.
when it was simultaneously losing economic and political sovereignty in international affairs to the European colonial and capitalist world order.

Yet, there were other unintended religious and political consequences to these reforms. On the political front, the new generation of Ottoman citizens who were educated in these new secular bureaucratic schools were exposed to European political ideas and became increasingly secularized in their outlook given their European-style education. Moreover, they came to expect that some European political ideals would have to be implemented in the empire if it was to truly modernize.\textsuperscript{64} Out of this generation arose a political movement in 1865 that established itself in a society known as the Young Ottomans. This society used the new media of newspapers to advocate their ideals of democratic reform and pushed for a promulgation of a democratic constitution that would limit the autocracy of the state/dynasty.\textsuperscript{65}

As an indication of their anti-monarchical and Europeanized liberal outlook, here is statement made by one of the prominent leaders of the Young Ottomans by the name of Namik Kamal (1840-1888): “one would think it (the Tanzimat) to have been made as a surety for the life, property, and honor of every individual. But the truth of the matter is that it was proclaimed for the purpose of securing the life of the state.”\textsuperscript{66} As can be seen from the quote, this newly educated elite were affected by liberal political ideas emanating from Europe. The irony in this lies in the fact that it was the consequence of Tanzimat reforms that helped produce this modernized Ottoman elite who in turn

\textsuperscript{64} McCarthy, 302.
\textsuperscript{65} McCarthy, 302.
\textsuperscript{66} Voll, 92 emphasis added.
criticized those very same reforms which they were partly a product of. Their main criticism centered on Tanzimat’s facilitation of centralization of the Ottoman state powers instead of liberal reforms that would increase people’s freedoms.

Another one of their political ideals was to take the multi-ethnic and multi-religious makeup of the empire and create a trans-ethnic and trans-religious Ottoman nationality that would supersede those distinctions. Although they did not achieve this objective because of its lack of legitimacy within Ottoman society, especially among the many non-Turkish nationalities who wanted their own separate national states nevertheless, this hybrid model of nationalism which sought to fuse European ideas of secular (ethnic/linguistic/racial) nationalism and an Ottoman Imperial identity served as a precursor to the more ethnically-based Turkish nationalism that surfaced a generation later at the end of the 19th century with the Young Turks. The ethnic/linguistic nationalist dimensions of this new movement are reflected in its very name showing that some of the Turkish citizens of the empire were now identifying themselves less with their dynastic Ottoman identity, as had been the case in the previous generation of liberal constitutionalist political reformers and more with their ethnic background.

The 19th century Ottoman reforms had their impact on religious and cultural institutions as well. Not only did the practical ‘nationalization’ of waqfs strike a blow to a power base of the traditional Muslim ‘ulema, but also the re-ordering of the Empire’s court system further undermined their status. For instance, European governments, using

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67 McCarthy, 303.
68 McCarthy, 303.
69 Voll, 91.
their economic and military might, would force various Muslim nations (e.g. Ottoman Empire) to agree to give special privileges to European merchants residing in foreign society, where their citizens would not be subject to local laws, but be subject instead to European laws and courts (i.e. extra-territoriality).\textsuperscript{70} As capitulations to European demands, the Ottomans towards the middle of the 19\textsuperscript{th} century set up separate courts outside the purview of Shari`ah courts for Europeans subjects. Separate commercial and criminal courts were established that would settle disputes between the Ottoman subjects and European nationals. In these new courts, European consular representatives even had the power to veto decisions of these courts against their nationals.\textsuperscript{71}

Furthermore, education which had been mainly carried out by the traditional \textit{`ulema} class was now being increasingly centralized and administered by the state. For example, in 1869 the Ottoman state enacted the Regulation of Public Education Acts prepared under the direction of the French Minister of Education, which “brought the different schools of the Empire under a single comprehensive system.”\textsuperscript{72} But the continued decline of the status of Shari`ah scholars in the Empire did not stop there; there was the establishment of independent legal educational institutions like Na`ib’s College (founded in 1854-1855) for the training of judges that was focused on the legal practice sanctioned in the new courts more than the traditional study of legal compendia which served as the backbone of traditional juristic training. This institution “issued diplomas in the name of the College as a corporate entity, and teachers- instead of issuing the \textit{ijaza as

\textsuperscript{70} Hodgson, Vol. 3, 225.

\textsuperscript{71} Hallaq, 2009, 406.

\textsuperscript{72} Hallaq, 2009, 413.
independent pedagogical authorities—were now relegated to the rank of institutional functionaries, thus becoming contained by, and absorbed into, this corporate personality on behalf of an increasing centralizing state.\textsuperscript{73} The full consequences of these changes become manifest in the 20\textsuperscript{th} century when both the Shari`ah and the `ulema, who were its vanguard, would lose its preeminent status in Muslim society.

\textbf{Egypt}: Although Egypt was technically a part of the Ottoman Empire, after Napoleon’s invasion in 1798 and subsequent three year French occupation, Egypt became an autonomous Ottoman regency which independently ran its own affairs once it was freed from this brief period of French colonization. Yet independence from the Ottoman’s did not mean that Egypt in the 19\textsuperscript{th} century was free from other outside influences, and one thing that became apparent to Egyptians from its conquest by France is the dominance of European powers in world affairs. Hence, the newly instated non-Egyptian rulers of Egypt in the nineteenth century, Muhammad Ali and his successors, set it on a course of modernization that would solidify their own hold over the country as well fend off further European encroachment. This push towards modernization would cause dramatic disruption of Egyptian economic, social, and religious life.

Muhammad Ali’s socio-economic initiatives are best described as “a formation dominated by a state commercial sector.”\textsuperscript{74} This is because of the direct control of the state over all commercial industries and crops on which the entire Egyptian economy depended.\textsuperscript{75} In 1815, Muhammad Ali seized control of the country’s agricultural

\textsuperscript{73} Hallaq, 2009, 418.

\textsuperscript{74} Gran, 111.

\textsuperscript{75} Hodgson, V.3, 217.
production by eliminating the role of local merchant financiers and replacing them with government officials and foreign merchants of his own choosing. On these state-controlled lands he introduced a variety of cotton for export to British mills, hence commercializing Egyptian agriculture and creating a greater linkage between Egypt’s economy and the international market. Wheat, which had been both the main staple and export crop of the Egyptian economy in the previous period, was now replaced by cotton, a non-edible crop with a market fluctuating, a change which made Egypt import much of its food at prices determined by the capitalist world market. This made it less of a self-subsistent economy and more of a dependent one. The result of these measures is that ruling circles and merchant elites acquired a great deal of wealth and power through their close, yet dependent, relationship with Europe.

Moreover, Muhammad Ali’s land and military reforms even had a drastic impact on the social relationships in Egyptian society. By his abolition of the traditional tax-farming system where villagers had to pay their taxes on a collective basis, the farmers now were made individually responsible for their taxes. This is because these land reforms privatized collective village holdings and thus “possession of the land had become a matter of individual legal process in the civil courts rather than an internal

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76 Gran, 114.
77 Hodgson, V.3, 218.
78 See Gran’s explanation on the French need for Egyptian wheat as the fundamental reason for its invasion a decade and half earlier in his book The Islamic Roots of Capitalism pgs. 6-11. It should also be remembered that it was a dispute over unpaid French debts on Algerian wheat that ultimately precipitated French colonization of Algeria.
79 Hodgson, V.3, 218; Also see Lapidus, 513.
80 Hodgson, V.3, 218; Also see Lapidus 514.
81 Lapidus, 513; Hodgson, V. 3, 283.
matter within each village….and each peasant was responsible directly before the
government for his land and his taxes,” which increased the possibility of foreclosures if
the individual was unable to pay their taxes.\textsuperscript{82}

In addition, these privatization policies allowed village lands to be bought and
sold to foreigners or absentee proprietors who lived in the cities. By the early 20\textsuperscript{th} century
nearly a quarter of all estates of more than fifty acres were owned by foreigners or
Egyptians who owned foreign passports.\textsuperscript{83} These new reforms promoted state control and
individualism in the place of village collectivities which led to destruction of village
economies and the disposition of many of the peasants of the land while the new
landowning elite, government officials and merchants, who mainly came from those
close to the ruling class, greatly prospered.\textsuperscript{84} Also, many Egyptian peasants ended up
being recruited by Muhammad Ali’s newly formed conscripted army which he devised
with the help of Italian and French military advisors.\textsuperscript{85}

But Muhammad Ali’s modern state did not restrict itself to land reforms, projects
of social engineering were carried out to change the very nature of Egyptian village life.
As Timothy Mitchell points out, a modern sense of order and discipline to produce the
‘model village’ was applied to Egypt in the 1840’s with villages that were under the
custody of officials of the ruling family and European merchants. The essence of this
order, what Mitchell calls enframing, was to rebuild villages that operate on the conjuring
up of a neutral surface or volume called ‘space’ whereby “the spacing that forms rooms,

\textsuperscript{82} Hodgson, V. 3, 283.
\textsuperscript{83} Lapidus, 514.
\textsuperscript{84} Lapidus, 514.
\textsuperscript{85} Lapidus, 513.
courtyards, and buildings is specified in exact magnitudes……the dividing up of such items is also the breaking down of life into a series of discreet functions….each with a specific location.”

The purpose of this restructuring was to create the appearance of a modern order.

All of these changes produced massive social dislocation in Egyptian society and in the village where most of Egyptians in the 19th century still resided in particular. As Hodgson points out, “the cultural forms which had expressed a common village life began to give way to patterns derived from city life, patterns in which an individual nuclear family was more on its own and the solidarities of the village counted for less.” Hence, the sense of being part of a larger community was diminished.

Under the advice of French advisors, Muhammad Ali not only sought to subdue the general Egyptian masses with his centralizing reforms, but also sought to gain control over other aspects of Egyptian civil society like the ‘ulema. He achieved this by taking control of the waqfs from which they derived their subsistence and make them dependent on state salaries. The state’s confiscation of waqfs weakened the ‘ulema and their educational institutions in the 19th century because it brought to an end many colleges that were rivals to the Al-Azhar University, the premier Islamic university in Cairo, and made many others subordinate to the head of Al-Azhar (Shaikh al-Azhar). Moreover, the

86 Mitchelll, 44-45.
87 Mitchelll, 60.
89 Lapidus, 514; Hallaq, 2009, 420.
'ulema increasingly withdrew from public life in the 19th century to protect their narrow spheres of education and the judiciary.\textsuperscript{90}

Furthermore, to advance his modernization efforts of Egypt, Muhammad Ali began to send Egyptian students to France early in his reign where among technical subjects that they studied, they also learned French law and upon their return to Egypt began to translate French codes\textsuperscript{91} that would eventually be put into effect in Egypt in the second half of the 19th century under the rule of Muhammad Ali’s successor and grandson Khedive Ismail (r. 1863-1879). ‘Modernizing’ (i.e. Europeanizing and centralizing) reforms in the first half of the 19th century continued with vigor in new social spheres in the second half under Khadiv Isma’il (r. 1863-1879). As Mitchell points out in his work \textit{Colonizing Egypt}, from the mid 1800’s to the beginning of the civil war, Egypt and Cairo in particular witnessed the greatest period of construction since Mamluk Cairo in the 1300s. In his reign, roads and drains were constructed, trees were planted, and public squares were created, etc. The social objective of this construction projects, says Mitchell, was to implement a new political discipline on the population that is expressed in a modern form of orderliness.\textsuperscript{92}

Furthermore, because of the high prices for cotton during the American civil war, he invested more massively in the production of cotton, as the main cash crop for the capitalist world market, for which the Egyptian state would depend on for its earnings.

\textsuperscript{90} Lapidus, 514.

\textsuperscript{91} Hallaq, 2009, 422.

\textsuperscript{92} Mitchell, 63-65.
For this he invested heavily in improved irrigation works. Yet as much as Egypt became exporter of cotton, they had also become an importer of British cloth.

Moreover, under reign of Isma‘il, the government opened up many modern schools which encouraged European culture amongst the new Egyptian elite. Mitchel claims that this modern schooling was the method of implementing a new form of political and economic order that served to change the habits of people by persuading them to be efficient and part of the productive process required by the new system of land ownership and production for European market.

Yet changes in the socio-economic sphere in Egypt in the second half of the 19th century were matched with equally sweeping changes in the politico-legal sphere. In 1853, the Egyptian regime adopted the French modeled Ottoman Commercial Code of 1850, which were followed by merchant councils that were presided over by European and Egyptian judges. Thereby, moving commercial transactions outside the purview of Shari’ah courts. In addition, in the 1860’s, a special commission, applying French-modeled laws, was established to deal with all legal issues involving foreigners with the exception of land which was left under the jurisdiction of Shari’ah courts. This commission eventually gave birth in 1876 to what became known as ‘Mixed Courts’. These courts were autonomous institutions which were administered by European judges.

93 Hodgson, V. 3, 240; Lapidus, 515.
94 Lapidus, 515.
95 Hodgson, V. 3, 240; Mitchell, 75.
96 Mitchell, 75.
97 Hallaq, 2009, 422.
98 Hallaq, 2009, 422.
that had legal jurisdiction over European residence in Egypt including their disputes with native Egyptians. Hallaq states that these courts represented the growing interference of European powers like France and England in Egyptian affairs; an interference which led to the introduction of a slew of other European modelled codes (e.g. civil code, the Code of Criminal procedures, etc) which all but stripped the jurisdiction of Shari’ah law from all matters except personal status, inheritance, *waqfs* and crime.

Despite these drastic reforms and construction projects, by the third quarter of 19th century Egypt would lose its sovereignty to European states. Because of the high costs of the modernization projects that it undertook, it incurred heavy debts from European financial institutions which made it eventually declare bankruptcy. A European managed debt administration was then imposed on Egypt in 1875. This imposition was resented by Egyptians and sparked the ‘Urabi Revolt in 1882 which sought to eliminate European control in Egyptian affairs. To suppress the widespread revolt, the British directly occupied Egypt initiating the phase of direct colonialism in Egypt which would last in various forms till the 1950’s. Under the British, tax collection was improved, private property ownership was consolidated and sufficient revenues were raised to pay Egypt’s debts. But as a result of these measures, Egypt became all the more dependent on its cotton exports and industrialization was inhibited because the British lacked interest in encouraging competition with its own industries. Hence, British policies promoted

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99 Asad, 2003, 211.
100 Hallaq, 2009, 422-423; Also see Asad, 2003, 211 for similar assertions.
101 Hodgson, V.3, 241; Lapidus, 515.
102 Hodgson, V.3, 241.
103 Lapidus, 516.
underdevelopment of the Egyptian economy in the capitalist world system that was run by the core European states.

### III. Concluding Remarks about European Colonialism in the Muslim World

In the foregoing pages, I have documented case studies of types of profound changes that took place in Muslim regions towards the end of 18th century due to the rise of European countries as global powers and the imposition of those powers on the rest of the world. But what did these European impositions actually entail with respect to the restructuring of society and state and the groups who benefited from such changes? Hodgson tells us that the international order that European powers either cajoled or imposed on everyone else to accept was mainly constituted on the notion of preserving the interests the class of moneyed enterprisers, who were the emergent class in Europe during the early modern era. This class of entrepreneurs came to replace the old elite who status was primarily based on descent (i.e. the nobility) and who saw that “it was in their common interests to only allow the legitimation of the market, in which ownership and legal rights practically coincide.” 104

Modern European governments evolved seeking to protect the rights of this class and this is one of the main principles that Europeans tried to make the basis of the new international order. So the security of interests of this entrepreneurial class especially in the form of securing of property rights became the supreme obligation of Western governments in the modern era. This ideal became one of the major premises of the international order that the Europeans set up as a way to recognize the sovereignty of a

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nation. If nations were to respect these rules then they could be accepted as sovereign nations that could be engaged in international transactions; if any nation did not accept these rules of securing property interests, then they were seen as forfeiting their sovereignty and were subject to intervention and even occupation when diplomatic pressures seemed ineffective.\textsuperscript{105}

It was precisely this new European-modelled international order, what has been called by some the Modern (i.e. capitalist and colonialist) World System, which wreaked havoc on Muslim societies beginning in the 19\textsuperscript{th} century and radically reconfigured their social, economic, legal and political structures and conditions. Yet despite these sweeping changes, the ‘development gap’ which had existed between European (i.e. core) and non-European (i.e. peripheral) regions were only further perpetuated by the further diffusion and entrenchment of this system around the globe. Furthermore, these rapid alterations in the socio-historical conditions that were compounded by the fact that these alterations were alien in origin that had not organically evolved, produced a profound psychological alienation amongst Muslim peoples (and colonized peoples the world over) not only with the new world order, but with their own tradition as well. Both this social dislocation and the subsequent psychological alienation spawned various new socio-political reactions in the Muslim world that emerged towards the end of the 19\textsuperscript{th} and beginning of the 20\textsuperscript{th} century, which changed both worldview and practices of Muslim peoples.

\textsuperscript{105} Hodgson, Vol. 3, 224.
Secular Nationalism and Islamic Reform in the Twentieth Century Muslim World

In the 20th century, European colonialism went unabated. In fact, during this century, there were an increase of the span of regions that succumbed European imperial control. As far as the Muslim world was concerned, after World War I, only several Muslim countries remained free from direct colonial control even though they also incurred some form of colonial occupation: Modern day Turkey, Saudi Arabia, Iran and possibly Oman even though it was under British suzerainty. This near total domination of European powers over Muslims led to the growth of modern socio-political movements that sought to bring the end of colonialism in the Muslim world as well remedy its weaknesses that was perceived to be a factor in bring about colonization of Muslim lands.

Amongst the newly formed secular and Western educated elite the path to freedom and progress was through intensifying the modernization efforts that began in some Muslim regions in the previous century. Modernization for this group in some ways meant westernization because aping western values and customs was the easiest and fastest path to modernization. Those values included nationalism because every western society was based on an “intense sense of the nation.” For Muslim secular colonial elites, to be modern was to imagine there communities as nations. This gave rise of ethnic nationalism. By the late 19th century for example, for the first time in the multi-ethnic and multi-religious Ottoman Empire, this Arab western educated elite began to speak of an Arab fatherland, while their Turkic counterparts began to emphasis the Turkish nature of the ruling elite within the empire.107

107 Voll, 94.
In Egypt for example, the 19th century Egyptian westernizer Tahtawi, spoke of past Egyptian glories and within the larger Muslim community “there were special national communities (i.e. Egyptian) that were deserving of loyalty”108 paving the way for 20th century Egyptian nationalism. The same analysis applies to movements in other Muslim nations such as the Young Tunisians in Tunis or the Pan-Turkish Jadidi movement in Central Asia.109 Eventually, nationalism became the political vehicle by which to eliminate western domination in Muslim lands in the 20th century and the basis for re-orientation of Muslim societies into nation-states,110 which were an extension of the artificial partitions already established by colonialism.111 Moreover, Muslims secular elite were often committed to a liberal constitutionalism in the first half of the 20th century.112 But in the second half of the 20th century after achieving independence from their colonial master, there commitments took on a more socialist hue.113

Yet the rise of Muslim modernism (rationalism) among some Muslim groups, i.e. the exposure of Muslims to Western liberal ideas through contact with the West or their institutions, did not always engender secular outlooks amongst other groups of educated Muslim elites in the 19th and 20th century. Another group that came into being are Islamic reformers who advocated new Islamic solutions to the current crisis faced by Muslims, but were different in their approach to Islam from the tradition-oriented

108 Voll, 96.
109 See Voll pgs. 100 and 124.
110 See Lapidus 518-519 for how this process took shape in the case of Egypt.
111 Schulze, 28.
112 Lapidus, 519.
113 Hodgson, V.3, 369.
conservative ‘ulema although many of these reformers were from the ‘ulema. Islamic reformers often approached the authoritative textual sources of Islam (The Qur’an and the Sunna) from the point of view of modern rationalism and the natural sciences that developed in the West.\footnote{See Waines’s article “Islam” in Woodhead’s \textit{Religion in the Modern World}, pg. 196.}

Their agenda had two interrelated goals: to provide a progressive Islamic program that would remedy Muslim material decadence and spiritual malaise by showing that Islam was compatible with modern values; secondly, they wanted to combat the western perception that Islam was an irrelevant force in the modern world.\footnote{See Waines’s article “Islam” in Woodhead’s \textit{Religion in the Modern World}, pg. 196.} The sought to revive Islam by reassessing the authority of tradition and hence rejected traditional notions such as \textit{taq}\textit{lid} (following the authority of medieval Islamic schools of law and theology) and advocated a new ‘\textit{i}j\textit{ti}h\textit{ad} (independent rethinking) based on the textual authoritative sources of Islam so as to keep Islam relevant to its modern context.\footnote{See Waines’s article “Islam” in Woodhead’s \textit{Religion in the Modern World}, pg. 196.} Two 19\textsuperscript{th} century representative figures of this movement were Sayyid Ahmed Khan in India and Muhammad Abduh in Egypt whose ideas gave birth to Islamic reform movements of the 20\textsuperscript{th} century.

With regard to Islamic law, the 20\textsuperscript{th} century disciples of these reformers advocated legal positions that broke with the established Islamic legal discourse that had been developed over the previous millennium. For example, Rashid Rida (d. 1935), Muhammad Abduh’s Syrian disciple, advocated setting aside of legal doctrines that were based on \textit{madhabs} so as to reformulate Islamic law based in the legal sources (i.e. Qur’an...
and Sunnah). So, he was a call for a new ‘ijtihad (legal reasoning) to be applied to legal issues that there had already been a consensus about amongst the legal schools; This proposal was essentially calling for the legal doctrines of madhabs to be abandoned.\textsuperscript{117}

Furthermore, reformists called for a shift away from prominent concepts Islamic legal theory that were unanimously agreed upon and the adoption of legal precepts that were not traditionally considered as prominent tools in the formulation of law, at least from the perspective that they were explicitly employed in legal reasoning by jurists. For example, Rida was of the opinion that the widespread legal deductions based on qiyas (analogical reasoning) should be circumscribed while advocating wider scope for the usage of maslaha (arguments of utility) to legitimate new legal positions.\textsuperscript{118} Also, Abdul Wahab Khallaf (d. 1956), a prominent legal scholar from Egypt who advocated for legal change, promoted an expanded role for ‘urf (i.e. customary practice) in modern Islamic legal reasoning.\textsuperscript{119} He also rejected the validity of the practice of ‘ijma (legal consensus) of past jurists because of the historical impossibility of its determination.\textsuperscript{120}

Some Islamic reformist in the later part of the 20\textsuperscript{th} century like Sudan’s Hasan al-Turabi went as far as categorically rejecting traditional Islamic legal theory\textsuperscript{121} and called for a reformulation of classical Islamic legal theory (tajdid usul al-fiqh) based on modern and holistic approaches to legal reasoning.\textsuperscript{122} On can say what that at the heart of all of

\begin{footnotes}
\item[118] Hallaq, 1997, 217.
\item[119] Hallaq, 1997, 221.
\item[120] Hallaq, 1997, 223.
\item[121] Hallaq, 1997, 226.
\item[122] Hallaq, 1997, 227.
\end{footnotes}
these demands of reform of the Islamic legal discourse was to shift it from a textually prominent discourse, as it was perceived, to an increasingly contextually prominent discourse. This means that greater emphasis should be given to the modern context over and beyond textual considerations.

In conclusion, the colonial experience spawned new ideological movements in the Muslim world, which were seeking for the best path forward to cope with a European imposed world order and an increasingly attractive Western worldview. The ideological responses to that challenge were varied, but they all underlined how Islamic tradition and society had to change to meet the demands of the new world that European colonial powers had been forging. Views of these reformers varied from those who sought to exclude religion (i.e. Islam) from public life altogether and those who felt that the religion of Islam should continue to play a role in the public square, although they advocated an Islam whose concepts and tradition were sufficiently revamped to deal with the European notion of modern progress.

Modernization and Nation-State Formation in the 20th Century Muslim World

Reinhart Schulze, in his A Modern History of the Islamic World, asserts that one characteristic that was common to all Islamic societies in the 20th century was the modern Muslim political public’s insistence on the preservation of the territorial state and that this state is a manifestation of the society which constitutes it.123 These Muslim territorial entities were very much linked to European power in that colonial boundaries formed the core of later nation- states even though many of these territories were already established.

123 Schulze, 7-8.
provinces within the pre-colonial Muslim political framework, which colonialism further reified.¹²⁴

Once colonized peoples were able to secure their independence from European colonialism in the second half of the 20th century, although they continued to face outside intervention and domination by a westernized post-colonial international order, it was the secularized elite who gained the leadership that was created by departure of the colonizers. Hence the formation of these nascent territorial states in some respects represents to the triumph of nationalist ideas in the modern Muslim world and it was nationalists who took control of the modern Muslim nation-state in the late colonial and post-colonial period.

The socio-political program of these secular political elite for the newly emerging Muslim nation-states was modernization. Speaking of North Africa, Gellner asserts that modernization programs established by Muslim leaders of these newly formed and independent North African nation-states was based on the twin factors of industrialization and nationalism. The gist of his argument is that in modern societies, industrialization has broken down the old social structures of pre-modern societies and has fragmented the social unity that once existed. In the case of North Africa, that cohesion was tribally based. In light of this breakdown in social cohesion, nationalism became the new cement that held modernizing societies together.¹²⁵

The modernization efforts undertaken by the national leadership of Muslim nations were secular in nature given their westernized orientation which tended to

¹²⁴ Schulze, 28.
¹²⁵ Gellner, 92-94.
alienate the traditional institutions and customs of Muslim society. This caused a backlash by segments of Muslim society like the religious establishments who found their role greatly diminished in the new nation. One example of the modern nation state building in the 20th century is the formation of modern Iran. For the remainder of this section, I will examine the establishment of modern Iran as a case in point for the formation of modern post-colonial Muslim nation-states in the 20th century with special emphasis to the modern nation-state’s relationship to religion.

The Modern Muslim Nation-State and Religion: The Case of Modern Iran.

Although Iran was never formally colonized, except for certain parts of the country like the region of Azerbaijan that was annexed by Russia, it has had history of colonial influence and outside interference in its internal affairs, which was an impetus for acts of resistance by Iranians who sought to curtail these colonial influences on their country. This goes as far back as the late nineteenth century with the revolt against the Tobacco concessions in the 1890s, which sought to limit the concessions to Britain and Russia that would undermine Iran’s sovereignty.

The modernization process that twentieth century Iran had undergone is crucial to understanding the interplay between politics and religion in that country and to some extent other Muslim nation states in the 20th century. But before I explore this issue, we need to take a brief look at the structure of Iranian society with regards to religious and political authority before this modernization process was implemented. This presentation would put us in better position to determine the socio-political upheaval that this process created, eventually leading to mass revolt by the Iranian people against the absolutist secular monarchy who imposed these policies.
Religious Authority in Iran and Their Involvement in Political Life Prior to the Formation of Modern Iranian Nation-State

Since I am discussing the issue of modern Muslim nation-state formation with an emphasis on the relationship of religion with the nation-state, I want to focus on one particular aspect of Iranian civil society that played the pivotal role in the public life: the ‘ulema. As I have previously pointed out, the ‘ulema, as guardians of the Islamic law, always possessed special prestige in Muslim society and have often been the mediators between the common folk and the political authorities throughout the history of Islam. This is no less the case in the Muslim history of Iranian society, and the coming of the Qajar Dynasty in Iran during the late 18th and early 19th century, enhanced the ‘ulema’s role. They had authority over the educational, judicial and religious institutions, and were the legitimate recipients of particular religious tax, which gave them a great deal of financial autonomy to perform this role.126

The Iranian ‘ulema’s social prestige, financial autonomy, and authority over certain institutions in Iranian society gave them the necessary independence to challenge the political authorities during this period and they often teamed up with other segments of Iranian society like tribal chiefs and later modern reformers to do just that. Their challenges to political authority during the 19th and early twentieth century often revolved around two issues: the autocracy of the ruling monarchy and opposition to foreign colonial influences. As we will see, these two issues were the main points of contention between Iranian society and the political authorities throughout the 20th century.

126 Arjomand, 14-15.
The first point is illustrated by the period of constitutional reform in the early 20th century where the ‘ulema corroborated with liberal reformers to promulgate a constitution that would limit the arbitrariness of the monarchical rule and give greater representation of the Iranian public in governance through means of an elective assembly. The revolt against the Tobacco Concessions in 1890 where the Iranian public, with the explicit support of the elite ‘ulema, demonstrated against granting foreign powers, like Britain, concessions on the country’s resources in a way that undermined Iranian sovereignty. So in the beginning of the 20th century, the ‘ulema had a large public role in reforming institutions and influencing events in Iran. As we will see in the following section, this role was undercut by the establishment of the Pahlavi Dynasty in 1925 through its modernizing reforms, which attempted to centralize the state at the expense of the traditional institutions that existed in Iran.

Iran and Its Path towards Modernization

In the 1920’s the Qajar Dynasty was brought to an end and a new shah, Riza Khan, was eventually installed where he declared the beginning of a new monarchy called the Pahlavi Dynasty. Under Riza Khan (r. 1925-1941), later called Riza Shah, Iran underwent the most drastic modernization efforts to date. The primary objective of these efforts was to centralize the state and consequently re-organize Iranian society on a nation-state model. I will examine some of those modernization efforts during his reign and the later in the reign of his son Mohammad Riza Shah to appreciate the reaction these modernization efforts engendered in Iranian society.

127 For more on this point see Nikki Keddie’s Roots of Revolution pgs.67-68.
128 Voll 107-108, Akhavi 28-29; Arjomand 137.
One of the most important dimensions for centralizing modern nation-states is the creation of standing armies. Riza Shah, who previously was head of the army, undertook great efforts to extend the ongoing process of creating a standing army through conscription. This conscription effort primarily drew upon the tribal base of Iranian society, which removed the tribes out of their regional environment to be stationed elsewhere in the country. Aside from trying to create a strong army, one of the intended consequences of this measure was to break up the tribal structure and its cohesion so as to foster exclusive loyalty of its citizens to the new nation-state.

Another ways which Reza Shah tried to facilitate national cohesion and break-up the traditional structures of tribal solidarity was the forced relocation of tribal chiefs to cities like Tehran so they could be monitored and controlled, hence leading to the loss of their power base in the tribal regions and removing a potential challenge to the organizational structure of the new state. He undertook these measures to strengthen and centralize the state and to encourage national unity at the expense of traditional forces. These forced measures were carried out through the use of one of the pillars of modern nation-states: i.e. the national army.129 To facilitate the transportation of the national army from one part of the country to another so as to solidify the central powers of the state, yet another modernization measure was undertaken: the building of 3000 miles of new roads and the Trans-Iranian railway.130

129 Arjomand, 62-63; Keddie, 97; Voll, 182.
130 Arjomand, 67, 71, Keddie, 99.
Of course, all of these measures required a great deal of government spending and it introduced new tariffs and taxes to increase revenues. 131 Riza Shah’s attempts to increase the bureaucratic powers of the state by organizing the country into hierarchical administrative units controlled from the capital were even more important. He divided the country into ten departments and further divided these departments into smaller units and districts where governors, mayors, and officials were appointed by the Ministry of the Interior in Tehran. 132

So far we have talked about Reza Khan’s modernizing reforms in political-military establishment; now I would like to turn your attention to the social and legal reforms that directly impinged on the religious authority enjoyed by the traditional ‘ulema in Iranian society. As I pointed out in the previous section, the ‘ulema in the pre-modern Qajar Dynasty had control of the judiciary, educational, and religious spheres, but under Riza Shah’s Pahlavi Dynasty their sphere of influence became severely restricted. For instance, Riza Shah undertook legal and judiciary reforms where he eventually promulgated Western style legal codes that replaced religious and customary law. 133 For instance, religious law forbade trade by Muslims in some goods like alcohol as well as the dealing with interest. Traditionally, these areas were under jurisdiction of the ‘ulema. The new commercial codes that were promulgated during early period of Reza Shah’s reign legalized such transactions much to the objection of the ‘ulema. 134

131 Arjomand, 65, Keddie 95-96.
132 Arjomand, 66.
133 Arjomand, 66, Keddie 95.
134 Arjomand, 82, Keddie 95.
Moreover, he revamped the judiciary system and secularized it, restricting the jurisdiction of the ‘ulema. The ‘ulema’s juristic authority over Islamic law became restricted to issues of family law while commercial and social concerns came under the jurisdiction of the secular courts.\textsuperscript{135} Legal reforms concerning control of religious endowments (i.e. waqfs) and the registration of deeds also directly impinged on the authority of the ‘ulema. Prior to the Pahlavi centralizing reforms, these institutions were under the jurisdiction of the Iranian ‘ulema, but policies were introduced placing their control under the state.\textsuperscript{136}

On the social religious level, Riza Shah issued restrictions on the wearing of traditional clothing such as turbans for males and enforced adoption of European dress codes and the licensing of liquor stores, even in places that were considered sacred among the Shi’a Muslims like the city of Qum.\textsuperscript{137} Later in his reign, he “outlawed the veil and women were ordered to dress in Western style clothing”\textsuperscript{138}, which he enforced by ordering police to remove the veils of women forcibly beginning in 1935. Moreover, he forbade religious instruction to be taught in public schools.\textsuperscript{139} These Westernizing and secularizing social reforms struck at the heart of the Islamic sensibilities of Iranian society and the ‘ulema in particular.

Despite the efforts of Muslim secular political elite, like Reza Shah, to build strong nation-states that would be independent of European manipulation through a

\textsuperscript{135} Arjoumand, 66, 82; Keddie 95.
\textsuperscript{136} Arjoumand, 82-83.
\textsuperscript{137} Arjoumand, 82.
\textsuperscript{138} Keddie, 108.
\textsuperscript{139} Arjoumand, 82.
process of radical modernization, the perpetual dependent status of the states in the European driven world order seriously mitigated the success of these efforts. In a move reminiscent of Russian intervention in 19th century Iranian monarchical succession, the British eventually removed Reza Shah from power in 1941 due to his supposed pro-German sympathies. In his place, the British installed his son Mohammad Riza Shah (r. 1941-1979) as the new king of the Pahlavi Dynasty. If Riza Shah’s reign can be characterized by its absolutist and centralizing tendency, Mohammad Riza Shah’s reign is best known for its proclivity for foreign intervention in Iranian affairs. In fact, the very installment of the new Shah was a foreign imposition and indicative of how the rest of his reign over Iran would be.

As I mentioned earlier in this essay, the main objectives of the various political movements in Iran in the late nineteenth and early twentieth century, including the religious establishment, were to limit the power of the ruling elite and stem the tide of foreign influence on the country. As was seen in the reign of Riza Shah the first objective was not achieved and in the era of his son, the second objective was also thwarted. While continuing the autocratic and modernizing (Westernizing) policies of his father, Mohammad Riza Shah re-opened the gates of the country to foreign interference, which exacerbated tensions between the state and Iranian society whether that was the Iranian religious establishment or nationalist liberal reformers.

Almost as soon as he took office, many of the country’s institutions were turned over to foreign hands. For instance, the state finances were turned over to the
Moreover, Iranian oil resources were conceded to the British oil company Anglo-Iranian Oil Company. These policies led to the formation of opposition groups both among the secular liberals and the traditional religious establishment. These groups reasserted the double objectives of limiting the monarchies’ autocracy and scaling back foreign influences on the country. At the same time, political Islamic movements, like the fidda’yyan, began to sprout up to resist the Pahlavi regime’s secularization and westernization efforts on Iranian society and to reassert the role of Islam in public life that was so much undermined during his father’s reign.

All of these opposition movements culminated in the election of a national government in the late 1940’s and early 1950s, which carried out policies to achieve those two primary objectives. These two goals were the source of unity for all groups who opposed the Shah. This new government did indeed pass legislation to curb the Shah’s powers and nationalized the Iranian oil, wresting them from the control of the British Anglo-Iranian Oil Company (now known as British Petroleum or BP). These events precipitated a CIA backed coup of the national government, which reasserted the Mohammad Riza Shah in full control and further reinforced foreign intervention in the country.

Monarchical autocracy and foreign influence on the country was the hallmark of Mohammad Riza’s regime. Ten years after the CIA coup, in 1963, he ruthlessly crushed a revolt that was led by the ‘ulema against his socio-economic reforms which he dubbed...
the “White Revolution.” A part of the opposition of the ‘ulema was not solely to the socio-economic reforms that he attempted to institute. But it was the monarchy’s subservience to foreign powers like the United States as well as Iran’s good relations with Israel were some of the main bones of contention. Ayatollah Khomeini led this resistance, which brought him to prominence among segments within the Iranian public.\(^{144}\)

After the crackdown on the uprising and the jailing and expulsion of Khomeini from the country, the shah felt more emboldened and took on policy in the 1960’s and 1970’s which further suppressed and alienated the religious establishment. Some of these were the destruction of religious seminaries in the Shiite holy city of Qum and the creation of a governmental religious corps designed to challenge the independent ‘ulema’s traditional authority within the Iranian public.\(^{145}\) His purpose was to create some sort of civil religion that was amicable to his policies.

Furthermore, to foment secular Persian nationalism, as the primary source of solidarity for the Iranian nation, in 1971 he celebrated twenty-five hundredth anniversary of the founding of the Persian Empire and replaced the Islamic calendar with a fictitious imperial calendar.\(^{146}\) These acts were attempts to undermine Islam as the basis of Iranian society by appealing to Iran’s pre-Islamic legacy as a source for tradition and to bolster the legitimacy of the monarchy, by implying that his monarchical rule was within the pre-

\(^{144}\) Keddie, 157-158.

\(^{145}\) Arjomand, 86.

\(^{146}\) Arjomand, 86.
Islamic Iranian tradition. The idea here was to foster a secular nationalism as the new source of cohesion for the secular nation state at the expense of Islamic traditions.

Overall, the Pahlavi dynasty’s autocratic and secularization policies and its later pandering to foreign influences made the Iranian public extremely discontented and eventually led to its demise. The Iranian public turned to the Iranian ‘ulema for leadership in their struggle to overthrow the Shah’s regime. No other group in Iran enjoyed the same level of legitimacy as the ‘ulema; who were the class that has historically mediated between the greater public and the ruling elite in Muslim society. Eventually, the Pahlavi Dynasty was toppled by the Islamic Revolution of Iran in 1978 and new relationship between the state and religion was forged. The irony lies in fact that the Pahlavi Dynasty’s attempt to cultivate political absolutism of the secular monarch spurred a movement where the religious clerical establishment of Iran, led by Ayatollah Khomeini, came up with a religio-political absolutism of their own in the form of the modern Islamic political doctrine of *velayat al-faqih* (i.e. rule of the jurists). Each of these absolutisms saw the centrality of capturing the modern state as vehicle of achieving its secular or religious ends.

In conclusion, the Pahlavi regime’s political and social engineering program to form a modern and secular nation-state created great social upheaval by dislocating many and disenfranchising others. This was made worse by the perception of the public that the institution and values that the state sought to impose were products of the Western historical experience. Many Iranians viewed these efforts as attempts to delegitimize the authenticity of their culture and way of life. What further exacerbated the problem was
the continuous foreign intervention in Iranian affairs in the 19th century and the greater part of the 20th century that made the country an almost semi-colonialized.

Yet this move towards modernization (euphemism for westernization and secularization) was not only indicative of modern Iran, but was a wide-spread phenomena in the 20th century Muslim world in varying degrees of intensity, for which Iran and Turkey represent the more extreme models. But in each case these efforts served to alienate Islamic traditions from the society and more particularly marginalized the role of Islamic law and its institutions in the public sphere, a role that was very prominent in the pre-colonial period.

Observations on the Socio-economic effects of Colonialism and the Capitalist World System on Colonial and Postcolonial Muslim Society

Now that we have looked at the history of colonization and modernization (westernization) in Muslim regions in the 19th and 20th centuries, I now want to offer a brief assessment of the socio-economic impact of the colonial and capitalist order on Muslim society as seen through observations of prominent historians, which I will cite. This will be a prelude to my next discussion of religious and legal effects that the new world system brought about in the Muslim world.

Schulze claims that the economies of colonized states continued to be very much dependent on the Western determined world market in the 20th century. Jolts in the international market hindered the ability of colonized nation-states to achieve consistent development. For example, world-wide economic crises of 1920 and 1930’s severely affected the economies of Muslim nation states because there was a steady decline in the prices of primary commodities for which Muslim countries were heavily dependent on
agrarian exports. For instance, French Algeria’s export income from cereals fell by more than half between the years of 1928-1935 from 18,756,000 Algerian Pounds in 1928 to 8,285,000 Algerian Pounds in 1935. Its entire exports declined by 50% during the same period. The export income of Egyptian cotton in the period of 1928-1935 declined from 45,138,000 Egyptian Pounds in 1928 to 26,413,000 Egyptian Pounds.\textsuperscript{147}

The economic crisis created a decline in Muslim states purchasing power and revenue for consumption, which eventually lead to greater unemployment. Increased unemployment and the growth of urbanization made the economic situation for masses of recent urban immigrants dire as modernity’s promise of a better tomorrow evaded them. Living segregated in slums and having little access to the benefits of a modern colonial society and at the same time being detached from the traditional way of life, this disenfranchised group were critical of their traditional life as being a false tradition that led to the backwardness of Muslims, something taught to them by the modernist westernized discourse, and at the same time they became critical of modern colonial Muslim societies as bringing false hopes and being un-Islamic.\textsuperscript{148} It was under these socio-economic conditions and among these disenfranchised groups—young, educated, and impoverished citizens—that calls for Islamic reform and resurgence found fertile ground.

Yet, by the middle of the 20\textsuperscript{th} century when direct colonization was coming to an end in most Muslim countries, “the competition of Western products and the presence of

\textsuperscript{147} See Schulze, 92 for these figures and export statistics on other Muslim nations.

\textsuperscript{148} See Schulze, 92-93.
Western capital market still posed much of the same problems as they had throughout the nineteenth century” especially for countries that did not place controls on their internal economies.\textsuperscript{149} The continued effect of the capitalist world market on these societies made them feel that allowing this market free play would continue to perpetuate their dependence and facilitate the disparities between the privileged and the impoverished. These conditions fostered the growing socialist tendencies of Muslim post-colonial government which called for greater control and planning of the national economies and fostering of massive industrialization to break this dependence on the Western capitalist world system.\textsuperscript{150}

But Muslims drive to modernize had some unintended consequences. As Hodgson points out, at the very core of modernization meant instilling in society what he calls technicalistic traits\textsuperscript{151} and when this trait becomes the overriding norm, societies experience a disruption of their cultural traditions uprooting individuals and atomizing society.\textsuperscript{152} It is modernity’s disruption of Islamic legal tradition, which I seek to highlight in this investigation so as to appreciate the socio-historical circumstances for the changes that are taking place in this tradition. Hence, in the next section, I will give an assessment of the changes that Islamic law had undergone in the modern period so as to better appreciate the course that this law system has taken since the inception of this period and its convergence and/or divergence from the established legal tradition.

\textsuperscript{149} Hodgson, V.3, 368.
\textsuperscript{150} Hodgson, V.3, 369-370.
\textsuperscript{151} Weber might have called this instrumental rationality.
\textsuperscript{152} Hodgson, V.3, 417-418.
Modernity and the Change in the Status of Shari’ah in Muslim Societies

In this section, I would like to recapitulate the arenas where Islamic law (i.e. Shari’ah) had been challenged in the colonial and post/neo-colonial period. This will help the reader assess the extent that political, economic, social changes that have occurred in the 19th and 20th century have impacted Islamic legal tradition in the ‘modern’ world so we can better appreciate the socio-historical impetus that are possibly leading to a transformation in that legal tradition. I identify two primary arenas where Shari’ah had been reconfigured in the modern period: institutionally and discursively. Both of these types arenas can be broken down to two different periods: colonial and post/neo-colonial (nation-state) period. So, let us begin by assessing the institutional changes that Islamic law has undergone in the colonial and postcolonial period and then I will turn to the discursive ones:

I- Institutional Changes in Shari’ah

Colonial Period: In the 19th century, under colonial rule or foreign pressure, Shari’ah law in many Muslim regions was restricted to adjudicate matters of family law and pious endowments and were stripped of jurisdiction over criminal and commercial law. An example of this is Ottoman adoption of European penal and commercial codes. In addition, European pressure to set up separate courts in Muslim regions that would handle cases involving Europeans (e.g. Egyptian Mixed Courts) led to the growth of secular courts and restrictions on religious courts. This bifurcation of roles was

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153 Asad, 2003, 211.
eventually abolished by post-colonial states where religious courts were just subsumed under the new secular courts, which were now called in Egypt as National Courts, and this further limited the jurisdiction Shari’ah to issues such as family law.\footnote{155}{See Asad, 2003, 211 and 215.}

Moreover, these legal reforms in the jurisdiction of Shari’ah ultimately reduced the role of ‘ulema, who were the traditional representatives of the Shari’ah in society. These modernizing reforms were really intended to strengthen the hand of the secular state at the expense of the civil society and this was done through increasing of the centralization of state and the widening of its intrusion in the realm of public affairs. For example, during the 19th century Ottoman Empire, the period of Tanzimat reforms which led to the increasing bureaucratization of the state, Sultan Mahmud II (in 1826) and his advisors created the ministry of Imperial Pious Endowments “which brought the administration of the major waqfs (charitable endowments) under the central administration; where waqfs were previously under the independent control of families and religious scholars and organization.\footnote{156}{See Hallaq’s, “Jurist's Authority and State Power”, pgs.255-256.} The pious endowments which traditionally were the material base of the ‘ulema passed out of their hands into state control further weakening the independence of this group.\footnote{157}{Voll 91.}

\textbf{Nation-State Period:} with formation of Muslim nation states in the early 20th century the arrest of the legislative and promulgation of Islamic law from the hands of Muslim jurists (fuqha) had been almost complete. Whereas the jurists controlled the legislative and judicial functions and authority in the pre-modern state, this function and authority was
transferred to the modern nation state in the form of a secular legislature and judiciary. Pre-modern sovereigns in the Muslim world were subject to the law and were not its makers, while the modern nation state “arrogated to itself the status of legislature and at the same time a position above the law.”

Centralization in the modern nation state was the main process that was employed to take control of the law. We have already seen this in the case of Iran and other examples of the modern Muslim nation state trying to take the law outside the domain of Muslim jurists. For example, in Syria and Iraq polygamy was prohibited unless it was permitted by the qadi, “who must be satisfied that the husband is financially capable of maintaining more than one wife.”

Even in areas where Shari’ah law was allowed to have jurisdiction, there was a move away from madhab determined legal doctrines and a formulation of law based on pan-madhab considerations by use of the legal mechanism of talfiq (i.e. amalgamating rulings from different schools). In the pre-colonial period (i.e. pre-nation-state), as demonstrated in previous chapters, Shari’ah was only operationalized through the particular madhhab adopted by the state, but with the formation of the nation-state, that was no longer a consideration. Examples of how modern Muslim nation states used traditionally dubious legal mechanisms to legislate laws were Sudanese and Egyptian laws that legalized right of the deceased to dispose of inheritance in accordance to whom s/he saw fit which was in agreement with Twelver Shi’ite law. This was despite the fact that both Sudan and Egypt were Sunni majority countries and Sunni law only allows for

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159 Hallaq, “Jurist's Authority and State Power”, pg. 255.
160 See Layish, 95.
the disposal of the inheritance in accordance to pre-fixed shares. This type of amalgamation of law was unheard of in previous eras.

**II- Discursive Changes in Shari’ah**

**Colonial Period:** During the 19th century, the Ottoman Tanzimat we witnessed how the representation of Shari’ah had changed. Prior to these modernization efforts, the Shari’ah was embodied in the form of fluid interpretive legal texts that were accepted by Islamic legal tradition and were the reference point for how Islamic legal matters were decided under Shari’ah law. This form of Shari’ah changed in the Ottoman Empire in the latter part of the 19th century where Shari’ah law took the form of a rigidly codified law, as was the case in the legal work known as al-Madjella, so as to immolate European models of law.\(^{161}\)

**The Nation-State:** Discursive changes in the Shari’ah during this period were of two types: State based reforms and non-state based reforms. As for state based reforms, the injunctions of the Shari’ah were codified into statutory provisions. By codifying the Shari’ah in this way brought about a nationalization of the Shari’ah because Shari’ah injunction’s that were incorporated within these legal statutes were seen strictly as national-territorial statutes; hence, they were interpreted within framework of the nation-state as opposed to the framework of the Islamic legal tradition where trans-regional legal commentary informed the public how to understand those laws. Codifying Shari’ah in statutory form made it no longer bound by the rules of Islamic legal theory and

\(^{161}\) Asad, 2003, 210-211.
methodology that was developed by Muslim jurists, but was determined by national legislatures which were ignorant of the origins and implications of these laws.\textsuperscript{162}

As for non-state reforms, there were growing calls of reform within Muslim intelligentsia who wanted to reformulate the classical Islamic legal doctrines that were based on \textit{madhhab}s, for new legal doctrines that would harken back to scriptural sources (i.e. Qur’an and \textit{sunnah}) and be formulated for contemporary conditions. This is best illustrated in efforts by reformist to formulate doctrines that did not adhere to the traditional legal schools such as the Sayyid Sabiq’s legal work \textit{Fiqh al-Sunnah}. Also there were call for a shift away from legal juridical concepts in the reformulation of law that were traditionally agreed upon like \textit{qiyas} (analogical reasoning) to juridical concepts that were not overtly considered as prominent legal principles such as \textit{maslaha} (utility) and ‘\textit{urf} (customary practice). We saw this in our aforementioned discussion of Rashid Rida’s rejection of \textit{qiyas} and its displacement with \textit{maslaha} as well as Khallaf’s elevating the prominence of ‘\textit{urf} in legislation.

The preceding pages illustrate the impact of European imposed modernity on the manner in which Islamic law was reconfigured both institutionally and discursively. This challenge solicited responses from various Muslim circles, yet the intricacies and transformations of modern life happened so drastically, even violently, that it made it difficult for these Muslim circles to adequately address the totality and extend of that challenge especially with socio-legal tools that were developed by Islamic tradition for more agrarian based societies rather than capitalist and industrialized modernity. Hence,

\textsuperscript{162} For more on this point, see “The Transformation of the Shari’ah …” by Ahron Layish, pg. 96).
the call for radical change within segments of Muslim intelligentsia. Yet the key point here is to see whether these calls for change are having a lasting impact on the Islamic legal tradition and are filtering into its core discourses.

**Fatwa in the Postcolonial Age**

In this final section of the chapter, I will analyze fatwas issued in the postcolonial period as a barometer of assessing the impact of modernity on Islamic law in light of the sweeping changes that have taken place in the Muslim world in the past two hundred years. We have talked about the influence of European ideas and colonialism on the theoretical legal discourse of the reformist in the 20th century Muslim world, yet did this theoretical discourse have an effect on the subsequent practical discourse of Islamic law as represented in the fatwas? Moreover, how have the changes that were initiated in the colonial period affected Islamic legal institutions in the postcolonial period? To make such an assessment, I would examine the fatwas one postcolonial Muslim legal institution: The International Islamic Fiqh Academy (IIFA) of the Organization for Islamic Cooperation (OIC). But before I engage such an examination, the following is a brief introduction to these institutions.

**The Organization of Islamic Cooperation (OIC) and the International Islamic Fiqh Academy (IIFA).**

The Organization of the Islamic Conference (OIC) now known as the Organization for Islamic Cooperation is an intergovernmental organization that arose out of need to increase cooperation between Muslim states in an era of the post-colonial nation-state system. Fostering ‘Islamic solidarity’ between Muslim nation-states was the
key objective in the organization’s formation\(^{163}\) in the postcolonial era. The initial impetus for the call for cooperation came about in light of an Israeli arson attack on the Muslim holy shrine the Al-Aqsa Mosque in Jerusalem in August of 1969. Muslim governments were called upon to hold a summit to condemn the Israeli occupation of Palestine.\(^{164}\) An initial organizing meeting, the First Islamic Summit, took place in September 1969 in Rabat, Morocco\(^{165}\) in the aftermath of newly formed Muslim nation-states freeing themselves of the European colonial yoke by the 1960’s. Thirty six Muslim nation-states were invited to the summit, but only 25 attended.\(^{166}\)

The OIC membership of Muslim nation-states grew since its initial inception in 1969. It now has 57 member states\(^{167}\) even though some of those states are not majority Muslim states but have a significant populations of Muslims (e.g. Gabon). The organization established many subsidiary organizations that would promote its goal of Islamic solidarity. One such organization was the creation of the International Islamic Fiqh Academy (IIFA) which was created in the OIC Third Islamic Summit Conference in Mecca in 1981.\(^{168}\) The OIC’s stated purpose for and the membership in this academy would consist of “religious scholars and intellectuals in various cultural, scientific, social and economic disciplines from various parts of the Muslim world, to study problems of contemporary life and to engage in original effective *ijtihad* (legal reasoning) with the

\(^{163}\) Ihsanoglu, 2.

\(^{164}\) See al-Ahsan, 1992, 108.

\(^{165}\) Al-Ahsan, 1988, 18; Ihsanoglu, 26.

\(^{166}\) Ihsanoglu, 26.

\(^{167}\) See Ihsanoglu, 219-220.

\(^{168}\) Al-Ahsan, 1988, 36.
view to providing solutions, derived from Islamic tradition and taking into account developments in Islamic thought, for these problems.”

The membership of the IIFA consists of “expert jurists and scholars of Islamic jurisprudence and various other sciences.” The purpose of the Academy is to foster Islamic unity by promoting adherence to an Islamic jurisprudence that is engaging contemporary issues so as provide Islamic solutions that are both effective and authentic. The idea is to bring about renewal of Islamic jurisprudence that reconciles the differences between Islamic legal schools by emphasizing their common ground through a process of collective *ijtihad* (legal reasoning) on modern problems. In other words, there is a recognition by the academy that problems in postcolonial world are too complex to be dealt with strictly by traditional approaches and methodologies of Islamic law and require a more collective effort that brings together muftis from the various legal schools to produce a trans-*madhhab* approach to resolving these problems. This approach is partly substantiated by the fact that the muftis that are chosen for the fatwa committees come from all across the Muslim world and have various *madhhab* affiliations.

An Examination of the IIFA’s Fatwas.

As far as the sample of fatwas that I will investigate, I will look at fatwa literature issued by the IIFA in the field of commercial and financial transactions as that is one of

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169 As quoted in Ihsanoglu, 33.
170 Ihsanoglu, 42.
171 Ihsanoglu, 42, 91-92; Also see al-Ahsen, 1988, 36.
172 Ihsanoglu, 92-93.
173 See [http://www.fiqhacademy.org.sa/](http://www.fiqhacademy.org.sa/) members (al-‘adha’) page for the current list of scholars that are members of IIFA.
the fields that has undergone the most change with the imposition of the global capitalist system. The point here is that modern financial practices which developed in the West and are the standard mode of operation in global financial institutions, pose a challenge to Muslim economic ethics and law and Muslims are trying to negotiate that challenge through the use of traditional legal practices such as fatwa. Therefore, we always need to keep in mind how the Islamic legal discourse and institutions are being slowly reconstituted to adapt to the challenges of colonialism and its aftermath.

With this in mind, I have chosen five particular fatwas (or qararat- resolutions- as the IIFA calls them) as the sample for my case study of contemporary fatwas. These fatwas are about the following three topics: Abstract rights, Islamic stocks (sukuk), endowing shares and stocks, health insurance, and international trade. But before I talk about the actual fatwas, let me make a few brief remarks on the deliberation procedures of such fatwas. While the muftis on the fatwa committees make their deliberations on the particular issues at hand at the conferences that are convened for these deliberations, they are presented with detailed research studies on the subject of deliberation from various specialist on those issues, so that issues of finance receive detailed studies from those who are experts in finance and economics. It is not until they have read/heard the expert analysis of the subject of deliberation that they come to some legal resolution of the legality of the matter being considered. There is recognition in this that the issues that are arising in modern times are too complicated to be addressed simply by a mufti

\[footnote{See a sample of these research studies that were presented to the muftis of the IIFA 19th Session on Tawarruq at the following site: www.isra.mymedia-centredownloads accessed July 4, 2013.} \]
without the mediation of an expert in that field who can help these muftis better understand the nature of the process or phenomena that they seek to address.

Instead of analyzing each fatwa individually, as was done in previous occasions, I will examine these fatwas in light of some common themes that emerge from them. This approach to the analysis is justified by the fact that all of the fatwas are issued from the same fatwa making body (i.e. the fatwa committees of IIFA) and display a similarity of certain substantive and procedural legal characteristics that would facilitate this approach. With that said, I could say that there are two basic common themes that emerge from my analysis, both of which revolve around the broad unifying theme of continuity and change in Islamic law. Those two themes are: first, the connection of the new rulings of the IIFA to the historically established teachings of Islamic law; second, are the types of legal rationale that are employed in the justifications of their positions. In the following paragraphs I will handle each of these points in more detail.

*Relationship of IIFA Fatwas to Established Islamic Law:* As far as this is concerned, the resolutions (fatwas) of the IIFA are not made in a vacuum, but assume a body of legal knowledge from which their resolutions are an extension. In other words, the legal decisions that are reached and presented give the impression that these decisions are reached in lieu of already established and agreed upon legal principles and doctrine and that these new legal decisions are merely trying to elaborate and make applicable in the contemporary context. For instance, in Resolution 178, the IIFA tries to delineate the specific characteristic of a legitimate Islamic stock (*sukuk*), the decision reached by the
IIFA says: “the Islamic stock (sak) should be issued in accordance to a Shari’ah (legal and legitimate) contract, and it takes on all of its legal rulings.”

The resolution goes on to spell out some of those conditions of a legitimate Islamic financial contract, but what is of greater concern here is that this statement indicates that Academy already assumes that there are established Shari’ah rules for contracts that are to be taken into consideration when formulating this new financial instrument of Islamic stocks such as sukuk. Hence, there is an implicit analogy between traditionally established financial contracts and between the newly established financial contracts of sukuk. So it seems that the academy is not trying to re-invent the wheel by arguing for the legitimacy or illegitimacy of a certain issue by appealing to the discursive sources of Islamic law like the Qur’an and Sunnah, nor is it trying to appeal to any innovative Islamic legal principles by which they are arriving at their decision. Rather, there is an assumption of established body of legal doctrine (symbolized by the term Shari`ah) that needs to be adhered to, albeit modified, in these new cases under consideration. There is no appeal to any specific doctrine of any of the classical schools (i.e. madhhab), but there is an impression from the language used in these legal decision that the legal doctrine that they are appealing to is something which is matter of consensus in all of the different schools of Islamic law.

Similarly in another fatwa concerning the matter of endowing shares, Resolution 181, they state that both permanent and temporary endowments are legitimate endowments. This is a prerequisite that they must establish because shares and sukuls

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Islamically legitimated stocks are obviously temporary properties that would need this prerequisite in order to be legitimated. They also assert that an endowment may be movable, money or even a benefit. It is interesting here that their definition of endowments seems to build on Abu Saud’s 16th century fatwa on cash waqfs that I analyzed earlier, and at the same time diverges from it in other respects. It should be remembered that Abu Saud argued for the legitimacy of endowments made from moveable properties as a way of legitimating the idea that cash to be made into a waqf. This is in lieu of the fact that the major jurists of the madhhab did not approve of this.

Yet it seems that Abu Saud’s legal position has had a lasting impact on Islamic law in the fact the IIFA’s fatwa committee has now taken this point for granted. They have stated that cash waqfs can be endowable properties and hence no longer a point of controversy that needs to be debated as was the case in the 16th century. Also, like Abu Saud, the IIFA claim that cash (as a particular example of a moveable property) can be made into a waqf. Yet the IIFA seems to depart from Abu Saud’s position in terms of the temporariness of the endowment. It should be remembered that the second condition for endowments that were a part of the doctrines of Islamic legal schools is that the endowment must be permanent. Abu Saud does not try to question this premise other than to establish that cash (nuqud) can be considered permanent from the point of view of its interchangeability. Yet the IIFA’s resolution goes further than all of these by declaring that temporary property can be made into a waqf (i.e. endowment). The rationale for this contrarian position to previously established legal doctrine is not provided in the text of

the fatwa (i.e. resolution), but it is a prerequisite for the establishment of their positions on endowing shares and sukuk.

Once they state their general position on endowment, the IIFA is now in position to state their ruling on the legitimacy endowing shares and sukuk. They claim that endowing shares and/or sukuk are legitimate in view of the Shari’ah. As these fatwas/resolutions scarcely provide the rationale for these legal positions in the text of the fatwas themselves, one only presumes that the disregard for the previous condition of permanence and immovability of endowment properties is the reason why shares and Islamic stock, despite the volatile nature of these properties, are seen as properties that can be endowed. But I will address the issue of legal rationalization in the next section.

Yet even after establishing that previously prohibited properties (moveable and temporary) can be turned into endowments (i.e. waqfs), the same resolution of the IIFA places stipulations on these non-historical forms of waqfs. In this regard they first stipulate that the preeminent (asl) position in endowed shares is that they remain intact (baqa’uha) while the profits (returns) from these shares are to be used for the purposes of the endowment and not for trade on the market. This statement is an interesting parallel to Abu Saud’s position in cash waqfs where he states that the cash endowed in a cash waqf remains essentially intact (although not actually intact) in the form of a loan/investment, because its likeness remains while the profits that are accrued from the cash are spent on

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the perpetuating the aim of the cash *waqf* (i.e. for further loans and investments). So, it seems that IIFA is building on the sort of legal positions and rationale that Abu Saud established earlier or at least takes that legal rationale for granted.

In addition, the council states that if the company, from which the shares were endowed, is liquidated or the value of the stocks (*sukuk*) has been paid, then the original endowment may be exchanged for other properties like estates or shares in other companies or *sukuk* based on the conditions of the endower or that will serve the preponderant interests of the endowment. This stipulation also in way mirrors the traditional position on *waqfs* that states that *waqfs* may be sold and exchanged for other properties if the new property is in position to accrue greater benefits for the original endowment.

It may be concluded from what has been so far about the relationship of IIFA resolutions to the already established doctrines of Islamic law that they seem to build on the already existing corpus of laws found in the classical legal compendium, but these rulings show some important advancements, for example, in the understanding of what properties or benefits can be considered endowable like shares and stocks that were not financial instruments in the pre-modern era. Here the circle is expanded to include new types of endowables that are consequence of the invention of modern business products. Yet the acceptance of these new business products as legitimate endowables is built on

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180 See this ruling stated in Abu Saud’s Fatwa on cash *waqfs*” MS. Ebussuud, *Risale fi vakfi'l-menkul*, Süleymaniye Ktp., Hacı Selima Ağa 299, vr. 10b. pg. 214.
previous advancements to the legal discourse that latter generations of jurists, like Abu Saud, contributed to. Hence, the leap between the classical and the modern rulings as demonstrated by IIFA fatwa committee are not as wide as would have been had it not been for precedence of change already that was taking place in classical legal positions.

Types of Legal Rationale Manifested: In earlier statements I alluded to the fact that the IIFA’s resolutions (i.e. fatwas) do not state publically the legal rationalizations for their positions. The rationale for these fatwas are obviously subject to debate between the muftis at the fatwa sessions that are held for the sake of settling these issue. Even though the rational for such fatwas is never fully and explicitly stated in the text of the resolutions that are made available to the public on their website, on occasions some rationale for their positions is given, although it is very short on details. From these brief statements, there are some interesting observations we can derive about the types of legal rationalizations employed by the IIFA to arrive at their conclusions.

The first interesting observation to note about the IIFA’s approach to legal reasoning is that they issued two resolutions endorsing increased consideration for the legal precepts of *maslaha* (i.e. public interest), Resolution 141 in 2004,\(^1\) and ‘*urf* (i.e. customary practice), Resolution 47 in 1988,\(^2\) in contemporary fatwas. The fact that IIFA decided to take resolutions explicitly endorsing the increased consideration of these two legal concepts, without endorsing other forms of legal reasoning, is significant because it seems to give vindication to agenda of the 20\(^{th}\) century Muslim reformist like Rida and

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Makhlouf who advocated for greater implementation of these two legal concepts in contemporary Islamic legal reasoning.

Even though, the IIFA’s Resolution on *maslaha* (public interest/utility) and ‘*urf* (custom) do not introduce much nuance to the classical formulation of these legal concepts, but the resolutions’ significance lie in the fact that they signify a new attitude by scholars/muftis of the IIFA councils (and possibly modern muftis) indicating a greater prioritization of previously minimal (or at least unpronounced) Islamic legal concepts. If it says anything is that these muftis who comprise the IIFA’s fatwa committees are trying to loosen the hold of textual (scriptural) hermeneutics on Islamic law which is perpetuated through previously prominent legal concepts as *qiyas* (analogical reasoning). In addition, it signifies that they would like loosen the hold of authority of legal precedence on contemporary ruling especially as represented in the legal doctrines of the Islamic legal schools (i.e. *madhahib* sing. *madhhab*).

For example, with respect to loosening the hold on established precedence of past legal doctrines, their resolution on ‘*urf* states the following: “The Muslim jurist, whether a mufti or a judge, should not be confined (*jumud*) to what is reported (*manqul*) in the books of (previous) jurists without giving due consideration to the changing of custom (*‘urf*).”183 This is an explicit statement that the muftis on the IIFA fatwa committee that issued this fatwa are trying to open the doors of fresh legal reasoning and loosen the hold of the authoritativeness of *madhhab* legal doctrines which make up the content of those legal compendiums that were alluded to in the resolution.

This is some indication that there is a greater receptivity among some modern muftis to giving greater attention or pronouncement to legal reasoning based on public interest (*maslaha*) and custom (*‘urf*) when formulating new legal rulings than previously was the case. By giving these context based legal devices greater consideration in contemporary legal reasoning lessens the role of other legal precepts like *qiyas* (analogical reasoning) and precedence might play in the current legal discourse. There is some suggestion that this new attitude towards legal rulings and reasoning is not only theoretically endorsed but actualized in the resolutions/fatwas of the IIFA. This is because there are occasional references to *maslaha* and *‘urf* in the rational in the textual pronouncements for their resolutions/fatwas.

For example, in Resolution 43, the IIFA took on the issue of legality of abstract rights with respect to company trademarks, copyrights, and inventions. It is interesting that the committee of scholars who deliberated on these issues took the position that those abstract rights are “the specific rights of the owner” and s/he has the right to gain monetary benefit from them. The justification that they give for such a position is that these abstract rights have acquired a monetary value in the contemporary *‘urf* (customary practice).\(^{184}\) The interesting point here is that the mufti committee explicitly referred to *‘urf* customary practice as the legal basis for this decision and not referring to scriptural authority or previous legal doctrine on this matter. This gives some indication that contemporary Islamic law may taking on a more contextual hue in contrast to the textual

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emphasis of the legal tradition. Moreover, this ruling is some sense innovative from the point of view that traditional doctrines of Islamic law did not consider the legality of abstract rights as it was not the customary practice of previous eras to do so.

In another example, in Resolution 149, the IIFA tackled the issue of the legality of health insurance. Previous to the modern period, health insurance and similar type contracts would have been viewed as illegal from the perspective of classical Islamic law. The rationale for such a prohibition was that these types of contracts contain too much ambiguity (qarar) to be valid business contracts.\(^{185}\) The ambiguity (qarar) in the health insurance contract lies in the fact that there is an exchange of something that is determined (i.e. cost of the insurance) for something that is undetermined (i.e. coverage if and when patient gets sick). Yet given the pervasiveness and overreliance on health insurance in the post-colonial globalized health system, IIFA took on the subject trying to bring a fresh perspective on the issue. IIFA could not ignore the entirely the established ban on such contracts, but it had to take into consideration the pressing social circumstances surrounding contemporary health systems. Hence their strategy for legitimating health insurance was to find a way to minimize the issue of ambiguity (qarar), while at the same time declare the necessity of insurance in the current context.

Based on these pressing circumstances, the IIFA fatwa committee considering this case decided to legitimate insurance policies that are issued directly from health centers that provide health services. The justification being that the degree of ambiguity (qarar) in this kind of contract is small and negligible to be a considered a violation of the norms.

\(^{185}\) See Ibn Rushd’s *The Distinguished Jurist’s Primer*, V2, 179 (translation by Nyazee) for discussion of the criteria for sale contracts that contain qarar (i.e. ambiguity) and the illegitimacy of such contracts.
of Islamic financial transactions. It is not quite clear how the suggested type of insurance policy would have a lesser degree of ambiguity than the conventional health insurance as the fatwa committee does not provide the rationale as is the case for most of their resolutions, but one may presume that with non-for-profit status of health centers. The reason for this assumption is that they stipulate conditions for the validity of such insurance policies where one of those conditions says that the health center may only charge the recipient for services that were actually rendered and not for presumed services in the case of private (conventional) insurance companies.\footnote{See Resolution 149 On Health Insurance: \url{http://www.fiqhacademy.org.sa/qrarat/16-7.htm} accessed February 20, 2014.} Although they don’t explain the exact workings of this insurance policy, it may be surmised from the stated condition that the insurance contract would use the premium towards setting up some sort of declining balance for the insured where the insured party would use as needed and the balance would be returned to the insured. Hence, the level of ambiguity (\textit{qarar}) of the exchange in this contract is negligible.

Yet there are more pronounced reasons, which are relevant to the issue of \textit{maslaha} (public interest), for why such insurance contracts would be legitimate according to the IIFA. According to the resolution the need for health insurance has become so required that it is a necessity due to its connection to the preservation of self, mind, and progeny which are factors that the Shari’ah seeks to preserve.\footnote{See Resolution 149 (16/7) On Health Insurance: \url{http://www.fiqhacademy.org.sa/qrarat/16-7.htm} accessed February 20, 2014.} This rationalization for the legitimacy of health insurance is interesting because it is directly linked to the foundational legal principles (\textit{maqasid}) of Shari’ah which are the manner
for which to determine in legal argument whether maslaha (utility/public interest) is being realized. Hence, the IIFA is essentially appealed to an argument of public interest (maslaha) as a rationale for legitimating at least this restricted form of health insurance contrary to the traditional legal stance with regards to insurance.

Resolution 181, on endowing shares, which I handled in the previous section, also refer to the aims (maqasid) of Shari’ah when arguing for the legality of these types of endowments. In the same resolution, it also refers to the criteria of maslaha when stipulating the conditions for when the supervisor of these endowed shares may transact with these shares when there is some preponderant interest (maslaha rajiha) to the endowment.

All of these cases give an indication that when traditional (i.e. discursive and hermeneutical authority) legal considerations are not a factor in establishing the rule or when then classical rulings do not meet modern circumstances, a resort to more open ended rational considerations of maslaha (i.e. utility) or ‘urf are resorted to in the fatwas of the IIFA. So, there mode of legal rationalization seems to give quite a bit of prominence to these concepts in ways that were not so explicit in the rationalizations of past rulings of Islamic law. Even though concepts like maslaha and ‘urf are classically formulated authoritative legal tools, yet explicit appeal to them in past legal rationale was

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far more limited in scope then the way they have been appealed to in the fatwas of the IIFA. This may be a new development in postcolonial Islamic legal justifications.

Preliminary Conclusions about Postcolonial Fatwas:

In his study on the development of the Hanafi madhhab, Brannon Wheeler190 asserts that the post-classical period, future scholarship in the Hanafi school was only authoritative if they could demonstrate that their “conclusions were consistent with the conclusions of previous generation of scholarship.”191 I take this statement to mean more broadly that their conclusions are consistent in principle with the previous conclusions and not necessarily in exact content (i.e. they applied the same legal and interpretive principles of the previous generations as we saw in the previously discussed case of the Hanafi Ottoman Shaykh al-Islam Abu Sa’ud for example). This statement perhaps can be generalized to all of the legal schools of Islam (case in point the fatwa of Ibn Rushd of the Maliki School which was discussed previously).

But if this is how Islamic jurisprudence was carried out in the precolonial period, how could we describe this jurisprudence in the postcolonial era as represented in fatwas issued by the OIC’s International Islamic Fiqh Academy (IIFA)? With regards to this, I have two observations as to the character of postcolonial from my analysis of the fatwas of the IIFA: Firstly, it is a kind of historical jurisprudence in that it takes established legal norms and rulings as a reference point to its own rulings; secondly, it is a sort of hybrid jurisprudence in that it is not merely an extension of those historically established legal norms and rulings, but it is a product of a new legal rationale that is addressing novel

190 Applying the Cannon. Work that was cited in earlier chapters.
191 Wheeler, 228.
socio-historical conditions. I will expand each one of these points in the subsequent paragraphs.

As for the historical nature of postcolonial fatwa, I indicated that IIFA fatwas seem to assume a body of Islamic legal doctrine and principles which are launching point for its own contemporary fatwas. For example in the fatwas (Resolution 147)\textsuperscript{192} concerning the trade of international commodities and conditions that govern that trade, they draw several scenarios on how this trade can take place and then state their judgment with regards to each case. In each case they make reference in their rulings to already established legal rulings that legitimate their own position. For instance, in what they draw out the first two type of transactions where both the commodity and its payment are both exchanged on the spot or what is effectively on the spot as guaranteed by the market place, the declare that these transactions are legal in accordance to “the known conditions for sales.”\textsuperscript{193} The language of “known conditions” indicates that there are already established rules for which they are referring to and an indication that their judgments are taking place with clear reference to these established legal norms.

As for the hybrid character of the postcolonial fatwa, I shown how the IIFA’s fatwas often employ more context driven legal rationales such as \textit{maslaha} and ‘\textit{urf} in the legitimation of their fatwas and less on previously established authoritative doctrines. Yet their fatwas do not strictly relying on legal concepts and methodologies like \textit{maslaha} (public interest) or new deductions from scriptural (Qur’an and hadith) proof texts, but

\textsuperscript{192} See \url{http://www.fiqhacademy.org.sa/qrarat/16-5.htm} accessed March 25, 2014.

are anchored in a set of agreed upon legal norms and principles that must be reapplied and reinterpreted to meet the demands of new realities facing Islamic law. In this reapplication, fresh legal methodologies and approaches such as *maslaha* and *’urf* (custom) are being employed more overtly and frequently then may have been the case in the past. Hence, the legal product (fatwas) are not entirely new nor are they a rehash of legal doctrines of the past. Thus, what you end up with is a product that is marked by hybridity in various ways.

But how does this characterization of postcolonial fatwas tell us about the impact of the call for *ijtihad* (i.e. legal reform through new legal basis) made by modern Muslim reformers? The IIFA’s fatwas, as prototypical postcolonial fatwas, neither meet the complete overhaul of Islamic law that was demanded by some reformers like Rida and Turabi, nor are they a continuation of the Islamic jurisprudence of old. This is because IIFA’s fatwas do not try to reinvent the wheel by attempting to derive new legal norms from the scriptural sources of the law through the use of novel hermeneutical techniques as demanded by those modern reformers, nor do they stick to the pre-established legal positions as demanded by traditionalist muftis. Instead, the IIFA’s fatwas display sufficient innovation in legal rulings and application of legal rationale that render their judgments as constituting a new *ijtihad*, but at the same time the display enough conservatism and consistency with pre-established legal norms that there is a sense of continuity of character to their jurisprudence; and herein lies the hybrid nature of the postcolonial fatwa.

Judging from this, I can say that the Muslim encounter with modernity seems to have made an impact on their legal discourse that is not totally effacing to the legal
tradition, but has created a discursive shift in both the substance and form of the Islamic legal discourse. What this says is that Islamic law continues to evolve in response to constantly changing historical conditions even as the pace of change in the modern period took on qualitative dimensions that seemed to require a completely new set of rules to deal with that change. Despite the disrupting nature of historical change that swept the Muslim world over the last two centuries, the evolution of Islamic law remains anchored in a set of legal principles that is both historically established and remarkably adaptive to the realities that confront it, so that shifts in its legal discourse do not cause it to lose its authentic Islamic character.
CONCLUSION

My study has retold the history of Islamic law from the perspective of one of its practices, *ifta’* or the art of issuing fatwas. This was possible because I view fatwas as the fundamental building blocks from which the law was constructed and having this unique position they are capable of telling us a lot about the structure and function of Islamic law. This is because, even though the whole is more than the sum of its parts, the constituent elements that making up the whole still have bearing on its character. It is with this in mind that I have taken this approach to study of Islamic law.

I have tried to show in this study how fatwas contributed the formation and transformation of an Islamic legal discourse and tradition. This is because this discourse and tradition in some respects arose organically out of the resolutions to Muslim problems that took the form of fatwas. This was not the only ingredient that made up the discourse and tradition, yet it played a very instrumental role. Out of the materials of fatwas particular forms of legal rationale emerged that would go on to constituted the legal discourse of Islamic legal theory. In addition to this, Islamic legal doctrines were informed by these statements and many of these fatwas went on to become the basis of these doctrines. Some of the legal authorities who uttered these fatwas came to occupy a special place in Islamic history so much so that legal institutions, *madhhabs*, became identified with them. All of these components, that have their discursive origins in fatwa, went into making a peculiar Islamic legal tradition that shaped subsequent legal practice.

Yet fatwas were not simply instrumental in shaping Muslim law, but they also played a pivotal role in representing and shaping Muslim society. This was so because of the very nature of fatwas. Fatwas are both a discursive and dialogical engagements
between the Muslim public and its religious specialists and these characteristics are important for social change. They are discursive engagements in the sense that fatwas are statements that instruct their practitioners on proper religious and social practice, and dialogical engagements because they are social exchanges between the public and the religious elite. In this way fatwas functioned as indicators of prevailing social attitudes because they often reflected what was being debated at any given time. But more importantly, fatwas facilitated social transformation by legitimating new practices that brought about change.

These features of fatwa were displayed repeatedly in various periods of Muslim history that we covered in this study. Time and time again, we saw the Muslim public reach out to the religious specialists to seek guidance for various new challenges that confronted them and the way that these religious specialists often addressed these concerns was through the agency of fatwas. Fatwas were used either to condone or condemn certain action or positions and in doing so they facilitated change in some directions and hindered change in other directions. So in this way fatwas were the instrument that allowed Islamic law to keep its flexibility in the face of changing circumstances.

Yet throughout all the various periods of the transformations within Islamic law, it always maintained an essential identity of being a discursive legal tradition because it was grounded in the fundamental and normative discourses of the Qur’an and the early traditions. So no matter what form Islamic law took in the various stages of its evolution it always was positioned with respect to these discourses. This is exemplified by the fact that even the quintessential Islamic legal practice of fatwa had its discursive origins in the
Qur’an. In fact, fatwas were attempts at extending the reach of those Qur’anic norms in history. This is still very much the case today modern Islamic legal discourse still draws its authenticity from newer interpretations of Qur’anic norms.

Yet despite this stability in the Islamic legal tradition, the Islamic legal discourse seems to be undergoing a discursive shift. Changes in the legal methodologies employed in modern jurisprudence, as for example the employment of *maslaha*, constitute a shift in the Islamic legal discourse towards a contextually based methodology of jurisprudence that moves away from the textually dominated discourse in pre-modern times. That is because the employment of legal tools such as *maslaha* in legal rationale represent a mode of legal production based on social utility and context while previously relied on tools like *qiyas* sought to bind the law more tightly to sacred text.

My brief analysis of contemporary fatwas shows that *maslaha* has come to greater prominence as a tool in evaluating contemporary legal concerns and in the issuance of fatwas. This approach has its advantages in that it allows lots of room for social context to play a larger role when considering legal issues. This larger role for context driven methodology has legal implication in that it takes place at the expense of the more literalist legal hermeneutics of sacred and authoritative discourses. In this case, fatwas become less of a function of direct deductions from legal textual sources, such as the Qur’an and *hadith*, and more of a function social circumstances.

Yet what remains to be seen is whether the modern trend amongst some Muslim thinkers and jurists towards these contextually oriented legal devices represents a lasting shift away from the traditionally textually oriented legal methodology that will change the orientation of the Islamic legal tradition or be a passing phenomenon that will not
have little lasting impact. This question can only be answered with further research and reflection.
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