

THE EVOLUTION OF *USUL AL-FIQH*: AN EXAMINATION OF ITS ROLE IN CLOSING THE DOORS OF IJTIHAD

Zakiyya Haruna*
Usman Ibrahim Abubakar**

ABSTRACT

Usul al-Fiqh (Islamic Law of Jurisprudence), as a field of knowledge, evolved over centuries as a result of intellectual struggle by scholars in keeping its context in the phases of changing times and emerging issues in the Muslim communities. This undeliberate development, which necessitated the excessive use of *ijtihad* (exerting one's effort to deduce a legal ruling from the text) in resolving challenging issues, was attributed but not limited to the dispersal of the early scholars among the *Sahabah* (Companion of the Prophet)¹ and *Tabi'un* (the followers of the *Sahaba*). The compilation and codification of *Fiqh* (Islamic jurisprudence) has constricted the use of *Ijtihad* to the *Madhab* (schools of thought) reference. This period perceived the door of *ijtihad* to have been closed, hence Muslims became constricted *Taqlid* (blind followership of a particular *madhab* and discouragement from exercising *ijtihad* even when there was a need to). This article examines the development of *Usul al-Fiqh* and its relevance as a field of knowledge. It also examines the doors of Ijtihad as to whether they are actually closed. The research finds that, the theoretical variations in the perception of *ijtihad* creates multiple approach in analyzing and understanding the concept of *taqlid*. The research concludes that, the door of *ijtihad* is still open with certain

* Lecturer II, Faculty of Law, Yusuf Maitama Sule University, Kano, Nigeria. Can be accessed through zharuna@yumsuk.edu.ng

** Assistant Lecturer, Faculty of Law Yusuf Maitama Sule University, Kano. He can be accessed through his email: uibrahimabubakar@yumsuk.edu.ng

¹ On every occasion in this article where reference to Prophet/Messenger Mohammad appears, words "Peace Be upon Him" shall be assumed.

restrictions and that the doors of *Ijtihad* have never been closed.

Keywords: *Fiqh, Ijtihad, Mazaheb, Taqlid, Usul Al-Fiqh.*

1. Introduction

Usul al-Fiqh (Islamic Law of Jurisprudence) as a field of knowledge evolved over centuries as a result of intellectual struggle by the scholars to deal with the ever-changing times and emerging issues in the Muslim communities. The growth of *Usul al-fiqh* was not by design or intention. The early scholars who travelled around the world in search for knowledge inadvertently set out the rudiments and basic foundations of *Usul al-fiqh*. These pieces of knowledge that were developed and scattered around the Muslim world by the early scholars were later on collected, edited and translated into volumes of books. Some of the works by these early scholars can be found today on shelves while some still remain undiscovered in volumes of manuscripts yet to be put together. The rudiments and pieces of work by the early scholars were later given more tune and structure by the followers of the early scholars. The structures of *Usul al-fiqh* were further harnessed and driven forward by the Muslim jurists later, who developed *Usul al-fiqh* as a genre. Their efforts and dedication at preserving the depth, meaning and authenticity of the *fiqh* rulings is unarguably one that deserves accolade. Going through the pages of history, one must respect their endeavors, appreciate their differences, and also learn to avoid unguarded and careless utterances about the *Sharia*. This article examines the development of *Usul al-fiqh* as a field of knowledge and its relevance in resolving the emerging legal issues of modern times through the use of *Ijtihad*.

A. Conceptual Clarification

When discussing *Usul al-fiqh*, it is common to come across words such as *Sharia*, *fiqh*, Islamic law and Muhammadan law. These words have been a cause of confusion. They are used interchangeable in some books as though they carry the same meaning. A lot of books written by non-Arabs and westerners use these words interchangeably and it becomes difficult to differentiate them all, making the reader confused about which is what and what is which. However, *Sharia*, Islamic law and Muhammadan law are synonyms with broader and narrow

meaning. Sharia is broader than Islamic law as can be examined later. Muhammadan law on the other hand, is a western coined concept to refer to Islamic law which literally denotes Muhammad as the originator of the law. Sharia is divine and therefore, Muhammad cannot be the originator or owner, but the Almighty Allah, is the law giver. It is also common to find books which refer to Islamic jurisprudence and Islamic law. After reading deep into these books one would realize that the contents of the books are not about *Usul al-fiqh* but *Fiqh*. Thus, from the onset it will be good to make some conceptual clarification about these terminologies.

Usul al-fiqh has two components; *usul* and *fiqh*. *Usul*, being an Arabic word, literarily is derived from the word '*asl*' the plural of which is *Usul*. *asl* means something on what other things are built upon². In this regard, *fiqh* then is what is built on *Usul al-fiqh*.³ The primary concern of *Usul al-fiqh* is to deduce rules of *fiqh* from the primary sources i.e. the Quran and the *Sunnah*. Thus, *Usul al-fiqh* is the root of *fiqh* simplicita and *Fiqh* therefore is the end result of *Usul al-fiqh*. According to Ibn Hajib, *Usul al-fiqh* can be defined as the principles by which a *Mujtahid* derives the legal rules of conduct from specific evidences⁴. In a simple sense, *Usul al-fiqh* is like rules of grammar to English. In another way, *Usul al-fiqh* can be seen as a research methodology and *Fiqh* can be seen as the result of the research conducted using the research methodology. *Usul al-fiqh* is a methodology that is concerned with the primary sources of the law that is used by *Mujtahid* during *ijtihad* to deduce rules of law i.e. *Fiqh*. The relationship between *Usul al-fiqh* and *fiqh* (*furu*) is mutual, each one influencing the other throughout their period of development⁵. Some argue that *Usul al-fiqh* is necessarily an independent science and its relevance may vary between one scholar and another arguing that its function was to hone the intellectual skill of students thus suggesting

² Muhammad Nabeel Musharraf, *Waraqaat of Imam Haramayn al-Juwaini, a Classical Manual of Usul al-fiqh* (Perth Western Australia: Australian Islamic library 2015) 16.

³ Ibid.

⁴ Ibn Umar Ibn Usman al-Hajib, *Mukhtasar al Muntaha al-Usuly* (in Arabic) [The Summary of a Final View of Jurisconsult] vol. 1 (Qahirah: Kardastan al-Ilmiyya Publisher nd) 4.

⁵ Youcef S. 'The Soufi The Histriography of Sunni Usul al-fiqh in Anyer M. Emon, Rume Ahmed (eds) *the Oxford: Handbook of Islamic Law* (Oxford Handbook Online, 2016) 11.

that *Usul al-fiqh* though not necessarily determining the law provides jurists with a set of analytical tools for thinking about the law.⁶ Whether or not *Usul al-fiqh* is an independent science, it certainly was a tool for justification of the *furu* (*Islamic rules*) which were developed before *Usul al-fiqh* was regarded as a science of its own.

Fiqh is the knowledge of *Ahkam al Sharia* (Regulatory Rulings) that are established through *Ijtihad*. The literal meaning of the word *fiqh* in the dictionary is “to understand” “to comprehend”⁷ It refers not only to knowledge but to profound understanding,⁸ a perfect and a detailed understanding. That is why it is sometimes said that *fiqh* is Islamic law. According to Abu Tariq, as a juristic term, *fiqh* has two meanings,⁹ (i) as defined by Amidi and Zarkashi, Baydawi and Shaukani; *Fiqh* is knowledge of the practical *Sharia* matters that are derived from their elaborated evidences; and (ii) All the Islamic Laws. This definition is synonymous to the term *Sharia*.

As seen in the above definition, *Fiqh*, which is also being termed as the Islamic law, is equally referred to as Muslim Law. These words have been used in some books and write-ups interchangeably to mean the *Sharia*.¹⁰

Now let us consider what the *Sharia* is. *Sharia* was originally called law of religion and this covered not only legal norms but also human conduct and ethics.¹¹ The *Sharia* is more of a divine religion from God Almighty to Mankind for his guidance. The relationship between the *Sharia* and *fiqh* is one of overlapping. The *Sharia* is the revelation that comes from God. It is eternal and constant i.e. does not allow changes while *fiqh* is derived from human reasoning in an attempt to understand

⁶ *ibid* (n.5) 11.

⁷ Dildora Komiljanovna.Nishanova Role of Usul al-fiqh in Islamic Law (2021) 4 (3) International Journal of Integrated Education 416, 416.

⁸ Literarily, *Fiqh* means understanding coming from the word *Fahm*. For instance in Quran Surat Al Hud (The Prophet Hud) 11 v 91 [Abdullah Yusuf Ali (tr), ‘The Meaning of the Holy Quran’ (Maryland U.S.A: Amana corporation 1992)] it reads “O Shu’ayb much of what thou sayest we do not understand”.

⁹ Abu Tariq Hilal, *Fahm Fi Usul Al Fiqh* (in Arabic) [Understanding Usul Al Fiqh] (Abu Ismael al Bairawi (tr) Delhi: Revival Publication 2020) 2.

¹⁰ *ibid* 3.

¹¹ Musharraf (n 2) 2.

the intendment or meaning of the *Sharia* as it comes from Allah.¹² Unlike the *Sharia*, *fiqh* is flexible. During the early years of the religion, the adherents were people devoted to the religion and their duty to Allah. They were men of God and did not consider themselves as men of Law. As would be seen later, the growing of the religion outside the Arabian Peninsula in the second year after Hijra¹³ forced political and social changes. By the third year after hijra,¹⁴ the *Sharia* underwent a form of transformation from divine legal thinking to a thinking of logical systemic rules bringing about a legal system which became a force to be reckoned with around the world till date.

The Islamic Jurisprudence on the other hand is *Usul al-fiqh* i.e. the methodology of the Law.¹⁵ Source refers to Quran and Sunna while *Adillah* (proof) is the evidence found from the sources i.e. Quran and *Sunnah*.

2. Usul Al-Fiqh as a Field of Knowledge

The primary purpose of man being created by Allah is that man should worship Him. Allah created man in the best form and nature, and endowed man with *aql* (intellect) and *wilaya* (the free will to make choices). Having endowed man with intellect, He chose the prophet to receive the revelation of the Quran. The Quran contains laws, rules and regulations that guide man on his mission on earth i.e. to worship Allah. It is therefore incumbent upon man to know the Laws and Regulations contained in the Quran and the Sunna of the prophet in order to be guided, after which he will be asked to account for. The guidance is through the *Sharia*. Despite the fact that the primary sources of the *Sharia* i.e. the Quran and the Sunnah provisions are fixed not permitting changes and alterations in them, these two sources provide indications wherein their provisions could be expounded where circumstances demand so in order to meet up with the evolving society. The Quran provides thus;

¹² Prawitra Thalib, 'Distinction of Characteristics of Sharia and Fiqh on Islamic Law' (2018) 33 (3) Yuridika Fakultas Hukum Universitas Airlangga 439, 440.

¹³ Equivalent to the Eighth Century CE

¹⁴ Ninth Century CE

¹⁵ Ibid.

‘...today I have perfected your religion and have chosen for you Islam as your religion...’¹⁶

The above verse shows that the *Sharia* is perfected and complete. It is a religion of today, yesterday and tomorrow. It is for the jurists to deduce the law to suit the circumstances.

Usul al-Fiqh is a body of evidence, principles, methods and approaches that Islamic jurists utilize to provide rulings, *fatwas* and solutions to problems.¹⁷ It is a science dealing with Islamic jurisprudence and encompasses knowledge and skills required of a Muslim jurists in deducing rulings.¹⁸ According to Kamali,¹⁹ *Usul al-fiqh* or the roots of Islamic Law as he calls it, “expound the indications by which rules of *fiqh* are deduced from their sources”. These indications are indicated in the Quran and Sunna form where the rules of *Fiqh* are deduced. Thus, *Usul al-fiqh* as a field of knowledge is not only devoted to methodology of interpretation but the sources to which the methodology is applied. Knowledge of the rules of interpretation is necessary for the understanding of legal texts. Where the provisions of the sources are not comprehended it will be difficult to bring forth from the sources any legal ruling particularly where the texts are not self-evident. This is because of some of the provisions of the Quran are clear and detailed (*zahir*) while some are not given in details (*nass*). Some are general (*‘amm*) while some are specific (*khass*), some are literal (*haqiqi*) and some are metaphoric (*majazi*). Some provisions are binding but with concessions while some are without concessions. Where provisions of the Quran are not clear or detailed, we find guidance in the Sunna.²⁰

The Guidance is the *Sharia* and the rules, laws and regulations are not only limited to *Fiqh* but extends to all aspect of human endeavor. *Usl al-Fiqh* provides the platform for deducing the Laws, Rules and Regulations from the Quran and the *Sunnah*, in the process, building legal theories upon which sound rulings are pitched on. *Usul al-Fiqh*

¹⁶ Quran Surat Al- Ma'idah (The Repast) 5 v 3 [Abdullah Yusuf Ali (tr), 'The Meaning of the Holy Quran' (Maryland U.S.A: Amana corporation: 1992)].

¹⁷ Hilal (n 9) 1.

¹⁸ Ibid 4.

¹⁹ Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society 1991) 1.

²⁰ Quran Surat Al- Najm (The Star) 53 v 4 [Abdullah Yusuf Ali (tr), 'The Meaning of the Holy Quran' (Maryland U.S.A: Amana corporation 1992)].

provides the conditions that must be satisfied before any *hukm* (ruling of *Fiqh*) that is deduced from the Quran and Sunnah can be accepted and considered authentic. The *Adillah* through which these *ahkam* are extracted from the Quran and Sunna, *Ijma* and *Qiyas*²¹ and other *furū'* are carefully guided and guarded. The secondary sources include *Istihsan*, *Urf*, *masalih al Mursalah*, *saddu al-zaria*²² etc. For instance, the use of *Istihsan* which involves choosing from the available or conceivable options of solving a problem. *Usul al-fiqh* guides and limits the exercise of such discretion involved in making the choice judiciously. This applies to other secondary sources which are rationalist oriented. Thus, *usul al-fiqh* guards proper use of human reasoning in a system of law that is divine.²³ These conditions for building theoretical backgrounds, upon which legal rulings are made, are of utmost importance in order to safeguard the '*Maqasid al-Sharia* (objectives of the Sharia). These conditions are necessary in order to avoid diluting and even polluting the *Sharia* especially with the passage of time and the influence of other cultures due to influx of people accepting Islam with different cultural background. *Usul al-Fiqh* not only sets conditions for deducing *ahkam* but also the conditions which the *faqih/fuqaha* must possess before he is considered fit to make any rulings and pronouncement on the *Sharia* which is called *Ijtihad*. Through this means, the meaning and depth of the Sharia is preserved. Knowledge of this field is therefore relevant in order to safeguard the *ummah* from falling into error due to misguided individuals and sects.

From the above, it can be safely said that Muslim jurists have two purposes for articulating *Usul al-fiqh* texts. The first reason being the need to develop a methodology that will guide the jurist in deriving at a law that gives solution to a novel issue and secondly, was to provide

²¹ Ibn Taimiyya in AL Munajjad explains if we say the Quran, Sunnan and Qiyas all stem from the same source, because the messenger agrees with everything that is in the Quran and the umma is unanimously agreed upon it in general. There is no one among the believers who does not believe it is obligatory to follow the book and everything that is enjoined in the Sunna, the Quran obliged us to follow it. So the believers are unanimously agreed upon that, and everything the believers are unanimously agreed can only be true and in accordance with what is in the Quran and the Sunnah.

²² Please note that apart from the Quran, Sunna, *Ijma* and *Qiyas*, scholars have varied regarding their validity and usage as evidence and even where they are they must be secondary to Quran and Sunnah.

²³ Kamali (n 17) 2.

a reasoned defense or authority of legal doctrines of a school, in essence, justify the law that was derived at.²⁴

A. Emergence of Usul Al-Fiqh

The emergence of *Usul al-fiqh* dates back to the time of revelation of the Quran. The understanding here is that *Usul al-fiqh* has been inexistence as long as *Fiqh* has been in existence. *Fiqh* could thus not have been in the absence of the sources and the *Usul al-fiqh* i.e the methodology of deduction. At this time, the prophet was the teacher who taught the Quran to his companions and this spanned a period of twenty-three years. During this time, the prophet was among his companion and readily explained the Quran, its laws and principles and answered or solved any situation that the Muslim community faced. Through their questions²⁵ and therefore, answers given by the prophet, inadvertently established rules, principles and laws. So, from explaining the Quran the Sunnah was also gradually laid down. The Quran itself has established the authenticity of the Sunna. Instances can be found in the Quran where we are commanded to obey Allah and obey the Messenger.²⁶ In another instance the Quran says ‘And most certainly by your Lord, they can never be true believers until they make you a judge in their affairs’²⁷ and in another instance the Quran says ‘and indeed in the messenger you have a perfect example of conduct to imitate.’²⁸ The Quran and Sunnah at this time were the only source of law.

It is unarguable that there was ever a time when the Quran as a primary source of Law was contemplated. The Quran was the principal source of law for man and was referred to all the time as binding. However, the binding nature of the Sunna came about centuries after the death of the prophet. During the life time of the prophet the word Sunnah was taken simplicita as a conduct that was worthy of being emulated. So

²⁴ ibid 10.

²⁵ See the yas alunaka verses in the Quran. According to ibn Abbas 13 questions were asked.

²⁶ Quran Surat Al- Ali Imran (The Family of Imran) 4 v 59 [Abdullah Yusuf Ali (tr), ‘The Meaning of the Holy Quran’ (Maryland U.S.A: Amana corporation 1992)].

²⁷ Quran Surat Al- Ali Imran (The Family of Imran) 4 v 65 [Abdullah Yusuf Ali (tr), ‘The Meaning of the Holy Quran’ (Maryland U.S.A: Amana corporation 1992)].

²⁸ Quran Surat Al- Ahzab (The Confiderarte) 33 v 21 [Abdullah Yusuf Ali (tr), ‘The Meaning of the Holy Quran’ (Maryland U.S.A: Amana corporation 1992)].

not only the conduct of the prophet, other Arab customary practices dating back to prophet Ibrahim (AS) and his conduct were also retained as Sunna.²⁹

This phase witnessed no conflict of understanding or interpretation as the Quran and the Sunnah were the only sources of law.³⁰ During this time, the Quran was revealed in piece meal and was written down in bits and pieces on rocks, leaves etc. and it was also memorized by some of the *Sahabah*.³¹ *Sahaba* had the privilege of learning directly from the two sources. They were a living witness as to what, when, where, how, and why verses of the Quran were revealed. They had the privilege of asking the prophet questions about the Quran and heard his answers and interpretation *Tafsir* of the *fiqh*. This learning process of the *Sahaba* was of great significance. It has played a role in advancing knowledge to the next generation of Tabi'un.

Apart from the Quran and Sunnah, other methods of deriving legal rulings from the source gradually manifested. These methods include the *ijtihad* and *qiyas*. For instance, when some of the *Sahaba* were faced with a situation, they will use their own *Ra'y* to address the situation and thereafter inform the prophet about how they handled a situation. If the decision they made was correct, the prophet will endorse it and if the decision was not correct, He would give proper guidance on the matter. So, it means that the decisions of the *Sahaba* which were endorsed by the prophet became established principles so that if another incident occurred that was similar, using analogy i.e *Qiyas*, on the former decision, they will arrive at a decision.

After the passing away of the prophet, a number of the companions left the Hijaz to various places and established their schools. For instance, Ibn Masud left to Kufah (Iraq) only the seven *Fuqaha* (jurists) remained in the Hijaz among which were A'isha, Abdullahi ibn Abbas, Abdullahi Ibn Umar, Umar ibn Khattab, Uthman bin Affan, Abubakar

²⁹ Wael B. Hallaq, 'A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh' (Kiribati: Cambridge University Press 1997).

³⁰ Abdullateef Wale Adeyemo and Abdullateef Abubakar Sadiq, 'The Historical Development of Islamic Jurisprudence' (Illabillah publishing Company Ltd, Kano, 2012) 21

³¹ Zaid bin Thabit was the Chief Scribe and at the time of the demise of the Prophet some 30,000 companions have memorized some parts of the Quran and some the whole of the Quran.

Siddik and Ali ibn Abi Talib. Later on Aliyu ibn Abi Talib shifted first to Iraq then to Syria. This dispersion of the Muslim's jurists became excessive during the period of Usman bn Affan, this was because Usman ibn Affan was the first caliph who allowed the companions to leave Medina and spread to various regions, at that time, more than 300 companions ventured beyond Medina to various places like Kufa, Basra, Egypt, and Sham (Greater Syria).³²

The four Rightly Guided Caliphs faced challenges during their tenures and each exhibited his style at handling situations which had arisen. For instance, Abu Bakr will resort to Quran then Sunna of the Prophet and if he is unable to find the answer, he would consult the other *Sahaba* who were not many if they know of any verse in the Quran or Sunna to resolve the situation, if they know no any verse or *sunna* on the issue, they discuss the situation and arrive at a decision via *Ijma*. He also made use of *ijtihad*. For instance, the decision to fight those who refused to pay *zakat* after the passing away of the prophet was made by exercising *ijtihad* via *qiyas*.³³

Umar bin al-Khattab was inclined to the use of *Ra'y* than *ijma*. His reasoning for using *Ra'y* was because he saw that whenever the prophet was faced with a situation and he had options, he would take the easier way out.³⁴

Uthman Ibn Affan adopted the way of his predecessors Abu Bakr and Umar while Ali was more inclined to the way of Umar and he was known for arriving at strict and deterrent rulings. Using *Ijtihad* and *Qiyas*. For instance, Ali was reported to advice Abu Bakr to burn homosexuals alive using *qiyas*, saying that since this act was only committed by one nation (the people of prophet Lut) before us, and

³² Thaha Jabir Fayyadh al-Ulwani, *Adab al'ikhtilaf fi al-Islam* (Ethics of Disagreement in Islam), translated by Ija Suntana, (Bandung: Pustaka Hidayah, 2001) 38.

³³ Ali Al Ghamdy, 'Zakkat and the Wars Fought for it' *Saudi Gazette* (Saudi: 15 August 2012) <https://saudigazette.com.sa/article/12440> last assessed 29th June 2024.

³⁴ Ishaq Ishaq, Muannif Ridwan, A Study of Umar Bin Khatab's Ijtihad in an effort to Formulate Islamic Law reforms cogent social sciences (2023) 9(2) Cogent Social Sciences 1, 5-9.

Almighty Allah punished them with what you know (burn with fire) I see we should also burn them with fire.³⁵

Looking from the above, it means that during the first two centuries of Islam, Sunna was not differentiated from consensus.³⁶ This is because the sanctity of the Sunna was found in the overwhelming agreement of the Sahaba who collectively upheld the practice. So, consensus which was the way of Abubakar was not only seen as binding but determinative of a Hadith or Sunna. What is noticed during this period is that even though, Sunna was a source of law, it did not have a binding force. The Sahaba like Umar bin al-Khattab could make a ruling that was in the interest of the people despite a tradition of the prophet dealing with the situation. He was of the opinion that certain rulings were made at the time of the prophet because they suited the time and situation but that, that ruling may not have the desired effect if it was applied to the situation at hand arguing that it may be harsh on the people or that it would be too lenient on the circumstance at hand. For instance, after the Prophet's death, Umar implemented several policies that differed from those of the Prophet and Abu Bakr, such as *ghanimah*, zakat for new converts (*mu'allafatu qulubuhum*), divorce, sale of Ummu al Walad, adulterers, and discretionary punishments (Ta'zir).

Reasons attributed to the non-binding force of the Sunna at that time is because the Sahaba had a good understanding of the Sunna and reasons behind revelations and decisions made by the prophet so much so that they were able to handle situations using the guidance the Prophet had taught them. This situation continued for a long time after the time of the rightly guided Caliphs. For this period, the Muslim community was united; there were few divisions as to interpretations and which were resolved amicably with utmost respect.³⁷

³⁵ Abubakar Muhammad bn Ja'afar al-Khara'idiy, *Masa'wi'u al-akhlaq wa dara'ik makruhiha, (bad habits and the method of)* Beirut, 1st ed. 1993)1, 455.

³⁶ Wa'ell Hallaq, '*Sharia, Theory, Practice and Transformation*' (London: Cambridge University Press 2005) 48.

³⁷ Adeyemo (n 29) 27-28.

B. Evolution of *Usul al-Fiqh*

The later parts of the *Umayyad* dynasty to the time of the Abbasid dynasty can be said to be the evolution period of *Usul al-fiqh*. This period witnessed the establishment of the four *sunni* schools of thought and Islamic law had developed its basic characteristics³⁸. The binding force of the Sunnah started gaining momentum about the 2nd century after the demise of the prophet (SAW). This was due to fact that, *Sahaba* who learnt firsthand from the Prophet have now become scattered around the Muslim world. *Sahaba* taught what they knew based on their understanding and because the Sunna was not compiled and written in texts, it became scarce. With the death of the four *khulafau al-Rashidun* and the death of the last of the *Sahaba* about 91 years AH (towards the end of the *Umayyad* period), there was a lot of fabrication of the hadith. Many of the Scholars stopped narrating hadith for the fear of being misquoted and out of fear of being persecuted. The Muslim community became polarized between the *Ahl al-ra'y* and the *ahl al-hadith*. This polarization was seen right into the first half of the second century AH.³⁹ The use of *ra'y* was taught by Abdullah ibn Mas'ud (RA), Fuqaha Companions who relocated to Iraq. The situation in Iraq was quite different from that in the Hijaz. Iraq was very eventful and coupled with the fact that there were few companions of the Prophet in Iraq, unlike in Hijaz, there was not enough narrators of Sunna so the people of Iraq had to resort to *ray'* in absence of clear text from the Quran and the Sunna⁴⁰. Imam Abu Hanifa, believed that in absence of the Quran, where there was a weak tradition of the prophet that Sunna was not binding and that reasoning could be used to decide a case. The *ahl al-hadith* (Jurists of Hadith) on the other hand, were attuned to the preponderance of drawing any ruling from the Quran and the *Sunnah*. They believe in grounding rulings on text. These were the followers of the Sahaba who had remained in Madina like Abdullahi ibn Umar, A'isha (R.A) the mother of believers. The followers of these Sahaba like imam Malik not only based his rulings on the Sunna narrations but on the practice of *Ahl al-Madina* (people of Madinah) because he was of the view that those practices were taught by the prophet himself. The Shia group was inclined to follow traditions that

³⁸ Abu Ameenah Bilal Philips, '*The Evolution of Fiqh*' (*Islamic Law & the Madh-habs* (n.p.: International Islamic Publishing House nd) 60.

³⁹ The Eighth Century CE

⁴⁰ *ibid* 57.

had affiliations to Ali ibn Abi Talib with their 6th imam Jaafar bin Siddiq, while the Mu'tazilites had strict conditions regarding less than one or two narrators. The two groups accept it no matter how authentic the Sunna was. All these put together with the paucity of hadith narrations strengthened the *ahl al-Ra'y* position. This was a period of scholastic upheaval and division⁴¹ throughout the second century,⁴² where *ra'y* dominated the scene and became an umbrella term for a wide variety of legal arguments and remained a standard term designating legal inferences for almost a century.⁴³

The desire to be guided by authentic Sunna ushered in an era of search for knowledge. This is the period which Joseph Schacht describes as the literary period.⁴⁴ A period which the use of paper over parchment and papyrus had a lot of advantage for historians. It was a period where writings were deliberately composed and disseminated. According to Schacht, this period was about 150-250 AH. This search for knowledge was a true search for authentic Sunna traditions of the Prophet (SAW). This period saw a proliferation of jurists and writers. It was a period that saw the rearing of scholars in an environment that was permeated by authentic Sunna practice. By this time the Sunna had come to assert the personal authority of the Prophet⁴⁵. Umar Bin Abdul Aziz was instrumental in this phase as he caused the scholars who had knowledge about the traditions of the prophet to reduce them into writing for the fear of losing knowledge with the death of the scholars. Because of his genuine intentions, many scholars answered his call to compile genuine Sunna and even Rulings of the Sahaba such as that of Umar ibn Al Khattab, Abdullah ibn Abbas, A'isha, Ali Ibn Abi Talib and Abdullah Ibn Mas'ud. He also instructed that no rulings should be made that were not grounded on a primary text. This development was an important and remarkable milestone in the evolution of Islamic law and *Usul al-fiqh*. This is because, this effort brought about originality of *fiqh* and also the scholastic vigor that had suffered a comatose interface was

⁴¹ The more entrenched a hadith the less freedom to exercise *ra'y* on an issue. As will later be seen, this division later was bridged with the *Ray* people accepting the traditionalists' view and the traditionalists who did not approve *ra'y* also admitted instances of *ra'y*. Shaf'i was instrumental to these changes.

⁴² Eighth Century CE

⁴³ Hallaq (n 35) 48-49.

⁴⁴ Schacht Joseph, *The Origins of Muhammadan Jurisprudence*. (United Kingdom: Clarendon Press 1967).

⁴⁵ Hallaq (n 28) 49.

awoken.⁴⁶ Unfortunately, Umar died before the completion of the work.

The sacking of the Umayyad Dynasty by the Abbassid Dynasty heralded an era of great advancement in *fiqh* and *Usul al-Fiqh*. This occurred between 2nd to 4th Century AH.⁴⁷ The scholastic vigor that was not too long awoken was further reinvigorated. This era marked the period of real evolution in the development of *Usul al-Fiqh*. The growth of the four classical *sunni* schools of thoughts began around the 3rd century after Hijra.⁴⁸ First of these developments was the compilation of the *Mus'haf*, establishment of various schools of Jurisprudence and the codifications of the schools principles approaches and views. Scholars were held in high esteem. The borders of the Islamic empire expanded and there were more people accepting Islam all over. This was an achievement in Islamic history. But then, like with every good development came about a challenging price to pay for. The rebirth of foreign non Arabs into Islam brought into scholastic arena different ideologies that were inclined to rationalist disposition and in some cases alien to the Muslim scholars. This created a confused scholastic atmosphere generating controversies among the scholars.

Furthermore, the translation of foreign philosophical and ideological works like that of Aristotle and Persian and Roman civilization introduced foreign methodologies for deducing laws, which were either alien or were irreconcilable with Islamic law. These new methods started to be accommodated by some scholars with ease and without caution.

In order to deal with the challenges and protect the religion from foreign influences, the scholars were forced to come up with institutionalized and systemized methodology for deducing Islamic law. For instance, there was a letter written to one of the rulers on the need to harness the practice of differing rulings in different parts of the Islamic empire.⁴⁹ The practice obtained in Iraq was different from the practice in Madina. What was allowed in Iraq was not permitted in Madina and so on. The altruistic effort exerted by the Muslim scholars

⁴⁶ Adeyemo (n 29) p.35 see also Hallaq (n 28).

⁴⁷ Eighth to Tenth Centuries CE

⁴⁸ Ninth Century CE

⁴⁹ Philips (n 38) 61.

at this stage remains hailed in the pages of history. There was palpable zeal in various fields of knowledge like *tafseer*, *nahw*, *hadith* etc. All these developed into specialized fields of knowledge with students seeking to learn. The strict adherence to schools was relaxed and it was no longer unusual to find a *Mutakallim* scholar becoming a student under a tutor from *ahl al-Ray* (people of opinion). Al Shaybani, a disciple of Imam Abu Hanifa who was of the Ahl al-Ra'y, travelled to Madina to study and memorize the Muwatta of Imam Malik. Imam shafi'i, the founder of the Shafi'i school, travelled to Hijaz to study under imam Malik and then to Iraq to study under shaybani who was a student of Imam Abu Hanifa. In fact, the history of the evolution of *Usul al-Fiqh* cannot be complete without the mention of Imam shafi'i and his immense contribution to the evolution of *Usul al-Fiqh*. Mere mention Imam Shafi'i and his work as a passing gist does great disservice to his efforts of bringing structure of all the previous works of eminent scholars on *Usul al-fiqh*. Discussion on his work will form another chapter for discussion. Suffice it here to say that he was declared as the founder of *Usul al-fiqh*⁵⁰. His book Al Risala (the Epistle) was a master piece on *Usul al-fiqh*. Imam Shafi'i's contributions are monumental in the history of *Usul al-fiqh*.

Imam Shafi'i was a student of Imam Malik and had lived closely to him till his death. Shafi'i had met a wealth of juristic work on methodology advanced by Imam Abu Hanifa and his teacher imam Malik. He arrived at the scene at a time when the works of these scholars were taken to be sacred. However, Shafi'i while mastering their works discovered discord and conflicts of methodology. Imam shafi'i sifted through these works using a standard system that he had articulated in his legal theory of *Usul al-fiqh*⁵¹. This was a period of authentication (the period of *Tashih*).

Shafi'i was determined to maintain the purity of the *Sharia* and the language of the Quran set standards for the exercise of *ijtihad* and expounded the rules of *khāss* and *āmm*, *nāsikh* and *mansukh* and

⁵⁰ This has been contended by Hallaq in his work "Was Shafi'I the Founder of Usul al Fiqh. According to Hallaq the award of founder was rightly that of Surayj but Surayj's write up on Risala drew attention back to Al shafi'I, stealing the award from him.

⁵¹ Kamali (n 17) 4.

articulated the principles of *ijma* and *qiyas*.⁵² He also discussed the rules relating to accepting a *khabar al-whahid* and its value in determining *ahkām*. Shafi'i also disregarded *istihsan*.

The Risala of Shafii did not cover every principle regarding *Usl al-Fiqh*. Some of these principles he had articulated were further marshaled out by other jurists from Hanafi and Maliki schools e.g. *Urf*, *Istihsan* were added and *Ijma* was reduced by the Maliki jurist to the Madina consensus.

Shafi'i attempted to combine the methods of *ahl al-Ray'* and that of the *ahl al-Hadith* in his work. It was much later that Shafi'i's most loyal disciple, Surayj put forward a strong argument for Shafi'i on combining the two methods and made commentary on the Risala that the work of Shafi'i the Risala gained prominence⁵³. This style was to be used by other jurist and was the period of convergence. The period after this did not witness much progress in the development of *Usul al-fiqh*. Meaning there was shortage of literary work discovered in 4th century. Most of the writings during this time were rejoinders protecting a school and its imam vehemently or disagreeing with the imam of other schools. The work by Shafi'i was considered though without contention as the first work on *Usul al-fiqh*. The Risala was written about two centuries before other works by scholars such as Surayj, tabari, ibn Khuzaima, ibn Mundhir and al-Ash'ari specifically devoted to *Usul al-fiqh* as a science of its own standing identity emerged. This was the period of maturity of *Usul al-fiqh*. It may be true to say that while Shafi'i was the first to write a documented thesis on issues pertaining methodology, the later scholars marshaled out *Usul al-fiqh* as a standing subject or genre in its right.

The Schools further sophisticated their methodologies. Strict and restricted form of *Ijtihad* was developed based on the school principles. The emergence of jurists within the schools was seen. The earlier *Ijtihad* by the imams of these Schools was abandoned for this new style of *Ijtihad* which was narrowed to the existing principles of the school. Where these jurists could not find existing principles or where the evidences used by the imams were weak, these jurists had to look

⁵² Ibid.

⁵³ Wael Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 3-41.

outside their schools. This was the first phase of the decline of *fiqh*⁵⁴ i.e. the period of *Taqlid* first stage set in, sometimes referred to as *insidad baab al-ijtihad*. This decline had more impact on *taqlid* than it did on *Usul al-fiqh*. In fact, *Usul al-fiqh* gained prominence because its principles were widely accepted and embraced in making *Ijtihad* based on the already established principles of the schools.

The growing political success of the Abbasid dynasty which broadened the borders of the empire had its own effect on growing scholastic activities. For instance, with the passage of time, there came about a divide between the rulers and the scholars. The scholars were persecuted for making rulings that did not go down well with the rulers. The Mu'tazilites became the most patronized by the rulers. This prompted scholars to begin collecting and compiling hadith and other fields of knowledge that were hitherto reduced to writing during the early period of the Abbasid dynasty. With this codification, Islamic law started to lose its flexibility and there was an over dependence on the books written by the imams of the *Mazahib*; the Hanafi, Maliki, Hanbali, Shafi'i and possibly Zahir Schools.⁵⁵ This was the ripening of the period of *taqlid* which lasted for about three centuries from the mid fourth century of Hijra.⁵⁶ *This closing of the gate of ijtihad as it was called amounted for the demand of the taqlid... which now came to mean the unquestionable acceptance of the doctrines of established school and authorities.*"⁵⁷

The art of *ijtihad* was downsized to *taqlid*⁵⁸ in the following manner;

- i. They try to expound the reasons for the rulings of their imams thereby giving more articulated arguments on the rulings;
- ii. They further entrenched the rules implored by their imams and in the process put the final finishing touches of *Usul al-fiqh* in bringing it to completion. These were however criticized for radical fanaticism.

⁵⁴ Jamal N "Origin and Development of Islamic Law in Herbert J. Liebesny, Majid Khaddur I (eds), *Law in The Middle East* (United Kingdom: Law book Exchange 2008).

⁵⁵ Other schools died a natural death due to lack of organizational skills.

⁵⁶ Jamal (n 50) 13.

⁵⁷ Sacht (n 42).

⁵⁸ Prawitra Thalib (n 12).

- iii. The differing opinions of the imams were researched to find out the reasons for such differences in one school and set out their order of priority

Despite efforts to break the fixation not much development was achieved advancing *Usl al-Fiqh*. It was at this time that Imam Ahmad bin Hambal developed his Book; Musnad, and the two Sahih Books by Bukhari and Muslims were composed. Late in this period of time, intellectuals like Al Baqilillni and Abdul Jabbar, al Ghazali, Shadhali, ibn Haddad, ibn Hasan al Tanukhi, Rafi'i al-Razi and al-Suyudi of tenth century after Hijra. These jurists wrote a lot of books, interpretations and commentaries⁵⁹ and are also argued to be *Mujtahids* of their times even though *istiddad* baab al *ijtihad* was contemplated.⁶⁰

The second phase of *Taqlid* manifested towards the end of the twelfth century AH.⁶¹ At this time, the door of *ijtihad* was closed. Judges in this phase of *Taqlid* were restricted to use only the rulings of the past imams of the Sunni schools. Judges and jurists became blind followers and ceased to be *Mujtahideen*. Jurists then focused on writing books such as *mutoon* (text), *shurooh* (interpretation) *hawashi* (margins of interpretations) etc, Jurist like ibn Taimiyya and his student also ibn Qayyim tried to rekindle the exercise of *ijtihad* but by then much of the spirit and enthusiasm for *ijtihad* had died down.

Coincidentally, this phase of *taqlid* was also the period of colonialism. Colonialism definitely put a final endorsement stamp on *taqlid*. Colonial masters brought their foreign laws which were imposed on the colonies. Penal codes were enacted doing away with the Islamic law that was in use and in practice in the colonies. For instance, there were penal codes in India and Sudan. The Nigerian penal code was copied from Sudan. This brought Islamic law down to its knees limiting its application to lower courts and to Islamic personal law using Maliki school of thought.

⁵⁹ For more details on the works by various scholars please read Tah Jabir Al Alwanis *Usl al-Fiqh al- Islami (in Arabic) [Source Methodology in Islamic Jurisprudence]* (London, Washington: The International Institute of Islamic Thought 2003).

⁶⁰ Ibid.

⁶¹ Nineteenth Century CE.

3. The Gate of Ijtihad in the Contemporary Application of Islamic Law

Jurists divided into three categories as to the closure of the gate of *ijtihad* (*insidad baab al-ijtihad*) in the interpretation of Islamic law;

The first category are of the view of actual closure of the gate of *ijtihad*, this can be understood from the wording of al-Rafi'i, and Shafi'i,⁶² Maliki and Hanafi Schools.⁶³ Imam al-Ghazali in his book 'al-Wasit' says 'the generation is free from an independent Mujtahid'.⁶⁴ Imam al-Zarkashi in his book 'al-Bahr' report from Akthareen that, it is possible for a nation to be free from a *mujtahid*.⁶⁵

The second category rejected the closure of the gate of *ijtihad*, they include Hanbali School, they said, a generation could not be free from *Mujtahid*, and this is the view of Ishak and Zubair.⁶⁶ Writers like Hallaq in the 1980s and Iqbal in the 1930s have denied both closure and narrowing of the gates of *ijtihad*. Their arguments are based on historical examples of practical *ijtihad* being continually exercised. In support of his Thesis, Hallaq sets forth the following four points:

- (1) Jurists who were capable of *ijtihad* existed at nearly all times;
- (2) *Ijtihad* was used in developing positive law after the formation of the schools;
- (3) Up to the fifth century of the hijra calendar there was no mention whatsoever of the phrase "insidad bab al- iitihaa" or of any expression that may have alluded to the notion of the closure; and
- (4) The controversy about the closure of the gate of *ijtihad* and the extinction of *Mujtahid* prevented jurists from reaching a consensus to that effect.⁶⁷

The third category, are middle ground, contemporary Jurists like Muhammad Ali in 1936, Kamal Faruki in 1954 and Mufti Muhammad

⁶² Muhammad bn Muhammad bn Aliyu bn Muhammad al-Shawkaniy, '*Irshad al-fuhul ila Tahqeed al-haqq min Ilm al-Usul*' (Darul Kitab al'Arabi 1999)2 211 -215.

⁶³ Shaista P. Ali-Karamali, Fiona Dunne, 'The Ijtihad Controversy' (1994) 9 (3) *Arab Law Quarterly* 238-257.

⁶⁴ Cited by Shawkany (n 57).

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Hallaq (n 49) 3 – 41.

Shafi who are of the view that, gate of the *ijtihad* neither closed nor opened.⁶⁸ The Mufti Shafi essentially opined that *ijtihad* could be exercised only in cases of new impression whose solutions had not been hitherto determined by *Ijma*⁶⁹

4. Conclusion

Usul al-fiqh emerged to be a methodology for jurist in the field of Islamic law. It has brought in rules for deduction of law and originality of *fiqh*. Even though *Usul al-fiqh* remains, however, it will not be wrong to say that the technical use of it has died with *taqlid*. However, despite the claim for the closure of *ijtihad*, the study of *Usul al-fiqh* is very important as it add value to the understanding of the sources of the *Sharia* and their application. The energy and effort exerted by jurists to safe guard the purity of the *Sharia* shows the high level and esteemed position that a person must hold on scholars in their interpretation of the texts. It is argued that most of the issues facing the Muslim world today could be conveniently addressed via the use of the *ijtihad* tool. This steered more debates into the arena of *taqlid*. The question will now be how do modern jurist interpret the law and apply it in states that are western driven?

It is found that classical jurists, including four sunni Schools, allowed the exercise of *ijtihad* in legal interpretations. However, the supporters for the actual closure of gate of *ijtihad* do not foreclose the gate but they are against *ijtihad al-mutlaq* (outright) and the establishment of new school. Therefore, *ijtihad mugayyad* (restricted) is not only allowed but mandatory especially in novel issues by a qualified jurist in any generation. Thus, this paper recommends for the observance of the utmost interest by adhering to *Magasid al-Shari'ah* (objectives of Islamic law) and *qawa'id al-fiqhiyya* (Shari'ah Legal Maxim) in resolving legal issues in court of law and fatwa.

⁶⁸ Faruki, Kemal, *Ijma and the Gate of Ijtihad* (Karachi, 1954) 7-9.

⁶⁹ Ibid 9.