The Schools of Law

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Abstract:

The focal point of this study is the emergence of the classical schools of law in the formative period of Islam. This is followed by a discussion of the development of Islamic law. The attempt will be to study the first schools of law by looking at their founders, members of the schools, principles and thoughts.

There will be a review to some of the views of some Western Scholars dealing with the issue of the formation of the Islamic Schools of thought and some of Eastern Scholars, through this review, the differences among each point of view will be apparent. While the Eastern Scholars, mainly the Muslims, looked at it as a matter of Faith, the Westerns regarded it as a natural development of human laws.

Introduction:

Joseph Schacht wrote that it is impossible to understand Islam without understanding Islamic law.[1] Islamic law is a rigid system of law, derived from divine sources, or revelation.[2]

During the formative period of Islamic law, the Muslim jurists postulated that the portion of the law derived from the Qur'an and the Prophetic traditions (*Sunna*) provides the subject matter of the law.[3] The primary sources, the Qur'an and the *Sunna*, were not subject to change, though it was accepted that differing interpretations were feasible. The

[1] Schacht, Joseph, *and An Introduction to Islamic Law,* Oxford: Clerendon Press, (1964): 1.

[2] Mayer, Ann Elizabeth, "*Islamic Law: Shari'ah*," *Encyclopedia of Religion*, vol. 7 (1987): 431.

[3] Hallaq, Wael B. *A History of Islamic legal theories*, Cambridge: Cambridge University Press, (1997): 1.

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Qur'an does not explicitly address some areas of the law, such as the number and the performance of prayers, percentage of alms-tax, dowry and ablution. The interpretation of some cases is given on the bases of the teaching of the various schools of thought. A portion of the law developed from the derivative sources: *ijma'* (consensus) and *qiyas* (analogy).[4]

The Birth of Islamic Law:

During the 'Abbasid period (132-232/750-847) the judicial system evolved considerably.[5] The judge, under the Umayyad dynasty and even under the caliphate, used to exercise his own discretion in cases which lacked a clear ruling from the texts. We will notice that the notion of *ijtihad* weakened,[6] especially after the four schools arose. The four schools are Maliki (d. 179/795), Hanafi (d.150/767) Shafi'i (d. 204/820), and Hanbali (d. 241/855).[7] The judge's authority became limited as far as he now had to abide by the principles of the four schools. The judge was required to be knowledgeable of the *madhhab* of the province in which he was residing in. If, for example, the judge is residing in Iraq he should give his judgment in accordance with the Hanafi *madhhab*.[8] When a litigant adheres to the

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[4] Calverley, Edwin E. *"The Fundamental Structure of Islam"*, *The Muslim World*, Vol. 29 (1939):373-4.

[5] al-Sayuṭī, *Tārīkh al-Khulafā'a*, Dar elma'refah Beirut.1417 -1996.pp. 267-268.

[6] Ali Ibrahīm Hassan, *al-Tārīkh al-Islāmī al-'Āmm*, Maktabat Anglo- Mesreyyah. 1959. p. 567.

[7] During that period some other school excited but of less importance to the purpose of this study.

[8] Al-Maqrīzī, al-Mawa'iẓ wa'l-I'tibar fī Dhikr al-Khīṭaṭ wa'l-Āthār, vol. ii (Beirut: Dār Ṣādr, n.d.) 333-334; Hassab I. Hassan, "Judiciary System," *I.Q.* 1963: 13; Ali Ibrahīm Hassan, *al-Tārīkh al-Islāmī al-'Āmm*, p. 567.

principle of one *madhhab* in a particular province, the chief judge should delegate a judge who belongs to the same school to arbitrate the matter.[9]

Some of the caliphs in the 'Abbasid period compelled their judges to produce judgments which worked in their interest and which legitimated their rule.[10] Many of these judges abstained from accepting the post of chief judge (Qadi al-Quda) fearing that the caliph might compel them into legal consultations which contravene the principles of the law. According to many sources, prominent jurists such as Abu Hanifa (d. 150/767), Shafi'i (d. 204/820) and Sufyan al-Thawri (d. 161/778), who were asked by the 'Abbasid caliph al-Mansur (136-158/754-775) to accept the post of judge, excused themselves from the caliph offer. Their refusal earned some of them the punishment of the state.[11]

As we observed during the 'Abbasid caliphs appointed the chief judges. The latter, set up a system whereby the chief judge would take his residence in the capital of the empire and assign judges to the Muslim provinces. Abu Yusuf (d. 182/798), Abu Hanifa disciple, was the first to receive the title of chief judge during Harun al-Rashid's reign (170-193/786-809).[12]

During the 'Abbasid period the system of verifying the good character of a witnesses based on outward criteria,[13] without regard to their hidden

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[9] Ali Ibrahīm Hassan, *al-Tārīkh al-Islāmī al-'Āmm*, p. 567.

[6] Ibid.

[11] Ibn Abi al-Dam, *Kitāb Adab al-Qaḍī*, (Beirut: Dār al-Kutub al-'Almiyā, 1987): 25-31; al-Kaṣṣāf, p. 133-134; al-Suyutī, Jalāl al-Dīn *Tārīkh al-Khulafā'a*, (1959): 259.

[12] Al-Maqrīzī, *al-Khiṭaṭ almaqrīzīyyah* .3 vols, Maktabat Madbouly 1998.Cairo.p. 333; Ibn Abi al-Dam, *Adab al-Qaḍī,* p. 29; Ali Ibrahīm Hassan, *al-Tārīkh al-Islāmī al-'Āmm*, p. 568.

[13] Q. 2: 282.

character, was introduced.[14] Cases and decisions were not recorded in the earlier period; specifically in matters related to legacies, were now recorded under the 'Abbasids. This allowed judges and jurists to refer to them if they needed inquire to make their judgment. This might be considered an additional requirement for 'Abbasid judges, a feature which distinguishes them from previous judges who relied on personal discretion. It can be conclude, therefore, that the 'Abbasid judges worked under more limitations.[15]

The following pages will be reflecting upon the *madhahib* with respect to the view of Muslim and non-Muslim scholars from the formative period of Islamic law to the time where Islamic jurisprudence occupied the interest of classical jurists who they have contributed to the shape of Islamic law. Also, the view of non-Muslim scholars will be incorporated especially those who have keen interest in the evolution of Islamic Law.

The Classical Schools of Law

a. Maliki School
b. Hanafi School
c. Shafi‘i School
d. Hanbali School

The *Madhhab*, Pl. *Madhahib* (Schools of law) are a unique Islamic phenomenon and Islamic term that refer to a school of thought or religious jurisprudence (*Fiqh*) with Sunni Islam. Each of the *Ashab* had a unique school of jurisprudence, but these schools were gradually consolidated or placarded so that there are currently four recognized schools: Maliki, Hanafi, Shafi‘I and Hanbali. Shi‘ite Islam has its own school of law: The Ja'fari, founded by the sixth Imam Ja'far al-Sadiq.

[14] Joseph Schacht, *The Origins*, p. 127.

[15] Ali Ibrahīm Hassan, *al-Tārīkh al-Islāmī al-'Āmm*, p. 567-570.

The first stage

The four Sunni schools are not generally regarded as distinct sects, as there has been great harmony amongst the scholars of the fourth schools through Islamic history. Sunnis believe that all four schools have the correct guidance, and the differences lie not in the fundamentals of faith but instead in finer judgment and jurisprudence, which are a result of the independent reasoning of the four Imams, and the scholars who followed them. Because their individual methodologies in interpretation and extraction from the primary sources were different, they come to different judgment on many matters. For example, there are subtle differences in the methods of prayer in the four schools. Yet, the difference is not such that separate prayers need to be held. In fact, a follower of any school can pray behind an Imam of another school without any confusion. It is not clear when the Madhahib came to have such a wide membership. Historians who refer to their growth in membership mention different periods. Madelung, in his survey of the spread of religious trends in Iran, argue that Hanbalism arrived to eastern Iran as early as the first half of the 2nd/ 8th,16 He observes that in Balkh, for example, Hanafism merged with Murji'sm "and the people of Balkh" were adherents of his (Abu Hanifa's) doctrine. According to Madelung, Hanafism continued to win new adherents in Iran and "the third /ninth century, Tukharistan and Transoxania became Hanafite. Hanafism here took on a distinctly populist character. I prided it to be the Islam of "the great mass (al-sawad al-a'zam). [17]

[16] Madelung, W, *Religious Trends in Early Islamic Iran.*(Albany State University of New-York,1988),26

[17] Ibid. 20, Madelung's observation is corroborated by N.Tsafrir "*The Beginning of the Hanafi School In Islam*" Islamic law and Society, 5:1 (1998).

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Another historian who assumes that membership in the *madhahib* permeated the whole of the Islamic community is Hodgson, who remarks about the formation of the *madhahib* in the 2nd/8th century: "Each Muslim had to choose which *madhhab* school he would follow unless he was a great enough scholar to work out his own way (as did the historian al-Tabari)[18].

Other historians refer to the 4th/10th centuries a period in which the *madhahib* mobilized a wide following among the lay population (although they do not refer to, or argue against, an earlier periodization of this development). For the most part, these historians emphasize the connection between the school of law and local factional politics. *Muhadith* (traditionalist) depicts Hanbalis of Baghdad in the following manner:" In early fourth century Baghdad the Hanbalis were the most active of all religious groups in mounting popular demonstration".[19] State of scholarship; the dual nature of the *madhahib*, i.e., wide affiliation of members and specialist legal discourse, has led historians treat the *madhahib* as socio-political movements that developed different modes of interaction with their surrounding environments. Their studies focus on the participation of the *madhahib* in local as well as caliph's politics, their social networks, [20] and their involvement in theological controversies.[21] These workers demonstrated that the *madhahib* were an important agent

[18] Hodgson, M, G. *The Venture of Islam*, 3 vols, Chicago: The University of Chicago Press, 1974), vol.1, 535.

[19] Mottahedeh,R, *Loyalty and leadership in an Early Islamic Society.*(Princeton: Princeton University Press,1980),25

[20] Ibid. *Loyalty*, 135,150

[21] Madelung, W. *The Early Marji'a in Kharasan and Transoxania and spread of Hanbalism*, See Makdisi, *The Rise of Colleges ,Institutions of learning in Islām and the West.* Edinburgh Edinburgh University Press.1-9

in Islamic social, political and intellectual life and conversely that social political and intellectual circumstances influenced the development of the *madhahib*.

R. Bulliet's Patricians of Nishapur (which was the birth place of Ibn al-Mundhir), an important study of the manner in which *madhahib* were integrated into local politics, examines the hostilities between the Hanafis and the Shafi'is in Nishapur, between the $4^{th}/10^{th}$ and $6^{th}/12^{th}$ centuries. Bulliet opens chapter three (" Hanafi and Shafi'is ") with a fascinating question: "When a chronicler states that partisans of one legal interpretation fought to the death with partisans of anther legal interpretation in the streets of one of the great cities of Iran or Iraq, what does he actually mean? [22]. Perhaps the Hanbalisn and Shafi'isim in Nishapur were not merely groups of scholars who shared a legal outlook, but local political factions as well since Bulliet does not find echoes of legal Argument in the struggle, he is under the sensible impression" that hidden beneath the labels of the law schools some other conflict was being played out.[23]In Nishapur, he concludes, Hanafism and Shafi'ism had the dual meaning of "modes of legal interpretation "and political parties[24]

Social historians have also examined the spread of *madhahib* in various regions of the Islamic world, focusing on some won adherents in deferent regions while others did not. Should their successor failure be attributed to legal doctrine alone, or did other historical circumstances come into play?

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[22] Bulliet,R. *Patrician of Nishapur*, Cambridge :Harvard University Press, 1977 vol.31:28

[23] Ibid, 30, Nishapur was not an exception. Between the $4^{th}/10^{th}$ and $6^{th}/12^{th}$ centuries, the Shafi'is and Hanafis were engaged in a constant struggle for control throughout the region and were active in the political arena.

[24] Ibid 38

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A second group of scholars approach the *madhahib* from the angle of legal doctrine, rather the body of substantive legal decision (*Furu'*) or jurisprudential principles (*usul al- fiqh*).[25]In both cases, historians of law consider legal doctrine as the determining element in the development of the *madhahib*. Another feature that characterizes the studies of legal historians is the considerable attention that they give to the formative period of the *madhahib* (2nd/9th centuries).[26]

Goldziher, who emphasized, *Usul al Fiqh*, in his study of the Zahiri *madhhab*[27] in its time, this inquiry into the history of the Zahiri *madhhab* was an important contribution to the field of jurisprudence. Goldziher approach to the formation of the, Zahiri *madhhab*, i.e., many historians, adopted emphasis, on doctrine, as the determining force in *madhahib* formation in Islamic law. At the beginning of the ninth century, the Muslim jurisprudents had not clearly divided themselves amongst the Hanafi, Maliki and the Shafi'i schools, but mainly between the adherents of *ra'y* (rational opinion) and the adherents of Hadith. Mutual suspicion ran deep: the adherents of *ra'y* doubted whether the adherents of *hadith* were competent to make out the divine law. The adherents of *hadith* doubted even whether the adherents of *ra'y* were properly Muslims.

By the beginning of the eleventh century, most Muslim jurisprudents were adherents of the Hanafi, Shafi'i, Maliki, or some other school of law.

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[25] Goldziher. *The Zahiris, Their Doctrine and Their History*, tras.W. Behn (Leiden: E.J, Brill, 1971) Schacht. J, *"An Introduction to Islamic Law"* (Oxford: The Cambridge Press, 1964)

[26] See, for example, the articles that appeared in Islamic Law and Society, 3: 2 (1996).

[27] Goldziher, I. *The Zahiris*, xiii, for a clear statement regarding the impact of doctrine on school formation, see: I, Goldziher, *Introduction to Islamic Theology and Law*, Trans. A. and Hamori (Princeton, Princeton university Press, 1981). 47

They may have disagreed almost as much as Muslims of two centuries before over details of the law. George Makdisi has recently argued that we should no longer talk of-school of law -except in the pre-classical period, before the tenth century. But neither the schools, nor did the Guilds literally translate *madhahab.* Guilds had the positive advantage of implying something about the *madhhab*'s structure and function. The term Guild suggests parallels with later institution of higher learning in the Latin West, starting with Inns of Court, which Makdisi believes were directly influenced by Islamic precedents, transmitted especially through Norman Sicily and the Crusader states.[28] There is no easy way to tell when the school of law came to be. None of the schools of law is associated with anything like a datable Charter. Neither are any of the Sufi orders or rather institution of Islam; the Muslims recognize no community. The literature of jurisprudence is very large, but Muslim writes have seldom directly addressed the question of law. When the schools began, it was something of an embarrassment that schools even began at all; they did not present al-Naysaburi as the inventor of epochal of the compromise theory of jurisprudence, as an admiring Western historian might do.

Joseph Schacht, in his pioneering work, on the *Origins of Islamic Law*, observed that what is known as the classical theory of Islamic Law was the result of the efforts of Shafi'i (d. 204/820), who brought together two stands of thought in early Islamic intellectual history concerning the prophetic role in law. Schacht argued that "the ancient school of law "did not, at first, make a distinction between prophetic traditions and other traditions, and they understood Sunni as the living traditions of the community, based on personal reasonable reasoning and common sense.

[28] Melchert. Christopher, *The formation of the Sunni schools of Law 9th- 10th-Centuries*. C.E. Vol.4.1997.xviii.

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Then another tendency emerged which attempted to define the law as transmitted traditions of the prophet, leaving no room for personal reasoning, Schacht's account of the early phase of Islamic law reformulates the well-known distinction between *Ahl al-ra'y* and *Ahl al-hadith*: Schacht replaced the original actors with new ones, i.e. with 'the old school of law' and the newly emerging traditional opponents. According to Schacht, it was Shafi'i who introduced a new synthesis by pouring prophetic traditions and personal reasoning into a single mould. Thereby inaugurating a new era in the Islamic law,[29] Schacht emphasized that this new stage in the history of the Islamic legal tradition provoked opposition from representatives of the early school of law.

Schacht knew the legal sources better than any predecessor among Western scholars, and his work on Islamic Law, particularly the context and significance of al-Shafi'is work marks the greatest advance since Goldziher's. Much remains to be done, but for the early period it will be done on the basis of Schacht. Reading Schacht with a view to determining when schools emerged, two limitations become apparent. First, Schacht treats the period after al-Shafi'is not in the same depth and detail in which he treats the period that ended with him. Some of his remarks on developments in the third century (A.d.816-913) are acute indeed. For example, he points out the traditionalization of Hanafi doctrine during that time. But the most important work on the school of law since Schacht is that of George Makdisi, in the 1960's he published important articles on the institutions of learning and on Ash'ari theology,[30] his work sharpened

[29] On the early development of theory and Shāfi'ī role in it, see J. Schacht, Origins of Muhammadan Jurisprudence (Oxford University Press, 1950).

[30] George, Makdisi. *Muslim Institution in Eleventh century. Baghdad*, bulletin of the School of Oriental and African Studies24): (1961) 1-56 "*Ash'ari and the Ash' rites in Islamic Religious History*", Studia Islamica, no (1962), 37-80,18 (1963) 19-39

much further the idea of how the school must operate. Schacht argued that "the ancient schools of law" did not, at first, make a distinction between prophetic traditions and other traditions, and they understood Sunna as the living traditions of the community, as mentioned in the Makdisi work, the school of law is a body of men with a regular approach for transmitting their doctrines with emphasis on the school as a body of doctrines.

N. Coulson identifies al-Shaybani - as the true founder of Hanafi School. He goes on to say that Shafi'ism became a school in the generation after al-Shafi'i, when only minority were immediately converted to his views, (I would call this an outright error) Aḥmad founded the Hanbali School by collecting his *Musnad*.[31] Recent Western scholarship has suggested that Schacht exaggerated that role played by Shafi'i in this development. Hallaq has argued that Shafi'i played a minor role, if any, in the development of Islamic legal theory, which later came to be known as *usul al-fiqh*. Schacht and Coulson set forth a more complex formation of analysis;[32] they considered legal doctrine the decisive force behind the development of the *madhahib*. Schacht identified two stages in the development of *madhahib* formation: First, the "ancient schools" then "the late school of law"[33]. During the first stage, each of the "ancient schools" worked out a "Consensus of scholars" that was acknowledged as the "Living tradition" of their city. According to this description, the ancient school of law had two characteristics: The first was a shared doctrine, "the average opinion of the representatives of a school. The second was a shared geography, meaning the members of a *madhhab* come from one region. Schacht's theory has long been accepted by scholars writing on the early period of Islamic law .The only exception to this

[31] Melchert, C, *The Formation, Introduction,* pp, xxiii and P.161

[32] *Ibid.* 162

[33] Nimrod Horvitz, *School of law and Historical context: Re-Examining The Formation of The Hanbali Madhhab*, "Islamic law and society, 7,1[2000]: 42-46.,

statement is Nimrod Huruvitz[34] which appeared after the completion of the present study. Huruivtz argues though incidentally in general terms that the geographical schools are an artificial historiograhpical category that has less substance to it than is conventionally though. Its tenaciousness is exemplified by what is thus far the most important study of school formation, that Christopher Melchert described in his 1997 work, Melchert accepts the existence of regional schools, and in at least one full chapter, discuses the transformation "from regional to personal school "Melchert argues that this transformation was the result of the challenge posed to the early Hanafi jurists, who belonged to the rationalist camp (*Ahl al- Ra'y*). Melcher's explanation is an attempt to solve a non-existing problem and, in a less than satisfactory manner, Melchert commits the same mistake as Schacht when he posits an anonymous regional doctrine which he forth more declares "vague" in nature.[35]

The second stage

The second stage, that of "the later school of law," came about as a result of jurisprudential controversies, most of which evolved around Shafi'i, and his criticism of the "ancient school". Schacht's depiction of the developments that occurred after Shafi'I, i.e. the formation of the Hanbali and Zahiri *madhahib*, stresses the jurisprudential debates that took place within the Traditionalists milieu which includes the Hanbalis, Zahiri, Shafi'i and independent scholars who tended to rely on *hadith* and were wary of *ra'y* (rational opinions) such as Ibn al-Mundhir and others. In al-Subki's estimation, Ibn Surayje differed as often as al-Muzani with the Known position al-Shafi'i, more often than the great Shafi'i jurisprudents of the eleventh century; however he differed much less often than his contemporaries Muhammad Ibn Nasr al Marwazi., al-Tabari, Ibn

[34] Hallaq. W, *From Regional To Personal School Of Law*?, Islamic Law and Society 8,1 [2001] 3,20

[35] Melchert, C, *The Formation* ,p. 92

Kuzaymah, and Ibn al-Mundhir. That is, he started a trend toward closer adherence to Shafi'i had tough, reversing the tendency f the looser Shafi'i school of his time.[36] This argument, reflecting those jurisprudential disagreements, is a fine example of weight that historians of the early stages of *madhab* formation placed on doctrine. The term "ancient schools of law" is pivotal in any modern account of the history of law.[37] Due to its centrality it is beneficial to be reexamined (which has been done) by Hallaq. According to Hallaq, legal theory proper owes little, if anything, to Shafi'i and was developed only at the end of the third and beginning of the fourth century A.H. He based his conclusion on the fact that the first so-called *usul* work, *al-Risala*, by Shafi'i was not the subject of commentaries or refutations, a common feature of Islamic scholarship already in third century.[38] Among recent contributions from specialists, Hallaq's treatment of the end of *Ijtihad* stands out [39] perhaps this forthright article will at last put an end to careless talk of "The closing of the gate of *Ijtihad*". In as much as *Ijtihad* means going over the sources in order to answer a juridical problem, that gate cannot close so long as any Muslim jurisprudent delivers opinions. He also makes valuable suggestion concerning the formation of school of law; he locates that formation in the late ninth and early tenth centuries, which subsequent research has confirmed. His characterization of the work of al-Khallal, and other jurisprudents of the

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[36] Hodgson, M, G, S, *The Venture of Islam*, vol.1: 335

[37] Hallaq, W, "*Was Shafi'i Master Architect of Islamic Law?" International Journal of Middle eastern Studies* 25 (1993): 587-607.Hallaq reiterates this position in his recent work, *history of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1998), 5-30

[38] Ibid

[39] Hallaq, Wael. "Was *the Gate of Ijtihad Closed*?" *international Journal of Middle East Studies*.16 (1984): 3-41.

time as inventing doctrine and projecting it backward projection. One idea of Hallaq is that discussion on its own is an occasional backward projection, he assumes, in the classical Literature of usul al fiqh, that analogy was essential to the practice of Islamic law. He is thus to misrepresent the possibilities of the Zahiri school, which was abandoned merely disagreed with the later orthodoxy. Did Ibn al-Mundhir belong to the streams of this school? Makdisi has identified three stages in the development of schools of law: the regional school, the personal school, and the guild school, which, several historians had declared that guilds, not found in Islamic world before the late Middle Ages. Makdisi shows that their definitions, particularly, (that of my own teacher Gabriel Bear. from the Hebrew University of Jerusalem), perfectly fit the legal Fatwa; it regulated a profession, the practice of law (including both the teaching of law and issue of juridical opinions. Was organized city by city, had its local chiefs, and soon. With his sharpening of definitions, the tasks of determining when the school originated become much easier. (Melchert calls the classical).[40]

The most important book of the past decade is Norman Calder; he examines a series of early texts and rebates many of them. He casts various doubts on attributions to the eponyms of the school, particularly Abu-Hanifa, Malik and Shafi'i, stressing contradictions in the texts. He finds instead that the books traditionally attributed to the eponyms were evidently worked up over time by informal schools that are circles to confirm earlier suggestions that the school of law did not achieve their classical form until the tenth century. Recently, N. Calder has questioned the authorship of *al-Risala*, asserting that the content of this text does not allow us to ascribe it to Shafi'i and that it probably was a product of the

[40] Melchert,M, *The Formation, Introduction* pp, xxv

late third century, [41] Hanafi, and other school of law. Two centuries before, however, the principal struggle among jurisprudents had been that between *Ashab al-Hadith* or traditionalists and *Ashab al-Ra'y*; that is between proponents of entirely scriptural authority in theology and law and more of less rationalistic jurisprudents. The traditionalists had separated out from *ashab al-ra'y* in the later eighth century. Traditionalism enjoyed a spectacular triumph when the Caliph al-Mutawakkil rescinded every last measure of the Inquisition 237/853 and the intellectual descendants of acceptance only by imitating certain of the forms of the traditionalists. Yet it was a sharp struggle, in the later eighth century and prevailed was a compromise between the two extremes, regulated by the institution of the Guild school of law.[42] The split between, *Ashab al-Hadith*, and *Ashab al-Ra'y*. Hadith reports from earlier authorities are a principal foundation of classical Islamic al law.

They always come with attached chains of transmitters (*isnads*) in the form 'So-and-So related to me, so-and-so related to me, so on so back to the text (*matn*) itself, a statement of what the Prophet, or a Companion, or from someone from the following generation, a Successor said or did in a particular situation. From the Later eighth century to the beginning of the tenth, there raged fierce controversy between those who would found their jurisprudence exclusively on *hadith, ashab al-hadith* or traditionalists, and those who reserved a leading place for commonsense *ashab al-ra'y*. The Controversy concerning orthodoxy as well as non-orthodoxy making way to the theological debate to continue through most of the Middle Ages. There is no easy way to tell when the school of law came to be, none of the schools of law is Associated with anything like a datable Charter.

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[41] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Crandon Press.1993). p. 242.

[42] Melchert, C., *The Formation*, pp̄xviii

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Neither is any of the Sufi orders or other Institutions of Islam; the Muslim recognize no authority that might issue such charters, beyond the consensus of the community, the literature of jurisprudence is very large and wide, but Muslim writers have seldom directly addressed the question of how and when the schools began. After all it is something to go back to the beginning .The disciples of al-Shafi'i did not present him as the inventor of an epochal compromise theory of jurisprudence, as an admiring Western historian might do, but as the renewal of his age, acting in the tradition of a revered Caliph from a century before. Ibn –Khaldun (d. 806/1408) is a notable exception, devoting a chapter of his prolegomena to the origins of the various clods of law. The Treatment done by modern scholars bear the impression of this discussion, He begins with the jurisprudents of Iraq and the Hijaz, the former skillful at analogy *qiyas*) the latter knowing much *hadith*. The foremost of the Iraqis was Abu Hanifa. On him and on his disciples the schools became fixed (*istaqarra*). Similarly, the foremost of the Hijazis was Malik. This is very close to Joseph Schacht. Schacht explanation of how the old regional schools became personalized, as the followers of Abu Hanifa, chiefly by their literary activity. Made themselves the sole surviving fraction of the Kūfans, while the followers of Malik similarly transformed themselves into the whole of the Hijaz School.[43] Later, says Ibn- Khaldun, al-Shafi'i blended the doctrine of the Hijazis (*mazaja tariqat ahl al –Hijaz*) with that of the Iraqis to produce his own school.[44]

The distinguishing feature of a school was a body of distinctive juridical opinions. A School was formed when a body of opinion was

[43]Schacht J, "*The Schools of Law and Later Development of Jurisprudence*" Law in the Middle east, ed. Majid Khaddurian and Herbert J. Liebesny (Washington, DC: The Middle East Institute, 1955)p. 63.

[44] Ibn Khaldūn, *al -Muqaddimah*, p. 448

collected and ascribed to a particular teacher.[45] The mechanism by which there came to be four schools. Not more or fewer were *taqlid* (imitation), speaking on someone else's authority. Herby one does not search the sources for one's own answer to a question (*ijtihad*) but merely repeats for the opinion of formatter jurisprudent." *Taqlid* " in the center came on these four; those who spoke on the authority of others died out.[46] This is very close to the recent explanation of George Makdisi stressing that a school died out at the point when advocates for it were no longer to be found.[47] Ibn Khaldun goes on to explain that. Jurisprudents stopped trying to come up with their own solutions. When the ramification of technical terms became too great; when it became difficult to reach the rank of *ijtihad*, and when they began to fear to depend on the unqualified and entrust worthy.[48] This is to Joseph Schacht's account of why the formation of new schools came to a halt; that after about A.D. 900, all the essential problems had been solved and nothing was left to do but to elaborate the minutiae.[49] By Ibn- Khaldun own account, Malik related only 300 *hadith* reports in his *Muwatta*; witch included all that he considered sound, whereas Aḥmad Ibn Hanbal related 30,000 in his *Musnad*.[50] Schacht always emphasizes the similarity of Iraqi and *hijazi* attitudes towards the words *Ra'y* and *Hadith*, but still like Ibn- Khaldun, offers no account of where and how the traditionalist movement began. Survey of modern Scholarship on the school of law and their origins reveals much vagueness some downright error, but few answers more direct than what Ibn-Khaldun provides.

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[45] Ibid.

[46] Ibn Khaldūn. *al- Muqaddimah*. p 448.29

[47] George Makdisi. *The Rise of Colleges*. (Edinburgh University Press, 1981), p. 4

[48] Ibn –Khaldūn, *al- Muqaddimeh*. p. 448.

[49] 43Schacht, *School of Law*, p. 73

[50] Ibn Khaldūn, *al-Muqaddimah* 2: 404

The Schools of law

Ignas Goldziher speaks of foundation by disciples but does not describe in detail the formation of any school.[51] But D. B.Macdonald had big doubts about Goldziher, at first refers to their eponyms as founders of the historic schools.[52] This is impossible; even if we suppose that the operation of a school is signaled by no more than the existence of a body of juridical opinions. We cannot consider Abu Hanifa the founder of the Hanafi School, for he left no books. MacDonald acknowledges as much two pages later, than wittily states that Sufyan al- Thawri narrowly missed founding a separate school.[53] And he recognize that the formation of a school was chiefly the work of later men who worked up the eponyms ideas into a body of authoritative doctrine still, one finds in his account no dates and few names to characterize that decisive later work of forming schools.

S. G. Versey Fitzgerald seems often just as astute, building on a knowledge of Islamic law as actually practical in 20th- century; however, he goes little beyond the superficial traditional account when it comes to the writing, he refers to Abu Hanifa, Abu Yusuf, and al-Shaybani as the founders of the Hanafi school. Malik as the founder of the Maliki and allows only that Ahmad ibn-Hanbal could not, with his unreasoning hostility towards jurisprudence, have been the actual founder of the Hanbali School. How that school was founded he dons not say.[54] A. S. Tritton suggests that the Qur'an and Sunna (Prophetic norm) were the

[51] Ignas Goldziher, *Introduction to Islamic Theology and law Trans*, Andras & Ruth Hamori, Modern Classic in Eastern studies, (Princeton University, Press, n.d), p. 49

[52] Melchert. C, *The Formation* (*Introduction*), xviii

[53] Ibid.p. 96-97

[54] Vesey-Fitzgerald, S.G. *Muhammadan Law, As Abridgement According to Its Various School*. London: Clarendon Press, 193. pp. 11-16.

original sources of law, and like others he suggests that the Hanafi School was founded by his students, Abu Yusuf and Shaybani, the Maliki school by Malik and the Shafi'i school by al Shafi'i .The opinions of Ahmad Ibn Hanbal were set in order by his disciples.[55]

The *madhhab* was a body of legal existing alongside individual jurists who partook in the elaboration of that doctrine. It was the association of the two, brought about by a common, authoritative hermeneutic and a particular set of principles, that gave the *madhhab* its identity. The political, economic, social, educational and other identities and roles of the *madhhab* are historically and logically posterior to their legal identity. The doctrinal constitution was to give rise to and define them.[56] The Constitution of the *madhhab* is therefore dramatically different from the much simpler relationship that existed between the leading jurists and their followers during the second/eight century and a great part of the third/ninth. Hallaq accept that there is no doubt than that the notion of regional school is a fallacy: such networks as existed were neither regional nor had they the structure of school. At the same time, there is little reason to identify the later schools as personal. That the later schools were eponymous in no way entails that their doctrines were dominated by the teachings of their respective founders. And if these schools were not personal and their earlier counterparts, not regional personal schools. Instead, was from individual juristic doctrines to doctrinal schools.[57] We agree with Hallaq's conclusion that it is not only elimination of the problem of how to explain the transformation from the Islamic legal

[55] Tritton, A.S. *Islam: Belief and Practices*. London: Hutchinson Library, 1951 p. 60. 41

[56] Hallaq W, *Fron Regional to Personal School of Law? A Reevaluation*. (Islamic Law and Society 8,1) 25

[57] Hallaq .*in Authority* ,pp. 40-46

history. Positing the existences of geographical school creates an artificial diversion, even a fundamental disruption, in legal history during the first centuries A.H. and violates the spirit of legal scholarship which began to bloom some time during the second half of the first century as a highly individualistic venture and one which rested on personal *ijtihad* effort. And this is a fundamental point, for while developments in technical, methodological and substantive features of the law most certainly continued, the personal, individual *ijtihad* character of the law never diminished or ceased to exist, until, that is, the demolition of the Shari'a's infrastructures in the nineteenth and twentieth century's. The *madhhab*, in its most developed doctrinal sense, would never have come into being were it not for the need to control this thoroughly individualistic character of Islamic law. and some of the *madhahib* which have been abandoned are: The *madhhab* of Sufyan b. Sa'id al-Thawri (d. 97-161/715-777) the *madhhab* of al-Hasan b. Yasar al-Basri (d. 21-110/641-728) the *madhab* of 'Abd al-Raḥman al-Awza'i (d. 88-157/706-773) The *madhhab* of Ibn Thawr, Ibrahim b. Khalid al-Kalbi (d. 246/860) The *madhhab* of Muhammad b. Jarir al-Tabari, and the last one which has been abandoned is *madhhab* al-Zahiri.

This *madhab* was promoted by Abu Baker Ibn 'Abi al-Thalj (d. 325/936) and after him by his student al-Qadi al-Mu'afa Ibn Zakariyya al-Nahrawani (d. 390/999), among Imams of *madhab* are also to be counted "the *Fuqaha'* of the towns" mentioned by Abu-Zahrah in his book "*al-Madhahib al-Islamiyya*",[58] who used either to refer to the *Tabi'in of the Tabi'in* (follower of the followers) or practiced *ijtihad*. Among them are:

[58] Abū -Zahra. *Tarīkh al-Madhāhib al-Islāmyyah*, Dār al-Fikr al-'Arabī, Cairo,(n.d.), pp. 76-98

1) Abu al-Harith Layth Ibn Sa'd Ibn 'Abd al-Rahman al-Fahmi al-Khurasani (b. 94/712, d. 175/791) in Cairo. He was the Imam of the people of Egypt, both in *Hadith* and *Fiqh*.
2) Ibn Jurayj 'Abd al-Malik Ibn 'Abd al-'Aziz (80-150/699-767) he was the Imam of the people of Hijaz during his period.
3) Al-Majishun 'abd al- 'Aziz ibn 'Abdallah ibn Abi Salamah al-Madani al-Isfahani, *al-Faqih al-Theqa* "trustworthy" (d. 64/780) in Baghdad.
4) 'Othman Ibn 'Umar Ibn al-Taymi (circa. 145/762) he was a judge during the reign of al-Mansur.

Apart from these, there were other *madhahib*s popular in different regions whose Imams, in their lifetime and after their deaths, had been authorities consulted and referred to for *fatwa*s (legal opinions) and *ahkam* (rulings) with groups of followers, big or small among Muslims, their *fatwa*s were acted upon for a period of time, long or short, until they were abandoned, becoming obsolete with passing away of their followers. As to the *madhahib* that did not last for long, they were followed as were by a group of Muslims only during the lifetime of their imams, there were countless. These became extinct with the death of the followers. This is the case of Ibn al-Mundhir.

Conclusion:

Islamic law originated during the time of the Prophet, especially in Medina. Islamic law was derived from a divine source, the Qur'an, as the first and most important source. Secondly, the *Sunna* of the Prophet became an important source in cases the Qur'an did not contain solutions to certain problems. Thirdly, *qiyas* (analogy) came to be an important method of expanding the rules of the Qur'an and the *Sunna* to cover problems that are not addressed in these sources. This involved legal judgment by qualified Muslim jurists. The fourth source of Islamic law is *ijma'* (consensus) which

is constituted by the consensus of all the jurists of one generation.[59]According to the majority of the Sunni jurists once a legal principle won unanimous agreement, it becomes definitively established and cannot be challenged by latter generations.[60] Shafi'i refers to the consensus of the scholars as a method of explaining the law acceptable to the contemporary jurists. The later references to the consensus of the community at large, he probably tends to higher authority.[61]

Islam and Islamic law existed in the area where many people have different ways of life. Thus, Islam came and introduced different lifestyles that related and connected with a divine revelation. It recognized rules and practices in the pre-Islamic era, which were not expressly abrogated by divine legislation. It changed what needed to be changed in accordance with the command of the Qur'an and modified the pre-Islamic customs deemed to be acceptable.

Islamic law changed many laws which existed in pre-Islamic society, such as the law of inheritance. Allowed the female to inherit as stated explicitly in the Qur'an.[62]

Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. (Q: 4:11).

With regards to marriage, the Qur'an again explicitly prohibited the marriage from the same kinship and limited polygamy.

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[59] Mayer, E. A. "Islamic Law," *Encyclopedia of Religion*, Vol. 7 (1987): 347.

[60] Ibid.

[61] Majid Khadduri. *Islamic Jurisprudence: Shāfi'ī Risāla*, Baltimore: Johns Hopkins Press,1987: 38, 285-287.

[62] Ibid, 344-349

Forbidden to you (for marriage) are: your mothers, your daughters, your sisters, your father's sisters, your brother's daughters, your foster mother who gave you suckling, your foster suckling sisters, your wives' mothers, your step-daughters under you guardianship, born of your wives to whom you have gone in - but there is no sin if you have gone in them (to marry their daughters), - the wives of your sons who (spring) from your own lions, and two sisters in wedlock at the same time, except for what has already passed; verily, Allah is Oft-Forgiving, Most Merciful" (Q:4:22); "And if you fear that you shall not be able to deal justly with the orphan-girls, then marry (other women of your choice, two or three, or four but if you fear that you shall not be able to deal justly (with them) then only one. (Q:4:3).

There were other schools of law founded in the first centuries of Islam, some survived into the modern time such as Maliki, Ḥanafi, Shafi'i, and Hanbali schools. On the other hand, some schools did not survive, perhaps due to their fundamental views. Such as the Zahiri school founded by Dawud ibn Khalaf (d. 884). The latter schools stand for the insistence on the required literal adherence to the words of the Qur'an and the Sunna. Furthermore, human interpretations of their meaning were not binding.[63]

However, the field of Islamic law is not a field that one can cover in a few pages; it takes major effort to elaborate the basic principles of such a complex field. Generation after generation wrote and contributed to this field. The hope of this study is to only give an overview of the development of Islamic law, including its major schools and scholars.

[63] Ibid. 435; for more details information about the Ẓāhrī school, please see. Goldziher, Ignaz. *The Ẓāhirīs : Their Doctrine and Their History*. Translated and edited by Wolgang Behn. Leiden: E. J. Brill, 1971.

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تلخيص:

يهدف هذا المقال إلى تسليط الضوء على موضوع تطور المذاهب الإسلامية السنّيّة الأربعة في بداية الإسلام، ثمّ يجول المقال بمراجعة قصيرة حول الجدل القائم حيال تطورهذه المذاهب ، ونظرية تطور التشريع الإسلامي، كما ويهدف المقال –بنظرة ثاقبة– الى تحليل النظريات حول تطور المذاهب على يد المؤسسين من ناحية، والمبادئ والآراء والأفكار لكل مذهب ومذهب من ناحية أخرى.

كما ويقدم المقال عرضا لبعض آراء المستشرقين الغربيين الذين كتبوا حول الموضوع وآراء علماء المسلمين حيال نظرية تطور المذاهب الإسلامية، من خلال رصد هذه الأفكار ودراستها وتحليلها ونقدها، ثمّ الوقوف على الخلافات الجذرية بين الفريقين، حيث أن علماء المسلمين نظروا من الناحية الدينية العقائدية في حين ينظر المستشرقون إلى تطور هذه المذاهب كتطور للقانون الطبيعي الإنساني واختلاف وجهات النظر فيما بينها، مما أدى إلى ظهور خلافات بين المذاهب .

תקציר:

ההתמקדות במאמר זה תהיה הופעתן של האסכולות האסלאמיות הקלאסיות בתקופה של התהוות האסלאם.

אח"כ תהיה סקירה קצרה סביב הוויכוח לגבי התפתחות המשפט המוסלמי,כאשר המטרה היא ללמוד את האסכולות השונות של המשפט המוסלמי ע"י הסתכלות מעמיקה וניתוח ביקורתי למחשבות ועקרונות והדעות ששררו בתקופה ההיא.

תהיה גם סקירה לכמה מהדעות של המלומדים המערביים,ובמקביל נלמד את דעותיהם של הוגי הדעות המוסלמים לגבי התהוות האסכולות האסלאמיות,דרך סקירה זו ,ההבדלים בין כל צד יתחדדו ויהיו בולטים יותר,כאשר מלומדי האסלאם הסתכלו על התהוות האסכולות ממבט של אמונה ,ואילו המלומדים המערביים ראו בזה התפתחות טבעית של החוקים האנושיים בתקופה הראשונה של האסלאם.