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IS THERE A ḤANAFĪ *UṢŪL AL-FIQH*?*

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Özet

İslam Hukuk usulü ilminde iki farklı metodun olduğu genellikle kabul edilen bir olgudur: Kelamcı metod ve fukaha (ya da Hanefi) metodu. Ancak bazı Batılı yazarlar bu farklılığın dikkate alınacak bir fark oluşturmadığını iddia etmektedirler; bazı diğer Batılı yazarlar da bu farkı anlamlı buldukları halde fukaha metodunun Hanefi usul metoduyla ilişkisini yeterince vurgulamamışlardır. Bu makale fukaha metodunun Hanefi mezhebinde baskın yöntem olduğunu savunmakta ve bazı örnekler ışığında bu metodun ne anlama geldiğini ortaya koymaya çalışmaktadır.

Ibn Khaldūn in his *Muqaddima* notes that *uṣūl* works up to his time follow two patterns, the pattern of theologians (*ṭarīqat al-mutakallimīn*) and the pattern of jurists (*ṭarīqat al-fuqahā'*), the latter of which in fact refers almost exclusively to the Ḥanafī jurists[1]. Before him, the famous Ḥanafī jurist 'Alā' al-Dīn al-Samarqandī (d. 539/1145) in the introduction of his *uṣūl* work, *Mīzān al-Uṣūl fī Natā'ij al-'Uqūl*, mentions the same phenomenon:

> Know that *uṣūl al-fiqh* is a branch of *uṣūl al-dīn*; and that the composition of any book must of necessity be influenced by the author's beliefs. Therefore, as most of the writers on *uṣūl al-fiqh* belong to the Mu'tazila who differ from us in basic principles, or to *Ahl al-ḥadīth* who differ from us in questions of detail, we cannot

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1 Ibn Khaldūn,'Abd al-Raḥmān b. Muḥammad, *Muqaddima*, 455 (Bulaq: 1902-1903)

rely on their books. Our scholars' books, however, are of two types. The first type is of books that were written in a very precise fashion, because their authors knew both the fundamentals (*al-uṣūl*) and their application (*al-furūʿ*). Examples of this type are *Kitāb Maʾākhidh al-Sharʿ* and *Kitāb al-Jadal* by Abū Manṣūr al Maturīdī. The second type of books dealt very carefully with the meanings of words and were well arranged, owing to the concern of their authors with deriving detailed solutions from the explicit meanings of narration. They were not, however, skilful in dealing with the finer points of *uṣūl* or questions of pure reason. The result was that the writers of the second type produced opinions in some cases agreeing with those with whom we differed. Yet, books of the first type lost currency either because they were difficult to understand or because scholars lacked the resolution to undertake such works[2].

George Makdisi has recently[3], in his study on the Ḥanbalī scholar Ibn ʿAqīl, argued that *uṣūl al-fiqh* was originally part and parcel of the science of *uṣūl al-dīn* (or *kalām*), citing as evidence the examples of *al-Mughnī* by Qāḍī ʿAbd al-Jabbār (d. 415/1024), a Muʿtazilī theologian and *Uṣūl al-Dīn* by ʿAbd al-Qāhir al-Baghdādī (429/1037), an Ashʿarī theologian. Ibn ʿAqīl (d. 513/1119), according to Makdisi, opposed mixing *uṣūl al-fiqh* with theology and favoured the method of *fuqahāʾ*. Makdisi, however, did not mention the origin of the method of the *fuqahāʾ*, but stressed that Ibn 'Aqīl was the most important actor in this method. Although he does not explain what he means by the "method of the *fuqahāʾ*", he seems to associate it with the traditionalism of the Ḥanbalī school. Makdisi recognised the influence of Ḥanafī thought on Ibn ʿAqīl, but as far as *uṣūl al-fiqh*, and in particular, the two methods of this science, is concerned, Makdisi did not make any comment on Ḥanafī connection, despite the fact that the "method of the *fuqahāʾ* " is usually associated with the Ḥanafī school.

Aron Zysow in his study on Ḥanafī *uṣūl al-fiqh* de-emphasised the distinction between the juristic and theological approaches to *uṣūl* on the basis

2 Samarqandī, 'Alā' al-Dīn Abū Bakr Muḥammad b. Aḥmad, *Mīẓān al-Uṣūl fī Nataʾij al-ʿUqūl*, 1-3, ed. by Dr M. Zakī 'Abd al-Barr (Qatar: 1404/1984)

3 G. Makdisi, *Ibn ʿAqīl: Religion and Culture in Classical Islam*, 76-85 (Edinburgh: UP, 1997).

of his research on Samarqandī's *al-Mīzān* in particular[4]. W. Hallaq also does not pay a particular attention to that distinction in his general survey of Sunni *u●ūl al-fiqh*[5]. E. Chaumont, in his introduction to the translation of *al-Luma'* by al-Shīrazī, mentions that the phrase 'method of "*fuqahā*"' had been used before Ibn Khaldūn , by a Shafi'i jurist Abū Muzaffar al-Sam'ānī (d. 489/1096). Chaumont further asserts that this difference between these *fuqahā'* and *mutakallimūn* was in fact a reflection of power struggle between these two camps on the question of who would have the final decision in matters of religion[6]. The Khaldunian distinction of two methods of *u●ūl al-fiqh*, nevertheless, has been widely accepted by the contemporary Muslim writers on *u●ūl al-fiqh*[7].

It is the contention of this paper that the prevalent ◌anafī *u●ūl* tradition, up to the six Century of the *Hijra*, preserved a distinctive character, which can be characterised, on the one hand, by its insistence on keeping the science of *u●ūl al-fiqh* as an independent endeavour as regards to *kalām*, and on the other hand, by its excessive obsession with the substantive law (*furū' al-fiqh*), in that virtually every principle of *u●ūl* has been put to the test of Hanafi *corpus juris*, with a view to reaching a legal system comprised of consistent and coherent *u●ūl* (legal theory) and *furū'* (practical jurisprudence). This tradition, as far as we know, began to emerge as a literary genre with Abū Bakr A✚mad b. 'Alī al-Rāzī al-Ja●●ā●[8] (d. 370/981) in Baghdad and was later brought to Transoxania, the stronghold of the ◌anafī school. There it was remoulded by the likes of Abū Zayd 'Ubayd Allah b. 'Umar. al-Dabūsī[9] (d. 430/1038) into a

4 Zysow, Aron, 'The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory,' 3. (Ph.D. Dissertation: Harvard University, 1984).

5 Hallaq, Wael B., *A History of Islamic Legal Theories: An Introduction to Sunnī U●ūl al-Fiqh* (Cambridge University Press, 1997).

6 Chaumont, *'Introduction à la Lecture du Kitμb al-Luma' fâ U●ūl al-Fiqh du Shaykh Abū Is✚āq al-Shīrāzī al-Fīrūzābādī',*V-VIII, XXV (forthcoming)

7 See for example, Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*, 7-9, revised edition. (Cambrdige: Islamic Texts Society, 1991); al-Barrī, Zakariyya, *U●ūl al-Fiqh al-Islāmī*, 9-11 (Cairo: Dār al-Nah◓a al-'Arabiyya, 1982).

8 *Al-Fu●ūl fī al-U●ūl*, ed. 'Ujayl Jāsim al-Nashamī, 2nd edition, 4 vols. (Kuwait: Wizārat al-Awqāf wa Shu'ūn al-Islāmiyya, al-Turath al-Islāmī, 1414/1994).

9 *Taqwīm al-Adilla* (Istanbul MS Laleli No: 690).

new shape, which was then popularised by Abū Bakr Mu+ammad b. Ahmad b. Abī Sahl al-Sarakhsī[10] (483/1090) and Abū al-Ḥasan ʻAlī b. Mu+ammad b. Ḥusayn al-Pazdawī [11] (482/1089), the latter of whom finally left his indubitable print on it. From now on I will refer to this *u●ūl* movement as the dominant Ḥanafī *u●ūl* tradition, or simply the juristic approach.

The discourse in the above quotation from al-Samarqandī seems to be deceptive since it considers *u●ūl al-fiqh* under the general title of *furūʻ* (here it probably refers to jurisprudence as opposed to theology), in that both *u●ūl al-fiqh* and *furūʻ al-fiqh* are considered to be the branches of *u●ūl al-dīn*. Al-Samarqandī's book in fact falls outside this juristic tradition, a fact which explains the reason why A. Zysow had no problem in rejecting the idea of a distinctive Ḥanafī approach to *u●ūl al-fiqh* on the basis of this book. Al-Samarqandī's book actually reveals a desperate attempt to reconstruct the so-called Maturīdī *u●ūl* as a natural corollary to the Maturīdī *kalām*, situating it between the traditionalism of *Ahl al-+adīth* (probably meaning Ashʻarīs) and the rationalism of Muʻtazilīs.

As regards Makdisi's interpretation of ʻAbd al-Jabbār and al-Baghdādī, it does not seem to be convincing to conclude merely on the basis of such an encyclopaedic book of the former and a religious compendium of the latter that *u●ūl al-fiqh*, as a formal literary genre, had not gained its independence from *kalām* (or *u●ūl al-dīn*) at the end of fourth and beginning of the fifth centuries. These two authors wrote, as Makdisi notes, separate works on *u●ūl al-fiqh*. The fact that ʻAbd al-Jabbār's works of *u●ūl al-fiqh* were said to be excessively engaged in *kalam* debates proves no more than that the earlier an *u●ūl* treatise of this theological tradition is, the more full of theological points it is. Ja●●ā●'s *al-Fu●ūl fi al-U●ūl*, which was earlier than these two theologians', on the other hand, proves without doubt that *u●ūl al-fiqh* by the time of the middle of the fourth century had a formally developed structure independent of any other literary genre of the period. Last but not least, Jassas'

10 *Kitāb al-U●ūl* (*U●ūl*), ed. Abū al-Wafā al-Afghānī. 2 vols. (Haydarabad: Lajnat I+yā' al-Maʻārif al-Nuʻmāniyya. Reprinted in Beirut).

11 *Kitāb al-U●ūl*, published in the margins of *Kashf al-Asrār* by ʻAbd al-ʻAzīz al-Bukhārī, 4 vols. (Istanbul: 1307).

work proves that *u●ūl al-fiqh* had another important source out of which it developed, namely the science of jurisprudence itself.

George Makdisi's version of the two methodologies of *u●ūl al-fiqh*, however, deserves credit in terms of its reference to the origin of one approach towards *usūl al-fiqh*, namely the theological approach. This approach appears to have been harnessed in the field of discussion among the major schools of *kalām* including the Mu'tazila, Ash'ariyya and Maturīdiyya. His references to Qā◓ī 'Abd al-Jabbār and 'Abd al-Qāhir al-Baghdādī evidence the role of the first two schools in this respect. 'Alā' al-Dīn al-Samarqandī's reconstruction of the views of Abu Man●ūr al-Maturīdī (d. 333/944), however retrospective and reconstructive it may be, points out the fact that al-Maturīdī's interest in *u●ūl al-fiqh* was mainly governed by the same theological drive, though he was also a renowned *faqih* of the ◔anafī school[12]. Since we do not have his related works, we are unable to differentiate how much of al-Samarqandī's projection of al-Maturīdī's views is historical. As we have already pointed out, al-Samarqandī's reconstruction of his views aims to present him as a leader of a theological school rather than to describe his views.

The method of the *fuqahā',* therefore, must refer to the development of *u●ūl al-fiqh* in the circles of juristic discussion. Ja●●ā●' work seems to be the one of earliest and complete ones in this tradition. Al-Shāfi'ī's (d. 204/820) *al-Risāla* and 'Īsā b. Abān's (a leading ◔anafī jurist, died in 221/836) works on *khabar al-wā✚id* and *ijtihād-qiyās* all contributed to the development of this juristic tradition. We will see below that these jurists close the gates of their dispute to non-jurists. Turning to the point raised by Chaumont, his claim of the tension between jurists and theologians seems to be justified as the works belonging to either camp reveal examples of such a tension. For example, an Ash'arī-Shāfi'ī jurist al-Juwaynī (d. 478/1085) talked about *fuqahā'* in a pejorative way[13]. Similarly the above quotation from al-Samarqandī politely criticised *furū'*-oriented jurists. Two Shafi'i jurists, Al-Sam'ānī and al-Shīrāzī,

12 He wrote the famous *fiqh* work *Tu✚fat al-Fuqahā'*

13 Al-Juwaynī, Imām al-◔aramayn Abū al-Ma'ālī 'Abd al-Malik, *al-Burhān fi U●ūl al-Fiqh*, I, 220, ed. 'Abd al-'Azīm al-Dīb (Cairo Dār al-Anwār, 1400/1980).

two contemporaries of al-Juwaynī appeared to avoid the theological perspective. In one instance, Al-Sam'ānī accused the Ash'arites of innovating an idea which is alien to the *fuqahā'*[14].

This by no means suggests that there was no interaction between theology and law, and hence, between their respective methodologies. On the contrary, there is a certain degree of truth in the claim that al-Shāfi'ī's *al-Risāla* was a response to the over-all theory of rationalism, and *u✹ūl al-fiqh* in this sense is an independent science and can be used as a juristic theology of its own. Al-Samarqandī's reason for his criticism was due the ignorance by some ⓐanafī jurists of the importance of *kalāmī* - ideological implications of the ideas they were promoting. It seems that he had in his mind Dabusi and his followers, as we realise, in the course of his study, that it was Dabusi and his predecessors in 'Iraq - among them Jassas occupies the prime position - who did not care whether their opinion in certain doctrinal points coincide with the theoretical-theological position of the Mu'tazila. As a theologian of the sixth century of *Hijra*, al-Samarqandī could not accept that his view coincided with the Mu'tazila, then the most unwarranted situation in Islamic Orthodoxy. Despite the efforts of al-Samarqandī theologians of the sixth century onwards the ⓐanafī *u✹ūl al-fiqh* seemed to have followed the road set forth by Ja✹✹ā✹ and the followers of Dabusi, giving only lip service to the emerging ideology of Maturīdism. This is best seen in the fact that the most celebrated *u✹ūl* work of ⓐanafī school was the work of al-Pazdawī, who clearly followed the juristic tradition.

What are the characteristics of juristic method? Ibn Khaldūn describes it along with its counterpart, the theological method, with following words:

> The writing style of the ⓐanafīs is more in tune with *fiqh* and more apt to the practical jurisprudence, because of the multiplicity of examples and citations, and constructing the issues there (in *u✹ūl*) on the juristic subtleties (*al-nukat al-fiqhiyya*). The theologians make the description of (*u✹ūl*) issues abstract from *fiqh* and tend to make rational deduction as much as they can, as this is the prevalent character of

[14] Al-Sam'ānī, Abū al-Muzaffar Man✹ūr b. Mu✚ammad, *Qawā✷i' al-Adilla*, I, 49, ed. by M. H. Ismā'īl, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1418/1997).

(their treatment of) the discipline and the consequence of their method. The Ḥanafī jurists had upper hand in this (science) due to their mastering of the juristic subtleties and deriving the principles of this science from the cases of *fiqh* as far as possible[15].

Three features in the writings of the Ḥanafīs are noteworthy. I shall try to explain these features with examples taken from the topic of *amr* (command). First of all, in this dominant Ḥanafī *uṣūl* tradition, every principle of *uṣūl* is put to the test of practical law of the school. This works in two ways, i.e. they, on the one hand, test practical law (*furūʿ*) with the theoretical law (*uṣūl*) (test of justification); on the other hand, more interestingly, they test the theoretical principles of *uṣūl* with the cases drawn from the practical jurisprudence (*furūʿ*). An interesting example of this second sort of test is at play in the discussion concerning the problem known as *takrār*, i.e. whether an imperative, in an unqualified situation, entails a repeated obligation or a single one. There seems to be an ambiguity on the part of the Ḥanafī school regarding the true doctrine of the school on the issue of *takrār*[16]. The *uṣūl* writers belonging to this school seek the solution to the question with reference to the school parameters. They refer to a legal case from the Ḥanafī *corpus juris* (*furūʿ al-fiqh*), which, in their view, prove the point in question. The case is from the section on marriage dealing with the utterance of divorce phrases; a man says to his wife 'repudiate yourself (*ṭalliqī nafsakī*)', an expression which gives rise to the question of how many *ṭalāqs* are delegated to the wife by this expression. According to Ḥanafī law, this gives rise to a single instance of the delegation of the right of divorce by the husband. There is also the possibility of three *ṭalāqs* (the maximum right of divorce possessed by a husband according to Islamic law), which can be realised if the husband confirms that he intended three at the time of utterance of this delegation. In other words, Ḥanafī *uṣūl* writers take the expression 'repudiate yourself' as a command and interpret it as entailing a minimum and a maximum amount. The former is understood from the

15 Ibn Khaldūn, *Muqaddima*, 455

16 See as an example, al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, II, 135-146; al-Dabūsī, *Taqwīm al-Adilla*, 16b-18a; al-Sarakhsī, *Kitāb al-Uṣūl*, I, 20-25; al-Pazdawī, *Kitāb al-Uṣūl*, I, 122-133.

command itself, while the latter needs an extra element to be realised, which is in this case the intention of the husband[17].

Secondly the juristic methodology keeps the *u●ūl* discussion within the confines of law, i.e. considering only the juristic implications of the *u●ūl* theories and leaving theological-ideological considerations at minimum. To give an example, the definition of the concept of command (*amr*) poses a considerable amount of theological problems in the writings of theologian-jurists belonging to various theological schools. The Mu'tazila define it as the form of imperative (*●īghat al-amr* or *if'al*) whereas Ash'arī-Maturīdī theologians avoid defining it as verbal entity. To the latter, the formula *amr=if'al* (command=imperative form) turns out to be problematic because, theologically speaking, it amounts to asserting that a "speech (*kalām*)" is what we utter through our mouth. The controversy surrounding the issue of *khalq al-Qur'ān* (createdness of Qur'an) gave rise to a great deal of theoretical thinking on God's attribute of speech, as the Qur'an is considered *kalām Allah* (God's speech). To define *amr* as something uttered is said to be equal to asserting that God's speech, i.e. Qur'an, is created, which is what the Mu'tazila viewed, because of defining "speech" as letters and voice. The earliest reference recorded in the sources which links this controversy to the definition of *amr* is attributed to the great theologian Ash'arī, who is said to have denied the formula "*amr* equals *if'al*". A fifth century jurist, a non-Ash'arī Shāfi'ī, Abū al-Muzaffar al-Sam'ānī (d. 489//1096), notes that there was no such controversy among the "jurists" as whether *amr* is *if'al* or not, until those Ash'arīs innovated this idea of "internal speech (*kalām al-nafs*)[18]. Al-Samarqandī, who seems to be one of the best representatives of the Māturīdī tradition, disagrees with the dominant ◌anafī tradition on the problem of the specificity of *amr* to *if'al*, on the grounds that the form of imperative is not the command itself but its indication (*dalīl 'alayh*), the reason being that the command as part of speech is an internal entity existing with the speaker, not the words he utters[19].

17 For the details of the issue of *takrār* see, Bedir M., "Early Development of ◌anafī U●ūl al-Fiqh", chapter 4. Unpublished PhD dissertation, the University of Manchester.

18 Al-Sam'ānī, *Qawā●i'*, I, 49

19 Al-Samarqandī, *Mīẓān al-U●ūl*, 83-84, 94-96

Samarqandī and other Sunni theologians, therefore, define command as non-verbal entity (*✹alab, istid'ā'*) constituted by the imperative or other forms.

The dominant ☪anafī *u✹ūl* tradition (the 'Iraqi-Transoxanian line) happens to be in agreement with the Mu'tazilī stance, but for different reasons. They, too, define the concept of command as an imperative form, but one cannot find any trace of the above theological discussion in their writings, despite the fact that some of them carefully avoid being associated with the Mu'tazila[20].

Thirdly, the juristic method appears more retrospective and justificatory than the theological methodology, probably due to the former's concern and need to deal with the already existing *corpus juris*, contrary to the open space in front of the theologian-jurists owing to the opportunities provided by "rational" subject matter. This is, however, only an appearance; in the end, *u✹ūl al-fiqh* is mainly a reflection on the theoretical questions that do not necessarily have practical importance as well as being a theoretical justification of the school tradition. The question, for example, of what an abstract form of imperative means has little use, as far as the practical legal cases are concerned, for the problem was already resolved in the tradition.

Finally, the juristic method, as pointed out above, presents a dispute generally as a legal one, i.e. the parties to a given dispute are mostly jurists. In the debate on the consequence of command, for instance, the parties were generally chosen by our authors from the camp of *fuqahā'* in spite of the fact that some views were only proposed by theologians. For instance, a leading representative of the dominant ☪anafī tradition of *u✹ūl*, Sarakhsi, enters into a long polemic with one of the parties (*wāqifiyya*) to a dispute on the implication of the form of imperative in an unqualified situation[21], but does not name them. This party is identified by other sources with the Ash'arīs[22].

20 Saraksī, for example in one of his few references to the theological issues, rejects the doctrine of *takh✹ī✹ al-'illa*, because it is a Mu'tazilī doctrine, see his *Kitāb al-U✹ūl*, II, 208.

21 Ibid., I, 16.

22 Al-Āmidī, Abū al-☪asan 'Ali Sayf al-Dīn, *al-I✚kām fi U✹ūl al-A✚kām*, 4 vols., ed. Sayyid al-Jumaylī (Beirut: Dār al-Kitāb al-'Arabī, 1984), II, 163; Al-Shīrāzī, Abū Ishāq Ibrāhīm b. 'Alī, *al-Tab✹ira fi U✹ūl al-Fiqh*, ed. Mu✚ammad ☪asan Haytū (Damascus: Dār al-Fikr,

1400/1980), 27; al-Ghazālī, Abū Ḥāmid Muḥammad, *al-Mustaṣfā min ʿIlm al-Uṣūl*, ed. Muḥammad Yūsuf al-Najm, 2 vols.) Beirut: Dar Sader publishers, 1995) I, 306.