Uṣūl al-Fiqh Hermeneutics as Reflected on the Debate on Human Cloning:

A Critical Analysis of Contemporary Islamic Legal Discourse

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ABSTRACT

This thesis discusses the prohibition of human cloning in contemporary Islamic legal discourse, which relies on two distinct doctrines: the first seeks support in the Qur'ānic text, while the second depends on method of utilitarian legal hermeneutics (*al-istiṣlāḥ*). These doctrines are examined by comparing them to the method that contemporary Islamic legal discourse adopts, namely, *uṣūl al-fiqh*. When this is done, a discrepancy emerges in the first doctrine that traces this prohibition back to the text of revelation, which in turn requires further clarification of the foundations of hermeneutics in *uṣūl al-fiqh* – identified here as textual and legislative consistency. For this, Shāṭibī's theory of *maqāṣid al-sharī'ah* offers one of the most reliable bases for the hermeneutics to evaluate the second doctrine. The methodological venture in this thesis aims at criticizing the current methodology while at the same time offering a justified approach to hermeneutics in contemporary Islamic legal discourse and in the case of human cloning.

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ABSTRACT

Cette thèse porte sur l'interdiction du clonage humain énoncée par la pensée légale musulmane contemporaine, qui peut prendre deux formes différentes selon le principe à partir duquel elle s'articule : soit celui qui impose de prendre appui sur le texte coranique, soit celui que l'on nomme : «herméneutique légale utilitariste» (*al-istiṣlāḥ*). Ces deux aspects seront évalués à l'aune des sources et des méthodes plus générales que la pensée légale musulmane adopte uniformément, à savoir l'*uṣūl al-fiqh*. Cet examen fera apparaître combien les deux formes que prend la pensée légale musulmane contemporaine sont contraires à un fondement essentiel de l'*uṣūl al-fiqh*, soit la consistance textuelle et juridique. Pour bien faire ressortir cette inconsistance méthodologique, la théorie de Shāṭibī, *maqāṣid al-sharī'ah*, sera la plus utile. D'un point de vue plus général, l'effort déployé en cette thèse cherche à la fois à critiquer les méthodes employées par la pensée légale musulmane contemporaine et à introduire une meilleure articulation dans l'entreprise herméneutique impliquée dans le droit islamique contemporain en général et dans le cas du clonage humain en particulier.

ACKNOWLEDGMENT

INTRODUCTION

Since the middle of the twentieth century, particularly in the West, medical and technological innovations have come to challenge the relationship between the human body and the traditional ethical worldview; these challenges include test-tube babies, organ transplantation, euthanasia, and many other new procedures. Consequently, a field of human sciences has emerged known as "bioethics," dedicated to engaging the ethical aspects of these technological interventions in human nature. Human cloning, as a sub-entity, is one of the most recent controversial issues in this field.

In the Arab world, where human cloning (*al-istinsākh al-basharī*) is being extensively sensationalized by the media, Muslims are beginning to question the legitimacy and the benefits of such an invention.[1] In the Muslim world, the field of knowledge dedicated to studying both the legal and ethical dimensions of any phenomenon is Islamic law (*fiqh*). The bioethical position of human cloning must be conceived in Muslim consciousness in *sharī'ah* terms; hence the issue has motivated Muslim jurist-authors and jurist-consults (*muftis*) to hold conferences and media interviews in order to generate legal arguments on this new, problematic bioethical issue. Although there is vast material in the Sunnī Arabic media discussing the issue of human cloning from a religious perspective, very little of it can be classified as part of *fiqh* discourse. Nevertheless, some of the most important contemporary legal figures have developed a *fiqh* argumentation on this question. For example, some currently available

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[1] Aḥmad 'Ulwānī, *al-Istinsākh: Jadal al-'Ilm wal-Dīn wal-Akhlāq* (Damascus: Dār al-Fikr, 1997), 117.

works include publications of the Fiqh Academy of the Muslim World League (Majma'

al-Fiqh al-Islāmī, al-Tabi' li-Munaẓẓamat al-'Ālam al-Islāmī), and the European Council

for Iftā' (al-Majlis al-Urūbī lil-Iftā'), as well as writings by al-Būṭī, al-Qaraḍawī, al-

Zuḥaylī, Ibn 'Uthaymīn, Ṭāhir Khaznah Kātbih, Muḥammad Mahdī Shams al-Dīn, Dr.

Naṣr Farīd Wāṣil, 'Abd al-Ghanī 'Abd al-Khāliq, and many others. These contemporary

jurist-authors, legal thinkers, and *muftis* constitute a fair representation of the core ideas

pertaining to the issue of human cloning in the Sunnī Arab world.

This burgeoning Islamic legal discourse is perceived by many Islamic

traditionalists[2] and reformers[3] (on the one hand) and secularists[4] (on the other) as a crisis.

It is seen as an unnatural, post-colonial development of Arab governments and societies,

which is itself characterized by: 1) a general dismantling of the *sharī'ah*, therefore

depriving Muslim societies of governance; and 2) a dismantling of the indigenous

educational system that once produced educated, qualified and trained jurists, *muftīs*, and

jurist-authors.

Bearing all this in mind, the thesis will deal with the *fiqhī* opinions and *fatwās* in

contemporary Islamic legal discourse relating to human cloning in relation to two

essential and primary questions. The first of these is: what is the broader context in which

the aforementioned discourse of human cloning exists? The answer to this question is the

hermeneutical methodology represented in Islamic legal theory (*uṣūl al-fiqh*), firstly, by

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[2] For further information see 'Abd al-Ḥamīd Abū Sulaymān, *Azmat al-'Aql al-Muslim* (Virginia: al-Ma'had al-'Ālamī lil-Fikr al-Islāmī, 1994).
[3] For further information see Naṣr Ḥamid Abū Zayd, *al-Naṣṣ wal-Sulṭah wal-Ḥaqīqah: Irādat al-Ma'rifah wa-Irādat al-Haymanah* (Beirut: al-Markaz al-Thaqāfi al-'Arabī, 2000), and Muḥamad Shaḥrūr, *Naḥwa Uṣūl Jadīdah lil-Fiqh al-Islāmī: Fiqh al-Mar'ah* (Damascus: al-Ahālī lil-Ṭibā'ah wal-Nashr wal-Tawzī', 2000), 23.
[4] For further information see Ṣādiq Jalāl al-'Aẓm, *Mā Ba'da Dhihniyyat al-Taḥrīm* (Damascus: Dār al-Madā, 1997), 227.

the concept of *dalīl* (lit. proof, evidence, guidance) and, secondly, by the theory of the objectives of *sharī'ah* (*maqāṣid al-sharī'ah*). This will be the theme, or the broader framework that shall play a key role in the establishment of the theme of the thesis. The second question is: To what exent are the contemporary hermeneutics of *dalīl* responsible for the present approach to the problematic *fiqhī* case of human cloning? In answering these two questions, our underlying thesis will emerge.

The reason for taking legal discussion of human cloning as a case-study for critical analysis stems from the challenges that this new technological invention poses for the *fiqhī* mind on a practical level – challenges that have philosophical dimensions derived from the Western worldview. For instance, human cloning is said to have no precedent (*nazilah mustaḥdathah*), which therefore necessitates a creative mental effort (*ijtihād*) to assess it legally. Also, human cloning is a legal case that is seen, particularly by some thinkers, as a theological issue,[5] which complicates and extends the methodological criteria necessary to deal with it. For this reason especially, human cloning is an intriguing yardstick against which to examine the methodological capacity of contemporary Islamic legal discourse, which is certainly theologically grounded.

Since contemporary Islamic discourse claims that the science of Islamic jurisprudence, *uṣūl al-fiqh*, constitutes its epistemological foundation and binds it to the tradition of the *sharī'ah*, we will test this claim by applying it to the case in hand. By logically criticizing the methodology of *dalīl*, and then restructuring it through the problematic *fiqhī* case of human cloning, the methodological approach to legal theory,

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[5] The *muftī* of Egypt, Naṣr Farīd Wāṣil, is of the opinion that the one who clones is an infidel (*kāfir*). See Ḥusām al-Dīn Shiḥādah, *al-Istinsākh bayn al-'Ilm wal-Falsafah wal-Dīn* (Damascus: Markaz al-'Ilm wal-Salām lil-Dirāsāt wal-Nashr, 1998), 125.

will be advanced and new hermeneutical solutions proposed. Additionally, this critical analysis may suggest a new path for the revivalist writers of today, such as Muḥammad Shaḥrūr, by proposing a more elaborate and systematic diagnosis of modern legal problems than those currently offered.[6]

Contermpoary Islamic legal discourse lies at the heart of many of the problems discussed in the present thesis. The main reason for this appears to be the discontinuity that exists between it and traditional methodology, which offers a solid interpretive foundation for understanding both the legal text and the world. The contemporary discourse shows fundamental weaknesses, as demonstrated in its attempt to seek improbable and very generalized methods to face the challenges of modernity. It is the intention of this thesis, therefore, to offer a solution for this legal and eminently methodological crisis, which has been often characterized as emanating from a "mentality of prohibition" (*dhihniyyat al-taḥrīm*).[7]

Although human cloning serves as the case study, it is not the major concern of this work. Much of the discussion will in fact be devoted to a more important concern – the methodological foundations that groud the case study. The thesis will initially explore the foundations that support the legal methodology enterprise and then seek to enhance the foundations of this methodology. The prohibition or the permission of human cloning, furthermore, does not motivate this thesis: its sole aim, as previously noted, is to criticize the contemporary hermeneutics of *dalīl* and reconstructing a new theory of *dalīl* through the problematic *fiqhī* case of human cloning.

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[6] For an example, see Shaḥrūr, *Naḥwa Uṣūl Jadīdah lil-Fiqh al-Islamī*, 23.
[7] For further information, see al-‘Aẓm, *Mā ba‘da Dhihniyyat al-Taḥrīm*, 227.

In order to achieve the aforementioned goals, the first chapter will endeavor to explore the Islamic legal discourse on human cloning and to describe its doctrines. This exploration and analysis of the *fatwās* and legal discourse will draw a map for the present case study, making it possible to demonstrate the existence of two basic doctrines: one that extracts its judgments directly from the Qur'ān and/or Sunnah and another that formulates its judgments not directly from the Qur'ān, but on the legislative principles of the *sharī'ah*. These two doctrines are extensions of historical traditions in *fiqh* – one following the traditions of the *Ahl al-Athar* school and the other that of the *Ahl al-Ra'y*. Within this exploration and analysis, a critical comparison will be made between the methodology of *uṣūl al-fiqh* and the previously mapped legal doctrines of human cloning. This first chapter makes the following argument: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are based neither on a valid legal interpretation of the religious texts nor on a comprehensive and necessary application of utilitarian legal hermeneutics.*

The second chapter will explore the foundations of *uṣūl al-fiqh* hermeneutics, which will provide a reply to the first basic doctrine and its misuse of legal interpretation of religious texts. The work of the distinguished contemporary *uṣūlī* writer Fatḥī al-Duraynī will be used as a model when defining *uṣūlī* terms such as specification (*takhṣīṣ*), restriction (*taqīd*), and metaphor (*majāz*). By this elucidation of the foundations of legal hermeneutics in *uṣūl al-fiqh*, the major claim of second chapter will be demonstrated: *Textual and legislative consistency is the objective of uṣūl al-fiqh hermeneutics.*

The third chapter asks and answers the question: "Why does a discrepancy exist between both the traditional and the contemporary methodological practices?" To do so, the theoretical discoveries of chapter two regarding the foundations of hermeneutics in *uṣūl al-fiqh* will be applied to an interesting development in *uṣūl al-fiqh* history, found in the text *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* written by the Andalusian scholar Abū Isḥāq Ibrāhīm al-Shāṭibī (d. 790/1388). This elaboration will serve as a reply to the second basic doctrine applied to the issue of human cloning, from which a comprehensive employment of legal hermeneutics is lacking. This criticism will further develop the theme of the second chapter, that of *textual and legislative consistency*, by investigating the worldview of 'time' in the Qur'ān as the major criterion in the process of legislation. Due to the original ingenuity and the reformative aspect of Shāṭibī's theory, this step is necessary to prove the essential claims of the third chapter: *If there is a methodological discrepancy in contemporary Islamic legal discourse, the path towards reform lies in continuing the traditional endeavor of uṣūl al-fiqh through the divine concept of revelation (al-waḥī) as the knowledge of the sign.*

CHAPTER ONE
OPINIONS AND LEGAL DOCTRINES OF HUMAN CLONING

This chapter will explore the Islamic legal discourse on human cloning (*al-istinsākh* or *al-istinsāl al-bashrī*) and analyze its conclusions. The analysis and exploration of *fatwās* and other legal texts will generate a map essential to further exploration of our case study. In describing the description of the *fiqhī* doctrines on human cloning, I will concentrate on comparing methodology of the contemporary Islamic legal discourse and the traditional methodology of *uṣūl al-fiqh*. Particular attention will be paid to critiquing the contemporary methodology wherever there arises a deviation from the principles of *uṣūl al-fiqh*.

The majority of contemporary Muslim writers consider human cloning to be prohibited.[8] One *uṣūl al-fiqh* professor has categorically and emphatically declared that human cloning lies in the realm of the forbidden, prohibited, and banned.[9] In the first part of this chapter, therefore, some of the issues raise in their writings and future will be categorized and elaborated on under the following headings: 1.) Defining human cloning as a bio-technological subject matter; 2.) the difficulty of classifying human cloning, due

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[8] This includes works by: The Fiqh Academy of The Muslim World League and major legal figures and *muftīs* such as al-Būṭī, al-Qaraḍawī, al-Zuḥaylī, Ibn 'Uthaymīn, Ṭāhir Khaznah Kātibah, the Shī'ī Scholar Muḥammad Mahdī Shams al-Dīn, Dr. Naṣr Farīd Wāṣil, 'Abd al-Ghanī 'Abd al-Khāliq, and many others.

[9] Nūr al-Dīn Mukhtār al-Khādimī, *al-Istinsākh fī Ḍaw' al-Uṣūl wal-Qawā'id wal-Maqāṣid al-Shar'iyyah: Baḥth Muḥakkam min Qibal Markiz al-Buḥūth wal-Dirāsāt al-Islāmiyyah bil-Riyāḍ, al-Tābi' li-Wizārat al-Shu'ūn al-Islāmiyyah* (Riyadh: Dār al-Zāḥim lil-Nashr wal-Tawzī', 2001), 66.

to legal (*sharī'ah*) and theological (*'aqīdah*) implications, of the the claim that cloning

constitutes a form of creation (*khalq*); and 3.) the obscuring of cloning as a practice

contradictory to God's primordial creation (*fiṭrah*) and His system in the world (*Sunnah*),

in an attempt to cite an authoritative concept.[10]

1.1. Defining Human Cloning as a Biotechnological Subject for Contemporary Islamic Legal Discourse

The ability to clone living creature is a recent biomedical and genetic engineering

breakthrough. The first known, documented and scientifically accepted implementation

of this technology took place in Britain, where, in 1996, a sheep named Dolly was

engineered as an exact copy of an existenting sheep.[11] Yet, while the cloning of animals

has been achieved, there has not yet been an authenticated instance of a successful human

clone. The definition of this phenomenon should be based on its place of origin, the

scientific field of biotechnology. Cloning, as it stands in the bioengineering and medical

fields, is not clearly understood (in some cases) within the discourse of Muslim legal

scholars.

I will not address those texts that do not recognize the technological nature of

cloning. This omission is intentional, because to do otherwise would legitimate erroneous

adjudication, since lawmaking without proper understanding produces a verdict outside

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[10] The only truly qualified Muslim scholar encountered in the course of this research that did not issue a *fatwā* prohibiting Human Cloning is the Shī'ī Lebanese scholar al-Sayyid Muḥammad Ḥusayn Faḍl Allāh; see Shihādah, *al-Istinsākh Bayna al-'Ilm wal-Falsafah wal-Dīn*, 131.

[11] al-Ṭayyib Salāmah and 'Abd al-Majīd Bin Ḥamādh, *al-Istinsākh: Abḥāth Nadwat al-Majlis al-Islāmī al-A'lā* (Tunis: Sharikat Funūn al-Rasm wal-Nashr wal-Ṣaḥāfah, 1998), 86.

of the proper realm of the case (*manāṭ*). For example, some *fatwās* do not take into account the technological nature of cloning and, consequently, these scholars have miscategorized cloning as creation (*al-takhlīq*) and, therefore, necessarily prohibited (*ḥarām*). This latter fact stems from Islamic theological principles declaring that creation is God's exclusive work.[12] In other *fatwās*, the sins of adultery, fornication, and other non-permissible sexual peculiarities are erroneously made analogous to human cloning; thus, through legal analogy (*qiyās*), prohibition is understood to be the only plausible and possible outcome. Similarly, the *muftī* of Jordan, Ṭāhir Khaznah Kātibah – from the General Department of al-Iftā'– has classified human cloning as a form of adultery "*ḍarb min ḍurūb al-zinā*", suggesting it bears a resemblance to a type of pre-Islamic marriage known as "*nikāḥ al-istibḍā'*."[13] The *ratio legis* ('*illah*) for his *qiyās* is the desire to obtain better genetic features in a child through illegitimate means.[14]

In a further display of incorrect classification and understanding, some scholars have placed human cloning within the same category of genetic engineering that seeks to fashion new creatures and organisms. The Kuwaiti scholar 'Abd al-Ghanī 'Abd al-Khāliq advocates this stance, arguing that human cloning is part of a larger framework of

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[12] Shihādah, *al-Istinsākh Bayna al-'Ilm wal-Falsafah wal-Dīn*, 72.

[13] *Nikāḥ al-istibḍā'* is a pre-Islamic and ancient Arab custom whereby a poor or an unintelligent man could send his wife to an intelligent, powerful, or rich man in order to procreate a child with more valuable characteristics. The Kuwaiti scholar, 'Abd al-Ghanī 'Abd al-Khāliq, similarly analogizes to this marriage form, calling it "*Nikāḥ al-istibḍā'* of the modern age of ignorance". See 'Abd al-Ghanī 'Abd al-Khāliq, *Istināḵh al-Insān wal-Ḥayawān Ḍajjah Mufta'alah wa-Ukdhūbah Kabīrah wa-Fasād 'Aẓīm.* (accessed, December 13, 2003): http://www.salafi.net/articles/article18.html

[14] See "al-Shaykh Ṭāhir Khaznah Kātibah: *al-Islām Yuḥarrim al-Istinsḵh Taḥrīman Qaṭ'iyyan*," published in *Jarīdat al-Sharq al-Awsaṭ*, 8 December 2001, (accessed, December 13, 2003): http://www.asharqalawsat.com

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designing new organisms and humans.[15] 'Abd al-Khāliq derives and substantiates his position in favor of prohibition from a *ḥadīth* that deals with a similar issue. He adduces the Prophetic saying, "The Prophet prohibited letting donkeys mate with horses"[16] and the *ḥadīth*, "'Alī presented Prophet Muḥammad, peace be upon him, a mule and asked him why do we not we let donkeys mate with horses? The Prophet, peace be upon him, responded, only ignorant people do this."[17] However, the historical context of the *ḥadīths* does not support 'Abd al-Khāliq's contention, and his citation of this material is unique among *fiqh* jurists who write in opposition to cloning. The context and commentaries on the *ḥadīths* suggest that the cause of the prohibition (*ta'līl al-taḥrīm*) expressed in them was a fear of decreasing the numbers of horses needed for military purposes.[18]

Many scholars recognize that some of the *fatwās* about cloning do not fulfill the legal condition of identifying the true nature of the legal case. That is to say, some scholars, when rendering *fatwās*, do not take the trouble to understand the scientific aspects of the question at hand, and are as a consequence too ill-informed to deduce valid legal opinions. The President of the National Counsel of the Sudan and an acknowledged expert on *uṣūl al-fiqh*, Ḥasan al-Turābī, has even identified these types of inaccurate and naive *fatwās* as a "crisis." He has further classified them as *fatwās* that have been issued

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[15] 'Abd al-Khāliq, *Istinākh al-Insān wal-Ḥayawān Dajjah Mufta'alah.* (accessed, December 13, 2003): http://www.salafi.net/articles/article18.html

[16] Muḥammad Ismā'īl al-Bukhārī, *al-Tarīkh al-Kabīr. ḥadīth* Number: 7/247 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), vol.1, 259.

[17] Abū Dāwūd, *Sunan Abī Dawūd, kitāb al-jihād.* 15/ *bāb* 59 in *Jam' jawāmi' al-Aḥādīth wal-Asānīd wa-Maknaz al-Siḥāḥ wal-Sunan wal-Masānīd* (Cairo: Jam'iyyat al-Maknaz al-Islāmī, 2000) vol. 2, 439.

[18] Fahad al-Ḥumūdī, *Ḥimāyat al-bī'ah wal-Mawārid al-Ṭbī'iyyah fī al-Sunnah al-Nabawiyyah* (Saudi Arabia, Riyadh: Masters' thesis in Imām University, 2000)

without the perception of the natural and physical sciences: "*al-fatāwa ḥawal al-istinshākh... ṣadarat bi-ghayr idrāk.*"[19]

By contrast, certain recognized contemporary scholars of Islamic law, such as al-Qaraḍāwī[20] and al-Zuhaylī,[21] as well as the members of the Higher Islamic Council of Tunisia (al-Majlis al-Islāmī al-A'lā),[22] have demonstrated a very accurate understanding of the scientific and technological aspects of cloning. Moreover, at its tenth meeting (held in Jeddah, June 28 - July 3, 1997), the Islamic Fiqh Academy of the Muslim World League (Majma' al-Fiqh al-Islāmī al-Tābi' li-Munaẓẓamat al-'Ālam al-Islāmī),[23] offered this definition of cloning: "generation of one or more living creatures or more either by transferring a nucleus from a body cell to an egg without a nucleus, or by duplicating a fertilized egg."[24] This pronouncement and in fact the majority of texts by Muslim scholars present human cloning in a detailed and precise framework that is faithful to its biotechnological and medical origins. A comparison of the above quoted Jeddah statement with accepted scientific definitions of cloning will show how much importance they assign to having an informed position.[25]

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[19] Mu'īn Qaddūmī, *al-Istinsākh bayna al-Masīḥiyyah wal-Islām: Maqālāt wa Abḥāth li-Kibār Rijāl al-Dīn wal-Mufakkirīn wal-Bāḥithīn min Mukhtalaf al-Adyān wal-Madhāhib* (Beirut: Dār al-Fikr al-Lubnānī, 1999), 307.

[20] Yūsuf al-Qaraḍāwī: *al-Istinsākh wa-Ra'y al-Qaraḍawī fīh.* Mawqi' al-Qaraḍāwī (accessed, December 13, 2003):
http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2883&version=1&template_id=130&parent_id=17

[21] 'Ulwānī, *al-Istinsākh: Jadal al-'Ilm wal-Dīn wal-Akhlāq*, 122.

[22] al-Ṭayyib Salāmah, *al-Istinsākh*, 85.

[23] Mu'īn Qaddūmī, *al-Istinsākh bayna al-Masīḥiyyah wal-Islām*, 315.

[24] Ibid., 315.

[25] For further information, see cloning entry in *Stedman's Medical Dictionary* (Maryland: Lippircott and Williams, 2000), 364, "1. Growing a colony of genetically identical cells or organisms in vitro. 2. Transplantation of a nucleus from a somatic cell to an ovum, which then develops into an embryo; many identical embryos can thus be generated by

1.2. The Difficulty of Classifying Human Cloning in the Light of *Sharī'ah* and Creed (*'Aqīdah*)

With the advent of technology that makes it possible to understake human cloning, there arose a new dilemma that challenged not only Islamic legal discourse, but also, Islamic theological tenets. The technology of human cloning is understood by some scholars as posing a threat to the Islamic creed (*'aqīdah*), and particularly its stance on creation.[26] Creation in the Islamic *'aqīdah* is conclusively, and solely, assigned to Allāh. The theological problem originates in how to define the process of human cloning, i.e. whether it resembles a natural means of reproduction. It can be argued that scientists in the field of human cloning comprehend their work as resulting in the creation of humans. This scenario is a serious concern in contemporary Islamic legal discourse and is the topic addressed in most of the *fatwās*. This theological concern plays a discrete role in *fatwās* and opinions in contemporary Islamic legal discourse because it is vindicated by a legal method that intends to prove the prohibition.

However, in *uṣūl al-fiqh*, there are certain methods to interpreting a Qur'ānic verse, beginning with the fact that such interpretation is restricted to legal verses of the Qur'ān (*āyāt al-aḥkām*). Developing legal rulings from *'aqīdah* principles is irrelevant. This assumed confrontation with Islamic *'aqīdah* has contributed to overall legal stance

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asexual reproduction. **3.** With blastocysts, dividing a cluster of cells through microsurgery and transferring one-half of the cells to a zona pellucida that has been emptied of its contents. The resulting embryos, genetically identical, may be implanted in an animal for gestation. **4.** A recombinant DNA technique used to produce millions of copies of a DNA fragment. The fragment is spliced into a cloning vehicle (*i.e.,* plasmid, bacteriophage, or animal virus). The cloning vehicle penetrates a bacterial cell or yeast (the host), which is then grown in vitro or in an animal host. In some cases, as in the = production of genetically engineered drugs, the inserted DNA becomes activated and alters the chemical functioning of the host cell."

[26] 'Ulwānī, *Al-Istinsākh*, 122.

favoring prohibition. But, this stance is not clearly explained: if the Islamic prohibition is the way to prevent human cloning or to prevent creating humans, then the Islamic *'aqīdah*, in and of itself, would not be permanently true, because only prohibition would be a means way to maintain its veracity. The silent role played by *'aqīdah* is discernible in the legal proofs that are insufficient to establish the prohibition, as will be shown in sections 1.4.1. and 1.4.2.

This *'aqīdah* concern is peculiar since most of the legal texts encountered in the course of this research operate under the assumption that human cloning cannot be equated with creation. Two methods were used to prove the aforementioned claim: The first is based on a pure belief-reaction that adduces the Qur'ānic verses to the effect that creation is exclusively in the hands of Allāh. The second is based on a technological definition of cloning, namely, that it is based on utilizing the nucleus of a living cell, which is itself Allāh's creation. In other words, the second method acknowledges that human cloning is merely the modification of an already created life. Therefore, human cloning does not rely an ordinary methods of reproduction, but rather on Allāh's creation. In addition, in the second method it is claimed that cloning has simplified the Islamic creed of resurrection (*al-ba'th*),[27] relying for proof on the same Qur'ānic verses that are used to establish the *'aqīdah* aspect of the legal discourse on human cloning. These Qur'ānic verses are:

And Allah has created you and what you make.[28]

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[27] Yūsuf al-Qaraḍāwī: *al-Istinsākh wa-Ra'y al-Qaraḍawī fīh*. Mawqi' al-Qaraḍāwī (accessed, December 13, 2003):
http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2883&version=1&template_id=130&parent_id=17
[28] Qur'ān 37:96

So let man consider of what he is created: He is created of water pouring forth, Coming from between the back and the ribs. Most surely He is able to return him (to life). [29]

This is Allāh's creation, but show Me what those besides Him have created. Nay, the unjust are in manifest error [30]

1.3. The Implicit Influences on the Concepts of God's Primordial Creation (*fiṭrah*) and Allāh's System in the World (*sunnah*)

Writings on human cloning incessantly and repeatedly refer to the Qur'ānic verses describing the creation and growth of the embryo, seeing these as the theological background of human cloning. They also focus on the traditional paradigm of marriage and procreation as Allāh's primordial creation (*fiṭrah*) and Allāh's system in the world (*sunnah*). The relevant verses are:

Surely We have created man from a small life-germ uniting (itself): We mean to try him, so We have made him hearing, seeing.[31]

O people! be careful of (your duty to) your Lord, Who created you from a single being and created its mate of the same (kind) and spread from these two, many men and women; and be careful of (your duty to) Allāh, by Whom you demand one of another (your rights), and (to) the ties of relationship; surely Allāh ever watches over you.[32]

He it is Who shapes you in the wombs as He likes; there is no god but He, the Mighty, the Wise. [33]

He has created you from a single being, then made its mate of the same (kind), and He has made for you eight of the cattle in pairs. He creates you in the wombs of your mothers —a creation after a creation— in triple darkness; that is

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[29] Qur'ān 86:5-8
[30] Qur'ān 31:11
[31] Qur'ān 76:2
[32] Qur'ān 4:1; opponents also appeal to Qur'ān 86:5-8, quoted in the preceding section.
[33] Qur'ān 3:6

Allāh your Lord, His is the kingdom; there is no god but He; whence are you then turned away? [34]

Thus, it is argued that there is no need to apply the techniques of human cloning and thus tamper with the natural world's reproductive process.

1.4. Evaluating the Doctrines on Human Cloning:

In most attempts at proving the invalidity of human cloning, two traditional *fiqhī* methods are employed. The first seeks to find Qur'ānic or Sunnaic textual evidence to this effect, while the second aims to affirm the prohibition by way of an established *uṣūlī* proof, i.e., by means of *qiyās*, some legal principle (*qā'idah fiqhiyyah*), or legislative principles (*mabda' tashrī'ī*). These two methods are sometimes combined in an attempt to establish the prohibition from an *uṣūlī* perspective. An example of just such an effort may be found in the very detailed work of Nūr al-Dīn Mukhtār al-Khādimī, although it contain little of interest besides, being vased on opinion from supporters of the aforementioned two legal doctrines and therefore far from original. [35]

The evaluation offered below therefore proposes the following: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are based neither on a valid legal interpretation of the religious texts nor on a comprehensive and necessary application of utilitarian legal hermeneutics.* That this is the case will demonstgrated through an analysis of the two *uṣūlī* doctrines and their application.

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[34] Qur'ān 39:6

[35] Nūr al-Dīn Mukhtār al-Khādimī, *Al-Istinsākh fī Ḍaw' al-Uṣūl wal-Qawā'id wal-Maqāṣid al-Shar'iyyah: Baḥth Muḥakkam min Qibal Markiz al-Buḥūth wal-Dirāsāt al-Islāmiyyah bil-Riyāḍ, al-Tābi' li-Wiazārat al-Shu'ūn al-Islāmiyyah* (Riyadh: Dār al-Zāḥim lil-Nashr wal-Tawzī', 2001).

The first doctrine is based on a Qur'ānic prohibition against changing Allāh's

creation, while the second doctrine correlates to the prohibition vis-à-vis the

implementation of utilitarian legal hermeneutics. In a preliminary assessment of the two,

I note the first doctrine's appropriation as a complete failure of legal interpretation and

deem that the second, while operating from sound premises and procedures, has resulted

in unnecessary and incomprehensible inferences.

1.4.1. The Doctrine Based on the Qur'ānic Prohibition of Human Cloning

A consensus has evolved among some Muslim scholars in this doctrine that the

Qur'ān prohibits human cloning, for which they cite the following verse as evidence:

> Surely Allāh does not forgive that anything should be associated with Him,
> and He forgives what is besides this to whom He pleases; and whoever
> associates anything with Allāh, he indeed strays off into a remote error. They do
> not call besides Him on anything but idols, and they do not call on anything but
> a rebellious Satan. Allāh has cursed him; and he said: Most certainly I will take
> of They servants an appointed portion: And most certainly I will lead them
> astray and excite in them vain desires, and I will command them so that they
> shall slit the ears of the cattle, and most certainly I will command them so that
> they shall change Allāh's creation; and whoever takes the Satan for a guardian
> rather than Allāh he indeed shall suffer a manifest loss. He gives them promises
> and excites vain desires in them; and the Satan does not promise them but to
> deceive. These are they whose abode is hell, and they shall not find any refuge
> from it.[36]

The majority of those who support prohibition of cloning consider this Qur'ānic passage

to be the clearest evidence. The Syrian jurist-author Muḥammad Wahbah al-Zuḥaylī,[37]

the leader of the Lebanese Muslim Brothers Fatḥī Yakan,[38] the leader of the Supreme

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[36] Qur'ān 4:116-121,
[37] 'Ulwānī, *Al-Istinsākh*, 122.
[38] Qaddūmī, *al-Istinsākh bayna al-Masīhiyyah wal-Islām*, 209.

Shī'ī Islamic Council in Lebanon, Muḥammad Mahdī Shams al-Dīn,[39] and a Tunisian member of the Higher Islamic Council, al-Shaykh Muṣṭafā Kamāl al-Tāzī,[40] all adopt this interpretation, and thus understand it as a prohibition of human cloning.

However, none of the *fatwās* or legal opinions issued by the above applying anything resembling *uṣūl al-fiqh* methodology. In other words, these decisions are issued without showing how the verse leads to the prohibition. The fact, however, is that certain implicit *uṣūlī* foundations underlie their arguments: the task at hand is to demonstrate how these *fatwas* were plausibly generated.

It can be understood from their treatment of this verse that these scholars interpret Satan's order to alter the nature created by Allāh as an inherent source of sin and one that should be avoided. Some scholars further comprehend the alteration of Allāh's creation not only as conforming to Satan's order, but adduce it to be equivalent to and on the level of polytheism.[41] Since *al-istinsākh*, or cloning, comes under the heading, in their view, of changing God's creation, they see it as prohibited. Still, one must consider the question: Is the notion of *al-istinsākh* included or connoted in the Qur'ānic expression changing Allāh's creation? By examining the aforementioned Qur'ānic expression of changing Allāh's creation, an answer may be found.

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[39] Shihādah, *al-Istinsākh bayna al-'Ilm wal-Falsafah wal-Dīn*, 129.

[40] Salāmah, *al-Istinsākh*, 85.

[41] This analysis led to a strange attitude on the part of the *muftī* of Egypt, Naṣr Farīd Wāṣil, who is of the opinion that the one who clones is an infidel (*kāfir*). See Shihādah, *al-Istinsākh bayna al-'Ilm wal-Falsafah wal-Dīn*, 125. This analysis has more radical implications, since one of the most important figures in the Counsel of Chief Scholars in Saudi Arabia (Hay'at Kibār al-'Ulamā'), Ibn 'Uthaymīn stated that: "those in charge of the technique of human cloning must be treated under the Islamic legal judgment accorded to renegades (*al-ḥirābah*), i.e. that they should be subjected to the harshest of punishments, and they should get their hands and legs cut from opposite sides, or that they should be killed for their sowing corruption in the earth (*ifsād*)." See 'Abd al-Wāḥid Shu'ayr, *al-Istinsākh al-Basharī: Wahm am Wāqi'?* (Casablanca: s.n., 1997), 85.

1.4.1.1. Examining the Legal Interpretation of Verses 4:116-121 in Relation to this *Fatwā*

The modern juristic understanding of Quranic verses 4:116-121, specifically the statement, "*So that they shall change Allāh's creation*," while relied on as a basis for the judgment against cloning, is nevertheless incorrect. A quick overview of the most formative works on the interpretation of the Qur'ān, such as those of al-Ṭabarī, al-Zamakhsharī, al-Rāzī, al-Alūsī, and Quṭb, show that this semantically adduced evidence is mistaken.

According to one of the earliest surviving Qur'ānic exegetical work, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān* by al-Ṭabarī,[42] "*So that they shall change Allāh's creation*," was explained in three narrations by prominent successors of the Prophet's companions (*tābi'ūn*). The first of these narration concerns the castration of cattle, the second involves the tattooing of humans, while the third touches on modification of God's religion. Al-Ṭabarī chooses the third narration because he thinks that the Qur'ān should be understood through the best rhetorical hermeneutics, which confers this meaning not only upon physical changes, but also upon the religion of God, in terms of sin and virtue. Al-Ṭabarī justifies his choice by asserting that Arabic rhetoric does not consider it good to specify a word and then to generalize it again. Thus, God's religion is what is referred

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[42] Ibn Jarīr al-Ṭabarī. *Jāmi' al-Bayān fī Tafsīr al-Qur'ān* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol. 5, 56.

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to in the phrase "*So that they shall change Allāh's creation.*" This interpretation is concise and instructive concerning the most traditional Islamic understanding of this Qur'ānic verse.

According to the Muʿtazilī interpreter, al-Zamakhsharī, "*So that they shall change Allāh's creation*" refers to an old Arab custom, related to the camel, that entails the following activities: 1) cutting its ear; 2) forbidding it food once it has birthed five offspring, under the conidition that the fifth is a male, 3) poking out the eye of the best camel in its group, once that group reaches a specified number, in addition to castrating it. Additionally, he understands the verse to correlate other issues, such as attempts to alter God's religion, traditions of tattooing, and further examples of effeminate behavior on the part of the human male. [43]

According to al-Rāzī, "this verse can be interpreted according to two doctrines of interpretation."[44] The first interpretation is that the act of changing nature created by Allāh is "changing God's religion." The second is that it consists in "changing any of the apparent state of anything through tattooing, castration, poking out an eye of a male camel, effeminate behavior, and sacrificing certain cattle to idols." Al-Rāzī himself agrees on all of these interpretations, adding a further element that can be understood from this verse – namely, "if we go back to the words of Satan in the context of this Qur'ānic verse, he says: I will arouse in them false desires. Therefore, if a man accepts the word of Satan, it would lead him to change the nature created by Allāh." Al-Alūsī for his part says that "*So that they shall change Allāh's creation*" includes changing the

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[43] Abū al-Qāsim Maḥmūd Zamakhsharī, *Al-Kashshāf 'an 'Uyūn al-Aqāwīl fī Wujūh al-Ta'wīl* (Beirut: Dār al-Kitāb al-'Arabī [?]), vol.1, 566.

[44] al-Fakhr al-Rāzī, *al-Tafsīr al-Kabīr* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, [?]) Vol.9, 36.

appearance or shape of any of God's primordial creation, while for Sayyid Quṭb, this verse is directed toward attemptso to alter the shape of the body or to mutilate it in some way.[45]

From the above survey it is clear that the foremost interpreters of the Qur'ān saw the context of the verse in question as pertaining to the changing of God's religion in general and/or to other acts such as castration, tattooing, and the maiming of the eye of the camel, etc. Still, to strengthen this point of possible contention, more proofs will be offered to further corroborate this interpretation in the next section.

1.4.1.2. Critiquing the *Fatwā* Based on the Qur'ānic Interpretation

An objection may be raised not against the validity of the above Qur'ānic interpretive claims, but against the final meaning and authority of these interpretations. Do the above hermeneutical conclusions represent the final word on the verses in question, or is contemporary Islamic legal discourse juistified in extending their application? The answer is that, while it can be interpreted differently, it cannot be understood to mean that "any change in the world is prohibited;" for, if this were the case, the one making this claim would be required to demonstrate that the text is not limited to the case of camels and/ or cattle. Even if it is supposed that one could extend the aforementioned meaning of the verse, it cannot be generalized to include human beings or even all creatures because there would be three serious problems.

The first fundamental dilemma is: How can the meaning of "changing" in the context of this verse be transferred from livestock to human beings? Legally speaking, it

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[45] Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Beirut: Dār al-'Arabīyah lil-Ṭibā'a wal-Nashr,[?]) Vol.4, 210.

is necessary to formulate a valid legal analogy, *qiyās*. This *qiyās* would include the following procedure: a classification and successive elimination (*al-sabr wal-taqsīm*) of elements in which the *ratio legis* (*'illah*) is generally determined.[46] Then, this *'illah* should be examined for consistency (*ittirād*) against all cases that would be included under its application.[47] A thorough survey of the contemporary Islamic legal discourse on cloning, however, yields no such methodical attempt, but only a casual association of disparate facts. Hence, the conclusion reached by opponents of cloning on the verse in question may be valid in the context of moral preaching or exhortation, but it certainly does not constitute a legitimate and articulated legal argument on human cloning.

What assures the previous determination is that the methodology of *uṣūl al-fiqh* treats a legal text of the Qur'ān under a triad of laws concerning consistency: 1) generalized/specified; 2) restricted/unrestricted; and 3) literal/metaphorical relations between the vocabularies.[48] These laws would, firstly, require that the sentence "*Allāh's creation*" treated as an unrestricted clause (*mutlaqah*), i.e. connoting random items of its connotation substitutively.[49] Secondly, the word creation in "*Allāh's creation*" is in a subjunctive grammatical state (*manṣūb*) and the whole sentence is in a conjunction postion (*ma'tūf*), implying that this unrestricted clause should be restricted by the previous context – which is, "*and I will command them so that they shall slit the ears of the cattle, and most certainly I will command them so that they shall change Allāh's*

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[46] Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-fiqh* (New York: Cambridge University Press, 1997), 92.

[47] Ibid., 90.

[48] I will give a full analysis for this methodology in the second chapter.

[49] Ibn Qudāmah al-Maqdisī, *Rawdat al-Nāẓir wa-Junnat al-Munāẓir* (Beirut : Dār al-Kitāb al-'Arabī 1992),vol.2, 232, and Fathī al-Duraynī, *al-Manāhij al-'Uṣūliyyah fī al-Ijtihād bil-Ra'y fī al-Tashrī' al-Islamī* (Damascus : al-Sharikah al-Muttahidah lil-Tawzī' 1985), 668.

creation." Since the *uṣūlī* principle, in this case, declares that if any unrestricted clause positioned in the context of a non-negated (*ghayr manfiyyah*) restricted sentence with the similarity of reason and judgment.[50] Then that unrestricted clause should be restricted in connotations to the restricted phrase, "*they shall slit the ears of the cattle.*"

The second serious problem is the claim that "any change in the world is prohibited." Practically speaking, this is impossible, or in other words, it is meaningless.

The third problem is that there is a clear contradiction with the position of two other Qur'ānic texts. The first is the verse: "*And [He has created] horses, mules and donkeys, for you to ride and as an adornment. And He creates [other] things of which you have no knowledge.*"[51] This verse highlights, in a tone of admiration, the proliferation of new creatures such as mules, itself a hybrid of horses and donkeys. The second contradiction emerges from, "*So direct your face [Muhammad] toward the religion, inclining to the truth. [Adhere to] the fiṭrah of Allāh upon which he has created [all] people. No change would exist in Allāh's creation, but most of the people do not know.*"[52] The fact that these two verses cannot be reconciled with the position of contemporary legal discourse on verses invalidates the latter interpretation, and thus on the basis of the traditional *uṣūlī* principle of preserving the divine speech from contradiction (*ḥifẓ kalām al-shāri' min al-iḍṭirāb*).

From the foregoing analysis of the scholars of this doctrine we observe that their theory is based on a particular method of Qur'ānic interpretation: First, interpret some

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[50] Rafiq al-'Ajam, *Mawsū'at Muṣṭalaḥāt Uṣūl al-Fiqh 'inda al-Muslimīn* (Beirut: Maktabat Lubnān,1998),1456, and Ibn al-Subkī, *Ḥāshiyat al-'Aṭṭār 'alā Jam' al-Jawami'* (Bierut : Dār al-Kitāb al-'Ilmī), vol.2, 84.

[51] Qur'ān: 8:16

[52] Qur'ān: 30:30

Qur'ānic verses against human cloning in a way incompatible with the methods of the traditional methodology of *uṣūl al-fiqh* related to this field (the methodology of *uṣūl al-fiqh* insists on consistency in defining terms, particularly in applying the laws of restricted/unrestricted vocabularies in our case) and second, do so without acknowledging that an entirely new method of understanding Qur'ānic semantics would be needed to substantiate their conclusion. The end result can only be described as a *comprehensive failure of legal interpretation.*

The analysis provided by the Islamic Fiqh Academy of the Muslim World League and by Muslim scholars such as al-Zuḥaylī,[53] thus represents a massive self-contradiction of *fiqhī* doctrine. And to this the fact the verse specifically refers to animals, from which these scholars interpret a prohibition against humans; yet, significantly, they declare the cloning of animals and plants to be permissible, insisting that the practice is acceptable when it is for the betterment of humankind. Clearly, this egregious contradiction in interpretation is allowed to standfor ideological purposes. The opponents of human cloning extend the analogy to include entities (humans) not mentioned in the verse and yet, conveniently ignore the objects of ruling in the first place. It can therefore be reiterated: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are not based on a valid legal interpretation of the religious texts.*

1.4.2. The Doctrine of Prohibition Based on Utilitarian Hermeneutics

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[53] 'Ulwānī, *Al-Istinsākh,* 122.

It has been shown that in their *fatwās* and legal opinions, contemporary Muslim scholars who advocate against human cloning are not performing a true *fiqhī* interpretation of the Qur'ān, and that the most that can said is that they refer to the Qur'ān in a manner more attuned to pierty. Here, it may instead be assumed that they are basing their proofs on another fundamentally legitimate basis, the utilitarian legal hermeneutics. In other words, they can then argue that they are following one of the most important legislative principles (*al-mabādi' al-tashrī'iyyah*),[54] known in *uṣūl al-fiqh*, which is the hermeneutical principle of seeking benefits and preventing evil (*al-ta'wīl bi-jalb al-maṣlaḥah wa-dar' al-mafsadah*). That this is not the case, however, will be shown in the following for as we also state at the outset of the chapter: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are not based on a comprehensive and necessary application of utilitarian legal hermeneutics.*

Indeed, irrespective of whether the reasons for the *fiqhī* prohibition proposed by this doctrine is right or wrong, the methodology used to support it is incomplete and faulty. Thus, the reasons offered for the negative *fiqhī* response to the question: "Why cannot a married man and woman, who are sterile, have a child through human cloning technology?" Here, the deterministic attitude for the prohibition, which is remarkable in that it does not limit itself to a restricted or conditional prohibition, is most probably an indication of failure in devising *fatwās*.

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[54] For further information see Fatḥī al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 14.

The doctrine of utilitarian legal hermeneutics has among its followers three of the most highly regarded scholars in both the fields of *fiqh* and *uṣūl al-fiqh:* Yūsuf al-Qaraḍāwī,[55] Muḥammad Saʿīd Ramaḍān al-Būṭī,[56] and al-Ṭayyib Salāmah.[57] Common to each of these scholars is the fact that none of them rely on the aforementioned methodology, i.e., citing a supposed Qur'ānic prohibition of human cloning. For instance, none of the scholars advocating the second doctrine interpret the verse *"changing Allāh's creation"* to mean what has been inferred by other opponents of the technology. In *uṣūlī* methodology, moreover, the doctrine of the prohibition of legal hermeneutics claims that the case of human cloning is unstated in the Qur'ān (*ghayr manṣūṣ ʿalayh*). Similarly, Yūsuf al-Qaraḍāwī goes so far as to deny the existence of a previous case on which to practice *qiyās*, saying: *"lā yuqās ʿalayh."*[58]

The second doctrine for advocating prohibition depends on the epistemological application of two methodological principles of *uṣūl al-fiqh:* 1) the prevention of the wrong means (*sadd al-dharīʿah*) and 2) the final results of rulings (*ma'ālāt al-afʿāl*). The contents of this doctrine and its two major objections against human cloning will be discussed in the light of two issues: the first is the expected nefarious results that human

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[55] Yūsuf al-Qaraḍāwī, *Al-Istinsākh al-Basharī wa-Tadāʿiyātuh*, (accessed, December 13, 2003):
http://www.islam-online.net/fatwaapplication/arabic/display.asp?hFatwaID=13986
[56] Shihādah, *Al-Istinsākh bayna al-ʿilm wa l-Falsafah wal-Dīn*,121.
[57] Ibid.
[58] al-Qaraḍāwī, *Istinsākh al-Bashar wa-Ra'y al-Qaraḍāwī fīh*, (accessed, December 13, 2003):
http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2883&version=1&template_id=130&parent_id=17

cloning portends for the family and relationship structures,[59] while the second is the

generally anticipated and wider problems this entails.[60] These two objections will be

further analyzed in terms of the particular legal and ethical arguments they offer for the

prohibition of human cloning, in sections 1.4.2.1. and 1.4.2.2, respectively. Lastly,

ojection will be criticized in an effort pinpoint their weaknesses.

1.4.2.1. The First Objection of the Second Doctrinal Position to Human Cloning:

The expected disastrous results of human cloning and its potential effect on the

human family and its relationship structures is the first objection raised by scholars who

would prohibit the practice on the basis of utilitarian legal hermeneutics. Traditional

family structures would be destroyed since the cloned (*al-mustansakh*) and the source (*al-mustansakh minhu*) do not fit into normal models of human relations. This issue will be

referred to as the element (a) in the following presentation of the first objection to human

cloning in section 1.4.2.1.a. This, critic say, would in turn, result in the destruction of the

family as the exclusive entity through which a child receives her/his normal human

upbringing: This issue will be called element (b) and will be discusses in section

1.4.2.1.b. Following the description of these two elements, the evidence for their validity

will be examined and a critique offered for each in sections 1.4.2.1.a.1 and 1.4.2.1.b.1,

respectively.

1.4.2.1.a. The Evidence for Element (a) in the First Objection of the Doctrine

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[59] Husayn Balhasani, *Al-Istinsākh al-Basharī: Muqārabah Fiqhiyyah wa-Qānūniyyah* (Casablanca: al-Dār al-Bayḍā' al-Aḥmadiyyah lil-Nashr, 2000), 26.
[60] Ibid., 101.

of the Prohibition of Utilitarian Legal Hermeneutics

The most fundamental argument (*ḥujjah*) and the one to which Muslim scholars continually refer is the evidence of element (a) in the first objection to the doctrine of the prohibition of utilitarian legal hermeneutics. This element is the destruction posed to the traditional family by the fact that the cloned (*al-mustansakh*) and the source (*al-mustansakh minhu*) do not fit in traditional models of human relationships. Al-Qaraḍāwī applies his understanding of utilitarian legal hermeneutics to the issue of human cloning by beginning his argument with reference to these nefarious results of human cloning (*al-mafāsid al-mutarattibah 'alā al-istinsākh*). In another example, the Muslim scholar Abdulaziz Sachedina sees the following basic principles of *sharī'ah* as pertaining to new technical inventions: "(1) refraining from causing harm and loss to oneself and others (*lā ḍarar wa-lā ḍirār*), and (2) averting causes of corruption has precedence over bringing about benefit (*dar' al-mafāsid muqaddam 'alā jalb al-maṣāliḥ*)."[61]

Al-Qaraḍāwī works within the aforementioned framework described by Sachedina, but differs from most Muslim scholars by relying on a very rare interpretation of the following serves, quoted above in a different context:

> Do you not see that Allāh sends down water from the cloud, then We bring forth therewith fruits of various colors; and in the mountains are streaks, white and red, of various hues and (others) intensely black?[62]

This verse, according to his interpretation, is couched in modernistic terms, and presents an Islamic theological axiom, namely, preserving the phenomenon of pluralism (*ẓāhirat*

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[61] Abdulaziz Sachedina, *Islamic Perspectives on Cloning.* (accessed, December 13, 2003): http://www.people.virginia.edu/~aas/issues/cloning.htm

[62] Qur'ān 35:27

al-tanawwu‘). Human cloning, according to al-Qaraḍāwī, goes against this necessary phenomenon; thus filling the world copies of cloned humans will violate this divine principle.[63] This suggests to him another divine principle that may be set against the practice, i.e. Allāh's rule of pairs and pairing (*sunnat al-zawjiyyah*):

And of everything We have created pairs that you may be mindful.[64]

Within this theological conceptualization, al-Qaraḍāwī asks the following question: How can we understand the relation between the cloned (*al-mustansakh*) and the source, or "cloned from" (*al-mustansakh minhu*)? Is the source a father, a mother, a twin brother, or a stranger unrelated to the cloned?[65] Furthermore, the Qur'ānic definition for classification of a progeny (*bunuwwah*) is: "*their mothers are no others than those who gave birth to them.*" [66] Thus, if the legal relation between the cloned and the source cannot be determined, "we should deny this process from its origins, because of all these nefarious results and these sins, some of which have just been revealed while the rest are still hidden in the future." [67]

Similarly, if human cloning cannot fit in any classification of the traditional models of human relationships, how can we build (upon this vague relationship) legal fiscal relations, especially inheritance? In the absence of any answer to such concerns, then it can only pose a danger to, God's primordial creation, *fiṭrah*. In other words, this

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[63] al-Qaraḍāwī, *Mawqif al-Sharī‘ah min al-Taṭawwurāt al-‘Ilmiyyah.* (accessed, December 24, 2003):
http://www.aljazeera.net/programs/shareea/articles/2001/4/4-3-1.htm
[64] Qur'ān 51:49
[65] al-Qaraḍāwī, *Mawqif al-Sharī‘ah min al-Taṭawwurāt al-‘Ilmiyyah.*
[66] Qur'ān 58:2
[67] al-Qaraḍāwī, *Mawqif al-Sharī‘ah min al-Taṭawwurāt al-‘Ilmiyyah.*

bio-technological invention will ultimately be destructive of the structure of familial relations.

1.4.2.1.a.1. Critiquing the Evidence (a)

According to *uṣūl al-fiqh*, al-Qaraḍāwī's Qur'ānic conceptualization and argument can be subjected to serious criticism since it is not possible to infer an imperative mode (*amr*) from a declarative clause (*jumlah khabariyyah*), such as in the context of the Qur'ānic wonder at (*tasbīḥ*) and praise for Allāhs' creation:

> Do you not see that Allah sends down water from the cloud, then We bring forth therewith fruits of various colors; and in the mountains are streaks, white and red, of various hues and (others) intensely black? [68]

Qaraḍāwī's analysis can be seen as exceeding by a wide margin the conclusions arrived at by earlier *uṣūlīs*. For according to *uṣūl al-fiqh*, the above Qur'ānic text is not classified as a discourse of religious obligation (*khiṭāb taklīfī*) since it is not: 1) in an imperative mode (*al-amr wa al-nahī*), or 2) a conditional description of legal cases (*khiṭāb waḍʿī*).[69] *Uṣūl al-fiqh* sees only these two types of texts as valid grounds for deriving legal implications, due to the fact that the other type of verse is adduced for other reasons, such as for preaching for reward and punishment (*al-waʿad wal-waʿīd*), indicating the signs of Allāh's creation (*dhikr āyāt Allāh fī khalqih*), or relating historical narrations (*al-qaṣaṣ al-Qur'ānī*).

The methods of (*sadd al-dharīʿah*) and (*maʾālāt al-afʿāl*) are products of creative legal thinking, *ijtihād*, since they are not a direct divine injunction. This makes

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[68] Qur'ān 35:27

[69] al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Cairo: Dār al-Ṣafwah, 1992), vol.4, 127.

them controversial, especially pertaining to very specific cases or cases that the *mujtahid* does not anticipate. Al-Qaraḍāwī wants to highlight the exceptional aspects of the phenomenon of human cloning. If his argument were a universal and divine argument, the phenomenon of identical twin children, since they go against the principle of pluralism, would be a sinful phenomenon. Al-Qaraḍāwī does not offer an 'authentic' *uṣūlī* analysis explaining how he established the phenomenon of pluralism as a divine principle. As a result, he fails to illustrate what the *'illah* is in order to see the consistency (*ittirād*) that designates where and when we shall respect the principle of pluralism.

Accepting the premise that a given married couple is sterile, one might ask, if it is from their cells that the clone is obtained, the cloned human ought not to be attributed to that couple? Straightforward intuition suggests that the female source is a mother and the male source is a father. Financial relations can be just as firmly built on this criterion, as well as the family relations. And these family relations are precisely what al-Qaraḍāwī admits in the case of test-tube babies. These inconsistencies constrain al-Qaraḍāwī's doctrine and show how applying the principles of (*sadd al-dharī'ah*) and (*ma'ālāt al-afʿāl*) can lead to controversial positions on legal rulings when they are over- generalized and unlimited. Al-Qaraḍāwī's position could have been much more consistent had he limited the prohibition to cases in which the process of cloning takes place outside the limits of a legitimate family; such a case might well accord with the nefarious results he assumes.

1.4.2.1.b. The Evidence For Element (b) in the First Objection of the Doctrine of the Prohibition of Legal Hermeneutics

Destroying the basis of the family - the environment where a child ideally receives a normal human upbringing - is element (b) in the first objection justifying the prohibition of human based on legal hermeneutics. According to al-Qaraḍāwī, this element will have a disastrous effect upon the institution of the family and its relationship structures. Allāh's system in the world (*Sunnah*) is to have the child born and raised with the support and compassion of its parents, who provide her/him with a good example in education, while also supporting her/him financially and spiritually.

1.4.2.1.b.1. Critiquing the Evidence (b)

Even the foregoing the argument, with which few would disagree, cannot be a necessary (*lāzim*), but only a sufficient cause (*kāfī*). This is because its logic implies that a pregnant woman whose husband has recently died would be subject to the charge of undermining the family, since the family in this case does not have both parents. Once again, we see al-Qaraḍāwī speaking in terms of universals, based on incorrect assumptions.

1.4.2.2. The Second Objection in the Second Doctrinal Position to Human Cloning

In the second objection to human cloning, the doctrine of utilitarian legal hermeneutics reinforces the proofs of the prohibition. Most of the efforts by Muslim scholars, in this respect, can be classified as a collective discourse based on the international literature concerning the phobia against human cloning. There is an endless list of anticipated horrors,[70] such as: 1) a population explosion due to the expected

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[70] Shihādah, *Al-Istinsākh bayna al-'Ilm wal-Falsafah wal-Dīn*, 101-103, 112-113.

industry of cloning; 2) the ensuing despotism of governments and companies gaining control over the cloning process; 3) the cloning of evil historical figures and dictators as timeless rulers in some communities; 4) the possible advent of a universal matriarchal society; 5) the epidemic susceptibility to infection between the same cloned humans and new diseases; and 6) potential disasters stemming from massive social disorder, in which a man would not know his wife or a teacher her/his students. These are but a few of the numerous possible calamities that may arise and that are reasons for such vehement opposition to human cloning.

This list catalogue of potential horrors also informs the doctrine of the legal interpretation of the Qur'ān, although it is not the kernel of the juristic argument, rather, the doctrine of utilitarian legal hermeneutics relies on these elements and uses them as the primary source. The above list, which may be described by some as paranoia, is employed by the scholar Muḥammad Saʿīd Ramaḍān al-Būṭī, who is well known for his philosophical legal writings,[71] to make the required religious argument for prohibition. All of these chaotic phenomena and anticipated horrors of human cloning, according to al-Būṭī, would be the consequence of such a sinful offence against Allāh's system (*Sunnah*) and measurements (*taqdīr*) in the world. Nevertheless, he refers to the following verses to demonstrate the prohibition of human cloning:

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[71] For further information see the following works by Muḥammad Saʿīd Ramaḍān al-Būṭī: *al-Islām Mlādh kull al-Mujtamaʿāt al- Bashariyyah: Limādhā wa-kayf ?* (Damascus: Dār al-Fikr al-Muʿāṣir 1991); *Ḍawābiṭ al-Maṣlaḥah fī al-Sharīʾah al-Islāmiyyah* (Damascus: Muʾassasat al-Risālah lil-Ṭibāʿah wal-Nashr wal-Tawzīʿ, 2001); *Kubrā al-Yaqīniyyāt al-Kawniyyah* (Damascus: Dār al-Fikr al-Muʿāṣir, 2001); *al-Jihād fī al-Islām: Kayfa Nafhamuh wa-Kayfa Numarisuh?* (Damascus: Dār al-Fikr al-Muʿāṣir, 1994); *Ḥiwār Ḥawl Mushkilāt Ḥaḍāriyyah* (Muʾassasat al-Risālah lil-Ṭibāʿah wal-Nashr wal-Tawzīʿ, 1991).

He has created everything, and has measured it exactly according to its due measurements.[72]

Surely we have created everything according to a measure [73]

And do not make mischief in the earth, after its reformation [74]

This phenomenology of the sinfulness of human cloning can be found scattered throughout most of the *fatwās* on the subject, but not in this form of articulated discourse. Al-Būṭī starts his very short legal opinion by pointing out that "cloning is a type of tampering (*talāʿub*) with the structure of genetics, and the Qurʾān warns that the ecological, social, and genetic structures are composed chemically and microbiologically by God in a careful manner. Therefore, we may not tamper with it."[75]

1.4.2.2.1. Critiquing this Objection

Al-Būṭī, in this sense, does not even agree with the permissibility of animal cloning. It is not clear what the limits are to his conception of the so-called tampering (*talāʿub*) with the structure of genetics or nature at large, if any. Al-Būṭī's argument thus places him in difficulty in two respects. He is either forced to prove that human cloning is textually prohibited – which he already knows not to be the case, since he did not follow the previous doctrine of the Qurʾānic legal interpretation – or, he is forced to ban the whole process of the advancement of technology in order to prevent further tampering with the structure of nature, a doctrine to which he might well be unwilling to commit himself. A far more cautious approach is takeb by the Shīʿī Lebanese scholar al-Sayyid Muḥammad Ḥusayn Faḍl Allāh, the only Muslim scholar, to the writer's knowledge, who

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[72] Qurʾān 25:2
[73] Qurʾān 54:49
[74] Qurʾān 7:56
[75] Shihādah, *Al-Istinsākh bayna al-ʿIlm wal-Falsafah wal-Dīn*, 121.

has not issued a *fatwā* prohibiting human cloning, preferring to suspend his judgment until a successful realization of the experiment of human cloning has been accomplished.[76]

1.5. Concluding remarks

The entire enterprise of technology, in this instance, rests upon altering the normal course of nature in order to render it more pliant to the needs of the human being. And here lies the heart of the problem: Is it possible to alter nature for the benefit of humankind while remaining faithful to religious commitments? This orientation of the necessity of technology within religious paradigms is agreed upon by al-Būṭī, al-Qaraḍāwī, the Islamic Fiqh Academy and the majority of scholars studied in this chapter. However, the specified hermeneutics of the legal case of human cloning, prohibited on the casis of two different doctrines of contemporary Islamic legal discourse, is excessively ideological and shows insufficient legal judgment. Hence, the only conclusion is the following: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are based neither on a valid legal interpretation of the religious texts nor on a comprehensive and necessary application of utilitarian legal hermeneutics.* This evalution of the hermeneutics of the contemporary Islamic legal discourse, by comparing its methodology to the original methodology of *uṣūl al-fiqh*, will continue in the coming two chapters. The second chapter will assess the first doctrine of the interpretation based on the Qur'ānic verses pertaining to the prohibition of human

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[76] Shihādah, *Al-Istinsākh bayna al-'Ilm wal-Falsafah wal-Dīn*, 131.

cloning, while the third chapter will be directed at appraising the second doctrine of utilitarian legal hermeneutics.

CHAPTER TWO
THE FOUNDATIONS OF HERMENEUTICS IN UṢŪL AL-FIQH: AL-TA'WĪL AL-UṢŪLĪ

The purpose of this chapter is to discover the foundations of the hermeneutics of Islamic legal theory, *uṣūl al-fiqh*. This elucidation will serve as a reply to the first doctrinal argument against human cloning, which is based in Qur'ānic interpretation. This critique will offer methodological insight into the critical claim of the first chapter: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts, since the* fatwās *and* fiqhī *opinions offered in this regard are based neither on a valid legal interpretation of the religious texts nor on a comprehensive and necessary application of utilitarian legal hermeneutics.* This methodological background will support the critiques already made of the adduced generalizations and will argue a particular meaning for the verse, "*changing Allāh's creation.*" Before presenting the structure of the hermeneutics of *uṣūl al-fiqh*, and for added clarity regarding relevant terminology, a brief illustration will be offered of the position of hermeneutics (*ta'wīl*) within the various fields of *uṣūl al-fiqh* – to the exclusion of theological and mystical *ta'wīl*.

In the Arab world, there is currently underway a massive effort to reintroduce traditional Islamic legal therory, *uṣūl al-fiqh*. Books and articles appear on a regular basis in support of this effort. One example is the work *al-Manāhij al-Uṣūliyyah fī al-Ijtihād bil-Ra'y fī al-Tashrī' al- Islāmī* (lit. Jurisprudential Methodologies of Creative Thinking In Islamic Legislation) by Professor Muḥammad Fatḥī al-Duraynī.[77]

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[77] Muḥammad Fatḥī al-Duraynī, *al-Manāhij al-Uṣūliyyah fī al-Ijtihād bil-Ra'y fī al-Tashrī' al- Islāmī* (Beirut: Mu'assasat al-Risālah, 1997), 152.

Nevertheless, al-Durayni's work stands out as an original contribution to the science of *uṣūl al-fiqh* itself. The author demonstrates a masterful understanding of the three major schools of *uṣūl al-fiqh*: *al-Mutakallimūn* (lit. theologians), the *Ḥanafiyyah*, [78] and the *Ẓāhiriyyah* (lit. literalists). After evaluating each, al-Durayni chooses the methodology of the second school, having proved his satisfaction why its approach is the most efficient. Then, he integrates the general accumulation of the theory of *maqāṣid al-sharī'ah*, or objectives of the *sharī'ah* – especially as structured by Shāṭibī – to make it the common theme of his text.

Before delving into the heart of our topic, it may be useful to position *al-ta'wīl al-uṣūlī* within the various other types of *al-ta'wīl*. A widely-held contention exists within the field of Islamic studies that the methodological and rigorous process of hermeneutics (*al-ta'wīl*) is exclusively the territory of Islamic theology (*'ilm al-kalām*.) Theological hermeneutics was developed to solve the contradictory readings of certain Qur'ānic verses illustrating God's attributes, (*al-ṣifāt*.)[79] Although Islamic mysticism (*al-tasawwuf*) is one of the competing doctrines of theological hermeneutics, its approach to Quranic language is very subjective and symbolic,[80] which makes it less rigorous then theologians' hermeneutics of the Qur'ān in terms of logic and structure.

Although Islamic hermeneutics achieved a high level of logical elaboration in *'ilm al-kalām* and an intense usage of symbolic and metaphorical reading in *tasawwuf*, in

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[78] See, Ibn Khuldūn, *Muqaddimat ibn Khuldūn: Dīwān al-'Ibar wa-Kitāb al-Mubtada' wal-Khabar fī Akhbār al-'Arab wal-'Ajam wal-Barbar wa-Man 'Aṣrahum min Dhawī al-Sulṭan al-Akbar*, ed. 'Alī 'Abd al-Wāḥid Wāfi (Cairo: Dār Nahḍat Miṣr lil-Ṭibā'ah wal-Nashr, 1981) vol. 3, 1066.

[79] Naṣr Ḥāmid Abū Zayd, *al-Ittijāh al-'Aqlī fī al-Tafsīr* (Beirut: Dār al-Tanwīr, 1982), 245.

[80] Naṣr Ḥāmid Abū Zayd, *Mafhūm al-Naṣṣ: Dirāsah fī 'Ulūm al-Qur'ān* (Cairo: al-Hay'ah al-Miṣriyyah lil-Kitāb, 1990), 318.

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neither does one find a logical-linguisitc approach to the religious text.[81] The previously

mentioned critique may be one of the reasons why hermeneutics was highly condemned

outside the fields of *'ilm al-kalām* and *taṣawwuf,* under the *'aqīdah* classification of

condemned hermeneutics (*al-ta'wīl al-madhmūm*).[82] Indeed, the only type of

hermeneutics that was not methodologically suspect and condemned, existed in the field

of *uṣūl al-fiqh.* Unfortunately, however, this area of scholarship did not receive much

attention.[83] For this reason, the following sections will constitute an attempt to answer the

question: "What is the structure of *uṣūl al-fiqh* hermeneutics" To do so, a reference will

be made to the system of Muḥammad Fatḥī al-Duraynī?" However, discerning the

process of *ta'wīl* as an endeavor that seeks consistency within the text itself firstly and

within the body of legislation, secondly, is the present auther's own contribution.

2.1. Qur'ānic Hermeneutics in *Uṣūl al-fiqh:* A Historical Background

The origins of *uṣūl al-fiqh's* hermeneutics can be traced back to a point many

years before the theological hermeneutics associated with the problem of *fitnah,* a period

of disagreement and disorder in Islamic society that arose in 35/655, and gave rise to

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[81] Abū Zayd, *Mafhūm al-Naṣṣ,* 275-336.

[82] For further information see Ibn al-Qayyim al-Jawziyyah, *al-Ṣawā'iq al-Munazzalah 'alā al-Ṭā'ifah al-Jahmiyyah wal-Mu'aṭṭilah* (Saudi Arabia: Maṭābi' al-Jāmi'ah al-Islāmiyyah bil-Madīnah al-Munawwarah, 1407 A.H.), vol. 1, 317, and the Qur'ānic verse 7:3 *"as for those in whose hearts is deviation [from the truth] follow that of which is equivocal language, seeking discord and seeking hermeneutics."*

[83] Ṭāhā 'Abd al-Raḥmān, *Tajdīd al-Manhaj fī Taqwīm al-Turāth* (Beirut: al-Markaz al-Thaqāfī al-'Arabī, 1999), 130, and Muḥammad Fatḥī al-Duraynī, *al-Manāhij al-Uṣūliyyah,* 37.

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many theological issues –beginning with the problem of Muslim leadership (*imāmah*).[84]

Qur'ānic hermeneutics, in essence, started after Prophet Muḥammad passed away, at

which point, the Prophet's companions, as Ṣaḥābah, were faced with the problem of

understanding the legal portions of the Qur'ān. In the next two sections (2.1.1 and 2.1.2),

two detailed examples will be offered in order to shed light on the implementation of

uṣūlī hermeneutics.

2.1.1. The Example of *'Iddah*

According to the Qur'ān, a woman who wants to marry a new husband after she

had a divorce case or her previous husband has passed away needs to wait for several

menstruational periods known as *'iddah*, [85] in order to be certain that she is not pregnant:

"And (as for) those of you who die and leave wives behind, they should keep themselves

in waiting for four months and ten days; then when they have fully attained their term,

there is no blame on you for what they do for themselves in a lawful manner." [86]

However, a question not originally addressed was: What if a woman's husband died

while she was pregnant? This question was a legal case that required the exercise of legal

hermeneutics. The Qur'ān may suggest a solution to this question in the following verse:

> And (as for) those of your women who have despaired of menstruation, if you
> have a doubt, their prescribed time shall be three months, and of those too who
> have not had their courses; and (as for) the pregnant women, their prescribed
> time is that they lay down their burden; and whoever is careful of (his duty to)
> Allāh He will make easy for him his affair.[87]

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[84] Abū Zayd, *al-Ittijāh al-'Aqlī fī al-Tafsīr*, 12.
[85] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 152.
[86] Qur'ān 2: 234
[87] Qur'ān 65: 4

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It is evident from the two Qur'ānic verses cited above that there is contradictory information being offered. In the first verse, the period is four months and ten days. In the second cited verse, the period is determined by the moment of a woman's giving birth, which could constitute a wait from the first discovery of the pregnancy until a point of time of nine months later. In other words, this period may extend, conceivably, form only one day if the delivery happened exactly after the death (as, by extension, divorce), to more than the four months and ten days proscribed in the first verse.

This contradictory set of Qur'ānic rulings, in a text that claims to be canonical as well as holy, would be logically and practically impossible to implement. The Prophet's companions (*ṣaḥābah*) found two ways to resolve this discrepancy through Qur'ānic hermeneutics. 'Abd Allāh ibn Mas'ūd (d. 23/ 643) issued his legal opinion (*ra'y*) on this problem, declaring the second verse a specifier, *mukhaṣṣiṣah*, of the first one. This means that the Qur'ānic verse "*And (as for) those of you who die and leave wives behind, they should keep themselves in waiting for four months and ten days*"[88] should be a general rule for all legal cases, wherease in the specific case of pregnancy, the verse "*(as for) the pregnant women, their prescribed time is that they lay down their burden*"[89] applies. 'Abd Allāh ibn Mas'ūd determined the period to be that which elapses until a woman gives birth, even if the pregnant woman were to deliver before the limit of four months and ten days or afterwards. Ibn Mas'ūd's interpretation prevents the Qur'ān from

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[88] Qur'ān 2: 234
[89] Qur'ān 65: 4

falling into a contradiction that might confuse Muslim practice, and likewise preserves

the textual consistency (*ittisāq*)[90] of the Qur'ānic legal discourse.

'Alī ibn Abī Ṭālib, another important Ṣaḥābī and the fourth Khalīfah of Islam (d.

40/660) issued a different legal opinion.[91] In his interpretation of the two previously

cited verses, he concluded that the further of the two limits should be adhered to: this

means that if the four months and ten days for the pregnant women elapse without giving

birth, the women should continue her *'iddah* period until she gives birth. But in contrast

to 'Abd Allāh ibn Mas'ūd's *ra'y*, he maintained that a woman cannot marry a new

husband even if she gives birth before the *'iddah* is over. The *ta'wīl* or hermeneutics of

'Alī ibn Abī Ṭālib aims at preserving the functional validity of the two Qur'ānic

sentences at once and in the same time. His legal decision (*fatwā*) rests on a Quranic

interpretation that fuses the meaning of both of the two sentences. The interpretation

seeks to prevent a new legal case from arising that may contradict any Qur'ānic verse.

From this point of view, 'Abd Allāh ibn Mas'ūd seems to have accepted a new legal case

contradicting the Qur'ānic verse, "*And (as for) those of you who die and leave wives*

behind, they should keep themselves in waiting for four months and ten days"[92] We can

generalize his *ta'wīl* and say that he accepts new particular legal case to contradict any

general Qur'ānic verse unless these verses are not articulated to connote particularly the

same legal case. Then a rational and creative effort (*ijtihād*) could practice Qur'ānic

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[90] I am borrowing the concept of *ittisāq* as Ṭāhā 'Abd al-Raḥmān articulates it, i.e. taking
it in the sence of "logical consistency." However, the application of this concept on the
foundations of hermeneutics in *uṣūl al-fiqh* is totally mine.
[91] Ibid., 153.
[92] Qur'ān 2: 234

interpretation by specifying a non-contradicted Qur'ānic sentence with a contradicted generalized Qur'ānic sentence.

The various perceptions and opinions as presentd by 'Abd Allāh ibn Mas'ūd and 'Alī ibn Abī Ṭālib exhibited a high level of intellectual sophistication, at a very early stage in the history of Islam, and achieved the aim of unifying contradictory or equivocal passages of the Qur'ānic and enabled it to cover new legal cases. It is clear in fact that their prime concern was to preserve the consistency of the Qur'ān in the face of this legal case, that this is what motivated the whole discussion between the two *muftīs*. I will call this *ijtihād*, which seeks to establish consistency between apparently contradictory texts of the Qur'ān, or 'textual consistency,' as will be explained in section 2.2.1. There are copious other similar examples that have engaged human reason in its approach in the core of the Qur'ānic legal text, and the next is one of them.

2.1.2. The Example of Sawād al-Irāq

It may be argued that 'Umar ibn al-Khaṭṭāb, a Companion and Caliph (d. 24/644), provides in the following case of *sawād al-'irāq* the best example of *uṣūl al-fiqh* hermeneutics.[93] He was regarded as a leader in creative legal reasoning and is in fact known as *Imām Ahl al-Ra'y*. The problem of our hermeneutical legal case is based on this verse:

> And know that whatever thing you gain, a fifth of it is for Allāh and for the Messenger and for the near of kin and the orphans and the needy and the wayfarer.[94]

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[93] Ibid., 154.
[94] Qur'ān 8 :41

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The verse establishes that if Muslims obtain war booty, one-fifth is to go toward the aforementioned expenditures. The rest, four-fifths, is for the fighters who won the war. 'Umar ibn al-Khaṭṭāb, however did not find this legal conjecture applicable to the conquest of Iraq (*fatḥ al-'Irāq*). The particular problem faced at that time was the fighters' desire to possess movable and immovable properties, including a huge amount of lands from the newly conquered (*sawād al-'Irāq*) country. The fighters requested that they receive their stated portion in the Qur'ān; even if this meant dividing up a newly conquered country for private purposes. 'Umar ibn al-Khaṭṭāb, as head of state, had to issue a *fatwā* to the army, declaring, "this is my legal opinion (*hādhā ra'yī*)." His interpretations were based on an argument that answers the following two questions: 1) If Muslims offer immovable properties to the fighters, what is to be given to the coming generations of Muslims? 2) If Muslims offers offer four-fifths of the immovable properties to fighters, what will constitute the financial source to fund future conquests, which itself is a major religious duty (*wājib shar'ī*)? Additionally, if given the land, how can it be ensured that the fighters will continue fighting in the cause of Islam, and not simply settle in Iraq?[95]

'Umar answered these questions in the process of establishing his own argument at a government-legislative meeting, or *shūrā*. His decision was to rest upon an understanding of the Qur'ānic verse on war-booty expenditure. In his *fatwā*, the immovable properties of Iraq would not be given to the fighters, but rather, would be left in the possession of the prior, non-Muslim Iraqi owners. Additionally, those owners

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[95] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 155.

would be expected to pay a citizenship and security tax (*jizyah*)[96] to reward the fighters for their fighting and cover both the expenses of subsequent Muslims generations and future Islamic conquests.

Yet, I see that 'Umar ibn al-Khaṭṭāb's interpretation of the Qur'ānic verse illustrates a different approach in comparison to the previously discussed Qur'ānic hermeneutics of 'Abd Allāh ibn Mas'ūd and 'Alī ibn Abī Ṭālib. The legislative consistency of the legal discourse, not textual consistency, was what controlled 'Umar ibn al-Khaṭṭāb's Qur'ānic hermeneutics. The reason behind this hermeneutical approach of legislative consistency was that contradiction is not to be found between two texts that discuss the same legal case or between a verse and a new legal case. Instead, it is usually between a stated verse and a principle, *mabda'*, or a faculty, *kulliyah*, that is induced from other stronger legislative principles that occur more often in the primary texts of the Qur'ān and Sunnah. In the case in question, the stated verse asserts that the portion taken from the total of the war booty for communal purposes was to be one-fifth, while the four-fifths were to the fighters. Still stronger legislative principles, however, or the spirit of the law (*nafs al-sharī'ah*),[97] understood from whole passages of the Qur'ān, forbade the nefarious results of stopping the conquests (*futūḥ*) and impoverishing the generations to come. These two undesirable results are mentioned in two other general verses:

> Surely Allāh enjoins the doing of justice and the doing of good (to others) and the giving to the kindred, and He forbids indecency and evil and rebellion; He admonishes you that you may be mindful.[98]

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[96] Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: al-Maṭba'ah al-Salafiyyah, 1353 A.H.), 14-16.
[97] Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid* (Beirut: al-Maṭba'ah al-'Aṣriyyah, 1982), vol.2, 154.
[98] Qur'ān 16:90

Certainly We sent Our messengers with clear arguments, and sent down with them the Book and the balance that men may conduct themselves with equity; and We have made the iron, wherein is great violence and advantages to men, and that Allāh may know who helps Him and His messengers in the secret; surely Allāh is Strong, Mighty.[99]

And strive hard in (the way of) Allāh, (such) a striving a is due to Him[100]

'Umar ibn al-Khaṭṭāb's legal hermeneutics pays close attention to the outcomes of the sharī'ah or the legislative consistency of the legal discourse and its functionality, and this process aims to prevent the Qur'ān from turning into a blind, mechanical,[101] and formalistic text that would contradict its own aims of seeking virtue in the world, al-iṣlāḥ fī al-ard. Thus, his hermeneutics reached a level of authority that would restrict the applicability of a Qur'ānic verse, implying that interpretation could generate a ruling to be comparable to the divine source itself. This point will be elaborated in more detail in the third chapter, but for now consideration must be given to the legal mind and the methodology that are implicit in hermeneutics: these are the foundations of the uṣūlī hermeneutics, as will be shown in the next section.

2.2. The Structure of Hermeneutics in Uṣūl al-Fiqh

Equipped with an extensive hermeneutical experience, legal theoristes or uṣūlists gathered most of the similar examples to cases of 'iddah and sawād al-'Irāq and studied them systematically, in order to establish a theory of hermeneutics. The uṣūlists developed in the process a highly elaborate method to determine when a generalized ('āmmah) Qur'ānic sentence should be specified (khāṣṣah), and when an unrestricted

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[99] Qur'ān 57: 25
[100] Qur'ān 22:78
[101] al-Duraynī, al-Manāhij al-Uṣūliyyah, 494.

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(*mutlaqah*) Qur'ānic sentence should be restricted (*muqayadah*). In the same vein, this theory of hermeneutic could be used to help distinguish metaphoric (*majāz*) from literal (*haqīqah*) usage of texts.

The question that may be posed is: What is the essence of Islamic hermeneutics (*ta'wīl*)? *Ta'wīl* is "the clarification of God's intentions behind revealing certain Qur'ānic sentences. This is to say, by changing its obvious or literal meaning to other possibly stronger meanings."[102] *Ta'wīl* is a verbal noun from the Arabic verb *awwal*, literally meaning to go back to the origin 'or the first' (*al-awwal*). However, it is technically used to convey meaning or to have something in its final outcome. For instance, the mathematical phenomenon of the infinite decimal number (1.99999) rounds up (*ya'ūl*) to the number (2). In this example, the infinite decimal number (1.99999) does not have a definite quantity in itself, but in its final outcome (2). In the case of *ta'wīl* with respect to a certain Qur'ānic sentence, it means having well-guided *ijtihād* into God's intention, by "rounding off" certain inapplicable Qur'ānic sentence in order to tease out its most accessible meaning. In the *ta'wīl* endeavor the *mujtahid* reaches the level of knowledge most probable (*ghālib al-zan*), as if God would have revealed a sentence discussing a given legal case in question. This suggests that some Qur'ānic sentences are undefined and in their meaning with regards to particular legal cases. This is similar to the example of the infinite decimal in the number (1.99999). *Ta'wīl* in this approach can be said to consist of three premises, namely: 1) God had an original intention (*maqaṣid al-sharī'ah*) in leaving an undefined connotation within certain verses; 2) a human rational and creative effort (*ijtihād*) is capable of communicating what God originally

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[102] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 167.

wanted, to be achieved by looking for an intentional virtuous state of being; and 3) the *mujtahid* is capable of reaching the level of determining the connotation of a Qur'ānic sentence by – for example – changing the connotation from generalization to specification; in other words, the *mujtahid* is capable of rewriting the literal Qur'ān again and again – in effect using it as as an inexhaustable legal source – since he/she is the successor of God Himself in the world (*khalīfah*). In recognition of this role of the *mujtahid* as the *khalīfah*, ibn al-Qayyim al-Jawziyyah (d. 772/ 1370), a Ḥanbalī jurist, decided to entitle his *magnum opus* on the hermeneutics of jurisprudence *The Declaration for Those Who Sign on Behalf of the Lord of the Worlds* (*I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*).

This being the case, is there a strict technique to be followed when practicing hermeneutics? Consider the *ṣūfī* hermeneutic approach in subjective discourse of explicit (*ẓāhir*) and implicit (*bāṭin*); this *ṣūfī* discourse resembles the *uṣūlī*st notion of Allāh's intention (*maqāṣid al-shāri'*), because they declare that, by *bāṭin*, they can know what is implied in the text, whereas the obvious Qur'ānic language (*ẓāhir*) gives no idea of God's real intention.[103] Thus, unlike the *ṣūfī* approach to Qur'ānic hermeneutics, which is condemned by a great number of Sunnī figures, *uṣūl al-fiqh* still has a methodology to support its *ta'wīl* approach.

The latter methodology can be summarized in two key notions: the first takes all of the various legal texts as a whole unit of legal faculties (*kulliyyyāt al-sharī'ah*) and recognizes the consistency that establishes a logical legal reference; the second aims to apply and utilize the virtuous functionality (*al-istiṣlāḥ*) of this whole unit by achieving

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[103] Abū Zayd, *Mafhūm al-Naṣṣ*, 350.

legislative consistency. *Uṣūl al-fiqh's* hermeneutical approach to the text itself shall be discussed in the next section on the textual consistency of legal discourse, while *uṣūl al-fiqh's* approach to the relationship between the text and the legal world will be illuminated in the following section on the legislative consistency of legal discourse.

2.2.1. The Textual Consistency of Legal Discourse

Uṣūl al-fiqh's hermeneutics approaches the legal sources of the Qur'ān and the Sunnah through a tri-past apparatus: specification (*al-takhṣīṣ*), restriction (*al-taqyīd*), and metaphor (*majāz*). These concepts are key to achieving the previously mentioned goal of taking the sources of legal texts as a single unit, or *kulliyāt al-sharī'ah*. In linguistic vocabulary, these three methods are designed to achieve textual consistency (*al-ittisāq al-naṣṣī*) in legal discourse, in order to rebuild all the legal propositions in one single detailed proposition known as a legal chapter (*bāb fiqhī*).

Taking the legal texts as a whole unit presumes that the verses discussing similar legal cases in different Qur'ānic chapters (*sūras*) or similarly pertinent *ḥadīths* are continuous and should be read in a way that fuses their combined meaning. It is the role of *ijtihādī* hermeneutics to establish coherence of the Qur'ān and Sunnah. Thus, the *uṣūlī*sts assert that if there exists a verse discussing a case in general terms on the one hand, and then in another verse it is specified, the final understanding would be in favor of the specified one. Similarly, if we have a verse discussing an unrestricted case once and then in another verse it is restricted, the final interpretation would be in favor of the restricted one. This mechanism shall be illuminated in the coming sections: 2.2.1.1, 2.1.1.2, and 2.2.1.3.

2.2.1.1. Specification, *al-Takhṣīṣ*

In the linguistic technique of specification (*takhsīs*), the jurist is faced with a number of verses that apply to a given legal case in a generalized mode, such as in the case of the verse, "*It is He who created for you all of that which is on the earth.*"[104] This verse has several implications; one of them is freedom of ownership and the capability of entering into all possible financial contracts. From a legal point of view, this verse can justify, for example, giving permission to someone who wants to cut down the trees in a huge forest. However, there is another verse that deals with the issue of ownership and entering into financial contracts in a more specific manner; it states:

> You who believe! Eat not up your property among yourselves unjustly except
> it be a trade amongst you, by mutual consent.[105]

The second verse treats ownership and trade as matters that depend on mutual consent, and can be used, for instance, to prevent of restrict the clear-cutting of trees cited in the above example. In *uṣūl al-fiqh's* hermeneutical approach, the second verse is a specification of the verse, "*created for you all of that which is on the earth.*"[106] The reason for this specification is the semantic status of the second verse, in which the legal case is mentioned or referred to directly and clearly. This semantic specification of the verse supersedes the previously mentioned verse of general application. Thus, in the *uṣūlī* hermeneutics, the more pertinent verse can determine the interpretation in preference to

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[104] Qur'ān 2:29
[105] Qur'ān 4:29
[106] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 185.

the less pertinent one, and this in order to achieve consistent meaning of the holy text.[107]

This demonstrates how human interaction with the Qur'ānic text can abrogate some

meaningful part of one verse by applying another, more specific verse. The *mujtahid* can

thus approximate (*yuqārib*) Allāh's intention by the method of *uṣūlī* hermeneutics to

achieve better legislation in the conflict between public and private ownership.

2.2.1.2. Restriction, *al-Taqyīd*

The aforementioned method of specification (*al-takhṣīṣ*) deals with verses that

apply to legal cases by virtue of having the same connotation. *Al-taqyīd*, by contrast, is a

linguistic technique that attempts another aspect of textual consistency. In this case the

common element is similar expressions occurring in the Qur'ān in different passages,

simultaneously possessing additional descriptions and information surrounding them. In

the following example, the additional description in the second verse restricts the other

expressions, i.e. the legislation concerning the financial relations between orphans and

their family provider:

> And give to the orphans their properties[108]

> And test the orphans [in their abilities] until they reach the marriageable age.
> Then if you perceive in them sound judgment, release their property to them[109]

In considering these two verses, the problem is manifest: Should the family provider of

the orphan(s) release their own money instantly? Or should the provider wait until the

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[107] Another possible interpretation is that if someone owns a piece of land or house that blocks another neighbors' road, he/she is not free to prevent other neighbors from accessing that road.
[108] Qur'ān 4:2
[109] Qur'ān 4:6

orphan reaches the age of maturity? Obviously, the second verse suggests that the family provider should wait until he/she is certain that the orphan reached the legal age before entrusting her/him with the property. Thus, in the case of *al-taqyīd* we can recognize the same theme of textual consistency as in the case of specification, whereby restriction elicits a certain theme allowing the jurist to approximate (*yu'wwīl*) God's original intention. This theme, on one hand, enables the *mujtahid* to say that God most probably wants this or that in such a legal case. In this way the *mujtahid* can attain a divine rational status that allows him to state what the Qur'ān does not say literally.

2.2.1.3. Compound Metaphor, *al-Majāz*

Al-majāz, as a word, is a type of verbal noun called *al-maṣdar al-mīmī* derived from the Arabic verb *jāz*,[110] which signifies the idea of crossing or bridging something from one state to another (*'abar*). However, *majāz*, in the terminology of the science of rhetoric (*balāghah*), means a compound metaphor, in contrast to other rhetorical concepts such as *tashbīh* and *istiʿārah*. Logical-linguistic analysis allows one to distinguish *majāz* as compound metaphor from *tashbīh* as simple metaphor by virut of the fact that the latter is a sentence that contains two major elements of assimilation, i.e. the assimilated (*al-mushabbah*) and the assimilated-to (*al-mushabbah bih*), and perhaps also a particle of similie (*adāt al-tashbīh*) along with a theme of simile (*wajh al-shabah*). For example, the following sentences may be considered typical of the *tashbīh* style in the science of rhetoric (*balāghah*) and *uṣūl al-fiq*:

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[110] For further information see Faḍl Ḥasan ʿAbbās, *al-Balāghah: Funūnuhā wa-Afnānuhā 2: ʿIlm al-Bayān wal-Badīʿ* (Amman: Dār al-Furqān lil-Nashr wal-Tawzīʿ,1987).

- Robin Hood is like a lion in bravery.

- Robin Hood is a lion in bravery.

- Robin Hood is like a lion.

- Robin Hood is a lion

We see clearly that Robinhood (*al-mushabbah*) and the lion (*al-mushabbah bih*) are in all the sentences the terms require to establish the simile. By the same token, the particle of simile is optional, as is the theme of bravery.

By contrast, the *isti'ārah* is a metaphor that contains neither of the two elements of the assimilation: the assimilated (*al-mushabbah*) and the assimilated-to (*al-mushabbah bihi*) at once and in the same time nor even the particle of simile (*adat al-tashbīh*) or the theme of simile (*wajh al-shabah*). The following sentences about Robin Hood in the context of bravery and strength may be considered examples of the *isti'ārah* style according to the sciences of rhetoric (*balāghah*) and *uṣūl al-fiq*:

- A lion fought bravely in the battle.

- Robin Hood ravaged his enemies in the battle.

We see clearly that neither Robin Hood (*al-mushabbah*) nor the lion or its attributes (*al-mushabbah bihi*) appear in the same sentence, and this is what constitutes the style of the *isti'ārah* metaphor. Nor is the simile found in this style of metaphor.

Yet, *al-majāz* in the logical analysis is either two steps of *isti'ārah* or the context in which the common usage of natural language is utilized. In the *majāz* of the two steps of *isti'ārah*, the signified (*al-mushabbah*) is absent and there is a complexity in the signifier (*al-mushabbah bih*). Thus, I consider it to be a compound metaphor. This technical concept is a remarkable intellectual enterprise in Arabic rhetoric and, indeed, *majāz* finds

its origins within the theological doctrine of the Muʻtazilah. Nevertheless, the *uṣūli*sts, in comparison to theologians (*mutakillimūn*), made valuable advances in the amplification of this rhetorical technique. *Al-majāz* is a textual reading process in which the reader recognizes the usage of natural language as a less than pure reflection of reality. In this instance, the reader says: it is not possible that the text here means what it says literally. The reason beneath that results from contradictions in the order of things or in what the text wants to say. To show how this operates, one may consider the verse:

> O you who have believed, when you rise to [perform] prayer, wash your
>
> faces and your hands forearms up to the elbows and wipe over your heads and
>
> wash your feet up to ankles[111]

This verse literally says that, if you pray, proceed to to make ablution, *wuḍū'*. This literal understanding is very odd, because it is very well known from the practice of the Prophet and the practices of all the generations after him that *wuḍū'* is the process of cleaning the body as a preparation for the praying. So why does the Qur'ānic style use this odd order? The *mujtahid's taʼwīl* asserts the Qur'ān is employing the habits of common usage, or what is called the usage of natural language (*al-lughah al-ṭabīʻiyyah*),[112] in which it permits itself the usage of some expressions instead of others that may be more strictly logical. Therefore, the *mujthaid* would favor the sound understanding of the legal text. The reason behind this permission relies, simply on how the audience of the Qur'ān reacted to such an expression. This process is exactly what is meant by *al-majāz*. Furthermore, the expression "*when you rise to*" in the sentence "*when you rise to [perform] prayer, wash your faces...*" is a possible usage for "if you intend to," which is

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[111] Qur'ān 5:6
[112] ʻAbd al-Raḥmān, *Al-Lisān wal-Mīzān*, 401.

a metaphorical usage. The reason for this is that the intention of doing an instant action, ablution in this case, can be substituted and reworded by name of the action itself, "*rise up*." The *ta'wīl* in this case tries to go beyond what is literally and naturally said to what is intentionally and originally meant. For instance, this hermeneutics is spiritually motivated to find out what is divine in the Qur'ān and how it can be understood in specific and restricted cases, as well as metaphorical ones, in order to realize the purpose of the text and prepare it to set things right in the world, or *islāḥ*.

2.2.2. Legislative Consistency of Legal Discourse

After discussing *uṣūl al-fiqh's* hermeneutical approaches to the legal text itself, or the textual consistency of the legal discourse, it is now time to illustrate *uṣūl al-fiqh's* hermeneutical approaches to the relationship between the text and the world. The dual apparatus of textual reconciliation (*al-tawfīq*) and textual preponderance (*al-tarjīḥ*), are the key methods that may be used to achieve the notion of applying and utilizing the functionality of this legal text by consistent legislative principles (*al-istiṣlāḥ*). In contrast to the textual consistency, these two methods are designed to achieve legislative consistency, in which attention is paid to actual legal practice rather than the language of the legal discourse.[113]

2.2.2.1. Textual Reconciliation, *al-Tawfīq*

Usually, if the method of textual reconciliation is applied to contradicting Qur'ānic passages, the same methods would be used as in 2.2.1, i.e., specification,

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[113] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 149-190.

restriction, and metaphorization. However, textual reconciliation will only demonstrate its clear functionality if it is used between texts that have the same legal authority or semantic clarity. Thus, it is be applied, typically, to restore contradictory legal proofs that have the same legal authority or semantic clarity, i.e., within contradicting Qur'ānic passages or within contradicting texts from the Prophetic narrations, Sunnah. As a result, a controversial case involving Qur'ānic passages and texts from other legal sources, such as the prophetic Sunnah, would rarely be considered part of the reconciliation method.

A very well known problem in the world of *uṣūl al-fiqh* is the contradiction between the Prophet's *ḥadīth*, "*the son and his money are for his father*" while another *ḥadīth* states this "*the father and his money are for the son.*" This is a very extreme example of legal contradiction. In spite of this, *uṣūl al-fiqh's* hermeneutics approaches the issue very creatively. The hermeneutical rule here declares that "reconciling all legal texts is better than ignoring any of them" (*i'māl al-dalīl awlā min ihmālih*). One of the hermeneutical solutions for this issue is to establish a new, mediated meaning (*al-qadr al-mushtarak*) to reconcile the contradiction. In this case, a possible mediation can be: "giving both the father and the son accessibility to each other's money on the condition of replacement in the future." The justification of this analysis is: 1) that the mediation depends on the possible meaning of the preposition "*for*" in the sentence "*the son and his money are for his father,*" since the meaning of possession is not implied visibly in the sentence; and 2) that the mediation saves most of the meaning of both contradicting sentences.

2.2.2.2. Textual Preponderance, *al-Tarjīḥ*

The second conceptual tool in *uṣūl al-fiqh* hermeneutics is preponderance (*al-tarjīḥ*); how to recognize superiority in the weight, power, importance, or strength of a legal proof. This tool has different application, depending on whether it is comparing: 1) Qur'ānic verses one with another, or 2) the Qur'ān and other legitimate legal sources. Since preponderance falls under the heading of the legislative consistency of the legal discourse that deals with relations between the text and the world, it is appropriate to discuss the latter of these applications, and particularly the question of preponderance in the enounter between the Qur'an and the Sunnah.

An often well discussed issue is the contradiction between an authoritative text and another, less authoritative text. In this case, the contradiction between the Qur'ān and the Sunnah would be an excellent application for the concept of preponderance. 'Umar ibn al-Khaṭṭāb, again, would appear to have been a key figure in the development of this method. The legal case of the post-divorce expenses (*nafaqat al-mut'ah*) of a fully divorced woman (*al-muṭllaqah thalāthan*) discussed in 'Umar ibn al-Khaṭṭāb's time is instructive.[114] The problem involved a Ṣaḥābī woman, Fāṭimah ibnat Qays, who claimed that she was not paid post-divorce expenses by a decision of the Prophet himself. 'Umar ibn al-Khaṭṭāb did not accept the fact that a Prophetic *ḥadīth* narrated by one chain of narrators (*aḥād*) could be used to challenge an authoritative source like the Qur'ān, which is narrated by multiple chains of narrators (*mutawātir*), especially as the verse in question seems unequivocal:

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[114] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 431.

> Lodge them [the divorced women] where you dwell, according to your means, and do not treat them in such a harmful way that they be obliged to leave.[115]

Simply put, Umar ibn al-Khaṭṭāb refused to apply the proof based on Prophetic narrative, because the Qur'ān is stronger both in: 1) authenticity, because it is narrated in the *mutawātir* form and 2) the virtuous nature of ʿUmar ibn al-Khaṭṭāb's hermeneutics would not abandon a divorced a woman without the financial means to support herself.

2.3. Concluding Remarks

Uṣūl al-fiqh hermeneutics is a Socially constructed endeavor that aims to implement the teachings of the divine text in worldly affairs. Interference in the interpretation and implementation of the divine text is a very serious act in the religious realm, since it amounts to interpolating the speech of God (*al-taqawwul ʿalā Allāh*). Thus, *Uṣūl al-fiqh* hermeneutics is based on three justified premises: 1) the significant role of man as God's successor in the world, *khalīfah*, 2) the rational responsibility to preserve the divine phenomenon of the Qur'ān from falling into contradiction by the divinely ordained mission of the *ijtihād*, and 3) the responsibility to allow the text to be a means of reform and virtue in the world and not, simply, to fall into the realm of formalistic legal texts. These objectives produced the hermeneutical procedure of preponderance and reconciliation.

The responsibility that the role of *khalīfah* entails in practicing *ijtihād*ic hermeneutics to achieve consistency in the realm of text and reality is what motivated *uṣūl al-fiqh* scholars to generate an elaborate apparatus of conceptual tools to deal with the phenomena of religious texts. Specification is a tool to be applied to contradictions

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[115] Qur'ān 65:6

that may arise because of some general verses, while restriction is a conceptual tool designed to limit the application of certain verses that connote some legal cases in an unrestricted manner. In the same vein, compound metaphors or the usage of natural language (*majāz*) is what helps the scholar rationalize problems of the natural usage of the Qur'ānic language. If the aforementioned linguistic tools seek consistency in the inner realm of the text, textual reconciliation (*tawfīq*) and preponderance (*tarjīḥ*) operate in a different realm which is outside the text. Reconciliation is be applied, usually, in the event of contradicting legal proofs that have the same legal authority or semantic clarity while preponderance recognizes superiority in the weight, power, importance, or strength of the legal proof.

After the foregoing, almost archeological activity of discovering the foundations of the legal hermeneutics of *uṣūl al-fiqh*, it can be claimed that: *textual and legislative consistency is the objective of uṣūl al-fiqh hermeneutics*. This claim supports the first chapter's claim: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the fatwās and the fiqhī opinions studied in this regard are based on a valid legal interpretation of the religious text*. The crux of the argument respectring the first doctrine on prohibiting human cloning based on the Qur'ān lies in its misuse of legal interpretation of the religious texts by not recognizing the existence of contradiction and the primacy of performing *textual and legislative consistency*. The following contradictions have been left to stand without being addressed by hermeneutics. The first is the verse: "*And [He has created] horses, mules and donkeys, for you to ride and as an adornment. And He*

creates [other] things of which you have no knowledge."[116] This verse highlights, in a tone of admiration, the proliferation of new creatures such as mules, itself a hybrid of horses and donkeys. The second contradiction of their thesis emerges from, "*So direct your face [Muḥammad] toward the religion, inclining to the truth. [Adhere to] the fiṭrah of Allāh upon which he has created [all] people. No change would exist in Allāh's creation, but most of the people do not know.*"[117] These two verses show an extreme example of conflict with the traditional *uṣūlī* methodology of preserving the divine speech from contradiction (*ḥifẓ kalām al-shāri' min al-idṭirāb*).

The next step in this survey is to look at a larger methodological concern that contemporary Islamic legal discourse evades, specifically, the role of perceiving revelation in Islamic legal practice.

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[116] Qur'ān: 8:16
[117] Qur'ān: 30:30

CHAPTER THREE
THE HERMENEUTICS OF REVELATION IN SHĀṬIBĪ'S THEORY OF MAQĀṢID AL-SHARĪ'AH

3.1. Introduction

According to the traditional Islamic understanding, revelation (*al-waḥī*) is the speech of God to human beings. The literal meaning of *waḥī* is vocal inspiration that someone hears, so that divine *waḥī* consists in a prophet regularly receiving communication directly from Allāh or from agents chosen by Allāh, like the angel Jibrīl.[118] This message is articulated in the the Qur'ān and in the Prophet Muḥammad's teachings (the Sunnah), which explicate the intentions of God. The identity of Islam is therefore grounded in the event the revelation of holy texts to Prophet Muḥammad. All branches of the discourse that emerged within the Islamic heritage, e.g. mysticism (*al-taṣawwuf*), theology (*'ilm al-kalām*), jurisprudence (*uṣūl al-fiqh*), rhetoric (*al-balāghah*), sciences of al-Qur'ān (*'ulūm al-Qur'ān*), and sciences of *al-ḥadīth* (*'ulūm al-ḥadīth*), are based on the process of representing and building exegesis of the Muḥammadan revelation. This process of discussing the Muḥammadan revelation, through exegesis, amplification, and ramification, is what may be called the hermeneutics of revelation.

The present case study of human cloning is explored in the following, through the hermeneutics of revelationas set forth by Shāṭbī's (d. 790/ 1388), in his *magnum opus*, *al-Muwāfaqāt fī Uṣūl al-sharī'ah*, where he considers this methodology in the light of *Maqāsod al-sharī'ah*. The relationship between revelation and the issue of human cloning is due to the fact that the religious legitimacy that produces *fatwās* and legal opinions

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[118] W. M. Watt and R. Bell, *Introduction to the Qur'ān* (Edinburgh: Edinburgh University Press, 1977), 19-154.

about this techonology is essentially derived from a certain understanding of revelation. Therefore, it is important to discuss the worldview behind the second doctrine of prohibition, i.e., that of utilitarian legal hermeneutics. This will be analyzed in the light of the Islamic understanding of revelation as presented by Shāṭbī.

Section 3.2 discusses how Shāṭbī's theory can be approached from a perspective different than those hitherto applied to his thought. It goes on in Section 3.3. to analyze Shāṭibī's hermeneutics of revelation, firstly, by investigating the presuppositions that epistemologically[119] generated the theory of *maqāṣid al-sharī'ah* (namely, the concepts of the divine proof, *dalīl*) and, secondly, by investigating the logical techniques applied in his theory (induction, and the construction of the *dalīl*). A new understanding of revelation is offered on the basis of hermeneutics in Section 3.4, to develop the systematic concepts of the theory of *maqāṣid al-sharī'ah*, by restructuring Shāṭibī's techniques, namely, the criticism of *al-dalīl* by means of its final results, *ma'ālāt al-af'āl*.

I build on the results of the second chapter, which focused on *uṣūl al-fiqh* hermeneutics generally and how it is based on both textual and legislative consistancy. This will allow us to proceed to the main task of "criticizing the methodology of *dalīl* and rebuilding it through the problematic *fiqhī* case of human cloning."

This chapter goes about the aforementioned task by asking the question, "Why does there exist a deficiency in the contemporary methodological practices?" The answer to this question is found in the third claim made earlier in the thesis: *if there is a methodological discrepancy in contemporary Islamic legal discourse, the path for reformation exists in continuing the traditional endeavor of uṣūl al-fiqh through the*

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[119] For further analysis see the introduction in: Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1973).

divine concept of revelation (al-wahī) as the knowledge of the sign. Here a new

understanding is proposed to resolve the for this legal-epistemological crisis, the author's

own legal opinion on human cloning as it were, through a new theory of the mechanism

of revelation.

The basic contents of the theory of *maqāsid al-sharī'ah* identified in many

studies[120] are comprised of the five faculties of the *sharī'ah* (*kulliyāt al-sharī'ah*): the

preservation of religion, life, mind, progeny, and property (respectively: *hifz al-dīn, al-*

nafs, al-'aql, al-nasl, al-māl). Moreover, these five universalities are considered the

sharī'ah's ḍarūriyyāt (lit. necessities), and leading to a classification of the rest of the

sharī'ah's laws and rulings under the headings of *hājiyyāt* (lit. needs) and *tahsīniyyāt* (lit.

improvements).

3.2. Epistemological Presumptions and A Restating of Shāṭbī's Hermeneutics of Revelation

Usūl al-fiqh is endowed with a clear program of legal problem-solving, whose

structure can be seen in the table to contents of any book of *usūl al-fiqh*. *Usūl al-fiqh*

recognizes many legal *dalīls*, but the Qur'ān and the Sunnah are considered the major

ones. However, the structure of *usūl al-fiqh* depends on the answer to the question:

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[120] For further information about the detailed content Shāṭibī's theory of *maqāsid al-sharī'ah*, see: 'Allāl al-Fāsī, *Maqāsid al-Sharī'ah al-Islāmiyyah wa-Makārimuhā* (al-Ribāṭ: Dār al- Gharb al-Islāmī, 1967), Wael Hallaq, *History of Islamic legal theory: An Introductoion to the Sunnī Usūl al-fiqh* (Cambridge: Cambridge University Press, 1997), Ahmad al-Hasanī, *Nazariyyat al-Maqāsid 'inda al-Imām al-Tāhir Ibn 'Ashūr* (Virginia: al-Ma'had al-'Alamī lil-Fikr al-Islāmī, 1996), al-Tāhir Ibn 'Ashūr, *Maqāsid al-Sharī'ah* (Tunisia: al-Dār al-Tūnisiyyah lil-Tibā'ah wal-Nashr, 1964), Ahmad al-Raysūnī, *Nazariyyat al-Maqāsid 'inda al-Imām al-Shāṭibī* (Virginia: al-Ma'had al-'Alamī lil-Fikr al-Islāmī, 1995), and 'Abd al-Majid al-Saghīr, *al-Fikr al-Usūlī wa-Ishkāliyyat al-Sulṭah: Qirā'ah fī Nash'at 'Ilm al-Usūl wa-Maqāsid al-Sharī'ah* (Beirut: al-Dār al-Jāmi'iyyah lil-Dirāsāt wal-Nashr, 1996).

"What is the legitimate legal proof (*dalīl*) that can derive rulings?" An answer to this question involves two levels of analysis: 1) discussing the number and differentiating criteria of legitimate *dalīls* such as the Qur'ān, the Sunnah, consensus (*ijmā'*), and legal analogy (*qiyās*) and 2) discussing the linguistic tools through which the meaning of major *dalīls* (the Qur'ān and the Sunnah) and the differentiation criterion of these legal tools. These two levels revolve around the issue of revelation – the principle that motivated Muslim scholars to build the structure of *uṣūl al-fiqh* in the first place. This principle involved making the utmost effort to find the truth that comes from the "Source," and this perceived truth was considered to be divine revelation.

In order to discuss Shāṭibī's hermeneutics of revelation, a vast range of terminology pertaining to the *dalīls* of *uṣūl al-fiqh* must be emplyed. The list of potential *dalīls* is very long as well as extremely controversial, according to the three major schools of *uṣūl al-fiqh* introduced earlier: al-Mutakallimūn (lit. theologians),[121] al-Hanafiyyah (lit. the school of Abū Hanīfah), and al-Ẓāhiriyyah (lit. literalists). However, following a taxonomy formed by the pair of external versus internal proofs, (*adillah*, pl. of *dalīl*) can simplify this task. By the category of external *dalīl*, I mean a method that does not derive rulings and laws from the direct text of revelation; on the other hand, the category of internal *dalīl* is the method that derives rulings and laws from a direct text of revelation.

Furthermore, *uṣūl al-fiqh* developed an extensive terminology for both external and internal proofs. For example: 1) external proofs are the intellectual tools designed to generate laws based on the Qur'ān and Sunnah e.g., *al-qiyās* (lit., Legal analogy), *al-*

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[121] This school includes the rest of the four legal Sunnī: al-Shāfi'iyyah, al-Mālikiyyah, and al-Hanābilah.

ijmā' (lit. consensus), *al-istihsān* (lit., legal preference), *sadd al-dharī'ah* (lit., prevention

of a path that leads to evil), *al-Istislāh* (lit., utilitarian legal hermeneutics), *shar' man*

qablanā (lit., laws of previous religions), *qawl al-sahābī* (lit., reports of Companions), and

al-istishāb (lit., presumption of continuity), etc.[122]

2) Internal proofs are the linguistic tools designed to extract a meaning from the

language of the Qur'ān and Sunnah. There are two types of internal proofs: a) semantic

tools, such as *dalālat al-'ibārah* (lit., explicit meaning) and *dalālat al-nass* (lit., implicit

meaning) and b) tools of propositional analysis: *al-takhsīs/al-ta'mīm*, (lit. specification/

generalization), and *al-taqyīd/al-Itlāq* (lit. restriction/unrestriction,)... *etc.*[123]

The previously mentioned category of external versus internal proofs of revelation

can shed light on the duality of *usūl al-fiqh* methodology (which existed before Shātibī's

renovation); in the process, revelational texts were interpreted and accessed. Without

exaggeration, it can be said that the problem of dual revelational proofs exhausted *usūl*

al-fiqh intellectual debate throughout history. The title of Shātibī's book, *al-Muwāfaqāt*

fī Usūl al-Sharī'ah (lit. the correspondences or the reconciliation in the origins of the

sharī'ah), elucidates what I would call the problem of duality existing in *usūl al-fiqh*.

Shātibī did not, after all, leave the purpose of his project to conjecture. He states in his

prologue, to *al-Muwāfaqāt*, that it is devoted to achieving his dream of reconciling the

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[122] For a complete list see Mustafā al-Zarqā, *Al-Madkhal al-Fiqhī al-'Āmm* (Beirut: Dār al-Fikr, 1968), 60-142, Badr al-Dīn al-Zarakshī, *al-Bahr al-Muhīt fī Usūl al-Fiqh* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), and Muhammad Kamālī, *Principles of Islamic Jurisprudence* (Cambridge: Cambridge University Press, 1991)

[123] There is a third category to, comprehensively, restructure *usūl al-fiqh* proofs, which is the investigative proofs, such as: Qur'ānic *naskh* (lit. abrogation), and *hadīth tashīh/tad'īf* (lit. authentication//de-authentication). However, these processes are dealing with the revelational proofs in an earlier step, which is in the borders of distinguishing which is revelational in origin and which is not. Thus, this third category is not included in our discussion.

doctrine of Abū Ḥanīfah (d. 150 / 767) and the doctrine of Mālik (d. 179 / 795).[124] This

declaration, in the context of the historical accumulation of *uṣūl al-fiqh*, could entail

various meanings; one of the most probable interpretations is that he was dissatisfied

with the first and most famous attempt to perform this reconciliation – namely, Shāfiʿī's

attempt in his *al-Risālah* to do the same. If this is true, Shāṭibī must not have accepted

Shāfiʿī's attempt in *al-Risālah*[125] (five centuries prior) to reconcile the thought of the

aforementioned figures; Shāṭibī believed that the issue needed to be reexamined. In other

words, Shāṭibī's venture aimed at solving the problems generated by the contradiction

dividing Ahl al-Ra'y (lit. the people of opinion/judgment) represented by Abū Ḥanīfah

from the Ahl al-Athār (lit. the people of traditions) represented by Mālik. If Shāfiʿī's

project can be seen as an effort to establish *uṣūl al-fiqh* by investigating possible

reconciliation between Abū Ḥanīfah and Mālik, his would be the first *muwāfaqāt* work

ever written, and Shāṭibī's *muwāfaqāt* the second, offering in its turn an alternative

solution. What assures Shāṭibī's different understanding compared to the history of *uṣūl*

al-fiqh are two points: (1) Shāfiʿī's definition of *fiqh* as the knowledge of extracting

practical rulings from particular proofs: (العلم باستنباط الأحكام العملية من أدلتها التفصيلية)[126] may be

contrasted with, Shāṭibī's methodology in conceiving of *fiqh* as the knowledge of

inducing universal rulings from constructive proofs (العلم باستقراء الأحكام الكلية من أدلتها الإجمالية);

and (2) the structure of *al-Muwāfaqāt* demonstrates a very different notion of the process

of legislation, i.e., as the joint project of two parties. This latter notion is a dialectic

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[124] Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, [?]), 17.

[125] Which is claimed to be the first book establishing the science of *uṣūl al-fiqh*. See Wael Hallaq, *History of Islamic legal theory: An Introduction to the Sunnī Uṣūl al-fiqh* (Cambridge: Cambridge University Press,1997), 21.

[126] ʿAbd al-Wahhāb Khallāf, *ʿIlm Uṣūl al-Fiqh* (Kuwait: Dār al-Qalam, 1986), 11.

structuring Shāṭibī's theory, and posits a certain mechanism linking the intentions of God or the Legislator, (*qaṣd al-Shāriʿ*), and those of the human being, or the receiver of revelation (*qaṣd al-mukallaf*) This mechanism corroborates the problem of duality in *uṣūl al-fiqh* identified earlier in this study, indicating the fundamental difference between Shāṭibī and the history of *uṣūl al-fiqh*.

If we further scrutinize the epistemological problem of duality in *uṣūl al-fiqh* in relation to the hermeneutics of revelation according to Shāṭibī's theory, the key solution offered in Shāṭibī's thought would be the search for reconciliation (*muwāfaqah*) between the external and internal proofs of revelation. This reconcliation would take place once the similarity between intellect (which precipitates the external proofs) and language (which grounds the internal proofs) is recognized.

The significance of this recognition, in this author's view, is what constitutes Shāṭibī's contribution to the intellectual debate in the history of *uṣūl al-fiqh*. Shāṭibī saw the point of unity between external revelational proofs (as part of the intellect) and internal revelational proofs (as part of the language) as located in the concept of the intention of God (*qaṣd al-shāriʿ*), which literally means "the intention of the revelator." Shāṭibī arrived at this solution by implementing a program consisting of two main sequences, inductive and constructive, but before clarifying these two operations, one point must be addressed.

This point is the guiding concept of Shāṭibī's program, which can be defined as a presmise that the apparent meaning of the Qur'ān and Sunnah cannot be the real meaning. This is because the Qur'ān and Sunnah are not merely straightforward texts that can be read and applied by a person of legal age and status (*mukallaf*). On the contrary,

the texts of the Qur'ān and the Sunnah are mere particulars (*juz'iyyāt*) and these particulars lead to several difficulties in reading them as direct narrative – problems such as contradiction, inconsistency, and specificity to time and place. These difficulties undermine the superficial and direct meaning of the Qur'ān and Sunnah.

The previous notion of the essentially indirect meaning of the Qur'ān and Sunnah can be understood within the history of *usūl al-fiqh* as well. As we saw in the second chapter, the history over *usūl al-fiqh* can be seen in its totality as a literary battle of specification/generalization, restriction/unrestriction, and literalization /metaphorization that was never resolved. This fact can clearly be seen in the discipline of controversial understandings of the Qur'ān and Sunnah (*'ilm al-khilāf*). The intellectual complexity of revelatory texts has nothing to do with the authenticity of their divine origin, but with their intellectual comprehensibility in the consciousness of their believeing audience. This impossibility of direct meaning is never expressed as such in Shāṭibī's work, nor has it been stated at any point in the entire history of *usūl al-fiqh*, but it is the premise presupposed beneath the entire Shāṭibian program. What is more, Shāṭibī was able to implement the premise successfully, with results that are as revolutionary as they are impressive. His unstated assumption that the Qur'ān and Sunnah are impossible to understand in their essence, means that not a paragraph, sentence, or even a single word can be understood without expert interpretation. The Qur'ān and the Sunnah are even not a text, in the philosophical sense of the term, i.e., that sets out to prove certain premises.[127] In fact, the Qur'ān and Sunnah are large conglomerations of varying preaching speeches, historical tales, and moral commands, that need to be treated with

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[127] Ṭāhā 'Abd al-Raḥman, *Fiqh al-Falsafah 2: al-Qawl al-Falsafī, Kitāb al-Mafhūm wal-Ta'thīl* (Beirut: al-Markaz al-Thaqāfī al-'Arabī, 2000), 35.

care in order to recognize their shape and tendencies and arrive at their originally intended meaning.

Assuming the impossibility of the direct meaning of the Qur'ān and the Sunnah is true, one might ask how Shāṭibī arrives at the notion that the *qaṣd al-shāri'* represents the meeting point that unifies external and internal proofs. How he does so, consists of two main intellectual sequences: inductive and constructive. The first process consists of *dalīl*-induction (*istiqrā' al-aḥkām*), the main process, which represents Shāṭibī's most important contribution. The process of searching for the *qaṣd al-shāri'* is based on the mechanism of inducing all the particular, controversial, and contentious proofs of both the divinely-inspired texts of the Qur'ān and Sunnah. Inducing the proofs means that the *mujtahid* is expected to read and understand the entire corpus of rhe revealed texts while focusing his attention on what is common in each of the particulars. The *mujtahid* is asked to observe how the manner of revelation oprates, in the process of which: 1) he/she gains the ability to know why the revelation happened this way; and 2) he/she gains the ability to predict when and how a new legal case should be judged under the title of revelation.

Dalīl construction is the second process, and it tries to solve the problem of how the body of revelation, as Qur'ān and Sunnah, be differentiated and restructured to provide a consistent text that enables application from the *mukallaf* without contradiction or hardship. In other words, how can revelation avoid the duality of external and internal proofs of revelation, proofs derived by the language or by the intellect, or more specifically, proofs that are elicited by the explicit reader or by the *mujtahid*? How can all these parallels be unified in proofs that are derived from the interaction between the

explicit reader and the intellect, or the *mukallaf* and the revelation, or the human being and God?

This process of reconliation (*muwāfaqah*) is the core concept of revelation: the interaction between human beings and God. It is the central contribution of Shāṭibī's program because, according to the prevailing understanding, the separation between human beings and God is what constitutes the concept of revelation as a transcendental entity, revealed to a profane human being. This separation dominated the previous understanding of *uṣūl al-fiqh* as recognized by ibn al-Qayyim,[128] and later, by Shāṭibī. If we look at the framework developed by the latter, revelation would, surprisingly, no longer be the Qur'ān and Sunnah as such, simply because of the impossibility of relying on this apparent meaning of the Qur'ān and the Sunnah. Therefore, according to Shāṭibī, the leading proof – transcending even the Qur'ān and Sunnah themselves – consists in the faculties or universalities (*kulliyāt*). Astonishingly, the process of reading the particulars of both the Qur'ān and Sunnah and inducing from them the major themes, *taṣaffuḥ al-kulliyāt min al-juz'iyyāt*,[129] is precisely "what the revelator intended to reveal." Hence, God, or the Legislator (al-Shāri') may have revealed certain particulars in the Qur'ān and Sunnah, but these do not represnt the particular "text" originally intended by Him. What determines the intentionality of a particular text is its being intended or not by al-Shāri'. In other words, consistent repetition with no contradiction in the body of the *sharī'ah* to establish a consistent habit of God (*'ādat al-Shāri'*) is what the revelator intends of verses. Thus, the hermeneutical work of combing-applying the intellect of the *mujtahid*

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[128] For further information see Ibn al-Qayyim al-Jawziyyah. *I'lām al- Muwaqqi'īn 'an Rabb al-'Ālamīn* (Egypt: Maṭba'at al-Sa'āda, 1955), 38. vol.1

[129] Abū Isḥāq Ibrārīm al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* (Beirut: Dār al-Kutub al-'Ilmiyyah, [?]), vol.3, 16.

to the language of Qur'ān and Sunnah by sensing the consistent habit of God (*'ādāt al-Shāri'*) is what determines the intentionality of that revealed text and gives it its legitimacy. By the same token, the profanity of the human intellect is, without doubt, sanctioned by the contact of the *mujtahid* with the soul of God (*rūḥ al-Shāri'*); thus, through the language of his revelation and its contexts, he/she is able to discover God's aims and intentions. Ibn al-Qayyim, as we saw earlier, prefers to call this connection between the *mujtahid* and the soul of God as "signing on behalf of the Lord."[130]

The previously analyzed mechanism of *dalīl* induction, used to construct faculties that lead to unification in the body of revelation, yields particular findings in Shāṭibī's theory. *Dalīl*-induction is thus said to create the following hierarchy of faculties: the *ḍarūriyyāt* (lit. necessities), then the *ḥājiyyāt* (lit. needs), and finally the *taḥsīniyyāt* (lit. improvements). Shāṭibī identifies the necessities as the five aspects that the *sharī'ah* must preserve: religion, life, mind, progeny, and property (respectively: *ḥifẓ al-dīn, al-nafs, al-'aql, al-nasl, al-māl*). However, the definition of the needs or improvements are not presented by Shāṭibī under any particular faculties, but rather as random examples.[131]

If there is unity, or *muwāfaqah*, between the intention of God or the revealer (*qaṣd al-Shāri'*) and that of the human being that implements revelation (*qaṣd al-mukallaf*), this will not only be achieved via the aforementioned hermeneutical techniques of induction and construction of the *dalīl* by creating *kulliyāt*. This will instead emerge, according to Shāṭibī, through criticism of the *dalīl* in light of its final

[130] For further information see Ibn al-Qayyim al-Jawziyyah. *I'lām al- Muwaqqi'īn 'an Rabb al-'Ālamīn*, 38. vol.1

[131] al-Duraynī, *al-Manāhij al-Uṣūliyyah*, 478.

results, *ma'alāt al-af'āl.*[132] This conceptual technique examines the functional validity of any generated legal judgment. The examination consists of the following steps: if there are laws that are explicitly mentioned by the Qur'ān and the Sunnah or implicitly generated by the intellect and that do not meet the criterion of the faculties of Sharī'ah, they must be rescinded. The legal authority of the faculties of *sharī'ah* has the ability to criticize laws whose application or final results do not achieve, or even contradict, the goals of these faculties. This means that the legal authority of the faculties of Sharī'ah are superior to the Qur'ān and the Sunnah, since they are constructed with a view to achieving consistency.

Shāṭibī's methodology of achieving the *muwāfaqah* in the problem of duality cannot of course be solved by a one-time static endeavor of the *mujtahid's* induction and the construction of the *dilīl.* The *Ma'ālāt al-af'āl* are considered to be criticism of the *dalīl* in the light of its final outcome, resulting in an infinite and open-ended endeavor whenever the two parts of intentions are in a dialectic. This means that there is an infinite enterprise of generating legal rulings (*aḥkām*). For example, if the *mujtahid*, while directly applying the *aḥkām* of the Qur'ān or Sunnah, recognizes that their final results go against general principles, he has the right to suspend or delete the application of these *aḥkām.* An important key point that manifests is that revelation (*waḥī*) is a more *a posteriori* process than an *a priori* one. In other words, revelation is an effort shaped by a sincere intention of discovering the reality and the results of our human perception of guidance, proof, or evidence. This effort integrates text and reality in one act, known as the *muwāfaqah.* Another point in Shāṭibī's methodology, subject to speculation, is the

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[132] Al-Shāṭbī, *al-Muwāfaqāt*, vol. 2, 34.

superiority of *kulliyāt*. In other words, particulars lose their authority, as verses or *ḥadīth* and are no longer in themselves proof or guidance, in comparison to faculties.

Before Shāṭibī introduced his methodology, this entire mechanism of *dalīl* induction aimed at constructing faculties so as to unify the body of revelation was unknown in *uṣūl al-fiqh*. Still, the question arises: Does not the hermeneutics of revelation, as presented in Shāṭibī's findings, contain a methodological problem related to its perception of the nature of the Qur'ān? If the answer is yes, this may require a restructuring of the theory of *maqāṣid al-sharī'ah*. Some answers to these questions will be found in the next section.

3.3. Restructuring The Theory of Maqāṣid al-sharī'ah

So far, the broadest and most fundamental mechanisms in Shāṭibī's theory of *maqāṣid al-sharī'ah* have been explained by the aforementioned three key concepts: induction, construction, and criticism of the *dalīl*. The presentation and restatement of Shāṭibī's theory gives earlier offers the most articulate formula possible for utilitarian legal hermeneutics doctrine by contemporary Islamic legal discourse (presented in the previous section, 1.4.2). The comparison between the doctrine of the prohibition of utilitarian legal hermeneutics and the original methodology of *uṣūl al-fiqh* shows that none of the three fundamental mechanisms in Shāṭibī's theory (induction, construction, and criticism of the *dalīl*) are present in the contemporary doctrine of utilitarian legal hermeneutics used to justify the prohibition on human cloning. In sections 1.4.2.1 and 1.4.2.2, the opinions of both al-Qaraḍāwī and al-Būṭī, neither of which incorporated

induction, construction, or criticism of the *dalīl*. This of course raises the question "Why does there exist a deficiency in contemporary methodological practices?"

There are in fact a few relatively weak points in theory of *maqāsid al-sharī'ah* that have prevented it from taking on a serious role in the later development of *usūl al-fiqh*,[133] and this is almost bound to continue. The central weak point in this theory is its understanding of the nature of the Qur'ān. Even if one grants the revolutionary presupposition that the Qur'ān and Sunnah cannot possibly be understood at face value, the acceptance of the Qur'ān as a book arranged according to the sequence of its chapters (*suwar*) can still be heavily criticized. There is no divine proof that can be attributed to the process of collecting the Qur'ān (*jam' al-Qur'ān*) by the companions after the Prophet's death (10 /631).[134] As a result, the concept of the induction of the *dalīl* from the pages of the Qur'ān as it stands is fundamentally undermined, due to fact that Shāṭibī accepts only the traditional, synchronic arrangement of the pages of the Qur'ān. The diachronic alternative of the induction of the *dalīl* in the Qur'ān is not examined in Shāṭibī's theory at all. In other words, the diachronic alternative considers the arrangment of the Qur'ānic verses from the standpoint of the chronological order of revelation (*tartīb al-nuzūl*), which is usually correlated with the reasons of revelation (*asbāb al-nuzūl*). In the rest of this chapter, the regular edition of the Qur'ān will be referred to as the synchronic Qur'ān and the rearranged chapters of the Qur'ān according to the chronology of revelation as the diachronic Qur'ān. It should be noted that no such edition yet exists,

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[133] Muḥamad 'Abd Allāh Darrāz, the contemporary discoverer and editor of Shāṭib's *Muwāfaqāt* confirms the unrecognized role of Shāṭibī's theory in the later history of *usūl al-fiqh*. See Abū Isḥāq Ibrārīm al-Shāṭibī, *al-Muwāfaqāt fī Usūl al-Sharī'ah* (Beirut: Dār al-Kutub al-'Ilmiyyah, [?]), 9.

[134] Watt and Bell, *Introduction to the Qur'ān*, 40.

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except for narrations of the reasons of revelation and the general classifications into Makkī and Madanī. The overall themes of the Qur'ān – metaphysics, historical stories, laws, and ethical preaching – can nevertheless be easily located and placed in relation to the Prophetic *sīrah* with the help of the books of *Asbāb al-Nuzūl*[135] and the available classifications into Makkī and Madanī.

Looking at Shatibi's theory from the angle of the diachronic induction of the *dalīl* manifests another weak point in his system, since it changes the scenery of the *kulliyyāt* that generated the revelation itself in early Islam (*ṣadr al-Islām*). As this chapter covers hermeneutics of revelation, the diachronic induction of the relationship between God (*al-Shāri'*) and the revelation receiver (*al-mukallaf*) may prove to be a hermeneutical contribution in itself to the restructuring of Shāṭibī's theory of *Maqāṣid al-Sharī'ah*.

What Shāṭibī's inductive *kulliyyāt* accomplished with respect to the synchronic Qur'ān can be carried over into another set of inductive *kulliyyāt* based on the diachronic Qur'ān, along with a distinct concentration on the process of the criticism of the *dalīl* by its final results, *ma'ālāt al-af'āl*. In this way, it can be shown how Shāṭibī's *kulliyyāt* were frozen in a particular time and worldview and how a restructuring can reform the fundamentals of *uṣūl al-fiqh*.

Although Shāṭibī's contribution (as analyzed in section 3.4) is very instructive, it still only recapitulates what al-Juwaynī (d. 484/1190) and al-Ghazālī (d. 525/1130) contemplated nearly four centuries earlier.[136] The preservation of religion, life, mind,

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[135] See: Abū Bakr al-Suyūṭī, *Libāb al-Nuqūl fī Asbāb al-Nuzūl* (Beirut, Dār al-Kitāb al-'Arabī, 2003).

[136] 'Abd al-Majīd al-Ṣaghīr, *al-Fikr al-Uṣūlī wa-Ishkāliyyat al-Ṣulṭah al-'Ilmiyyah fī al-Islām: Qirā'ah fī Nash'at 'Ilm al-Uṣūl wa-Maqāṣid al-Sharī'ah* (Beirut: al-Mu'ssasah al-Jāmi'iyyah lil-Dirāsāt wal-Nashr, 1998), 34.

progeny, and property (respectively: *ḥifẓ al-dīn, al-nafs, al-ʿaql, al-nasl, al-māl*) are still

the unchanged and unchallenged *kulliyyāt*. This consistency is not surprising, since

certain issues in the synchronic Qurʾān most probably necessitate this reading. This solid

undercurrent of the *kulliyyāt* in the history of *uṣūl al-fiqh*, is a product, it would seem, of

the very early separation between creed (*ʿaqīdah*) and its legal and ethical applications,

sharīʿah. The separation cannot be seen as early as the time of the Companions (*ṣaḥābah*),

for instance, as was seen in chapter 2, but it can be seen clearly and seminally in Abū

Ḥanīfah's hierarchic understanding of *ʿaqīdah* and *sharīʿah*. This understanding is seen

clearly in his description of *ʿaqīdah* and *sharīʿah* as the greater and the lesser

understanding: "*al-Fiqh al-Akbar wal-Aṣghar*."[137] In addition, Shāfiʿī's intellectual works

did not touch on matters of theology; nor did he build the theory of *uṣūl al-fiqh* by

employing *ijtihād* on matters of *ʿaqīdah*. This early disjunction between *ʿaqīdah* and

sharīʿah resulted in an odd tradition in Sunnī practice that shows itself in the traditions of

the *ʿaqīdah* and *sharīʿah* sciences whereby *ʿaqīdah* is not considered a subject of *ijtihād*

and thus, not subject to disagreement, (*mimmā lā yaḥtamiluh al-khilāf*). One of the

results of this double standard of disagreement in theological and legal judgments is the

status of first, of the five categories of *kulliyyāt* mentioned earlier: *ḥifẓ ad-dīn*. In this

first class, *ʿaqīdah* is given no really clear function or application in comparison to the

rest of the four *kulliyyāt: ḥifẓ al-nafs, al-ʿaql, al-nasl,* and *al-māl*.

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[137] For further information see Abū Ḥanīfah al-Nuʿmān, *al-Fiqh al-Akbar* (Cairo: Maṭbaʿat Dār al-Kutub al-ʿArabiyyah al-Kubrā, [?]).

In addition, a contemporary *uṣūl*ist, Ṭāhā ʿAbd al-Raḥmān,[138] expresses the view that the five *kulliyyāt* do not respond to the conditions of logical taxonomy. This criticism is supported by the three criteria of the traditional Islamic-Aristotelian conditions of logical taxonomy (*sharāʾiṭ al-taqsīm al-manṭiqī*): 1) absolute inclusion (*tamām al-ḥaṣr*), which necessitates that a taxonomy must include all the elements that it claims it represents, which is not the case in one of the five faculties if we ask about preserving justice or beauty; 2) absolute differentiation (*tamām al-tabāyun*) which requires that the elements of the category must be different from each other, although preserving the soul is not differentiated from preserving the mind in the five universalities, finally 3) the prevention of specification (*ʿadam al-takhṣīṣ*) which demands that categories must be in the same statutes and that they do not compose a specification of each other. However, in the case of the five universalities all of the rest of the universalities are derived from the first one.

This vague taxonomy of the preservation of the religion (*ḥifẓ al-dīn*), which is derived from the primacy of *ʿaqīdah*, has consciously and unconsciously prevented any advanced understanding of the diachronic *kulliyyāt*. Contrary to this tendency, I shall trace a more solid methodology of *dalīl* for the *kulliyyāt*. Thus, if we want to trace the origin that builds the major *dalīl*, Qurʾān itself, I think it might be by investigating the structure of 'time' in the Qurʾān. Why choose the concept of time? There are two reasons: 1) because the concept of time is always the mold where verbs or events are going on or it is where existence is taking place. The powerful semantic field of the notion of time is capable of relating vast amount of vocabularies, namely, creation,

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[138] Ṭāhā ʿAbdu al-Raḥmān, *Tajdīd al-Manhaj fī Taqwīm al-Turāth* (Beirut: al-Markiz al-Thaqāfī al-ʿArabī, 1994), 111.

creatures, eschatology, and values ...etc. 2) because the Islamic world view presents itself in a time line that starts with a beginning that is creation and ends with the Day of Judgment as the end of the entire creation. Within this timeline, God decided to create human beings and to have her/him as part of this process in which he/she seeks good deeds in order to receive a good reward and to prevent torture in hell.

The structure of 'time' in the Qur'ān will be seen clearly after I fully explain how the synchronic Qur'ān is a timeline that compels an unchallengeable worldview that includes the program of both *'aqīdah* and *sharī'ah*. I will elucidate now the faculties of the synchronic timeline in the Qur'ān and then I will show what the diachronic understanding can do to change this worldview.

I induced the whole Qur'ān and I find the synchronic timeline is shown in five essential steps that shape the Islamic worldview: 1) It starts with the story of creating the existence (*khalq al-kawn*), the universe, and the whole creatures, 2) then the story of creating the human being (*khalq banī ādam*) and deciding its destiny, 3) after that is the history of vanished nations and their Prophets (*al-qaṣaṣ al-Qur'ānī fī al-anbiyā' wal-umam al-khāliyah*) which ends up with the path of Prophet Muḥammad and creates a unity in the mission of the Prophets and the source of all religions, 4) afterward comes the story of Prophet Muḥammad and his affairs in Makkah and Madīnah as the finest example of human behavior in the world, and finally 5) The unseen world and the final destiny of the existence and humanity in the Day of Judgment (*al-ghayb wal-yawm al-ākhir*). This synchronic Qur'ānic timeline provides us with a very fertile standpoint to perceive how Qur'ān is generated.

If my interpretation and induction of the notion of time in the Qur'ān is accurate, then I would call the aforementioned five timeline steps a construction of new synchronic faculties of time in the Qur'ān. Analogous to what I mentioned before, the construction of the semantic field of the notion of time is, in fact, a construction of the notion of existence itself in Qur'ān. Now, I can take the five timeline steps in the Qur'ān as in Shāṭibī's program to be examined by the condition of criticizing the faculties by their final results (ma'ālāt al-af'āl).

Since I began my restructuring of Shāṭibī's project by changing the premise of the conventional arrangement of the chapters of the Qur'ān to the time arrangement, the contents of Shāṭibī's metaphors and terminology will be changed. These five timeline steps, surprisingly, can be investigated to show how the ma'ālāt al-af'āl are highly reflected as reasons of revelation (asbāb al-Nazūl) and can be used as the criterion to which the themes of Qur'ān are articulated. This means that diachronic asbāb al-nazūl shows the muwāfaqah technique between the qaṣd al-Shāri' and qaṣd al-mukallaf, Prophet Muḥammad this time. Next, we will elucidate how the aforementioned timeline is a result of a certain reflection on the world and thus this particular reflection would restrict its outcome. In other words, this synchronic Qur'ānic timeline that is the hidden program of 'aqīdah is subject to the hermeneutical technique of dalīl criticism whenever there arises a need to criticize the dalīl by new outcomes of human reflection.

Now, I will show some examples that illustrate what reasons of revelation (asbāb al-Nazūl) generated the five timeline faculties respectively: 1) the verses that discuss the story of creation usually suggest their source by the act of reflection on the signs of God,

al-āyāt al-kawniyyah. Thus, I say that the creed of creating the existence is itself a result

of this contemplation on the worldly signs. For example this verse says:

> Indeed, in the creation of the heavens and the earth and alteration of the
> night and the day are signs for the those of understanding Men who celebrate
> the praises of Allāh, standing, sitting, and lying down on their sides, and
> contemplate the (wonders of) creation in the heavens and the earth, (With the
> thought): "Our Lord! not for naught Hast Thou created (all) this! Glory to
> Thee! Give us salvation from the penalty of the Fire.[139]

In this verse the dialectic between the worldly signs and humans is what generates an

understanding of the early creation.

2) The human creation verses, for instance, the story of creating the first man

(Ādam) from mud, mention that the mission of this being starts by the ability of naming

and judging.[140] *"And He taught Adam the names all of them..."*[141] or a mission that was

started by giving the ability of logos – the language that shapes the perception, *bayān.* In

other occasions: *"The most merciful, taught* Qur'ān, *created the Man, [And] taught him*

bayān [logos]"[142] In these verses, the Qur'ānic reflection distinguishes the characteristic

of human being as determined by the ability to reveal the meanings of things. Thus, the

beginning of man was distinguished by having the intellect that enables the production of

language. This idea is clearly taken from the notion that what distinguishes human beings

from other creatures is the capacity to speak language.

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[139] Qur'ān 3:190-191

[140] This sharp and bright recognition was a result of the various and enlightening conversations I had with my colleague Mr. Simon Staszewski, an M.A student at the Institute of Islamic Studies at McGill University.

[141] Qur'ān 2:31

[142] Qur'ān 55: 1- 4, Ṭāhā 'Abd al-Raḥmān, argues that Heidegger's translation of the Greek concept *"Logos"* as "the language that reveals," goes exactly with the meaning of the Arabic word *"bayān."* See Ṭāhā 'Abd al-Rahman, *Fiqh al-Falsafah 2: al-Qawl al-Falsafī, Kitāb al-Mafhūm wal-Ta'thīl* (Beirut: al-Markaz al-Thaqāfi al-'Arabī, 2000), 315, and *Allisān wal-Mīzān Aw al-Takawthur al-'Aqlī* (Beirut: al-Markiz al-Thaqafi al-'Arabī, 1998), 423.

3) The historical verses typically propose the command of reflection on the laws

of God in history (*sunnat Allāh*). This command is given in order to allow Muslims to see

what bad or good deeds can do for the previous nations.

> Such [have] been the laws of God [sunnat Allāh] with respect to those who
> have gone before; and the command of Allāh is a decree that is made
> absolute[143]

In another set of verses with historical import, the Qur'ānic command for reflection uses

another term to describe the process of contemplation:

> Say: Travel [through] the land and see what the end of those who rejected
> truth was.[144]

4) The verses that touch on the life of Prophet Muḥammad and his affairs are the

richest of several instances of dialectics in the Qur'ān. The migration from Makkah to

Madīnah especially imposed new obligations on the Prophet. The effects of these

obligations can be seen from the reactions that occurred after his contact with Jews and

Christians. The emergence for instance of *'aqīdah* and the some elements of the notion of

an unseen world, featuring concepts that had never existed in the Makkī period, such as

angels and the messenger of God (Jibrā'īl),[145] are evidence of the use of *muwāfaqah*

technique resulting in the formation of the diachronic Qur'ān from the aforementioned

kulliyyāt extracted earlier. The appearance of some of the *sharī'ah* rules in the Madanī

period, like the punishment of stoning for the crime of adultery,[146] resemble a direct

positive or negative reaction to the laws of the Jews, further substantiating the existence

of the *muwāfaqah* technique.

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[143] Qur'ān 33:38

[144] Qur'ān 27:69

[145] Watt and Bell, *Introduction to the Qur'ān*, 40.

[146] S.D. Goitein, "The Birth-Hour of Muslim Law," *Muslim World*, 50, 1, (1960), 25.

5) Even the verses on eschatology and final destiny on the Day of Judgment, perhaps among the most metaphysical and *'aqīdah* related topics, are no exception to the hermeneutics of revelation. The human capacity of *bayān* to recognize truth in the signs of the world leads to realization of the value of resurrection in the following verse:

> We will show them Our Signs in the universe, and in their own selves, until it becomes manifest to them that this (the Qur'ān) is the truth. Is it not sufficient in regard to your Lord that He is a Witness over all things? Verily! They are in doubt concerning the Meeting with their Lord? Verily! He it is Who is surrounding all things! [147]

The verses that are related to the concept of time in the Qur'ān allow for construction of five timeline steps that cover that notion of time. A vast amount of related meanings that shape the entire timeline or worldview of Islam can then be gathered, and used to trace the generation of this Qur'ān discourse. Yet, the perspective of the diachronic Qur'ān would account for these five timeline steps differently. Restructuring Shāṭibī's theory would be understood in the terminology of the *muwāfaqah* technique. Thus, the dialectic between the intention of God (*qaṣd al-Shāri'*) and the intention of the human being (*qaṣd al-mukallaf*), Prophet Muḥammad this time, is the generator of the revelation, Qur'ān and Sunnah.

I can improve the synchronic faculties I presented above by taking into account the critical condition of Shāṭibī methodology. Still, the criticism of the *dalīl* by its final results can undermine my synchronic faculties whenever there is a fact that opposes my time line construction. I will construct diachronic faculties that perceive the giving of the previous five timeline steps and may face criticism as long as possible. This being the case, a new *kulliyyāt* can take a step backwards, in order to have a wider vision of the

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[147] Qur'ān 41:53

process of revelation. I represent the aforementioned five-timeline steps, consequently, in the context of the philosophy of being in an interrogative case instead of a declarative one. In this case I can invest the infinite ability of the question without falling into challenging the future outcomes. The five diachronic faculties are: 1) The question of the origin and the mission of the existence, 2) The question of the origin and the purpose of human being, 3) The question of the formation of human history, 4) The question of the particular affairs of our social group, and finally 5) The question of the destiny of existence, humanity, and thought. These are the *kulliyyāt* that we will have after inducing the diachronic Qur'ān.

As a result, my hermeneutics of revelation attempts to regenerate the *kulliyyāt* of the Qur'ān again without falling into the mistake of disconnecting *'aqīdah* and *sharī'ah*, but tying them as an infinite task for the intellect. Then, these *kulliyyāt* shall be taken not in declarative statements but in interrogative ones. Then the diachronic *kulliyyāt* shall be processed by the *muwāfaqah* technique that was operated by Prophet Muḥammad, as a semiological discourse that extracts the *dalīl* from the worldly sign. In this case, if the function of Shāṭibī's *kulliyyāt* is the knowledge of inducing universal rulings from constructive proofs (العلم باستقراء الأحكام الكلية من أدلتها الإجمالية), the function of my *kulliyyāt* depends on the criticism of the *dalīl* diachronically and would be the knowledge of questioning and constructing universal rulings from critical proofs:

(العلم بيناء واستشكال الأحكام الإجمالية من أدلتها النقدية)

My restructuring cannot exist as a novel contribution if the doctrines of *uṣūl al-fiqh* has recognized that the written words in the Qur'ān are not the mere revelation and do not exclusively constitute the divine *dalīl*. This contribution criticizes two groundless

and unverified premises: 1) *'aqīdah* is disconnected from *sharī'ah* and of a higher status, thus not subject to *ijtihad* and disagreement (*khilāf*) and 2) revelation subsists as the particular written signs (*āyāt*) found in Qur'ān. I think the abovementioned two unjustified premises along with the denial of the traditional methodology of *uṣūl al-fiqh* to achieve textual and legislative consistency, discussed in chapter two, is the answer to the question "Why does there exist a deficiency in the contemporary methodological practices?" Moreover, demonstrating the defenselessness and vulnerability of the aforementioned two premises, it is the second premise that validates the first, although it is false. The refutation of the second premise relies on the fact that God's *āyāt* are in only one occurrence[148] in the Qur'ān out of 84, for the singular *āyah*, means written Qur'ānic verse, on the other hand, only in 16 verses[149] out of 148, for the plural *āyāt*, mean written Qur'ānic verses. Thereafter, in a logical progression, one cannot help but to be compelled in asking, "Why would such a mutilation of the massive and great majority of the occurrence of the concept of *āyah* or *āyāt* compel them to lump them all as written words?"

It is not the purpose, in this chapter, to answer this question. However, the disfigurement of the concept of *āyah*, as sign or proof, is shown to no longer be legitimate. If we take into consideration that the sign in the major occurrence of Qur'ān is a worldly sign rather a written one, revelation would be defined as the relation between the *mujtahid* and the worldly sign. As a result, the process in which the *mujtahid* constructs the *dalīl* from the signs to produce the law, can aptly be labeled as the

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[148] Qur'ān 2:106
[149] Qur'ān 2:99, 2:231, 2:252, 3:7, 3:58, 3:101, 3:113, 4:140, 7:23, 29:49, 45:6-8,57:9, 58:5, 62:5, 65:11.

hermeneutics of revelation. Following suit, we can call this path of hermeneutics as the semiological science that produces law. This would involve all kinds of human faculties, e.g. sensation, perception, cognition, and emotional intelligence as part of this legal and *ijtihādic* semiology. Maybe the common pronunciation and meaning between the science of semiology and the singular Arabic word *sīmah*, is more than a proof to my argument. Contemplation for such a comparison may be further strengthened when one takes into account the following verse:

إن في ذلك لآيات للمتوسمين[150]
Indeed in that are signs for those who seek and interact with signs

I think the rewriting of *al-muwāfaqāt*, for the modern times, will solve two problems: the rigidity in contemporary Islamic legal discourse and the disconnection from heritage caused by Modernity. Several semiological answers can approach the five interrogative *kulliyyāt* presented on page 87 and can be determined by the level of intellect humanity reaches in a given age. The interrogative *kulliyyāt* can be approached by: 1) A physical and chemical answer such as the Big Bang theory to approach the first interrogative *kulliyah*, the origin of the existence; 2) A biological and environmental response like the Organic Evolution to approach the second interrogative *kulliyah*, the origin and the purpose of human being; 3) An economical and political answer such as the Genealogy of Power theory to approach the third interrogative *kulliyah*, the formation of human history; 4) A communally structured system for the financial and legislative issue like the Social Communicative Democracy to approach the fourth interrogative

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[150] Qur'ān 15:75

kulliyah, the particular affairs of our social group;[151] or finally 5) By an elaborate and integrated theology of the natural and human sciences to achieve the Qur'ānic aim of being as the creator's successor, *khalīfah*.

3.4. Concluding Remarks

I have shown the broader and most fundamental mechanisms in Shāṭibī's theory of *maqāṣd al-sharī'ah* by the three key concepts: induction, construction, and criticism of the *dalīl*. I restructured Shāṭibī's theory of Maqāṣd al-Sharī'ah by criticizing the conventional arrangement of the verses of the Qur'ān and by clarifying its hidden structure of the time line concept. This restructuring resulted in rebuilding the universalities (*kulliyāt*) of the Qur'ān in a diachronic basis that reveals the hidden questions that generated the general themes and contents of the Qur'ānic verses.

The semiological switch in the worldview of revelation or *dalīl* we have just built in this chapter has several revolutionary consequences. One of these consequences is the discovery of a forgotten Qur'ānic doctrine of semiology. A doctrine that converts the bases of hermeneutics in *uṣūl al-fiqh* from being inclusively based on the text to be oriented toward the worldly signs with all its interactions with the human cognitive capacities. Another consequence would, first, build faculties of consistency instead of relying on partial treatment of the revelational proof *dalīl*. Second, it would build the validity of revelation not on a *priory* basis stated in a written text, but rather on a

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[151] For further information see Jürgen Habermas, The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society, Volume 2: Lifeword and System: A Critique of Functionalist Reason. Translated by Thomas McCarthy (Boston: Beacon Press, 1984).

posteriori basis examined by final results of the legislation the feeds back the *dalīl* by *ma'ālāt al-af'āl*. The aforementioned consequences totally change both traditional understandings of revelation (*al-waḥī*) and the contemporary application for such authoritative and religious sources of law. Semiological, constructive, and functional scholarly orientations are the arguments that oppose the notions of textual, partial, *priory* treatment to revelation. This scholarly orientation is what justifies the claim of this chapter: *if there is a methodological discrepancy in contemporary Islamic legal discourse, the path for reformation exists in continuing the traditional endeavor of uṣūl al-fiqh through the divine concept of revelation (al-waḥī) as the knowledge of the sign.*

As I planed this chapter to be as a response to the second doctrine that prohibited human cloning of utilitarian legal hermeneutics, I can say now that my argument has been completed. I am in agreement with most of the reasons for the *fiqhī* prohibition proposed by this doctrine, namely, the expected disastrous results on the human family and relationship structures[152] and other generally anticipated and expected nefarious problems.[153] The point that I intend to concentrate on is the necessity and comprehensiveness of the methodology performed by this doctrine. This is of eminent importance due to the nature of this thesis, which questions Islamic legal methodology. I insist that all the reasons suggested by and for *fiqhī* forbiddance proposed in this doctrine are not convincing in answering the question: "Why cannot a married man and woman, that are sterile, have a child through human cloning technology?" In this particular case, I would suggest, the deterministic and generalized attitude for the prohibition from the second doctrine, without rendering any kind of restricted or conditional prohibition, is

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[152] Balhasanī, *Al-Istinsākh al-Basharī*, 26.
[153] Ibid., 101.

most probably an indication of failure of this *fatwā*. The failure of the second doctrine that is based on utilitarian legal hermeneutics is reasoned due to not taking the important key concept in Shāṭib's theory of *maqāṣid al-sharī'ah*. The induction, construction, and criticism of the *dalīl* are necessary and essential restrictions for a justified treatment to revelation. Yet, the second doctrine did not consider any of Shāṭib's theory key concepts and especially violated the third element, criticism of the *dalīl*, by prohibiting human cloning in the case of a married couples that suffers sterilization and want to have a child through human cloning.

4. FINAL CONCLUSION

Islamic law is a law of religion in the first place; it seeks its legitimacy from an authoritative proof. This proof in the traditions of the theory of Islamic law (*uṣūl al-fiqh*) is the *dalīl*. Facing a new legal case necessitates deriving and interpreting an authoritative verdict from the *dalīl*, as demonstrated by the case of human cloning. This thesis concentrated on the methodology of producing legal opinions and *fatwās* by investigating the process of hermeneutics as the source of legal authority.

Contemporary Islamic legal discourse produces *fatwās* and legal opinions that prohibit human cloning while relying on two doctrines of prohibition. The first doctrine supports its argument with Qur'ānic text, "*he said [Satan]:... I will command them so that they shall change Allāh's creation.*"[154] The second doctrine sees no texts to support the prohibition, instead relying on an alternative legal source, which is utilitarian legal hermeneutics. In the first chapter I undertook the mission of examining the two doctrines by comparing them to the sources and methods that contemporary Islamic legal discourse adopts, namely, *uṣūl al-fiqh*. I discovered a discrepancy in the methodology that leads to prohibition in the first doctrine – the semantic interpretation of the verse does not lead to what that doctrine inferred and I did not find a necessary and comprehensive argument in the second doctrine. This situation led me to argue: *It is not true that contemporary Islamic legal discourse on human cloning is based on a legal methodology of the religious texts since the* fatwās *and* fiqhī *opinions offered in this regard are based neither*

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[154] Qur'ān 4:118-119

on a valid legal interpretation of the religious texts nor on a comprehensive and
necessary application of utilitarian legal hermeneutics.

The aforementioned discrepancy in the first doctrine that is caused by contradicting partial verses and *ḥadīths* motivated me to clarify what is the foundation of hermeneutics in *uṣūl al-fiqh.* I arrived in the second chapter with the following result: *Textual and legislative consistency is the objective of uṣūl al-fiqh hermeneutics.* I built upon al-Duraynī's definition of hermeneutics (*ta'wīl*) and I illustrated key concepts in *al-ta'wīl.* I found that specification (*al-takhṣīṣ*), restriction (*al-taqyīd*), and metaphor (*majāz*) are the key techniques that achieve textual consistency. I inferred that textual reconciliation (*al-tawfīq*) and textual preponderance (*al-tarjīḥ*) are the key techniques to achieving legislative consistency.

In order to complete the endeavor of hermeneutics that derives laws from the principle of legal utilization similar to the second doctrine in human cloning, I examined Shāṭibī's theory of *maqāṣd al-sharī'ah* (in the third chapter), which is the most important theory in the history of *uṣūl al-fiqh* and discusses the principle of legal utilization. I suggested in Shāṭibī's theory a new basis for the hermeneutics of revelation. I presented three key concepts: induction, construction, and criticism of the *dalīl* in Shāṭibī's theory. Afterward, I restructured this theory by criticizing the conventional arrangement of the verses of the Qur'ān and by clarifying its hidden structure of the time line concept. My restructuring resulted in rebuilding the faculties (*kulliyāt*) of the Qur'ān in a diachronic basis that reveals the hidden questions that generated the general themes and contents of the Qur'ānic verses. These interrogative faculties are: 1) The question of the origin and the mission of the existence, 2) The question of the origin and the purpose of human

being, 3) The question of the formation of human history, 4) The question of the particular affairs of our social group, and finally 5) The question of the destiny of existence, humanity, and thought. This restructuring of the theory of *maqāṣd al-sharī'ah* leads to a semiological, constructive, and functional orientation to the relation between revelation and Islamic law. This argument opposes the traditional notions of textual, partial, *priory* treatment to revelation. This scholarly orientation is what justifies the claim of the third chapter: *if there is a methodological discrepancy in contemporary Islamic legal discourse, the path for reformation exists in continuing the traditional endeavor of uṣūl al-fiqh through the divine concept of revelation (al-waḥī) as the knowledge of the sign.*

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