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Series Editor:

Khaled Abou El Fadl is the Omar and Azmeralda Alfì Distinguished Professor in Islamic Law at the UCLA School of Law, and Chair of the Islamic Studies Program at UCLA. Dr. Abou El Fadl received the University of Oslo Human Rights Award, the Leo and Lisl Eitinger Prize in 2007, and was named a Carnegie Scholar in Islamic Law in 2005. He is one of the world’s leading authorities on Islamic law and Islam, and a prominent scholar in the field of human rights.

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Shi’i Jurisprudence and Constitution

Revolution in Iran

Amirhassan Boozari

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Contents

Foreword vii
Acknowledgments xi

Introduction 1
1 Uṣūlī Jurisprudence and Reason 9
2 Authority: Theories, Models, Discords 35
3 The 1905 Constitutional Revolution: Shi‘i Jurisprudence and Constitutionalism 45
4 Constitutionalist Jurisprudence 99

Notes 153
Bibliography 227
Index 245
Foreword

This is the third book in the Palgrave Series on Islamic Law and Theology, and it is a book that I take special pride in introducing. The source of my pride is not only the friendship and intellectual bond that I share with its author, but more significantly, it is an awe-inspiring volume from which I learned a great deal about the challenge of constitutionalist governance and the largely unknown efforts by prominent Muslim jurists to wrestle with the role and function of Islamic law in the wake of modernity. In my view, this book needs to be carefully studied, analyzed, and pondered by every reader interested in the fields of political theology, constitutionalism, and democracy. But especially for those interested in the dynamics and possibilities of Islamic reform, this book is nothing short of indispensable and compulsory reading.

Islam, secularism, and democracy are among the most widely debated issues in the contemporary world. Nevertheless, despite the numerous commentaries and studies dealing with Islam, democracy, and constitutionalism, there has been surprisingly precious little scholarship on the substantive arguments, or what I prefer to call the micro-discourses, made by Muslim theologians and jurists wrestling with these issues. Effectively, this has meant that there is a serious ongoing failure to understand, leave alone to fairly and analytically engage, how Muslims have constructed and reconstructed their tradition in an effort to negotiate the relationship between the sacred and the profane as well as the nature of religious authority within the contingencies of time and space in the postcolonial age. Even more troubling is the fact that this failure to study or engage the micro-discourses of Islamic theology and law on the challenges of democracy and constitutionalism is a problem plaguing not just the academia of the non-Muslim world, but also the Western-styled academia of the Muslim world. This has led to an unmistakable and inescapable essentialism and reductionism in comprehending and analyzing the arguments of the Islamist discourse. Most poignantly, whether at the level of public discourses or public policy, writers with only cursory knowledge and perfunctory attitudes toward the micro-discourses and details of Islamic
theology and law have been responsible for the propagation of the most detrimental generalizations about a claimed essential nature, or purported fundamental characteristics of Islamic thought, law, or culture.

This is where Amir Boozari’s book fills a serious void. By virtue of its very subject, Boozari’s book is timely and attractive, but it is the exactlying meticulous and commanding breadth of the scholarship that makes this volume a defining contribution in the field. Although treating a pressing and often contentious subject, Boozari skillfully avoids resigning himself to any essentialist paradigm or to a simplistic framework in unpacking and analyzing the debates of Muslim jurists for and against a constitutionalist system of government during a critically transformative period in the history of Iran and also Iraq. Having analyzed an exhaustively prodigious amount of primary and original sources, Amir Boozari presents a breathtaking study of the theological and jurisprudential arguments of Shi‘i jurists who in the early twentieth century were on the brink of achieving a revolutionary constitutional movement. Boozari gives his readers access to a transformative doctrinal reformation within Shi‘i Islam that to date has been insufficiently studied and poorly understood. As importantly, Boozari also explains why this revolutionary theological and jurisprudential movement ultimately failed.

By deliberately probing the theological and legal arguments made by pro-constitutionalist Shi‘i jurists and their opponents, the author makes his book very relevant to the ongoing intellectual struggles not just in Iran or Iraq but (as those who read the book will discover) in the whole Muslim world. The reason is simple: the theological and legal arguments made by the Shi‘i jurists in favor of constitutionalism are equally applicable to Sunni Islam. In my view, this is one of the most remarkable and attractive aspects of this study. Whether the readers are academics, scholars, policymakers, teachers, students, or part of the interested public, be they Muslim or non-Muslim, I dare say that they will not only be edified but surprised at the flexibility and creativity of Shi‘i jurists who fervently believed in a system of governance where the state is limited by the rule of law and individual rights are guaranteed. Readers will be able to assess first hand how Shi‘i jurists conceived of and negotiated critical issues such as the nature of sacred and temporal authority, the divine will and its relationship to the popular or majoritarian will, the relationship between religious conviction and social and political identity and commitment, and the normative relationship between moral and ethical principles and Islamic law. Many of the debates and disagreements centered around foundational philosophical questions such as the nature and normative roles of reason and revelation. Readers will be able to reflect upon the extent to which these arguments as well as the rebuttals offered by jurists opposed to the constitutionalist
movement are rooted in the Islamic tradition or are artificially grafted upon this tradition—whether the doctrines are natural outgrowths and authentic extensions from the evolving dynamics of the Islamic legacy as opposed to being apologetic constructs adopted in response to external political and cultural pressures or forced artificial transplants from the West. Readers will be able to evaluate the extent to which the constitutionalists failed because of internal and domestic pressures or external political pressures artificially imposed upon Muslim cultures. By exploring the trajectories of Muslim thought, and the contextual realities and limitations within which these trajectories unfold, Boozari empowers his readers to evaluate possible directions and potentials for the development of ideas, values, culture, and institutions in countries with a concentration of Shi’i Muslims such as Iran, Iraq, and Lebanon. But any reform-minded Sunni Muslim jurist will find that many of the arguments of the pro-constitutionalism Shi’i jurists are easily adaptable to the Sunni context, and that many of the challenges and hardships confronted by the Shi’i reformers are nearly identical to those confronted by their Sunni counterparts.

This book should become the standard reference source for researchers working on Iran, Shi’i theology and law, and Islam and democracy, among other topics. But beyond being an authoritative reference source, it helps us to make sense of the present and analyze the possibilities of the future. It is a book that clearly raises the bar and the scholastic and intellectual standards that must be met by any person who seeks to make a contribution to the discourses on Islamic law and theology, Islamic reform, and Islamic politics, leave alone Iran and its rich intellectual and political history.

Khaled Abou El Fadl
Los Angeles, California
October 2010
Acknowledgments

Writing on Shi‘i origins of constitutionalism was my secondary premise of discussions about the 1997–2005 Reform Movement in Iran, but easily replaced it. This, for the most part, was because of my primary dealings with the jurisprudential dynamics of Shari’ah and reason in Shi‘i Law, which required heavy engagement with original sources. I was fascinated with the degree of precision that Muslim jurists had employed in their efforts.

I owe this intellectual journey to Professor Khaled Abou El Fadl who introduced, represented, and embodied the legacy of Islamic civilization to me. His impressive personal example of juristic precision is internationally renowned. I have always been fascinated with his deep, resourceful, and detailed discussions on a variety of subjects, from philosophy and theology to history and ethics, and law and politics to literature. His personal impact, through mastery, exactitude, rigorous scrutiny, and vast knowledge of his subject, combined with moral nobility, has never blunted his warmth, kindness, and passionate, unsparing support directed toward me during my years at UCLA. I am privileged to have been an assistant and a friend of his. But I will always take pride and feel honored to find myself, first and foremost, his student. He has taught me all that I desperately needed to know.

I am deeply grateful to Professor Hossein Modarressi for his invaluable comments on the early version of this book. With an incredible encyclopedic mastery of all the sources that I had just put my first steps in, he has educated me with his many points and comments. He has always responded to my questions with warmth and kindness, and provided me with his great support in many of my requests for help.

Professor Abou El Fadl also read the early version of the book, and made another set of invaluable points and comments. Without their comments, I would have made irreparable mistakes. However, I am responsible for possible inaccuracies or wrong conclusions.

This book is in part an attempt to appreciate an authoritative scholarship of Islamic law that is presented in the writings of Professors Modarressi.
and Abou El Fadl, most notably in their *Kbaraj in Islamic Law* and *Rebellion in Islamic Law*, where Muslim jurists’ *ma’rakat al-ārā* (marketplace of ideas) is in full display and motion. They have set the academic standards for analytical engagement with Islamic law and jurisprudence. If this book has met those standards, or contributed, to the slightest extent, to such scholarship, then my goals of writing it will have been fulfilled.

At the UCLA School of Law I have cherished great scholarship of a group of prominent scholars whose comments and thoughts have always been invaluable to me. Professor Stephen Gardbaum is an inspiring scholar whose vast knowledge of comparative constitutional law and highly technical scholarship, well displayed in his writings in the field of comparative constitutionalism, has always been a source of inspiration and learning for me. He has combined his remarkable expertise as a comparatist with a methodology and deep-seated intellectual belief that finds no barrier to universality of constitutionalism and its goals. His support of my early steps triggered my interest and encouraged me to choose to write about constitutionalism in Iran. I am grateful to his direct advice and continued support. Professor Kenneth Karst has always inspired me with his true example of academic prominence, moral stature, and keen support. Ken is a master at conveying his sophisticated and unmatchable scholarship of constitutional law with sympathy, great knowledge of history, and awareness of the importance of humanity’s experiences in the establishment of constitutional democracy—all of which make him one of the most admirable intellectuals in my life. I am especially grateful to both Professors Karst and Gardbaum for providing me with their scholarly comments and insights on the first version of this book. I have utmost respect for both as long as I perform an academic duty.

This book could not be written without the constant love, encouragement, and support that my wife, Mandana, provided. Her sense of responsibility and sacrifice has often been greater than what a caring wife and mother is willing to offer. Unhesitant and forthright, she has always put my needs and those of our kids above her own on a daily basis. She is a true companion who has stood shoulder-to-shoulder in the ebbs and flows of life during the long years of my studentship.

*Amir Boozari*
*August 3, 2010*
Introduction

Although “constitutionalism” is an essentially contestable concept, scholars agree that it has three major requirements: limitation of political power, rule of law, and protection of individual rights. Substantial elements of constitutionalism, such as *garantisme* and supremacy of constitution, establish yet another set of characteristics that do not necessarily oppose its relational requirements—such as separation of powers and checks and balances. Furthermore, a “generally observed disposition to exercise of public power pursuant to publicly known rules, adherence to which actually provides a substantial motivation for acting or refraining from acting; …and a reasonably independent judiciary; and reasonably free and open elections with a reasonably widespread franchise” provide both political and judicial processes in which constitutionalism can be achieved.

The political process belongs to the realm of political culture, which can tentatively be defined as “some kind of commonly shared political norms and values” reflected in a “consensual theory of justice and reliance on procedural solutions for the settlement of disputes in a constitutional state” colored with “tolerance and trust.” Consensus on these norms, when conceived as higher elements at the constitutional level, establish a “constitutional culture [that] is a web of interpretive norms, canons, and practices which most members of a particular community accept and employ (at least implicitly) to identify and maintain a two-level [i.e., constitutional and ordinary] system of the appropriate sort.”

As is well known, Thomas Paine has said: “A constitution is not the act of a government, but of people….antecedent to a government.” A serious engagement with the key term “antecedent” requires a novel—or probably a renewed—treatment of concepts like precommitment, meta-constitutional, or preconstitutional norms that precede the adoption of a constitution. From a legal perspective, in the event of inevitable, difficult, and divisive interpretive questions, a normal society invokes, returns to, and preserves these norms—embedded in the legal theory and precedent. Historical examples suggest that conflicts between constitutional culture’s
norms and constitutional forms amount to a perplexing paradox between the constituent power of the people and the constituted power of the ruler, and thus to an unsuccessful experience of constitutionalism. More complex problems arise from the practice of constitutional borrowing. The idea of constitutionalism entails those underpinning concepts, theories, and elements upon which the constitutional culture is structured. The dialectical relations between the rule of law and supremacy of constitution, on the one hand, and between maintenance of social order and protection of individual rights, on the other, are delineated in yet broader contexts of common interests of society and legitimacy of the restricted government. This is where concepts of liberty, equality, prohibition of arbitrary rule, condemnation of oppression, sanctity of individual rights, and public duties of government in each legal tradition step in. The extent to which one can detach all these concepts from religious teachings is a moral, philosophical, historical, and legal question.

A theoretical analysis of the idea of constitutionalism in Islamic legal tradition requires intertradition, analytical jurisprudence, and a legal approach to constitutionalism. It is equally necessary to specify and trace juristic foundations of the ideas—be it in the form of fatwas or treatises or constitutional texts—that have supported Muslim societies’ pursuit of constitutionalism in the past one hundred years. Any other approach will easily lead to a faulty depiction of the achievements and discontents of those experiences, and instead of a multilayered engagement with philosophical, historical, and juridical elements, weakly performed and poorly developed analyses will emerge.

Modern historical facts and experiences provide fertile grounds upon which one can develop the aforementioned theoretical analysis. Because of their prescriptive nature, constitutionalist attempts can also be used as the building blocks of a model of constitutionalism that fits the need among Muslim societies for indigenous forms of constitutional government. The 1905–1911 Constitutional Revolution in Iran, undoubtedly, provided a Shi‘i version of popular sovereignty in the service of reconciling constitutionalism with the requirement of compliance to Shari‘ah. “The Constantinople Majlis-e Mab‘ūthān (Parliament of the emissaries) featured between 1908 and the First World War the first elected proto-federal Parliament in the Middle East, which included Ottoman subjects from present-day Turkey, Syria, Iraq, Israel-Palestine, and Saudi Arabia.” Before it was practically thwarted by the executive power, Egypt’s Constitutional Court issued important verdicts in support of individual rights and provided a manifestation of Islamic human rights in a Muslim nation’s constitution where Shari‘ah was inscribed in full force as the source of law. Ayatullah Khomeini’s juristic arguments in favor of the idea of wilāyat
**Introduction**

*al-faqih* was originally intended to reinstate the constitutional role of the learned jurists in legislation, which was incorporated in the constitution of the 1905 Revolution. The 1997–2005 Reform Movement in Iran reflected the tensions between pseudo-constitutional politics of an absolutist “constitutional” theory and democratic politics of Iranian constitutionalism, which revolved around protection of constitutional rights of the individuals, namely, their right to political participation.

This book is an attempt to engage in analytical jurisprudence of the Islamic idea of constitutionalism, as was played out in the 1905–1911 Revolution. In order to contextualize Islamic constitutionalism, one should read into the thematic arguments on components of constitutionalism that derive from mutually supporting and congenial realms developed by rationalist jurists, famously known as *Usūlis*. For the most part, chapter 1 of this book deals with these issues and introduces the *Usūlī* doctrine of reason, the importance of rational arguments, and the place of rational proofs and indicators in the grand concept of *ijtihād*: the juristic effort of discovering the rule of Shari’ah. This effort is a de novo review of the previous rulings by considering the new facts, which usually emanate from the impacts of time and space on the legal reasoning. Far from its simplistic definition as independent opinion, *ijtihād* in *Usūlī* theory provides a dialectical analysis of the relation between man-made law and Divine Law.

In a Muslim society, religion is the most important component of constitutional culture, and Islamic legal tradition is the major source and fountainhead of searching for constitutional norms. Perhaps more than in any other society, law plays a central role in a Muslim one. If one is to single out the most important aspect of the Islamic civilization, one is left with law. For centuries, Muslim intellectuals have strived to articulate the presuppositions of law—as a system of norms that govern the relationship among individuals—and present them to a faith-based community of believers who had not only found a parallel between religion and law, but had also developed a deep perception of obligation, in the form of *taklīf* (legal-moral duty), before their God in every aspect of life. This two-sided perception, emanating from “presuppositions of law” and “taklīf,” was by itself an expression of Muslims’ will, which included both secular and sacred expectations: an expression that prior to the introduction of Islamic faith to the community had found manifestations in social customs, but after the introduction of faith was combined with religion. Therefore, *taklīf* became—and still is—the most focal concept and orbit of legal arguments in the Islamic legal tradition. Dynamisms between popular expressions—social customs—and the process of encircling the concept of *taklīf* amounted to a dialectical and mutual postulation of law
through which jurists and judges introduced faith-based rules and laws and Muslims adopted them in order to form and repeatedly practice as new or revised social customs. In return, jurists and judges took thusly established customs as refined components of their fatwas and legal opinions. This process has provided the ground for accumulation of legal expectations and presuppositions. Many of the legal maxims in Islamic law reflect these dynamisms, especially in its larger part of nondevotional acts and rules. This process was in motion until the first decades of the twentieth century. One such maxim that exemplifies the endogenesis of law, introduced in chapter 3, was then a newly coined one that prohibited an individual’s guardianship over another, except for the ones who were legally in need to be guarded. *Usuli* jurists had created and then utilized it to make rebuttal arguments against the guardianship of jurists in social matters. In addition to this is the prevailing *Usuli* doctrine of determination of compatibility with Shari’ah, introduced in chapter 4, where *Usuli* jurists concluded that any contractual obligation that was not in apparent conflict with textually prohibited acts was in compliance with Shari’ah. This doctrine established the legitimacy of parliament’s enactments in a legal tradition whose traditionist defenders had long held legislation as heresy. Dynamisms do not merely add to the number of maxims and rules. It is in such indefinite, all-ever-moving sets of actions that an *Usuli* jurist emerges, moves further, and becomes a constitutionalist.

The 1905 Constitutional Revolution was, in part, the natural outcome of the long-standing legal crisis of legitimacy in the premodern Shi’i political theory of just sultanate. This theory itself was the by-product of a two-sided prerequisite of legitimacy. On the one hand, based on the Shi’i doctrine of Imāmah, legitimate leadership solely belonged to the person of the last Infallible Imam, known as the Hidden Imam. Any other form of domination over the temporal and spiritual affairs of the Shiite community that did not derive from this Occulted Infallible Imam was considered illegitimate. In the absence of the Imam, on the other hand, suspending the administration of those affairs until the unknown time of the advent of the Imam to power, especially in a long-awaited but then newly established Shi’i state, was, to say the least, imprudent. In other words, it was impossible to abandon all the mundane and otherworldly affairs of the Shiite community and refrain from solving their day-to-day legal issues. Insofar as those issues emerged from the private laws of Shiite individuals, it was possible to employ the theory of jurist’s agency of Imam. Brilliant jurists such as al-Karaki and Shahid Awwal who argued for such deputyship were aware that it would not only facilitate the flow and establishment of the legal system, but also help the individual perform his moral-legal obligations—to his coreligionist, neighbor, business...
partner, family, and compatriot—and live an enriched faithful life, as was the order of his religion.

Put another way, these jurists were cognizant of those social necessities that are part and parcel of a larger necessity, which in every society is called “legal order.” For Usūlī jurists, however, the concept of legal order had yet another trajectory. They were fully cognizant of the fact that in the Shi’a law and faith, a full-fledged legal order of society will materialize only when the Hidden Imam holds the power and leads. According to many Shi‘ī jurists, in the absence of its Imam, the Shiite community is on the verge of dissention and partisan contentions. The delicate balance between the implications of the absence of Imam and the necessity of an orderly society will be struck only when the legal agent takes full responsibility in meticulous reduction of such implications. Wisdom of the process prescribes edification, erudition, and affinity with the arguments. It also does proscribe inertia, inadvertence, fancifulness, and ludicrous vignettes. Al-Karākī, as the reader will see in chapter 2, fully takes this responsibility and with prudence and deep adherence to the law strikes the balance in his juristic treatment of the Friday Prayer.

The theory of Just Sultanate was successful in providing the Shiite king with a well-designed system of rule of law. If in premodern England the law was what the king found just to his people—doing justice to his people was the king’s royal duty to which he had been sworn by his coronation oath, and finding and implementing justice was part of his discretion—in Safavid kingship, the Shiite sultan was entrusted with the task of executing the juristic findings of Shari‘ah, which at the time functioned as the statutory laws of the realm. It was the leading jurist who was charged with finding the legal solutions for justice and defying injustice. Such jurist’s discretion was also restricted to adherence to a law that other jurists prior to him had worked out, in detail, its vectors, rendered opinions, and even established consensus on numerous issues.

In holding the religious authority, the leading jurist was to pledge his loyalty to the law and observe his status as one among many of the Imam’s agents, and not as the principal person. The Shiite king, as the holder of political authority, was also missioned to uphold the rulings of such loyal and observant agent. His oath to establish and enforce justice and use his power as a just sultan was to be signed off by the leading jurist. Though ideal and seemingly practical at the same time, to keep the process’s balance was as difficult as walking on a loose rope. World history is a good witness: the holder of religious authority did not maintain loyalty and observance, nor did the sultan stop at the border of pious execution, but easily and extensively overstepped the duties and abused the process. The relation between law and power was blurred.
Such a blurred relation was dominant at the dawn of the 1905 Revolution. It was not clear where the lines were in the relations between the monarch and the people, between religion and politics, between the monarch and the chancellor, and between the state and foreign diplomats. The fatwa issued by a religious leader in condemnation of a devastating royalty bargained the tobacco trade to a British businessman, and the large-scale following of people that culminated in its humiliating revocation by the king draws probably the only clear line in the then Iranian society. The just sultanate theory was breathing its last. What transformed, borrowing from Nā'īnī, an abject slavery to revived humanity was the people’s revolt against the arbitrary rule of an unbridled kingship. *Usūli* jurists led the crusade in two directions: against the despot king and against the anti-constitutionalist jurists. Two big names, among others, light up the path: Ākhūnd Khurāsānī and Nā’īnī. This book is about their jurisprudence of a constitution that was the most important achievement of the people’s social movement. There are two other results. First, *Usūli* jurists’ detailed juridical theorization of legitimacy of a constitutionalist state in the absence of the Imam, which revolved around a key factor—popular sovereignty. Second, despite their historical rivalry and conflict of interests, Great Britain and Russia allied to abort the Constitutional Revolution’s accomplishments.

This second result, however, needs more explanation. Alan Cromartie argues that the English Reformation was not based on the vestiges of Catholic modes of worship as the survival of a medieval institutional structure. He writes:

Richard Hooker (1554–1600), succeeded in fusing defense of the church with regard for legal values, but later high churchmen adopted a more risky strategy. As their claims for the church became bolder, their politics became more absolutist. They regarded themselves and the crown as equally menaced by the aggression of the common lawyers, and looked to a powerful monarch to defend them. Though James was sympathetic, he rejected their political assistance; Charles by contrast went into alliance with an anti-erastian church, and in so doing, helped to doom both church and monarchy.22

In the 1905–1911 Revolution, the alliance between the king and the clergy was on the side of a non-*Usūli* and semi- *Akhbārī* orientation of legal theory of Imāmah and just rulership. Both found themselves subject to strong attacks by *Usūlis* who would not compromise the law and the Iranian constitutional culture with royal policies and prerogatives. Muẓaffar al-Dīn, the first monarch in the period, dodged the fight and died at
the early stages of the movement. The second monarch, Muhammad Ali, allied with anti-constitutionalist jurists, however, and was about to “doom” both monarchy and anti-constitutionalist clergies. The only reason that prevented such “doom” was the external factor, the military and political intervention of the British empire and the aggressive expansionism of the Russian empire: an evil alliance of two major powers who had planned to divide Iran through an illegal treaty, in the midst of the floor discussions of First Majlis on transforming a legal instrument that wished for a kingly parliament to a constitution that was set to establish a parliamentary king.
In Islamic jurisprudence, what God has addressed to human being is technically called *khiṭābāt* (plural form of *khiṭāb*) or Divine Pronouncements. Some of these pronouncements ordain a *bukm* (a specific ruling) to which a *taklīf* (legal obligation) is incumbent upon the individual. These pronouncements have been made in the Qur’an and the Sunnah, and are called *Nāsī* (Text), as the embodiment of binding guidelines found in the divine addresses. Dynamisms between the Text and its content are prevalent in Islamic legal tradition. For the most part, they operate in the processes in which the human agent has a role in the apprehension, articulation, and reformation of the legal rulings derived from the Text: not a dichotomy, but a dual dialectical interrelation that exists between law as an ideal and law as a process, on the one hand, and between method and substance, on the other. In order to contextualize these dynamisms, one should delve into the thematic arguments that emerge from mutually supportive and congenial realms developed in the rationalist school of Islamic legal tradition. Famously known as *Uṣūlis*—as opposed to traditionists, that is, *ahl al-ḥadīth* and *Akhbarīs*—rationalist jurists start with the juristic tradition of engaging those endemic, trenchant, and didactic questions, raised in the Islamic Philosophy and *Kalām* (theology), that revolve around the Law of the divine and the human potential for acquiring knowledge about it. To treat it properly, a jurist ought to think about the essence of Divine Law; the ideal methods and means of acquiring knowledge; the nature and probative value of the available evidence; man’s potentialities of and categorical limits in acquiring the knowledge, that is, the possibility
of *kashf wāqi‘* (matching the reality of the subject matter of such acquired knowledge with the axiomatic truth about the subject inherent in the Law of divine); and comparing and contrasting such ideal truth of the Law with the real—moral and legal—value of the practically acquired knowledge. Imbued with the panoply of rational reasoning, *Uṣūlī* jurists have established a rich legal doctrine on these dynamisms, where a significant role for human intellect has been assigned in discovering the Text’s legal rules; a logic of legislation has been offered that provides substantial authority for the nontextual findings of "aql mustaqil (the independent reason); and *uqālā‘* (rational people) have been found capable of, and designated for, discovering the inherent necessity of mandatory acts or dispositive deficit of prohibited ones. For the most part, this chapter will introduce some aspects of the *Uṣūlī* doctrine of reason, the importance of rational arguments, and the place of rational proofs and indicators in the grand concept of *ijtihād*: the juristic effort of discovering the rules of Shari‘ah. Such effort is a de novo review of the previous opinions with, inter alia, consideration of new facts and the impacts of time and space on legal reasoning.

The first of such dynamisms in the relation between the Text and presuppositions of Law is in the conception of Shari‘ah, the threshold concept deep-seated in any legal argument. Muslim jurists view Shari‘ah as omnicompetent. When defined as God’s Law, the self-fulfilling potential of Shari‘ah becomes an attribute of nothing less than that of the All Knowing whose pronouncements were mediated through revelation to His Messengers, and through them to human beings. For *Uṣūlīs*, not only does the omnicompetence of Shari‘ah spring from the divine revelations, but it is also intertwined with objectives embedded in them, which lay out the Law’s philosophical and methodological components: justice as the core of Divine Commands, and reason, which man is instructed to employ in its establishment. Thus, Shari‘ah as an ideal embodies Laws that have been derived from the most just and the highest reason, and sets the rationale for the concomitant derivative rules. This perception of ideal omnicompetence views Laws not only as general rules, maxims, eruditions, and positive statements, but also as flexible with the capacity of addressing new social problems.

The process of articulation of the law’s presuppositions and presenting it to a faith-based community that has found a parallel between religion and law is the direct outcome of the Text in Islamic legal tradition. From early on Muslim jurists took it upon themselves to establish a methodology that would confirm and fully develop those rationales in human mind. What emerged from this process was a conception of legal maxims that was manifested in a relatively determinate body of procedures, dominated by technicality and micro-level reasoning on detailed application of
Law that would redefine the notion of exceptionless rules. It was true that legal rules and maxims derived originally from the Text, but they were not its unmediated or uncorroborated outcomes. If legal maxims were to connote the grounds or principles of the axiomatic bases of law—and for that matter, the legal reasoning—then, the possibility of change of the fixed rules was a direct dependent of the same authority that would find them immutable. In other words, while the authenticity of the Qur’an and its verses remains indisputable, there was—and still defies ceasing—an indefinite disagreement about a great number of the traditions attributed to the Prophet. Alternatively, if there was doubt as to authenticity of the prophetic traditions, then the resulting rule/maxim could not be rigid and eternally true for—and applicable—in all cases and issues.

_Ikhtilāf_ (disagreement) among Muslim jurists was manifested in two different categories: First, _ikhtilāf al-hadīth_, that is, disagreement on the content, methods of authentication, and categorization of _ahādīth_ (plural form of _hadīth_, Prophetic traditions), second, _ikhtilāf al-fuqahā‘_, that is, disagreement among the jurists on deducing the Law from sources and its application to relevant legal issues. Legal history of _ikhtilāf_ demonstrates the fact that disagreement among the jurists, at least by the middle of the second/eighth century, was not intended to devaluate the inherent importance of the traditions but to critically analyze their content. In other words, when Muslim jurists encountered a conflict between two different traditions, they chose one without denying the validity of the other. In both of its manifestations, disagreement was perceived not as a cause for sectarian prejudice, but as one for more freedom for a _mukallaf_ (from similar root of _taklīf_, meaning duty-bound Muslim) in adopting one over another opinion. Hence, depending on the plurality of opinions, there was more latitude in discharge or even absence of _taklīf_ (legal obligation). The importance of the field of _ikhtilāf al-hadīth_ in the establishment of normative status of the text in the processes of juristic determination is undeniable. There are reports about the Prophet’s dissatisfaction with wrongful attributions of what had been quoted from him. Other probative evidence shows that the Prophet himself was weary of the negative effects of such faulty transmissions on the Muslim community at large. By recognizing the conclusive authority of the Prophet’s sayings and deeds in resolving the legal and political conflicts in Muslims’ minds, there was a tendency among some of the jurists to refer more to the traditions in lieu of the Qur’an itself. In many cases, therefore, confusing Shari’ah as “the right way to follow” with what _Muhadithibūn_ (compilers of the traditions)—who were essentially ineligible to render juristic opinions—had compiled in their books of _hadīth_ was the unintended but practical outcome of the processes of compilation. There are also historical reports
that, at least during the Rightly Guided Caliphate, the idea of over-reliance on traditions was not supported.\textsuperscript{12}

From a purely technical perspective, however, reliance on books of compiled traditions was originally based on the belief in comprehensiveness of Shari’ah in the sense of providing answers to all questions.\textsuperscript{13} An internal dynamism between belief and reliance was at place. The issue was not whether the Text was capable of providing authoritative bases from which jurists could deduce legal solutions. Voluminous compendia of Muslim jurists’ books on jurisprudence are replete with such belief and defy any doubts. This belief, however, was not antithetical to similarly valid fact that the Text did not always furnish a positive rule for every detail of the legal issue.\textsuperscript{14} The issue was whether the compiled books of the traditions presented a true narrative of the Prophet’s Sunnah in a way that jurists could rely on.

Based on the technical arguments of \textit{hujjijat al-dalīl} (the probative value of the evidence), the \textit{Uṣūlīs’} reaction to the problem was formal and substantial examination of the traditions in the form of a mutually supportive process of authentication and approbation. In general, an ideal proof is the one that is attested by the Text, and it is always preferable to furnish a sufficient number of \textit{dalīl naqāli} (Text-based indicator/proof/evidence) for the validity of a juristic opinion. However, because of faulty transmissions or wrong attributions of the Prophetic remarks, the number of traditions that meet the conclusive presumption of reliability is very limited. In order to preserve the sacred truth transferred through revelation and to purge the Text from wrong attributions, it was of utmost importance to verify the authenticity of the traditions. It was after the second/eighth century that the relevant standards of such inquiries emerged. These new branches of knowledge were \textit{Ijm al-Rijāl} (the knowledge of requirements for evaluating the credibility of \textit{hadith} transmitters),\textsuperscript{15} and concomitant to it, \textit{Ijm al-Jarb wa al-Tādīl} (the knowledge of balancing and preferring the content of \textit{hadith}).\textsuperscript{16} In general, the traditions are divided into two main categories: (1) \textit{akhbār mutawātir}, that is, reports that are transmitted by a reliable chain of transmitters whose veracity and trustworthiness are admitted and approved by the jurists, and the unbroken chain is verifiably traceable to its origin of utterance. The source of utterance is the Prophet, with the addition of the infallible Imams in Shi’ī Law. According to the majority of \textit{Uṣūlī} jurists, only \textit{mutawātir} traditions provide incontrovertible and conclusive knowledge of the Law.

(2) \textit{Akhbār āhād}, that is, reports that lack one of the following requirements: (a) verifiable order in chain of transmission, (b) sufficient number of transmitters that is required for reliability of the traditions/reports, and (c) trustworthiness and veracity of their transmitters.\textsuperscript{17}
Due to lack of sufficient valid traditions, the process of derivation of the rules in part revolves around such less-than-reliable reports or *akhbār āhād*. It is this category of reports, however, that a traditionist jurist invokes to establish the validity of his opinion, whereas a great majority of the *Usūlī* jurists finds it merely ancillary for that matter. This is also where the notion of sufficient knowledge, capable of proving a valid opinion, steps in. In other words, there is a conflict between traditionist and rationalist jurists on the concept of validity. Shīʿī *Akhbāris* (traditionists) believed in the sufficiency of knowledge that emerged from reliance on *akhbār āhād*. The main premises of this discourse are:

1. There is a Divine Pronouncement, mostly in the form of a tradition attributed to the Prophet (or the Imam).¹⁹
2. Subcategorization of the traditions to merely valid or invalid is wrong.²⁰
3. All the traditions compiled in the canonical books are valid.²¹
4. The required knowledge to access the truth is far beyond man’s capacity to acquire.²²
5. Man’s acquired knowledge is insufficient to establish a valid counterargument against a *dalīl naqli* (Text-based evidence).²³

In contrast, a rationalist jurist would seek other legitimate sources of knowledge that would establish validity. One of those legitimate sources is *dalīl ’aqli* (rational proof). The characteristics of the rationalist Shīʿī School of legal thought are:

1. General rejection of *akhbār āhād* (traditions reported by less-than-reliable number of transmitters).²⁴
2. Invoking such traditions, only if their content could be verified by external indicators.²⁵
3. Acceptance of *akhbār mujma’un ’alayh* (those traditions that the Shiite community had consented on their applicability).²⁶
4. Acceptance of the Shiite community as an independent source of jurisprudence,²⁷ to the extent that al-Murtaḍā believed most of the Shari’ah rules are deducible from the established consensus in the Shiite community.²⁸

What follow are some *Usūlī* Shīʿī jurists’ arguments on these sources that continued to dominate the Shīʿī jurisprudence and the *Usūlī* doctrine of *’aql* (reason).
Legitimacy of ‘Aql as a Source

There are authenticated reports attributed to the Prophet and Imams in which reason has been described as the basis of the religion, the messenger of the truth, and God’s internal proof along with His external proof, that is, the Prophet and Imams. One of the earliest references to application of reason, as a method of discovering the Law, was made by Mufid:

Main origins of the Shari’ah rules are: God’s Book, Tradition of the Prophet, and what has been stated by the Imams. Paths to recognition of a legitimate hukm (legal rule) from these sources are reason, language, and reports... An āhād report that can assure the jurist of the absence of excuse [in his endeavor for finding the hukm] is the one that is supported by contextual proofs that establish knowledge to its authenticity. Such contextual evidence can be an argument developed by reason.

Furthermore, Mufid divided the akhbār āhād into two major categories: (1) a tradition that is corroborated by dalā’il mujib al-‘ilm (external indicators that establish knowledge), that is, reason, consensus, or custom; and (2) a tradition that is incapable of securing any of them. Mufid believed that the second category traditions would not furnish a probative ground, and the jurist can utilize traditions of the first to take remedial measures for the Text’s lack of incontrovertible evidence (khabarun qātī ‘udhr) and render a valid opinion. In addition to treatment of reason as a path to discovering the Law, Mufid criticized his mentor Shaykh al-Šadūq, one of the three main Muhadithhūn (compilers) of traditions in Shi’i history. Mufid was especially concerned about al-Šadūq’s mere adherence to the prima facie appearance of the traditions and applying them in legal issues, without critically distinguishing the right and wrong ones, and thus, following the transmitters and failing to render an opinion based on the probative value of the transmitted traditions. Mufid, therefore, designated ‘aql as a measure for evaluation of the content of hadīth and wrote: “When a tradition conflicts with the rules of reason, its fasād (incorrectness) should be rationally disproved. Such tradition cannot be the basis upon which a hukm (rule) would be discovered or gain validity.”

The nature of rejecting admissibility of āhād traditions was mainly founded on methodological concerns. As a matter of principle, it was against the then standards of evaluation of traditions to render a less-than-reliable tradition admissible. According to al-Murtadā, those traditions did not meet the required qualifications for “lifting the falsehood from the content of a tradition.” On the invalidity of the āhād traditions, al-Murtadā claimed that all the Shi’i jurists have by ijmā’ (consensus) rejected the idea
of validity of non-corroborated traditions. In his arguments on *ijmā’* and its rational basis of validity, al-Murtada made yet another argument in favor of practical reason in Shi’i law. By a rationalist account, support for the idea of “external indicators,” which could remedy the lack of validity of the *āhād* traditions, would also be found in analyzing whether or not it was possible to apply an invalid specific rule that the Shi’i community had perceived acceptable. Practical reason had its origins in the concept of lutf (inherent grace of the divine guidance). A common belief exists on the importance and applicability of lutf among Shiites and Mu’tazilites for the proof of rationality of Shari’ah. Summarily, this concept is employed to prove that God will and does only what is good, so it brings the human beings close to His obedience and keeps them far from disobedience. In addition, Shiites employ this concept to prove the righteousness of Imāmah. In his discussion on the “beauty of the appointment of messengers” by God, al-Murtada argued: “It would not be impossible [to assume] that [the rationale of] appointing the messengers by God was to emphasize the rules of reason, even if the appointed messenger brought no Law with himself.”

According to al-Murtaḍā, it is not impossible to assume that God knows when *mukallafūn* (duty-bound individuals) perform acts, they do so because such performance accords to what they believe to be a rational duty and in conflict with rational prohibitions. Obviously, there are other acts that when carried out amount to performing prohibited acts and violating a mandatory obligation (*amr wājib*). If it is acceptable that God is aware of all these varieties, then one should also accept the fact that God would inform the duty-bound individuals and let them know of His awareness, because informing people of this kind of matters is an established characteristic of God’s inherent grace. Finally, in his arguments about the relation between *al-sam’* (revelation) and *’aql* (reason), al-Murtaḍā wrote:

When revelation is invoked for the claim of prohibition of a prohibited act, our knowledge acquired by reason will [also] prohibit it. Similarly, when revelation dismisses [the claim of] prohibition, our knowledge will find it obligatory. Then, if something is disclosed by our reason, and not by the revelation, it is what would be discovered from revelation, though explored by our reason and what we know of revelation. Thus, there is not conflict between rational finding and our acquired knowledge from the divine revelation. There is no circumstance in which the proven [rational] principles would establish opposition to or rejection of revelation. And the discovery of (the rule revealed in) revelation on the details of the matters is not possible but by discovering the [social] customs and experiences and what has been reported about them.