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# A HISTORY OF ISLAMIC LEGAL THEORIES



AN INTRODUCTION TO SUNNĪ *UṢŪL AL-FIQH*

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# 3

## THE ARTICULATION OF LEGAL THEORY: II

### INTRODUCTORY REMARKS

ARMED with the knowledge of hermeneutical principles, legal epistemology and the governing rules of consensus, the *mujtabid* is ready to undertake the task of inferring rules. Inferring rules presupposes expert knowledge in hermeneutics because the language of the texts requires what may be called verification; namely, establishing, to the best of one's ability, the meaning of a particular text as well as its relationship to other texts that bear upon a particular case in the law. For this relationship, as we have seen, may be one of particularization, corroboration or abrogation. Before embarking on inferential reasoning, the *mujtabid* must thus verify the meaning of the text he employs, and must ascertain that it was not abrogated by another text. Knowledge of the principles of consensus as well as of cases subject to the sanctioning authority of this instrument is required to ensure that the *mujtabid*'s reasoning does not lead him to results contrary to the established consensus in his school. This knowledge is also required in order to ensure that no case that has already been sanctioned by consensus is reopened for an alternative rule.

The certainty engendered by consensus places the rules subject to this instrument on a par with the Quranic and Sunnaic texts which are semantically unequivocal and which have been transmitted through a multiplicity of channels (*tawātur*). All other cases, however, are open either to a fresh interpretation or reinterpretation. Those open for fresh interpretation are novel cases (*namāzih*; sing. *nāzila*) that befall the Muslim community, and they are considered to be infinite in number. Those open for reinterpretation are older cases of law for which the jurists proffered one or more solutions, but on which no consensus has been reached. The latter group of cases falls within the scope of juristic disagreement (*khilāfiyyāt*, *ikhtilāf*) and may therefore be subject to new ways of legal reasoning.

Now, the theorists recognize various types of legal reasoning, some of which are subsumed under the general term *qiyās*. Other types, which are somewhat controversial, come under the headings of *istidlāl*, *istiḥsān* and *istiṣlāḥ*. We begin with *qiyās*, unanimously considered in Sunnī jurisprudence as the fourth source (*aṣl*) of the law. The characterization of this method as a source must not, however, be taken in a literal sense. It is a source only insofar as it leads, as a method of reasoning, to the discovery of God's law on the basis of the revealed texts and of consensus.

### QIYĀS

#### Analogy

The most important form of argument subsumed under *qiyās* is undoubtedly analogy, which constitutes the archetype of all legal arguments. In fact, the analogical argument employed in the law became, in the thought of some theologians and jurists, the archetype of all logical arguments, including syllogistics; the categorical syllogism was deemed to be both epistemologically equivalent and reducible to legal analogy.<sup>1</sup>

Among all topics of legal theory, analogy drew the most extensive exposition. In a typical treatise on the subject, it alone occupies an average of one-third of the total space, if not more. The main issues discussed relate to the constituents of the analogical argument, the conditions they must individually fulfill, and the principles that govern the relationships among them. These constituents are four: (1) the new case (*far'*) that requires a legal solution; (2) the original case (*aṣl*) embedded in the primary sources – the Quran, the Sunna and consensus; (3) the *ratio legis* (*'illa*), the attribute common to both the new case and the original case; and (4) the legal norm or the rule (*ḥukm*) which is attached to the original case and which, due to the similarity between the two cases, is transferred from that case to the new one. The archetypal example of legal analogy is the case of wine. The Quran stipulates that grape-wine is prohibited. If we have, say, a case involving date-wine for which we need to establish a legal norm (prohibition, permission, recommendation, etc.), we find that grape-wine is prohibited by the revealed texts, and that it shares the attribute of intoxication with date-wine, an attribute for which prohibition was legislated. Having established that the *relevant* attribute is common to both cases, we transfer

<sup>1</sup> See Wael B. Hallaq, trans. *Ibn Taymiyya against the Greek Logicians* (Oxford: Clarendon Press, 1993), xxxv ff.; Wael B. Hallaq, "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law," *Cleveland State Law Review*, 34 (1985–86): 94–95.

the legal norm of prohibition from the case of grape-wine to that of date-wine.

In analogy, it is presumed that a new case is one the texts do not cover directly, and that there is a need for human agency to transpose the explicit decree in the texts to that case. Furthermore, for a new case to qualify as a *far'* (literally, a branch), it must bear a resemblance to a particular *asl* (literally source or stem; the metaphor of a tree here is unmistakable), for without a stem, so to speak, there can be no branch, and, tautologically speaking, the existence of a branch entails the existence of a stem.<sup>2</sup>

The original case, in which the legal norm is embedded, may be identified by means of either the texts or consensus. The texts, however, provide two types of case, with regard to the first of which the texts do not state the rationale behind the commands or prohibitions stipulated in them. Some cases in point are the number of the days of fasting, of prostrations in prayer, and the fixed times for performing certain rituals. No analogy may be drawn on the basis of such cases because the *ratio legis* cannot be uncovered and hence no extension to new cases is possible. In the second type of case, the *ratio legis* may be discerned, and it is here where the jurisconsult is able to extend the rule in the original case to the new. Furthermore, cases subject to consensus constitute the basis for analogical reasoning, since consensus renders such cases certain. Against a minority of jurists who rejected reasoning on the basis of consensus it was argued that since reasoning on the basis of the probable solitary reports (*khabar āḥād*) is admissible, consensus as a basis of reasoning must *a fortiori* be accepted. After all, consensus itself cannot take place unless the case subject to it has been solved in accordance with an original case in the texts, a case with which it has a common *ratio legis*.<sup>3</sup>

Some Ḥanafites and Shāfi'ites, among others, argued that even if consensus is not arrived at with respect to a new case, it may still serve as the basis for finding the rule for a yet unsolved case. In other words, these jurists argued that it is possible to base an analogy on a previous case which is in turn based on the revealed texts. Against this serial analogy, it was maintained that the *mujtahid* might lose sight of the *ratio legis* in the original case when drawing an analogy between the new case at hand and the second case arrived at on the basis of the original case. Usury, for instance, may be said to be prohibited in sale or barter of sugar on the basis of the original case in which usury is prohibited in the sale or barter of wheat. The

*ratio legis* for prohibition is said to be the fact of the commodity's being an edible foodstuff. Now, were there to arise a subsequent case pertaining to lead, the *mujtahid* may argue that usury in this instance is prohibited because lead shares with sugar the attribute of being measurable by weight. The *ratio legis* in the analogy between sugar and wheat is clearly not identical with that found between sugar and lead, and the *ratio* behind the prohibition in the original case is lost in the analogy between lead and sugar. This suffices, the opponents insist, to render such serial analogies invalid. On the other hand, the proponents of this type of analogy argue that if the jurisconsult establishes a different *ratio legis* in the inference that proceeds from sugar to lead, then both *ratios* must be considered valid since the same rule of prohibition may have behind it two *ratios*, and in this case they represent edibility and measurability by weight. From this it becomes clear that a single rule may be occasioned by more than one *ratio legis*. The death penalty, for example, is sanctioned for a variety of causes, such as murder, adultery (committed by a married person) and renouncing the religion of Islam. Conversely, a single *ratio* may occasion a variety of rules, such as in the case of menstruation which results in the prohibition of sexual intercourse, of fasting and of prayer.<sup>4</sup>

At the same time, the *ratio legis* may consist of one or more properties. The *ratio* of prayer, for instance, possesses two properties, namely, ritual purity and full legal capacity (i.e., being Muslim, free, of age and mentally sane). Likewise, the *ratio* of the penalty (*ḥadd*) for theft consists of five properties: (1) the taking away of something by stealth; (2) the stolen object must be of a minimum value (normally set at 10 dirhams or their equivalent); (3) the object must in no way be the property of the thief; (4) it must be taken out of custody; and (5) the thief must have full legal capacity. All of these properties must obtain for an act to qualify as theft punishable by cutting off the hand. Each property is necessary, although no single one by itself suffices to produce the *ratio legis*.<sup>5</sup>

In the aforementioned case of theft, the rationale behind the rule is comprehensible: stealing a particular object under certain circumstances qualifies as theft, and as a punishment and deterrent, the penalty of cutting off the hand is instituted. Likewise, the intoxicating property of wine renders it prohibited because intoxication incapacitates the mind and hinders, among other things, the performance of religious duties. In this example we comprehend the reason for the prohibition. Some properties, however, do not disclose the reason. We do not know, for instance, why edibility should be the *ratio legis* for the prohibition of usury; all we know is

<sup>2</sup> Ghazālī, *Mustasfā*, I, 7–9.

<sup>3</sup> Shirāzī, *Sharḥ al-Luma'*, II, 825–26, 829–30; Bājī, *Iḥkām*, 640–41.

<sup>4</sup> Shirāzī, *Sharḥ al-Luma'*, II, 830–32.

<sup>5</sup> Ibid., II, 837.

that all objects possessing the property of edibility cannot be the subject of a transaction involving usury.

Now, the *ratio legis* may either be clearly stipulated in the original texts or it may be inferred by the juriconsult. The inferred *ratio legis* finds its justification, *inter alia*, in the Prophetic report concerning one of the Prophet's lieutenants, Mu'adh b. Jabal. When he deployed Mu'adh to Yemen to govern and to act as a judge among the Yemenis, the Prophet is said to have asked him about the basis for his decisions when he could find no relevant revealed text, whereupon Mu'adh is reported to have replied: "I exercise my own legal reasoning" (*ijtihad*). The Prophet is said to have found the answer highly satisfactory. The clear implication of this report is that reasoning by inference, involving the derivation of the *ratio legis*, has been ratified by the Prophetic Sunna.<sup>6</sup>

The *ratio*, whether explicitly stated or inferred, may either bear upon a genus (*jins*) of cases or it may be restricted in its application to individual cases. If we say that the *ratio* of penal retaliation (*qisās*) is both intentional homicide<sup>7</sup> and the religious equality of the murderer and the victim (for, according to some jurists, a Muslim may not be executed if he killed a non-Muslim, since they are not equal in status), then retaliation must obtain whenever the *ratio legis* obtains, and it must be waived whenever that *ratio* does not obtain. In other words, the *ratio* and the entire genus of cases involving intentional homicide and religious equality are concomitant.

However, the *ratio* may not be concomitant with the entire genus, but only limited to some members of that genus. If we say, for instance, that intentional homicide and religious equality must be punishable by death (*qatl*), the *ratio* would not be applicable to the whole genus of *qatl*, because the death penalty may result from other acts, such as committing adultery (in the case of married persons) and renouncing the religion of Islam. The validity of this type of *ratio* is justified by the common juristic understanding that the death penalty is induced by other reasons. As we shall see, without such an understanding, the *ratio* may be dismissed as invalid.

One of the most fundamental questions raised in legal theory is how a property, or a set of properties, is confirmed to be the *ratio legis* behind a

<sup>6</sup> Ibid., II, 845–46.

<sup>7</sup> Islamic law distinguishes at least two types of homicide, intentional (*'amd*) and unintentional (*kbāʿa*). The former, unlike the latter, usually entails the use of a deadly implement, such as a knife. The penalty for intentional homicide is retaliation or payment of blood-money, whereas for unintentional homicide it consists of blood-money and performance of the *kaffāra*, a form of religious expiation normally involving the manumission of a slave or feeding the poor. Abū 'Abd Allāh Muḥammad al-Anṣārī al-Raṣṣā', *Sharḥ Hudūd Ibn 'Arafā al-Mawṣūm al-Hidāya al-Kāfiya al-Shāfiya*, ed. Muḥammad Abū al-Ajfan and al-Ṭāhir al-Ma'mūrī, 2 vols. (Beirut: Dār al-Gharb al-Islāmī, 1993), II, 613 ff.

certain rule in an original case. We have said that a *ratio* may either be stated or inferred. A *ratio* may be stated in the texts either explicitly or implicitly. An example of an explicitly stated *ratio* may be found in the Prophetic report relating to the barter of dates. When the Prophet was questioned about the legality of bartering ripe dates for unripe ones, he asked: "Do unripe dates lose weight upon drying up?" When he was answered in the affirmative, he remarked that such a barter is illicit. In this report, the language of causation is deemed explicit, for it is readily understood that the prohibition was instituted due to the fact that unripe dates become lighter in weight upon further maturity, and a barter involving these types of dates involves usury.<sup>8</sup>

But the *ratio* may be causally connected with its rule (*ḥukm*) in a less explicit manner. For example, from the Quranic verse "Say not 'Fie' to them [i.e., parents] neither chide them, but speak to them graciously" (17:23) one knows that uttering "Fie" is prohibited because it signifies a disrespectful attitude toward parents. If the mere utterance of "Fie" is prohibited, then striking one's parents is *a fortiori* prohibited. This last prohibition, engendered by the *ratio* of disrespect toward parents, is not explicitly stated in the texts, but is rather embedded in the language of revelation. (The *a fortiori* argument, however, was surrounded with controversy, as we shall see on pp. 96–99 below). Another example in point, illustrating a type of textual case that indicates the *ratio* by intimation (*tanbīh*), is the Prophetic report: "He who cultivates a barren land acquires ownership of it." The intimated *ratio* for ownership here is the cultivation of barren land. It is the semantic structure in this type of text that discloses the intimated *ratio*, for this structure is reducible to the conditional sentence "If . . . , then . . ." "If you rise up for prayer," the Quran states (5:6), "then you must wash . . ." The consequent phrase "then . . ." indicates that the *ratio* behind washing is prayer, and in the case of land, the *ratio* of owning a barren land is cultivating it.<sup>9</sup>

In the Prophetic Sunna, the sequence of events may also help in unraveling the *ratio* of a rule. If the Prophet behaves in a certain manner, and it is reasonably clear that he would not have behaved in this manner had it not been for the occurrence of a particular event or circumstance, it will be concluded that the *ratio legis* behind his action is that event or that circumstance. Similarly, any act precipitating a ruling by the Prophet is considered the *ratio* behind that ruling. When the Prophet knew that a man had sexual intercourse with his wife during the fasting hours of the month of

<sup>8</sup> Baṣṭī, *Mu'tamad*, II, 775–77; Juwaynī, *Burhān*, II, 774 ff.; Shīrāzī, *Sharḥ al-Luma'*, II, 844–45.

<sup>9</sup> Juwaynī, *Burhān*, II, 775; Baṣṭī, *Mu'tamad*, II, 779–80.



Ramadan, he commanded him to free a slave. From this the *mujtahid* concludes that sexual intercourse during the fasting hours of Ramadan is the *ratio* for doing penance, one form of which is freeing a slave.<sup>10</sup>

Thus far we have spoken of the *ratio legis* that is stated in the texts with varying degrees of emphasis. The second type of *ratio*, we have said, is that which is inferred. Between these two types, however, stands a third, namely, a *ratio* determined by consensus. Such a *ratio* is originally inferred, which means it enjoys probability. But from being subject to consensus it becomes as certain as a *ratio* stated in the texts. By means of consensus, for example, it is determined that the full brother has priority over a half brother in matters of inheritance. The *ratio* in this case gains a strength equal to that of a *ratio* stipulated by the texts, and thus it functions as an original case according to which a new case may be solved. One such new case is guardianship over the marriage of one's sister; the bride's full brother, in the absence of the father, has priority over her half brother in assuming the role of a guardian (it being a condition for a valid marriage – in all the schools except the Ḥanafite in the case of a previously married woman – that the bride must be given in marriage by the closest agnate).<sup>11</sup>

The *ratio* may be inferred and verified through a variety of methods, all of which were subject to juristic disagreement. Here we shall be content to discuss the most important three, the first of which is suitability (*munāsaba*), considered by many theorists as the single most important method. Ghazālī, who presents perhaps the most extensive discussion of this method, argues, against those who claimed suitability to be a subjective method, that the *ratio legis* is established by means of a clear-cut rational argument, an argument “even the opponent cannot reject.”<sup>12</sup> In the Quran, wine is forbidden because it possesses the property of inebriation, and inebriation incapacitates the mind, leading the intoxicated person to neglect his religious duties. If we were to assume, for the sake of argument, that the Quran did not stipulate the reason for the prohibition, we would still come to the understanding that the Quran prohibited the consumption of this substance because it leads to harmful consequences. This, Ghazālī insists, amounts to reasoning on the basis of suitability, since we, independently of revelation, know that there is a certain harm in allowing the consumption of wine and a particular benefit that accrues from its prohibition.

Since suitability is rationally conceived and emanates neither from the direct nor the oblique meaning of the revealed texts, its applicability to the

law cannot be universal. In other words, since the law cannot always be analyzed and comprehended in rational ways, reason and its products are not always in agreement with the legal premises and their conclusions. Suitability, therefore, may at times be relevant (*mulā'im*) to the law, and irrelevant (*gharīb*) at others. No *ratio legis* may be deemed suitable without being relevant. Any irrelevant *ratio* becomes, *ipso facto*, unsuitable, and this precludes it from any further juristic consideration. The obligation to pray, for instance, is waived under circumstances of hardship. The *ratio* of hardship is deemed relevant to the spirit and positive commands of the law, since a great number of obligatory actions cease to be obligatory under extreme circumstances, such as illness and travel. But in the case of barring guardianship over divorced women who are of minor age, suitability is irrelevant, and therefore inadmissible. A divorcée who has reached the age of majority may remarry without a guardian, since she is thought to have acquired a sufficient degree of experience during her last marriage. This reasoning, though equally applicable to a divorcée who is a minor, is considered inappropriate in the context of the Sharī'a since it runs counter to the aims of the law in protecting the interests and welfare of minors.

The ultimate goal of suitability is thus the protection of public interest (*maṣlaḥa*) in accordance with the fundamental principles of the law. But in determining the *ratio legis* by the method of suitability, the jurisconsult does not deal directly with the texts, since the *ratio legis* is not, strictly speaking, textual. Rather, he infers it through his rational faculty, but it must be in agreement with what may be called the spirit of the law. The law is known to prohibit that which is harmful and to protect and promote that which is beneficial to Muslims in this world and in the hereafter. Whatever is deemed detrimental to these benefits must be avoided, and whatever promotes harm must be prohibited. The constant and consistent promotion of benefit and exclusion of harm are the aims (*maqṣūd*) of the law, and it is to these goals that the rational argument of suitability must conform. The protection of life, private property, mind and offspring represents one of the aims of the law. Accordingly, the penalty of the murderer is death, a penalty instituted for the aim of deterring homicide. Similarly, wine is prohibited in order to safeguard the mind against malevolent and violent tendencies.

But the aims of the law are many and multi-faceted, and some are more fundamental than others. Ghazālī offers a hierarchical classification consisting of three levels, the first of which includes those aims that are considered indispensable (*ḍarūrāt*). Belonging to this level are the aforementioned central aims of protecting life, property, etc. This is complemented by a class of subsidiary aims that seek to sustain and enhance those

<sup>10</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 855–56. <sup>11</sup> Ibid., II, 856–57; Baṣṣī, *Mu'tamad*, II, 784–86.

<sup>12</sup> See his *Shifā' al-Ghā'il fi Bayān al-Shabāh wal-Mukhīl wa-Masālik al-Ta'līl*, ed. Hamd al-Kabīrī (Baghdad: Maṭba'at al-Irshād, 1390/1971). 143. For his discussion of this method, see pp. 142–266.

central aims. For example, the consumption of a small quantity of wine is prohibited because it invites the consumption of a larger quantity. This prohibition is intended to give added support to the original and principal prohibition on drinking the genus of inebriating substances. Any *ratio legis* determined by suitability and falling within this area of the law must be treated according to the principles governing this level.

The second level, consisting of the necessary aims (*ḥājjiyyāt*), is distinguished from the first in that the neglect of the indispensable aims causes severe harm to life, property, mind, etc., whereas aims classified as belonging to the second level are *needed* for maintaining an orderly society properly governed by the law. An example of these aims is the necessity to appoint a guardian for giving a female of minor age in marriage. Here, no life is threatened and no mind is corrupted; nevertheless, protecting certain interests, including those of the minor, are necessary for ensuring the orderly and just functioning of society.

Finally, the third, and least important, level is that which includes the aims of what Ghazālī calls "improvement" (*taḥsīn, tawsiʿa*) which merely enhances the implementation of the aims of law. The slave, for example, is denied the capacity to act as a witness because his menial social status and servitude impede his independent testimony. By this denial, the indispensable and necessary aims are not directly served, and in the absence of this denial, they are not harmed. But because of his impaired testimony, this denial serves to enhance the aims of the Shariʿa.

To sum up, while suitability in and by itself is a rational method, it must conform to what may be called the spirit of the law, a spirit that dictates to what extent and in what circumstances suitability is to be accepted or not. The need for this conformity explains the distinction between relevant and irrelevant suitability, for what is considered irrelevant is nothing but a rational conclusion incompatible with the spirit, and therefore letter, of the law.

The second method by which a property is confirmed to be the *ratio legis* of a case is that of co-presence and co-absence (*ṭard wa-ʿaks*) of the *ratio* and the rule, known to later theorists as the method of concomitance (*dawarān*). According to this method, the rule must be concomitant with the *ratio*; that is to say, it must be present when the *ratio* is present, and must be absent when there is no reason for the *ratio* to be present. Only then will the jurisconsult confirm that the relationship between the rule and the *ratio* is one of efficacy (*taʿthīr*), namely, that the rule is necessarily entailed by the *ratio*. That inebriation is the *ratio* in prohibiting grape-wine is known by virtue of the concomitant relationship between intoxication and the legal value of prohibition. Before fermentation, prohibition is not predicated of grape-juice because the property of intoxication is not found in the juice.

Upon fermentation of the juice it becomes prohibited, and when wine turns into vinegar, the legal value of prohibition is waived, just as had been the case with juice.

Some theorists draw a clear distinction between the methods of concomitance and the efficacy of the *ratio*. In the aforementioned example of grape-juice provided by Ghazālī, the distinction is virtually obliterated; efficacy in Ghazālī is interwoven with concomitance. But for Shīrāzī, these are two distinct methods. The example of qualitative transmutation occurring in grape-juice is employed by Shīrāzī to illustrate the method of efficacy, where the property of intoxication *effects*, and is productive of, prohibition. According to Shīrāzī, however, the method of co-presence and co-absence, or concomitance, amounts to an analogy on the basis of the texts, whereby a property is judged to exist in a matter not stipulated by the texts due to its existence in a similar matter specified by these texts. Thus we judge that mares and mules are exempt from taxes on the ground that such taxes are waived for stallions, for if mares were taxable then stallions would be too.<sup>13</sup> Like all analogical inferences, this analogy does not engender certitude but only probability, albeit of the strong type (*ghalabat al-ẓann*). In rational inferences, too, the argument yields the same type of knowledge. In illustration, one theorist gives the following example:<sup>14</sup> if we see two men constantly in each other's company on Tuesday mornings, and we know that a lecture on legal theory normally takes place on these mornings, and we observe that on other days of the week they are never together, we conclude that the reason that brings them together on Tuesday mornings is their attendance of the lecture on legal theory. Conversely, when no lecture on the subject is given, they do not come together. Here, no absolute certainty can be attained, but the absence of other variables, such as the holding of another lecture on theology at the same time, leads us to believe that our conclusion stands, with the highest degree of probability, to be true.

For this method to yield a high degree of probability, both co-presence and co-absence of the *ratio* and the rule must be established. The theorists unanimously agree that co-presence alone is insufficient to confirm the concomitance of the rule with its *ratio*. For example, rice, possessing the properties of being both an edible and measurable substance, cannot be transacted usuriously; and a number of other commodities that cannot be transacted usuriously possess these two properties. But measurability by weight, according to the Shāfiʿites, does not qualify as a *ratio legis*, since there are other commodities, measurable by weight, that can be transacted usuriously. For measurability to stand as a *ratio*, it must be present where

<sup>13</sup> Shīrāzī, *Sharḥ al-Lumaʿ*, II, 860–62.

<sup>14</sup> Abū Ṭayyib al-Ṭabarī, as cited by Shīrāzī, *ibid*.

prohibition of usury is present, and absent where prohibition is absent; that is, all measurable commodities must not be transacted usuriously, and all transactions in which usury is prohibited must involve measurable substances. Thus to confirm the latter part of the equation, namely, that "all transactions in which usury is prohibited must involve measurable substances," amounts to resorting to the method of co-absence.<sup>15</sup>

Finally, the *ratio* may be verified through the method of classification and successive elimination (*al-sabr wal-taqsim*), a method which consists of sorting out all *ratios* deemed to be candidates, and by a process of successive elimination, arriving at one remaining *ratio*. Bread, for instance, cannot be subject to usurious transactions. According to the Shāfi'ites, there are three possible *ratios* for the prohibition: measurability by weight, measurability by volume, or edibility. But bread, it is argued, cannot be sold by weight; nor can it be sold by volume. Thus, what remains is the *ratio* of edibility.<sup>16</sup>

When two or more *ratios* seem to stand as equally valid candidates, and when such methods as classification and successive elimination fail to lead the jurisconsult to the single most probable *ratio*, then a series of considerations must be taken into account in order to make one *ratio* preponderate over the other(s). The first, and seemingly obvious, consideration is that a *ratio* derived from a text that leads to certainty supersedes one derived from a text whose language or mode of transmission engenders only probability. Similarly, a *ratio* stipulated in the texts is superior to one that is inferred from these texts.<sup>17</sup>

Second, the conflict may be between two texts that are both subject to consensus. Although such texts enjoy equally the epistemic status of certainty, their status may be analyzed on another level, thereby allowing the jurist to distinguish them in terms of precedence. For instance, when a consensus is reached upon two cases of law, cases which in turn function as the textual basis for solving further cases, epistemic precedence is given to that case (text) in which the *mujtahid*, or community of jurists, can decipher the textual basis of, and arguments leading to, the solution that became subject to consensus. For it may happen that later generations of *mujtahids* are unable to uncover the texts and the line of reasoning employed by an earlier *mujtahid* in a particular case. However, if the textual evidence as well as the arguments can be deciphered in both of the competing cases, then the two cases are compared with a view to distinguishing them on other grounds.

<sup>15</sup> Bājī, *Iḥkām*, 649–51; Shīrāzī, *Sharḥ al-Luma'*, II, 864 ff.; Ibn Barhān, *Wuṣūl*, II, 275 ff.

<sup>16</sup> Ghazālī, *Mustaḥṣā*, II, 295–96; Ghazālī, *Manḥūl*, 350–52.

<sup>17</sup> On the issue of preponderance, see Shīrāzī, *Sharḥ al-Luma'*, II, 950–65.

Third, a text that has not been particularized is given precedence over another which has, the reason being that the manner in which particularization (*takhsīs*) is applied may be considered by others to be invalid, or at least questionable, and thus the particularized text will be deemed weaker than the other.

Fourth, a text that has been stipulated by the Quran or the Sunna as constituting a basis for inference has precedence over one that lacks such a stipulation. An example in point is the Prophetic report relating to a woman who asked the Prophet whether or not she could perform pilgrimage on behalf of her father who died before he could perform this religious duty. The Prophet is reported to have asked her: "Would it do you any good if you paid back a monetary debt which your father had incurred?" Upon hearing the woman's reply in the affirmative, he said: "Then the debt owed to God is more important to pay back." Here, an analogy was drawn between pilgrimage and debt, the former being the basis for the latter. It is thus the report treating of pilgrimage that is considered the leading text in matters where children act on behalf of their parents in fulfilling a religious duty or a mundane transaction.

Fifth, a *ratio* in the original text which belongs to the same genus as that found in the novel case overrides another *ratio* belonging to a different genus. Whiskey, for instance, belongs to the same genus of grape-wine, a substance the consumption of which is prohibited by the original texts. If we assume, for the sake of illustrating the point, that the original texts also explicitly forbade the use of opium, then the text treating of grape-wine would be taken to override that which deals with opium, since whiskey, like wine, belongs to the genus of alcoholic beverages, whereas opium does not.

Sixth, a *ratio* corroborated by a number of texts supersedes another derived from a single text. However, some jurists, apparently a minority, rejected this view, arguing that the *ratio* in a text is not strengthened by multiple attestations.

Seventh, an affirmative *ratio* has precedence over a negative one. To say that fruits may not be subject to usurious transactions due to the *ratio* of edibility is preferable to saying that the prohibition is due to their being commodities that *cannot* be measured either by volume or by weight.

Eighth, a *ratio* on the basis of which a number of cases have been solved is superior to one that has served as a basis for solving a smaller number of cases. Again, the reason here being that by having been extended to a number of other cases, the *ratio*'s validity acquires added corroboration.

Ninth, a *ratio* that is co-present and co-absent with its rule (*ḥukm*) is, as we have seen, far stronger than one in which co-absence has not been

shown. (In fact, the legal theoreticians agree that co-absence must be proven before a *ratio* can be considered valid).

Tenth, according to some jurists, a *ratio* that results in prohibition has precedence over one that dictates permission. These jurists argue that by adopting the rule of prohibition, no risk of violating the law is involved. To illustrate their point, they adduce the example of prohibition imposed on a man wishing to marry any one in a group of women suspected of including in it his sister (the assumption being that his sister, whose identity is no longer known, may be in the said group). Permission, on the other hand, may result in the man marrying his own sister.

Eleventh, and finally, a *ratio* that introduces a legal rule that did not exist before Islam (*al-'illa al-nāqila*) is superior to one that maintained the same rule throughout (*al-'illa al-mubqiyā*), namely, before and after the advent of Islam. The significance of this view seems to be more theological than juridical.

Now, when arriving at a *ratio legis* for a legal rule, the jurisconsult must be able to defend the validity of that *ratio* against the objections of the opponent. In the medieval Islamic tradition, legal learning and juridical disputation as academic pursuits were, needless to say, intimately connected with legal practice. A doctrine upheld and applied by a jurisconsult to a particular case of law in the world of mundane reality was normally taken up again in the realm of academics, where it was discussed and disputed by the learned legists. This intermeshing of judicial practice and legal scholarship is amply documented by the sources, and is clearly evidenced in the structure of works treating of legal theory. Many works belonging to this genre included chapters devoted to the art of juridical disputation, properly called *al-jadal al-fiqhī*. In addition to the prescriptive-cum-descriptive theories concerning such issues as legal language, legal logic, abrogation, consensus, etc., works of legal theory included chapters that dealt with the manner in which a jurist must defend his doctrines against the opponent. And the subject of *ratio legis* received foremost attention in these chapters.

Thus, to safeguard the *ratio legis* against the critique of the opponent, the jurisconsult must take into account a number of considerations, the most important of which are the following: First, the jurisconsult must establish the property, the common denominator, in the original and novel cases in such a way as to preclude any objection to it on the part of an opponent. If the latter succeeds in casting doubt upon the attribute common to the two cases, then the jurisconsult's reasoning is refuted. In fact, the very process of reasoning by *qiyās* may be wholly subject to refutation. The rea-

soner must ensure before embarking on his task that the rule (*ḥukm*) he aims to reach by reasoning has not been stated in the texts. He would be an easy prey if the opponent could produce a revealed text in which the rule for the case in question is explicitly stated.<sup>18</sup>

Second, the *ratio legis* must be extracted from an established text, namely, a text that has not been, *inter alia*, abrogated by another. Similarly, the rule in the original text must also be unambiguous, and subject to no disagreement. The validity of the *ratio* itself would be highly questionable if the rule it produces cannot be known with certainty: one *ratio*, for instance, would not be deemed valid if it gives rise, at one and the same time, to both legal norms of prohibition and permission, or for that matter, to recommendation and reprehensibility. Only one, unambiguous, legal norm can issue from the *ratio*. Furthermore, the text from which a *ratio* is extracted must be extendable to other novel cases, and must not be of limited applicability. A text would be subject to the opponent's refutation if that opponent can prove that the text is limited in its applicability only to the Prophet himself, for, as we have noted, some texts concern the Prophet alone, and do not constitute legal subject matter for juridical inferences of general applicability.

Third, the *ratio* must be proven as efficacious (*mu'aththir*) in producing the legal rule; namely, it must be present wherever the rule is present. If the opponent is able to prove that the rule is present where the *ratio* is absent, then the *ratio* will be shown to be invalid. The aforementioned example of grape-wine and vinegar is a case in point.

Fourth, the lack of correspondence between the *ratio* and its legal rule, known as *naqd*, suffices to invalidate that *ratio* according to some theorists. Lack of correspondence is defined as the absence of the rule that would be otherwise generated by a certain *ratio*. Instead, the latter is made to produce a different rule because the reasoner decides to accept as efficacious only a part of it. This is known as the limitation of the *ratio legis* (*takhsīṣ al-'illa*), an issue hotly debated in the context of *istiḥsān* (see pp. 110–11 below).

Fifth, the *qiyās* is undermined if the opponent can show that the employed *ratio*, without a change in any of its properties, generates a rule different from that reached by the reasoner. The ultimate test for the validity of either rule rests in efficacy (*ta'thir*); whoever can demonstrate that the *ratio* is efficacious in producing the rule is considered to have followed the correct reasoning.

<sup>18</sup> On these considerations, see Ghazālī, *Mustasfā*, II, 347–50; Bājī, *Iḥkām*, 651 ff.

*The a fortiori argument*<sup>19</sup>

In addition to the archetypal analogical inference, the term *qiyās* encompassed non-analogical arguments. The primary textual premises in the Quran, the Sunna and consensus were conceived of as consisting of two basic categories, the first being those clear premises subject to only one interpretation, and the other being the ambiguous premises capable of varying interpretations. Clear premises (*nuṣūṣ*, pl. of *naṣṣ*) were said to engender necessary and immediate knowledge, namely, knowledge imposed upon the mind without reflection. This knowledge also obtains with regard to matters that are not explicitly stated in these premises, but only tacitly subsumed under these premises. Q. 5:3, for example, states: "Forbidden to you are carrion, blood, pork (*laḥm al-khinzīr*)." It was unanimously agreed that the expression *laḥm al-khinzīr* covers all types of pork, including wild boars, although the original reference was to domestic pigs. Although reasoning in this case can be cast in the syllogistic form, the legal theorists maintained that the conclusion "The meat of wild boars is forbidden" needs no inference since it is clearly understood from the very language of the Quranic verse. Thus, what formal logicians consider as purely deductive arguments were for these theorists nothing but linguistic propositions that lay outside inferential reasoning.

Between these linguistic propositions and the cases in which analogy was needed because revelation was entirely silent, there existed a grey area which attracted a great deal of theoretical discussion, at the center of which stood the *a fortiori* argument. Some jurists regarded this argument, in both of its forms, the *a minore ad maius* and the *a maiore ad minus*, as the most compelling form of *qiyās*. When God or His messenger forbids a small quantity of a certain matter, we conclude that a larger quantity of the same matter is also forbidden. Similarly, if the consumption, say, of a large quantity of a foodstuff is declared permissible, then a smaller quantity would also be permissible. An example of the first type of inference, the *a minore ad maius*, may be found in Q. 99:7–8: "Whoso has done an atom's weight of good shall see it, and whoso has done an atom's weight of evil shall see it." From this verse, it is understood that the reward for doing more than an atom's weight of good and the punishment for doing more than an atom's weight of evil are greater than that promised for an atom's weight. An example of the second type of argument, the *a maiore ad minus*, is the Quranic permission to kill non-Muslims who engage in war against

Muslims. From this permission it is inferred that acts short of killing, such as the confiscation of the unbelievers' property, are also lawful.

Other theorists, however, argued that in these cases no inference is involved and that the matter is purely linguistic. The Ḥanafite jurist Sarakhsī (d. 490 or 495/1096 or 1101), for example, treats this issue as one that takes its premises from language, yielding a non-inferential, purely linguistic knowledge. In contradistinction to a higher linguistic category which contains statements that are expressly revealed in order to specify the rule of a particular case, this category of propositions is intended to legislate in matters that have not been explicitly specified but which are clearly understood from the language of these propositions. Legal questions in this category are denoted in the texts but not specifically stated. From Q. 17:23 "Say not 'Fie' to them [i.e., parents] neither chide them, but speak to them graciously," one knows that uttering "fie" is prohibited because it signifies a disrespectful attitude toward one's parents. The language of this injunction makes it abundantly clear that all words signifying actions of the same kind as well as actions exceeding in strength the uttering of "fie," such as striking one's parents, are prohibited. The intention behind the prohibition of uttering "fie" is to declare it prohibited for children to cause the least amount of harm to their parents. This, Sarakhsī maintains, is not a matter subject to reasoning by *qiyās*, but is rather a linguistic one, because the full extent of the meaning of "fie" is in fact encompassed by the meaning of harm. It thus follows that harmful things, which may range from expressing the sound of mere dissatisfaction to murdering one's parents, are forbidden by the uninferred specification of the Quran. Sarakhsī argues that in this category of language what may be considered the *ratio legis* is so obvious that the rule can be grasped by the mind without resorting to the method of *qiyās*.

This argument against including in *qiyās* the *a fortiori* argument had its counter-argument, with the Shāfi'ites as its chief exponents. Pinning the crux of the issue, Shīrāzī pointed out that *a fortiori* conclusions involve an inferential line of reasoning because the language of the texts does not explicitly state the rule with regard to matters implied. Striking one's parents, which is implied in the verse, cannot be understood from the word "fie." Only by implication can this term be taken to mean "any harm," and such an implication can be understood only through *qiyās*. Māwardī (d. 450/1058), another Shāfi'ite theorist, maintained that this *qiyās* is of the perspicuous type (*jālī*), which, among other types, is the closest to the unambiguous, self-explanatory texts. The ease with which *a fortiori* conclusions are reached derives from the fact that in such arguments the new case, though unspecified by the texts, comes under the meaning of these texts.

<sup>19</sup> Discussions in this and the following section draw on my article "Non-Analogical Arguments in Sunni Juridical Qiyās," *Arabica*, 36 (1989): 287 ff.

The absence of specification, Māwardī insists, draws a line between the legally clear texts, which require no reasoning whatsoever, and the perspicuous *qiyās*. In the clear texts, the case as well as its rule are explicitly stated, but in *qiyās* the rule is derived on the basis of another case. The word “fie” does not itself denote the meaning of “striking” or “insulting” and, conversely, “striking” and “insulting” are not used to describe the meaning expressed by the term “fie.” A king or a prince, for instance, could order his guards to execute his own father without uttering the word “fie.” Thus, the rule of prohibiting the striking of one’s parents was *deduced* from the intention behind the prohibition of uttering the expression “fie,” and not intuitively conceived from the very word itself.

In Ghazālī’s view, the determinant in this question is the relationship between striking and the expression “fie.” If “fie” conveys in linguistic usage the meaning of striking, then no *qiyās* is involved; on the other hand, if the prohibition of striking is understood from the *ratio legis* of the prohibition of uttering “fie,” then such an inference is nothing but *qiyās*. The fact that such a *qiyās* is quite intuitive and that its conclusion can be reached with little analysis makes of it no less a *qiyās* than other inferences subsumed under that term. Ghazālī rejects the claim that the issue is linguistic. As shown in the example about the king, “saying not ‘Fie,’” in and by itself, does not imply a prohibition imposed on striking or on any other violent act. We instead deduce this prohibition through the *ratio* behind the necessity to respect parents, and the knowledge that uttering “fie” runs counter to such respect. This, Ghazālī insists, is the very course of reasoning known as *qiyās*.<sup>20</sup>

It is difficult to determine whether or not those theorists who argued that the *a fortiori* argument is linguistic were a minority. It seems, however, that their opponents (who espoused the view that the argument is rational) were, at the lowest estimate, somewhat more considerable than the former. The later jurist Shawkānī (d. 1255/1839), who was familiar with an impressive range of early and later works on the subject, approvingly reports, on the authority of earlier writers, that the majority of jurists held the view in favor of subsuming the *a fortiori* argument under *qiyās*.<sup>21</sup>

That the *a fortiori* argument was taken by a majority of theoreticians to be a form of *qiyās* does not necessarily mean that its logical property is analogical or inductive, since the argument can be reduced to a kind of asyllogistic inference due to its special logical feature of relational transitivity. The relationship between the subject and the predicate of the premises is transitive, and this precludes the inference from being subsumptive, and

<sup>20</sup> Ibid., 289–96, and sources cited therein.

<sup>21</sup> Muḥammad b. ‘Alī al-Shawkānī, *Irsbād al-Fuḥūl ilā Tahqīq al-Ḥaqq min ‘Ilm al-Uṣūl* (Surabaya: Sharikat Maktabat Aḥmad b. Sa‘d b. Nabḥān, n.d.), 178.

thus from being syllogistic. In the proposition “Women are more intelligent than men,” the relation “more intelligent” is transitive from women to men. This relationship is also said to be asymmetric, since there is no parity between the two as in “Women are as intelligent as men,” but rather a comparison in terms of “more,” “greater,” “smaller,” etc. It is this asymmetry that leads to the knowledge that striking parents is *more objectionable than* saying “fie” to them. Taking harm as the *ratio legis*, one concludes that if “fie” is prohibited, then striking is at least equally prohibited. Arguably, the absence of a necessary premise from the argument, namely, the harm in uttering “fie,” renders it an enthymeme. The jurists, however, supplied the implied premise, which takes in a syllogism the position of a middle term. Thus, for Ghazālī the course of reasoning could be reduced to a deductive inference in which the major premise is “All harmful acts (directed against one’s parents) are prohibited”; the minor premise “Striking is a harmful act”; and the conclusion “Striking (one’s parents) is prohibited.” But this reasoning is steps removed from the Quranic stipulation against saying “fie.” The deductive inference on the basis of the verse would have been impossible had it not been presumed that “Striking is more harmful than saying ‘fie’ to one’s parents,” and that “harmful acts are prohibited.” In this inference, the premises have not been originally stipulated but are themselves the conclusions of yet another inference, a fact that precludes the *a fortiori* from being a regular deductive argument.

Nor can the *a fortiori* argument be considered inductive. The fundamental difference between the two arguments lies in the relationship between the original and the new case. In analogy the inference proceeds from a particular to another particular, such as in the case of grape-wine and whiskey. The original and the new cases here stand on the same footing in that they are two equal particulars. In the *a fortiori* argument, on the other hand, there is no such parity between the cases. The original case always maintains a “greater” or “lesser” dimension than the new case. Added to this is the consideration that in analogy the rule (*ḥukm*) is inferred on the basis of a similarity that exists between the cases, whereas in the *a fortiori* the rule is *implied* without the prerequisite of drawing upon a similarity. It would therefore be consistent with the principles of logic to say that the *a fortiori* argument is asyllogistic, and has virtually nothing to do with the category of analogical inferences.

### The *reductio ad absurdum* argument

Less controversial than the *argumentum a fortiori* was the *reductio ad absurdum* inference, defined as a course of reasoning in which the converse of a given

rule of a case is applied to another case on the grounds that the *ratio legis* of the two cases are contradictory. The fundamental thesis of this argument is the establishment of a rule by demonstrating the falsehood or invalidity of its converse. It presupposes a premise whose conclusion is to be established as true; a converse of this premise is adduced with the view of establishing that the conclusion to which it leads is false or invalid. Once it is established that the conclusion of the second or converse premise is false or invalid, and that it stands in diametrical opposition to the conclusion of the first premise, the *mujtahid* reaches the conclusion that the first premise is true. The Mālikite theorist Bājī (d. 474/1081) gives the following example. We maintain that the *ratio legis* behind the prohibition on taking the organs of living animals is that the soul still resides in them; and it has been established that the rule of prohibition is induced by the *ratio legis*. From this we conclude that the soul does not reside in animal hair, for if it did, the taking of animal hair would have been, like the taking of organs, prohibited. Thus the absence of the *ratio* of prohibition in the taking of hair (which amounts to a *ratio* whose property is the converse of that found in organs) renders taking it from living animals lawful.<sup>22</sup>

According to Ghazālī, who attempted to analyze legal theory in terms of logic, the first step in the *reductio ad absurdum* argument is to reduce the first proposition into its component elements, and by invalidating these elements one by one, the entire proposition is proven false or invalid. One concludes that *ilā'* is not a form of divorce by reasoning that if it were a form of divorce it would require a direct statement (*ṣarīḥ*) or an indirect declaration of intent (*kināya*) to the effect that the husband is divorcing his wife. *Ilā'*, which merely involves a sworn testimony (*ḥilf*) to abstain from sexual intercourse for at least four months (after which divorce goes into effect) entails neither a direct statement nor an indirect declaration of intent. Therefore, we conclude that *ilā'* is not a form of divorce. This line of reasoning, Ghazālī maintains, is reducible to two premises and a conclusion.<sup>23</sup> In syllogistic form, if divorce is *D*, *ilā'* is *I*, direct statement is *S*, and indirect declaration of intent is *K*, the argument can be put schematically as follows:

$$\frac{\begin{array}{l} \text{If } D \text{ is } I, \text{ then } I \text{ is } S \text{ and } K \\ I \text{ is not } S \text{ and } K \end{array}}{\text{Therefore, } I \text{ is not } D}$$

In Ghazālī's view then, the *reductio* argument as presented in this case seems to manifest the characteristics of the conditional hypothetical syllogism in

the *modus tollens*. However, the classical features of the *reductio* argument exhibit the form of indirect reduction of the syllogism that "is a way of showing that if a certain syllogistic form is assumed to be valid, by assuming that its conclusion is false, a contradictory result follows, proved by a syllogism in the first figure. Hence, the original syllogism must be valid on pain of leading to a contradiction."<sup>24</sup> Be that as it may, the *reductio ad absurdum* argument, like the *a fortiori*, lacks all analogical features, despite the fact that it was considered a form of *qiyās* by the great majority of jurists.

### A typology of *qiyās*

The above tripartite classification of *qiyās* into an analogical, an *a fortiori* and a *reductio ad absurdum* argument is clearly a logical one. It stems from our own analysis of the logical structure of legal argument, although we must recognize that the Muslim theorists did not, generally speaking, conceive of *qiyās* as being analyzable in these terms. The chief reason for advancing a logical analysis here lies in the misconception, rather widespread among modern students of Islamic jurisprudence, that *qiyās* amounts to no more than analogy. The theorists, on the other hand, were not particularly interested in an analysis of the logical structure of *qiyās*, for this structure had little, if any, bearing upon the issues that concerned them. Their concern lay elsewhere, namely, in the substantive relationship that exists between a linguistic proposition in the original texts and the new case or problem confronting the believer. In other words, their concern revolved exclusively around the degree to which the *ratio legis* makes itself manifest in the original texts, and its applicability, or lack thereof, to the new case at hand. Thus analysis of *qiyās* as an analogical, asyllogistic or syllogistic structure was for them largely an irrelevant issue. As jurists and "lawyers," the question that interested them was the degree to which a rule based on a particular *ratio* was thought to be probable.

This interest in the epistemological status of rules was instrumental in determining a particular typology of *qiyās*, a typology at the center of which stands the epistemological and ontological status of the *ratio legis*. According to this typology, *qiyās* is of two types, the first of which may be called causative inference (*qiyās 'illa*), and the second indicative inference (*qiyās dalāla*).<sup>25</sup> According to the definition of some theorists, causative inference must be understood as being identical with the inference in which both the *ratio legis* and the rationale (*ḥikma*) behind the rule can be

<sup>22</sup> *Iḥkām*, 673. <sup>23</sup> *Shifā'*, 452.

<sup>24</sup> R. M. Eaton, *General Logic* (New York: Longmans & Green, 1956), 128, cited in Hallaq, "Non-Analogical Arguments," 302.

<sup>25</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 799–814; Bājī, *Iḥkām*, 626–31.

determined, whereas in an indicative inference the *ratio* can be identified, but without that rationale. Wine is pronounced prohibited because it is an intoxicant substance – intoxication being the *ratio legis*. We also know that intoxicants are prohibited because their consumption leads to objectionable behavior, such as neglecting prayer, belligerent attitudes and lack of control over one's own affairs. In this example of a causative inference, the rationale is known. But in indicative inferences, it is not. We know, for instance, that the *ratio legis* behind the prohibition of usury is, according to the Shāfi'ites, the fact of edibility. Wherever the feature of edibility exists, no usury is allowed. But God did not care to make the rationale behind this prohibition clear.

Other theorists did not take the distinction between these inferences to be a substantive one. For them the issue was largely formal. The distinction between them lies in the difference of stating the *ratio legis*. In the causative inference, both the *ratio* and the rationale are stated in such a manner as to create a causal relationship between them and the rule of the case. On the other hand, in the indicative inference the *ratio* is stated as concomitant with the rule, thus effacing any causal relationship. The *ratio* in this inference merely "indicates" or "alludes" to the rule. Thus, the difference between the two inferential types may be reduced to the mode in which the language of the original texts is stated. God could have said "pray, because the sun has set" and He could have said "when the sun sets, pray." The former injunction gives rise to the construction of a causative inference, whereas the latter does not. The relationship between sunset and prayer is not causal, but a matter of concomitance. The obligation to pray is merely "indicated" by the fact of the sun's setting.<sup>26</sup>

Within each of these two inferences there is distinguished two sub-categories according to the degree to which the *ratio legis* makes itself evident. The causative inference is thus divided into a perspicuous (*jālī*) and a concealed (*khafī*) *qiyās*. The former, in turn, encompasses at least four types: (1) that in which the *ratio legis* is explicitly stipulated in a language of causality, such as "because" or "for the reason that" or "in order not to"; (2) that in which the *ratio* is linguistically, not rationally, inferred, such as in the aforementioned example with regard to saying "fie" to one's parents; (3) that in which the *ratio* is discovered readily, without exercising much intellectual effort. An example in point is the Prophetic injunction "No one shall urinate in stagnant water" – we readily know that the reason for this prohibition is the introduction of impurities into water, and from this we infer that all ritually impure substances are prohibited; and (4) that in which

<sup>26</sup> Shirāzī, *Sharḥ al-Luma'*, II, 799–80; Bāji, *Iḥkām*, 626–27, 630.

the *ratio* is established by consensus, such as in the case of Quranic penalties (*ḥudūd*) which were determined to have been instated *because* they represent a deterrent against committing crimes and other villainous acts.

Concealed *qiyās*, on the other hand, involves a process whereby the *mujaṭṭabid* infers – and not merely finds – the *ratio legis* from the original texts. Again, the theorists distinguish, in a descending order, various sub-categories of this inference according to the degrees in which the inferred *ratio legis* makes itself evident to the reasoner. The first of these is a *qiyās* in which the *ratio* is inferred from a property that appears conjoined with the rule. A case in point is the prohibition of usury in the Shāfi'ite school. The Prophet is reported to have forbidden the barter of unequal amounts of edible substances of the same kind. From this report, the Shāfi'ites inferred that the *ratio legis* in this case is edibility, for the prohibition seems to be conjoined, in the language of the report, with the property of edibility: thus, it was concluded that no edible foodstuff may be subject to usurious transactions.<sup>27</sup>

A *ratio legis* that seems connected to the rule in a less obvious way yields a concealed *qiyās* of a lower grade of probability. Upon hearing that a slave woman, whose husband was also a slave, was freed, the Prophet is said to have given her the choice between accepting freedom and rejecting it. It was inferred that the *raison d'être* of this choice was the fact that the woman was married to a slave who was not freed. The reasoner here assumes that a woman's right to accept or reject freedom is causally connected to the fact of her husband being a slave. Because the assumption of this connection has no textual indication or explicit specification to sustain it, it remains within the realm of mere probability, as opposed to high probability or certainty.

The last category of concealed *qiyās* is entirely based on inferential reasoning, but reasoning that follows the same dichotomous principles found in the method of concomitance (*dawarān*) in both of its components, co-presence and co-absence (*fard wa-'aks*). But the theorists here describe this inference in terms of negation (*salb*) and affirmation (*mujaḥib*). To illustrate their point, the theorists give the following example: before they grow into full-fledged spikes, grain plants are not subject to the prohibition on usury; when spikes and grain seeds have fully grown, they become subject to this prohibition; but when they further grow to become wild grass, prohibition is waived. Therefore, we conclude that the prohibition of usury is concomitant with the *ratio*, which is that grain is a humanly edible foodstuff. The exclusive dependency of this category of *qiyās* on inferential reasoning

<sup>27</sup> Shirāzī, *Sharḥ al-Luma'*, II, 804–06.

renders its degree of probability even lower than that of the preceding category.

Now we turn to the indicative inference that the theorists conceive of as being based not on an explicitly specified or inferred *ratio legis*, but rather on a common factor (*jāmi'*) between the original and the new cases, a factor that indicates or points to a *ratio*. In this type of *qiyās*, it is assumed that a *ratio* does exist, but the locus of its existence is the mind of God, not the revealed texts. It is argued, for instance, that marrying off a virgin despite her disapproval is lawful, since marrying her off without securing her consent is permitted. This permission indicates the *ratio* in this case, namely, that her consent does not constitute a prerequisite for marriage. If her consent is not a prerequisite, then she may be married off whether she objects or not.<sup>28</sup>

The *ratio legis* may also be indicated by means of resemblance (*shabāh*) between two cases, without, however, establishing this resemblance by means of efficacy (*ta'thir*), as in the case of wine and whiskey. This type of *qiyās* was highly controversial, and a good number of theorists rejected it altogether. The classic example illustrating this inference, as well as the controversy over it, is the case of a slave's ownership. Some theorists argued that slaves, like freemen, must be permitted to own property. This, they argued, is justified on the grounds that slaves and freemen resemble each other in that they are human, responsible before the law, subject to legal penalties, capable of matrimony, of divorce, etc. Other theorists, on the other hand, rejected the analogy between slaves and humans insofar as the right of proprietorship is concerned. They maintained that slaves may not be granted that right because they resemble animals, not humans, in that they may be bought, sold, gifted, hired, used as a collateral, etc.<sup>29</sup>

### The authoritativeness of *qiyās*<sup>30</sup>

Like consensus, but unlike the Quran and the Sunna, *qiyās* was not perceived as a revealed source of law and, as a derivative of the primary sources, it called for justification on the basis of these sources. The fundamental issues raised in this regard addressed the sources of the authority behind *qiyās*, as well as the epistemological status of this inferential method. The question whether or not this method could be justified by reason and rational argument, independently of revelation, was sure to lose any sig-

nificance. *Qiyās* was a Shar'ī method, and no amount of human reasoning could single-handedly establish the authoritativeness and validity of any part of the divinely ordained law. Consequently, *qiyās* was to be justified by the revealed sources and their immediate product, that is, consensus, whose authoritativeness, as we have seen, was subject to similar arguments.

While a small minority of jurists espoused the view that the authoritativeness of *qiyās* cannot be justified with certitude, the great majority of Sunnī jurists held the view that the evidence in the two primary sources, together with consensus, proves that this method is authoritative with certainty. Even many of those who stood on the periphery of, or outside Sunnism, and who rejected *qiyās* on principle, admitted that perspicuous *qiyās* (*al-qiyās al-jalī*) and linguistic inferences (e.g., uttering "fie" before parents) represent two forms of authoritative and valid *qiyās*.

The strength of perspicuous *qiyās* lies in the fact that it is based on an explicit *ratio legis*. If the texts stipulate, for instance, that "Sugar is prohibited because it is sweet," we must affirm the rule of prohibition in all *loci* where sweetness is found. The necessity of universalizing the rule is understood from the language of the texts: "Sugar is prohibited because it is sweet" is the perfect equivalent of "Honey is prohibited because it is sweet." Anything sweet is prohibited. If only sugar was meant to be prohibited, then an absurdity ensues, since the stipulated *ratio legis* becomes utterly meaningless. It would then be expected, the theorists argue, that sugar should be prohibited without a *ratio* being specified. Therefore, the very existence of a stipulated *ratio legis* attests to the necessity of extending the rule to all other cases where the same *ratio* is found. This necessity argues for the authoritativeness of at least the perspicuous *qiyās*.

Of those non-Sunnī theoreticians who rejected *qiyās*, some argued that the Islamic religion is complete and that the Quran has provided answers to all issues that have confronted or might confront the Muslim community. They derived support for their thesis from Q. 6:38: "We have neglected nothing in the Book," and 5:3: "This day I have perfected your religion for you." Accordingly, they argued, *qiyās* is superfluous.

The opponents – the advocates of *qiyās* – agree that religion has been perfected in the Quran, but they do not see how the use of this method is rendered superfluous. For to have recourse to *qiyās* amounts in essence to having recourse to the Quran. Similarly, when *qiyās* appeals to the Prophetic Sunna or to consensus, it ultimately appeals to the Quran, since reference to the Sunna is enjoined by the Quran, and the authoritativeness of consensus is attested by both the Quran and the Sunna. Furthermore, it is argued, *qiyās* is an integral part of what has been called "perfection of religion," because the Quran, together with the Sunna and consensus it

<sup>28</sup> Ibid., II, 806 ff.; Bājī, *Iḥkām*, 629.

<sup>29</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 812–14; Juwaynī, *Burhān*, II, 885 ff.

<sup>30</sup> On the authoritativeness of *qiyās*, see Baṣṭī, *Mu'tamad*, II, 724–53; Shīrāzī, *Sharḥ al-Luma'*, II, 757–87; Bājī, *Iḥkām*, 531–602; Ibn Barhān, *Wuṣūl*, II, 244–49; Ghazālī, *Mustasfā*, II, 234 ff.

sanctions, confirms the need for it. Resorting to *qiyās* is thus no less legitimate than employing solitary reports or any other method or narrative that engenders probable knowledge.

But none of this categorically proves the authoritativeness of *qiyās*. The ultimate proof must rest with either the Quran, the Sunna or consensus; or an aggregate thereof. The Quranic passage that was considered to have the greatest bearing upon the authoritativeness of *qiyās* is 59:2: "So learn a lesson (*i'tabirū*), O ye who have eyes." It was argued that the imperative verb *i'tabirū* derives from the verbal noun *'ubūr* which signifies the meaning of "crossing over" (as from one bank of a river to another), or making a passage from one place to another. The imperative form in the verse was thus construed to refer to "crossing over" from the original case to the new, and to the transference of the rule from the former to the latter.

No doubt the interpretation of the Quranic evidence seems somewhat strained, and many religious scholars and jurists have argued as much. The very controversy over the meaning of the passage suffices to relegate this evidence to the realm of probability, and proving the authoritativeness of *qiyās* with probability obviously leaves much to be desired; certainty must be attained.

Unable to find conclusive evidence in the Quran, the theorists turned to the Sunna, where a number of Prophetic reports were found to bear directly and obliquely upon the issue in question. But one report, said to be widespread (*mashhūr*), stood head and shoulders above the rest. This report has already been cited above in the context of the justification for accepting an inferred *ratio legis*. In the fuller form of this report, the Prophet is reported to have asked Mu'ādh b. Jabal, when he dispatched him to Yemen to govern: "According to what will you judge?" Mu'ādh replied: "According to God's Book." The Prophet then asked: "What if you do not find [in the book what you need]?" Mu'ādh answered: "Then according to the Sunna of God's Prophet." The Prophet asked: "What if you do not find [in the Sunna what you seek]?" Mu'ādh thereupon replied: "Then I exercise my own legal reasoning." The Prophet is said to have found the answer highly satisfactory. This report, the theorists maintain, shows that the Prophet approved of drawing inferences, which are understood to take their premises from the Book and the Sunna.

Furthermore, the Prophet himself is said to have employed such inferences. An example in point is the aforementioned report regarding a woman who asked the Prophet whether or not she could perform pilgrimage on behalf of her father who died before he could perform this religious duty.<sup>31</sup>

<sup>31</sup> See p. 93, above.

From this report, the Prophet is perceived to have drawn an analogy between pilgrimage and debt, where the former formed the basis of the latter.

Like the Quranic passage, these Prophetic reports are not considered conclusive, although their epistemological weakness does not stem from their meaning, which is fairly clear, but rather from the mode of their transmission. Neither of them is deemed concurrent, which means that they convey the information they contain with probability, albeit high probability. Again, certainty proves to be elusive.

Certainty nonetheless was seen to reside in consensus. In fact, the theorists seem to speak of more than one consensus. The Prophet's Companions are viewed as the first class of Muslim jurists who resorted to the use of *qiyās*, and universally agreed upon it as a legitimate method. And their consensus carries a particularly significant weight, since they are presumed, having been so close to the Prophet himself, to have known what he thought about, and how he dealt with, the matters befalling the Muslim community. Thus, if the Companions regularly resorted to *qiyās* and none of them objected to this practice, then their consensus is binding on two counts: their consensus *qua* consensus, and their intimate and unparalleled knowledge of the Prophet's behavior and methods in dealing with legal matters.

Later generations of jurists are also said, by those who held the authoritativeness of *qiyās* to be certain, to have reached consensus not only on the legitimacy of *qiyās* but also on the fact that juriconsults and legists throughout the centuries and in all Muslim regions have made use of it, without a dissenting voice among them. Thus, it was argued that the cumulative effect of generational consensus proves, once and for all, that the authoritativeness of *qiyās* is known with certainty.

#### JURISTIC PREFERENCE (*ISTIḤSĀN*)<sup>32</sup>

In chapter 1, we took note of the fact that by the middle of the second/eighth century legal reasoning was neither consistently nor constantly sustained by textual evidence. Shāfi'ī, whose discourse centered around anchoring all law in revelation, perhaps had good reason to launch a scathing criticism against the early Ḥanafites who had not yet realized the necessity of basing all legal arguments on the revealed texts. It was

<sup>32</sup> On *istiḥsān*, see Sarakhsī, *Uṣūl*, II, 199–215; Shīrāzī, *Sharḥ al-Luma'*, II, 696–74; Bāji, *Iḥkām*, 687–89; John Makdisi, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law*, 33 (1985): 63–92; John Makdisi, "Hard Cases and Human Judgment in Islamic and Common Law," *Indiana International and Comparative Law Review*, 2 (1991): 197–202.

primarily Abū Ḥanīfa's doctrine that gave rise not only to the critique of Shāfi'ī but also to that of later jurists and theorists. This critique focused chiefly on those positive legal doctrines arising from his use of juristic preference. Indeed, Abū Ḥanīfa, together with his school, could never be forgiven for what was deemed by all the other schools to be an arbitrary form of legal reasoning.

After the third/ninth century, however, the Ḥanafite theorists took steps to dissociate themselves from the reputation of being arbitrary reasoners. Following the normative practice that had by then evolved as the unchallenged paradigm of juridical practice and legal scholarship, they insisted that no process of reasoning by means of juristic preference might rest on any grounds other than the revealed texts. In fact, with the emergence of a fully fledged legal theory after the third/ninth century, no Sunnī school could have afforded to hold a view in favor of a non-textually supported *istiḥsān*. Therefore, in the context of the articulation of legal theory we need not speak of a proto-Ḥanafite type of arbitrary inference; it simply did not exist. The systematic and technical modifications introduced into this form of argument rendered it acceptable to all legal schools, though as we shall see, controversy over some of its crucial features was never settled.

If juristic preference came to be systematically supported by the revealed texts, then what made it different from *qiyās*? All theorists agree that *istiḥsān* is nothing but a "preferred" form of legal argument based on *qiyās*, an argument in which a special piece of textual evidence gives rise to a conclusion different from that which would have been reached by *qiyās*. If a person, for example, forgets what he is doing and eats while he is supposed to be fasting, *qiyās* dictates that his fasting would become void, for the crucial consideration in *qiyās* is that food has entered his body, whether intentionally or not. But *qiyās* in this case was abandoned on the basis of a Prophetic report which declares fasting valid if eating was the result of a mistake. This last argument is thought to be "preferred" because it takes into account a text that would not have otherwise been employed in *qiyās* and that results in a different rule. To cite another example, *qiyās* requires that the object of a contract be present at the time of sale, since the absence of such an object entails risk (*gharar*). By juristic preference, based on a Prophetic report, it is determined that the *ʿarāyā* contract – in which unripe dates on the palm-tree are bartered against their value calculated in terms of edible dried dates – is lawful. The preference given to *istiḥsān* over *qiyās* led a number of theorists to maintain that the preference amounts to *tarjīḥ*, namely, giving one solution more weight than another.

The abandonment of *qiyās* in favor of juristic preference is determined not only by the revealed texts but also by consensus and necessity (*ḍarūra*).

*Qiyās* dictates that the contract of hire be *ab initio* void, since payment in this contract is extended over time, and extending payment over time violates one of the constitutive conditions in a valid contract. But the common practice of people over the ages has been to employ this type of contract in their daily transactions, and this is viewed as tantamount to consensus. This consensus is therefore deemed sufficient to annul the logical rule otherwise reached by *qiyās*; the reasoning here is that since consensus constitutes an instrument that sanctions law on a level of certainty, its force is equivalent to the revealed texts themselves, by which it was sanctioned in the first place.

Necessity, on the other hand, requires that in certain cases *qiyās* conclusions be set aside, such as in the matter of ritually impure wells. When an impurity comes into contact with the water in a well, it is determined by *qiyās* that the water therein also becomes ritually impure. Such a determination, however, is bound to cause serious hardship since, it is maintained, water is needed on a regular basis and is an essential item of daily life. The validity of averting undue hardship is justified by the Quran and the Sunna, and necessity and need, when not fulfilled, cause nothing but hardship. Thus, the use of water taken from ritually impure wells is deemed lawful by juristic preference, and the concept of necessity (and hence hardship), which justifies the departure from *qiyās*, is itself legitimized by the revealed texts.

Ultimately, then, conclusions reached by juristic preference reflect what may be termed the reasoned distinction<sup>33</sup> of textual evidence; and the distinction is viewed in terms of the strength or weakness of the *ratio legis*, strength and weakness being strictly matters of epistemology and ontology. In other words, the main issue comes down to a distinction between two *ratios*, one establishing a commonality between the original case and the new one, and the other – while taking note of the rule generated by the first *ratio* – forming an exception to this rule based upon a more suitable and relevant text. This second type has been called, interestingly, a "preferred *qiyās*" (*al-qiyās al-mustaḥsan*).<sup>34</sup> An example in point is the analogy between predatory birds and predatory animals. Consumption of the former's flesh is deemed prohibited because the latter are stipulated by the texts to be ritually impure, and therefore prohibited. The *ratio legis* here is the impurity of the flesh of both kinds of animals. Consequently, food left by predatory birds is also considered impure and its consumption is thus prohibited, just as is the case with carcasses left by predatory animals. According to juristic preference, however, the food that predatory birds leave behind is lawful.

<sup>33</sup> See Makdisi, "Legal Logic," 85.

<sup>34</sup> Sarakhsi, *Uṣūl*, II, 204.

The reasoning involved here is this: when predatory animals eat, their own impurity is transmitted to the food through the saliva secreted in their mouths. But predatory birds eat by means of their beaks, which are formed of bone. Because predatory birds do not use their tongues when they eat, and because their beaks remain dry while doing so, no saliva is transmitted to the food they touch. Now, knowledge of the ritual purity of bones is derived from revelation which stipulates that the use of the bones of dead animals is lawful. Furthermore, this conclusion is bolstered by another Prophetic report which states that cats are ritually clean, and that whatever they touch is not rendered impure on account of their contact with it. The rationale for considering cats ritually pure is thought to be the hardship that may ensue from deeming them to be impure, since cats (one gathers) appear to have been a common pet. This is nothing but a juristic preference on the basis of necessity (*ḍarūra*), a principle that is brought to bear, as a subsidiary argument, upon the case of predatory birds. To consider the objects with which these birds come into contact as unlawful for consumption or use would also cause a great deal of hardship, since it is virtually impossible to prevent them from touching utensils that cannot be washed, for instance, in the desert.

Reasoning in this case is clearly grounded in both textual evidence, on the one hand, and the principle of necessity, on the other. On both sides of the argument, the conclusion runs counter to that reached by analogy, an insistence on which would have resulted in neglecting relevant, if not crucial, pieces of textual evidence and juristic principles. The introduction of the element of "dry bones" into the argument, together with its textual support, led to a change in the *ratio legis* which would have been otherwise taken into account without qualification in *qiyās*. But the change is significant and fundamental. Some theorists argued that the abandonment of the *qiyās*-based rule is in effect the result of abandoning the *qiyās*-based *ratio legis* altogether. The *ratio* in juristic preference is thus integral, being wholly unaffected by any limitation or curtailment.

This particular emphasis on the integral character of the *ratio legis* in juristic preference is nothing short of a loaded response to those theorists who held that preference requires the limitation of the *ratio legis* (*takhṣīs al-ʿilla*). Limitation occurs when the reasoner argues that the *ratio* of a case is *X* and the rule generated by *X* is *Y*, but due to an impediment (*māniʿ*) existing in the case, *X* is restricted in its scope; the resultant being a rule that is not *Y* but *Z*. To take the case of predatory animals, those who advocate limitation maintain that the *qiyās*-based *ratio* was limited due to the existence of an added consideration, namely, the ritual purity of bones.

The controversy over this issue, which caused much ink to flow from the

pens of theorists, is thought by some jurists to be a merely verbal dispute.<sup>35</sup> But it is clear that the opposition to limitation has more to do with theological affiliation than with strictly legal considerations. The advocates of limitation are accused of having adopted the doctrines of the rationalist Muʿtazilites whose theology was shunned by a good number of Sunnī theorists.<sup>36</sup> Without going here into the theological dimensions of the dispute,<sup>37</sup> which has no direct relevance to law, we shall conclude this section by stating the main arguments against the limitation of the *ratio legis*, especially as expressed by the Ḥanafite theorist Ibn Sahl al-Sarakhsī.<sup>38</sup>

The validity of the *ratio legis*, Sarakhsī argues, stems from its extendibility (*taʿdiya*) to new cases. Conversely, a *ratio* incapable of being extended is invalid because it would exist without its effect. Now, allowing for an impediment to be part of the *ratio* does not, logically speaking, preclude the existence of other impediments in the other parts of the same *ratio*. And since impediments necessitate a rule different from that which would have been generated by the otherwise integral *ratio* (in the original *qiyās*), allowing for them would amount to having a presumably sound and valid *ratio*, but without this latter generating its own rule in new cases (a deficiency we have discussed above and which is known as *naqd*). Put differently, a *ratio* with impediments is tantamount to a *ratio* that cannot produce rules in new cases. In rational arguments, this is equivalent to having a cause without its effect, which would be absurd, since a cause must by definition have an effect, and if it does not, it would cease to be a cause.

Furthermore, the limitation of the *ratio legis* is shown to be invalid when, in the absence of impediments, the *ratio* produces a particular rule in a new case but cannot produce, with impediments, the same rule in another. The impediment, moreover, must be supported by the revealed texts with at least the same strength as that with which the *ratio* is supported; otherwise, it would not be fit to limit a *ratio* of a higher epistemic value. And if both the *ratio* and the impediment are of equal strength, then the latter can stand on its own in that it may function as an independent *ratio legis* which can be extended to new cases in which it generates its own rule. This clearly demonstrates, Sarakhsī maintains, that a *ratio* cannot be amalgamated with an impediment, for each must stand on its own. And if the latter is made to limit the scope of the former, thereby changing its rule altogether, then this would amount to abrogating a *ratio* by another – an idea no theorist would tolerate.

<sup>35</sup> See Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Ph.D. dissertation: Harvard University, 1984), 403–4, and sources cited therein, especially n. 513, p. 454. <sup>36</sup> See Sarakhsī, *Uṣūl*, II, 208.

<sup>37</sup> On these dimensions, see p. 135 below. <sup>38</sup> Sarakhsī, *Uṣūl*, II, 208 ff.

TEXTUALLY UNREGULATED BENEFITS (*MAṢĀLIḤ MURSALA*)

In our discussion of the *ratio legis* on pp. 88 ff., we have taken note of the role that public interest (*maṣlaḥa*; pl. *maṣāliḥ*) plays in determining suitability (*munāsaba*), a fundamental method of establishing and verifying the *ratio*. It is because of this relationship between the *ratio* and suitability that *maṣlaḥa* (and *istiṣlāḥ*, the act of reasoning on the basis of *maṣlaḥa*) is deemed an extension of *qiyās*, and thus most works of legal theory do not devote to it an independent section or chapter but treat it under suitability. Some later authors, however, included discussion of this matter in a chapter normatively designated as *istidlāl*, a chapter that usually covers all sorts of inferences that do not belong to the category of *qiyās*.<sup>39</sup>

One issue that arises in *istiṣlāḥ* relates to cases whose rules are derived on the basis of a rationally suitable benefit that is not sustained by textual evidence. This is called *al-maṣāliḥ al-mursala*. The great majority of theorists reject any conclusion that finds no support in the texts, be it motivated by public interest or otherwise. It is reported that Mālik (d. 179/795), the eponym of the Mālikite school, adopted conclusions that appear to serve such interests without these having the support of the texts. His later followers, however, deny that this ever took place. Be that as it may, no theorist after the third/ninth century advocated *maṣlaḥa mursala* in the sense attributed to Mālik. But many approved this method of reasoning if it could be shown that the feature of public interest adopted in a case was suitable (*munāsib*) and relevant (*muṭabar*) either to a universal principle of the law or to a specific and particular piece of textual evidence. Thus, suitability and relevance are conditions necessary for a valid conclusion of *maṣlaḥa mursala*.<sup>40</sup>

Other theorists, such as Ghazālī, put the matter differently. We have seen that Ghazālī's hierarchy of legal aims (*maqāṣid al-sharī'a*) included, at its top, the principles of protecting life, private property, mind, religion and offspring. If the feature of public interest in a case can be defined as serving any of these principles, and if it can also be shown to be certain (*qaṭ'i*) and universal (*kullī*), then reasoning in accordance with it is deemed valid. The condition of universality is intended to ensure that the interests of the Muslim community at large, and not only a limited segment of it, are served. The classical example offered in illustration of this condition is the

<sup>39</sup> Hallaq, "Logic, Formal Arguments and Formalization of Arguments in Sunnī Jurisprudence," *Arabica*, 37 (1990): 317–18. For a useful discussion of the place of *maṣlaḥa* in the early and later works of legal theory, see Shawkānī, *Irshād*, 241–43. See also Ibn Barhān, *Wuṣūl*, II, 286–94.

<sup>40</sup> For a detailed discussion about the relationship between *munāsib* and *muṭabthir* according to later authors, see Weiss, *Search for God's Law*, 615–20.

one in which an army of unbelievers captures a number of Muslims and uses them as a shield. If the shield is not attacked, the army of the enemy will succeed in its design to destroy the Muslim community. In order to repulse the enemy it is necessary to attack the shield, an act that is sure to result in killing many, if not all, the Muslims forming the shield. Although the individuals of this group are not guilty of any offense deserving of the death penalty, it is argued, according to *istiṣlāḥ*, that the killing of fellow Muslims is suitable (*munāsib*) in light of the accruing benefits. Here, the case of protecting the Muslim community at large, which will certainly face extermination if not defended in this manner, meets the three stipulated conditions: namely, universality, certainty and the protection of the necessary aims of the law.<sup>41</sup>

## THE PRINCIPLE OF THE PRESUMPTION OF CONTINUITY

(*ISTIṢḤĀB*)<sup>42</sup>

Inasmuch as it is only a principle, *istiṣḥāb* does not, strictly speaking, qualify as a method of legal reasoning, although many later theorists included it under the umbrella chapter of *istidlāl*, where it is at times discussed together with the methods of juristic preference and the textually unregulated benefits. According to this principle, a legal state of affairs is presumed to continue to be valid until there is reason to change this presumption. The principle of *istiṣḥāb*, however, was discussed from two angles of application, one concerning rational presumption of continuity (*istiṣḥāb ḥāl al-'aql*), the other, the presumption of continuity in a rule subject to consensus (*istiṣḥāb ḥāl al-ijmā'*).

It is generally agreed among the theorists that the rational presumption of continuity is a valid principle. An example of the application of this principle is the presumption that a sixth prayer each day is not mandatory, because the texts decree that only five are necessary. The jurisconsult may argue that as long as there is no evidence in the text to the effect that a sixth prayer is required, the presumption remains that only five are mandatory. If an opponent maintains that a sixth prayer is mandatory, then the onus of proof lies with him; he is required to produce textual evidence to sustain his allegation. Similarly, an inheritance cannot be claimed from a missing person, since the presumption must be that he is alive as long as there is no proof that he is dead (a presumption also known as *al-barā'a al-aṣliyya*). If

<sup>41</sup> Ghazālī, *Mustaṣfā*, I, 284–315.

<sup>42</sup> See Ibn Barhān, *Wuṣūl*, II, 317–19; Ghazālī, *Mankebūl*, 372–73; Ghazālī, *Mustaṣfā*, I, 217 ff.; Shīrāzī, *Sharḥ al-Luma'*, II, 986–87; Abū Ishāq Ibrāhīm b. Alī al-Shīrāzī, *al-Taḥṣīr fī Uṣūl al-Fiqh*, ed. Muḥammad Ḥasan Haytū (Damascus: Dār al-Fikr, 1980), 526–29.

proof of his death is adduced, or if a claim of inheritance is made after a time too long for a human being to continue living, then his estate may be inherited by his relatives.

The presumption of continuity, however, must be sustained by reliable knowledge of the absence of evidence that might otherwise change this presumption. Knowledge of the absence of evidence is to be distinguished from the absence of knowledge of any evidence. Unlike the former knowledge, the latter is not admitted as a valid argument in favor of such a presumption: the absence of evidence to the contrary must be known with at least a degree of probability (*ẓann*). If it is argued that fasting during the month of Shawwāl is not required, it is not sufficient, to turn this presumption around, to maintain that knowledge to the contrary is absent. Rather, knowledge of evidence contrary to this presumption must be *shown* to be absent. Thus, it must be argued that if fasting were required during Shawwāl, such a requirement would have been stated in the texts, or, failing this, a large segment of the Muslim community would have known about it through some other means. The lack of textual evidence, coupled with the complete absence of any knowledge of this requirement in the community, go to show that the presumption of continuity is sustained by virtue of the knowledge that evidence to the contrary is absent.

The wide acceptance of the rational presumption of continuity is to be contrasted with the presumption of continuity on a matter subject to consensus, a position that has few adherents. The latter argue that the prayer of a person who has performed dry ablution (*tayammum*, i.e., washing with earth or sand in the absence of water) continues to be valid after that person has found out, while he is still praying, that water was available nearby. They maintain that consensus has been reached on the validity of the *tayammum*-prayer, and the validity backed by consensus is presumed to continue until the end of the prayer. This argument is rejected by the majority, who counter with the claim that consensus has been reached upon the validity of this type of prayer only when water is not found. Since allowing the *tayammum*-prayer is a license (*rukḥṣa*),<sup>43</sup> granted as an acknowledgement of the existence of hardship entailed by the performance of a duty, the very knowledge of the availability of water renders the prayer void. Furthermore, the fact that some jurists consider this prayer void when water becomes available demonstrates that disagreement surrounds the issue. Where there is disagreement, there is, *ipso facto*, no consensus. Therefore, consensus on the validity of the *tayammum*-prayer ceases to exist

<sup>43</sup> See Aḥmad Ibn al-Naḥḥ al-Miṣrī, *Umdat al-Sālik wa-ʿUddat al-Nāsik*, ed. and trans. N. H. Keller, *The Reliance of the Traveller* (Evanston: Sunna Books, 1991) 84–85. Further on *rukḥṣa*, see pp. 177 ff. below.

when knowledge of the existence of water becomes present, and presuming the continuity of such a consensus in turn becomes untenable.

#### MONOTHEISTIC LAWS BEFORE THE ADVENT OF ISLAMIC REVELATION<sup>44</sup>

Some discussion in the works of legal theory is allocated to the highly theoretical issue of what legal norms should be attached to objects and acts before the advent of Islam. This issue is treated under the designation “the rule pertaining to things in their original state” (*ḥukm al-ashyaʾ fi al-aṣl*), namely, in the state existing before they have become subject to Islamic law in particular and to other monotheistic laws in general. The crux of the controversy generated by this question is whether things are prohibited, permissible or neither of the two. Those who argued in favor of prohibition maintained that since no revelation exists, it is safer to assume they are prohibited. For if we make this assumption, we never run the risk of committing unlawful acts. On the side of permissibility, on the other hand, stood those who argued that if we know a thing to be beneficial and harmless to all people, then, in the absence of revelation, we can only assume it to be lawful. All agree that justice is good, and if we label an act as just, there would be no conceivable reason why it should not be considered lawful. A third group, however, rejected the foregoing arguments, saying, in effect, that judgment on all things before the coming down of revelation should be suspended (*ʿalā al-waḥf*). Human reason, they insist, is incapable of knowing whether a certain thing is good or bad, and therefore it cannot play a role in deciding legal values. God alone has the power to do so, and judgment must be postponed until He speaks!

While this issue seems to be of purely theoretical significance, the question of whether or not the Prophet adopted non-Muslim, monotheistic laws after he received revelation is not so theoretical. For the answer to this question, and it was by no means uniform, determined in turn whether or not a theorist would accept Christian and Jewish scriptures as a source of the law in cases where Islamic revelation is silent. This explains why the section in which this question is treated in works of legal theory comes under the general title “Sources of law subject to disagreement.”<sup>45</sup>

In chapter 1, we have seen that some time after the migration to Medina, the Prophet began to think of his new religion as capable of providing its believers with laws similar to those existing in Christianity and Judaism.

<sup>44</sup> Bājī, *Iḥkām*, 681–86; Shīrāzī, *Sharḥ al-Lumaʿ*, II, 977–86.

<sup>45</sup> See, e.g., Muwaffaq al-Dīn Ibn Qudāma, *Rawḍat al-Nāẓir wa-Junnat al-Munāẓir*, ed. Sayf al-Dīn al-Kātib (Beirut: Dār al-Kitāb al-ʿArabī, 1401/1981), 142.

Before that turning point, however, this was not the case, and constant reference to the two religions as natural predecessors of Islam was in fact common. As reflected in the Quran, this fact of transformation provided the material for legal theorists to argue in favor of, and against, the proposition that the Prophet adopted laws belonging to the Christian and Jewish denominations.<sup>46</sup> The Quran contained variable evidence to satisfy both sides of the argument.

Those who held that the Prophet never adhered to non-Muslim laws advanced a number of arguments, the first and foremost of which is Q. 5:48, which states: "We have made for each of you [i.e., Muslims, Christians and Jews] a law and a way to follow. If God willed, He would have made all of you one community." This verse, it was argued, indicates that for every prophet a legal system was divinely decreed, and that no prophet is to follow a legal order ordained for another. Furthermore, a number of reports attest to the fact that the Prophet prohibited his companions from issuing rules in accordance with Christian and Judaic laws. He is said to have rebuked 'Umar when he found him holding fragments from the Torah. Indeed, if the Prophet considered himself bound by these laws, he would have been in the practice of searching for legal rules in Christian and Judaic laws, and would have made it incumbent upon his Companions to do the same. But he did not. Finally, it is argued that the community's consensus has been that the Shari'a is the only law for Muslims, and that the Christian and Jewish laws are not binding upon them.

The proponents of the opposite position also argued on the basis of Quranic and Sunnaic evidence. Of the five verses cited in support of their argument, verse 5:48 is the most direct: "Lo, We did reveal the Torah, wherein is guidance and light, by which the Prophets who became Muslims [lit. surrendered] judged the Jews, and the rabbis and the priests [judged] such of God's Scripture as they were bidden to observe." And in the Sunna, the Prophet is known to have decided in some penal cases according to Jewish law, and to have referred to the Torah not only in the matter of stoning adulterers, but also in his dispute with the Jews themselves. If the Prophet did not consider the Torah, the embodiment of Jewish law, as authoritative and binding, he would not have referred to it so frequently. Now, against the aforesaid interpretation of verse 5:48, it was argued that assigning to each prophet a legal system does not necessarily preclude a prophet from drawing in part on the laws of another prophet. As to the other textual arguments advanced by those who advocated non-reliance on Christian and Jewish laws, it was maintained that Muhammad's opposition

to the earlier scriptures, as evidenced in his rebuke of 'Umar, was directed toward the corruptions that crept into them, not toward them as Christian and Jewish scriptures *per se*.

#### LEGAL REASONING AND ITS PRACTITIONERS:

##### IJTIHĀD AND MUJTAHIDS

In his *Mustasfā*, Ghazālī depicts the science of legal theory in terms of a tree cultivated by man. The fruits of the tree represent the legal rules that constitute the purpose behind planting the tree; the stem and the branches are the textual materials that enable the tree to bear the fruits and to sustain them. But in order for the tree to be cultivated, and to bring it to bear fruits, human agency must play a role. Thus, the additional element making up the metaphor is the set of cultivation methods, the principles of legal reasoning and hermeneutics, employed so that the tree may bear the fruits. Finally comes the human agent himself, without whom the tree can have no existential purpose.<sup>47</sup> Throughout this and the last chapter, we have discussed the first three constituents of legal theory. We shall now turn to the "cultivator," the human agent whose creative legal reasoning is directed toward producing the fruit, the legal norm. The jurist (*faqīh*) or jurisconsult (*muftī*) who is capable of practicing such legal reasoning is known as the *mujtabid*, he who exercises his utmost effort in extracting a rule from the subject matter of revelation while following the principles and procedures established in legal theory. The process of this reasoning is known as *ijtihād*, the effort itself.

We have already intimated that the province of legal reasoning and interpretation, properly called *ijtihād*, does not extend over the entire range of the law. Excluded from this province is a group of texts which unambiguously state the legal rules of a number of cases. The certainty (*qaṭʿ*) generated by these texts *ab initio* precludes any need for reinterpretation. Some cases in point are the prohibitions imposed, by textual decree, on adultery, homosexuality, and consumption of grape-wine. Also excluded are those cases subject to consensus, the sanctioning instrument that generates certainty. In all other spheres of the law, *ijtihād* is not only admissible but is also considered a religious duty incumbent upon those in the community who are learned enough to be capable of performing it; this duty is known as *farḍ kifāya*.<sup>48</sup>

But what are the conditions a person must fulfill in order for him to qualify as a *mujtabid*? The great majority of these conditions have to do with

<sup>46</sup> Ghazālī, *Mustasfā*, I, 245–60.

<sup>47</sup> Ibid., I, 8–9. <sup>48</sup> Shīrāzī, *Sharḥ al-Lumaʿ*, II, 1035.

the accumulation of expert knowledge in a number of areas. First, he must possess an adequate understanding of the nearly 500 legal verses in the Quran; he need not commit them to memory, but must know how to retrieve them efficiently and quickly when he needs to do so. Second, he must be familiar with the *ḥadīth* collections relevant to law, and must be proficient in the techniques of *ḥadīth* criticism so he can examine the authenticity and epistemological value of the reports he needs in his reasoning. If for any reason he is not proficient in these techniques, he may rely upon those collections in which Prophetic reports have been scrutinized, and which have been accepted as credible by the major jurists who preceded him. Third, he must be knowledgeable of the Arabic language so that he can understand the complexities involved, among other things, in metaphorical usages, in the general and the particular, and in equivocal and unequivocal speech. Fourth, he must possess a thorough knowledge of the theories of abrogation, so that he does not reason on the basis of an abrogated verse or report. Fifth, he must be highly proficient in the entire range of the procedures of inferential reasoning. Sixth, he must know those cases that have become subject to consensus, for he must not attempt to reopen a case on which a consensus has been reached. However, it is not required of him to know all cases of substantive law.<sup>49</sup>

Nor is he required to be of a just and trustworthy character (*ʿadl*). He may be unjust, and still be a skilled jurist who can exercise *ijtihād*. This does not mean, however, that the product of his *ijtihād* is binding upon other Muslims, be they legists or laymen. We shall see, on the other hand, that one of the conditions of the *mujtabid*-jurisconsult is a just character, since the office of the jurisconsult, unlike that of the *mujtabid qua mujtabid*, is a public one.<sup>50</sup>

Finally, some theorists maintained that one of the conditions of *ijtihād* is an adequate knowledge of theological doctrines, such as the proofs for the existence of God, His attributes, prophecy, etc. Many theorists, however, rejected this requirement, arguing that detailed theological knowledge is not directly related to that sphere of learning necessary for discovering the law. All the *mujtabid* needs to possess in this respect is a firm belief in God and the Muslim faith.<sup>51</sup>

Once a person fulfills these conditions, he, being a *mujtabid*, can no longer follow the *ijtihād* of others, but must, whenever he is presented with a case, find for it a solution if he is capable of doing so. The reason for this is that no *mujtabid* is infallible, and that his opinion extracted through *ijtihād* is as valid as that of another. This is why it is also held that a *mujtabid* must

never follow the opinion of a lesser *mujtabid*. Only if he is incapable of solving a particular case may he resort to the opinion of another *mujtabid*.<sup>52</sup>

The majority of jurists held the doctrine of *tajzīʿat al-ijtihād*, namely, permitting a jurist to practice *ijtihād* in a particular branch of the law when he is unequipped to practice it in others. A jurist who is proficient in matters of inheritance and whose knowledge of arithmetic is proficient may perform *ijtihād* in the area of inheritance, although he may be at the same time utterly incapable of *ijtihād* in other matters such as sales, family law and contracts. The opponents of this doctrine argued that dividing the scope of *ijtihād* is detrimental, since a case of *ijtihād* may be organically connected to another which may lie in an area of the law of which the limited *mujtabid* has little knowledge. The majority opposing this position does not address the issue of the organic connections within the law, a fact that is surprising given the interconnectedness of various areas of substantive law. Rather, the majority's counter-argument consists in appealing to the practice of the Prophet's Companions and the early doctors of the law who are reported to have frequently refused to issue legal opinions for new cases because they did not know all the answers. This practice, it is maintained, constitutes a consensus regarding the validity of *tajzīʿat al-ijtihād*, and those who reject the doctrine are thus charged with violating this consensus.<sup>53</sup>

At the outset of this section we commented on the province of *ijtihād* as being confined to the realm of probability; wherever certainty exists *ijtihād* must be set aside. In other words, the *mujtabid*'s territory is entirely devoid of certitude, and what he must deal with is strictly confined to probability and even conjecture. Thus, the possibility of his going astray on a case of law is not inconsiderable. Now, this salient feature of legal theory gave rise to an important question: What if a *mujtabid* is wrong either in the conclusions at which he arrived, or in the very methodology he followed in order to reach these conclusions? Is he to be punished in the hereafter for his mistake? Or is he to be rewarded at least for his commitment to fulfill the religious duty entrusted to him? And since the province of *ijtihād* is probabilistic, can two *mujtabids* who reach two contradictory solutions for the same case both be considered right?

It appears that the majority of theorists held the view that only one may be deemed right and that he is to be rewarded doubly in the hereafter. Doubly, because he fulfilled the obligation of practicing *ijtihād*, on the one hand, and succeeded in arriving at the correct rule, on the other. He who errs is to be rewarded only once, and this in recognition of his effort in fulfilling the obligation with which he was entrusted. God, it is argued,

<sup>49</sup> Baṣrī, *Muʿīnamad*, II, 929–32; Shīrāzī, *Sharḥ al-Lumaʿ*, II, 1033–35.

<sup>50</sup> Ghazālī, *Mustasfā*, II, 350. <sup>51</sup> Ibid., II, 352.

<sup>52</sup> Bājī, *Iḥkām*, 723 ff.

<sup>53</sup> Ghazālī, *Mustasfā*, II, 353–54.

nowhere made it a requirement that a *mujtahid* reach the correct rule of a case; all He obligated him to do is to exercise his utmost effort in seeking this rule.<sup>54</sup>

Among the Sunnī theorists, there seems to be no disagreement on the view that a *mujtahid*, in being right or wrong, does not commit a sin of any kind. Again, the justification of this view does not rest in the need for tolerance in an area heavily charged with all sorts of uncertainty, wherein error, if not tolerated, will make *ijtihād*, and with it an entire legal system, impossible. Rather, the justification of this view lies in Prophetic reports and consensus. The Prophet is reported to have said: "If the judge exercised his *ijtihād* and reached the correct result, he is rewarded twice; if he is wrong then only once." From the domain of consensus, the theorists refer to the practice of the Companions who did not consider each other to have committed a sin when they were in error. It is argued that this common practice constitutes a consensus to the effect that error is admitted in *ijtihād*. Furthermore, the community at large is said to have reached a consensus on the necessity of scholarly disputations and on the need to hold special sessions for conducting these disputations among the jurists. If all *mujtahids* were correct in their reasoning, then there would be no point in holding such sessions, for, after all, the purpose of such sessions is to demonstrate that one of the disputing jurists is right and the other wrong.<sup>55</sup>

The plurality of legal doctrine also provides an argument in favor of the view that only one *mujtahid*'s opinion on a case of law is correct, and that those of the others are not. It cannot be said, it is argued, that the divergent rules reached by two or more *mujtahids* on a single case are all wrong, since this clearly means that the community as a whole has been wrong in following erroneous law, when in fact the community is incapable of falling into error. If, on the other hand, it is argued that all such rules are correct for the case in question, then this would amount to violating the principle of non-contradiction. Therefore, only one rule is correct and the others are wrong. On the basis of this principle, it is argued that the principle of Equivalence of Proofs (*takāfu' al-adilla*)<sup>56</sup> is inadmissible in legal science since only one of a case's contradictory rules can be correct. The rejection of the latter principle means that the preponderance (*tarjīh*) of one *ijtihād* procedure over another is indispensable.<sup>57</sup>

The foregoing arguments indicate the existence of two groups of theo-

<sup>54</sup> Bājī, *Ihkām*, 708 ff.; Shīrāzī, *Sharḥ al-Luma'*, II, 1044–45, 1049–71; Ghazālī, *Mankeḥūl*, 453–57.

<sup>55</sup> Bājī, *Ihkām*, 708–11.

<sup>56</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1071–72; further on this philosophical principle, see Moshe Perlmann, "Ibn Hazm on the Equivalence of Proofs," *The Jewish Quarterly Review*, n.s. 40 (1949/50): 279–90. <sup>57</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1044–45.

rists who argued for and against the doctrine that all *ijtihād* conclusions concerning a single case are correct.<sup>58</sup> The opponents of this doctrine maintained that when the *mujtahid* is faced with two contradictory rules pertaining to a single case, and when he cannot determine which of the two is the correct one, he must either suspend judgment because he is unable to weigh one over the other, or have recourse to the decision of another *mujtahid* who was able to distinguish one rule as superior to its rival. The proponents of this doctrine, on the other hand, were divided among themselves: some maintained that he should suspend judgment, while the others adopted the view that he should choose either of the two rules as he sees fit. The reasoning behind this seemingly arbitrary choice is the equal strength of textual evidence and lines of reasoning leading to both rules. That this equivalence is possible and valid is proven by the fact that it exists in certain spheres of the law. In the area of penance, for instance, the law obliges those who break their fast in Ramadan to do penance, and here a choice is given between feeding the poor or freeing a slave; it is entirely up to the violator to choose between the two penalties. Similarly, the principle of equivalence is resorted to in the law of preemption, which may be defined as the right of a person to substitute himself for the purchaser in a sale of property by virtue of an interest he has as a co-owner, a sharer in right of way, or an adjoining neighbor. When two co-owners or equally adjoining neighbors lay a claim, as preemptors, to a property for sale, the judge has no choice but to give both of them equal shares in that property. This equal division is necessary due to the perfect equivalence in the strength of both claims. But unlike the judge, the *mujtahid* cannot issue two rules on one and the same case. Nor can his choice in favor of one rule be deemed arbitrary. Moreover, against suspending judgment and in favor of choosing, it is argued that it is often the situation that a case requires an immediate solution, and in the absence of another *mujtahid* who is able to weigh the contradictory evidence, a choice must be made instantaneously. Otherwise, the judicial process itself will come to a halt.<sup>59</sup>

#### FOLLOWING AUTHORITATIVE OPINIONS: *TAQLĪD*

Legal theorists draw a sharp distinction between *mujtahids* and non-*mujtahids*, the latter being commonly known as the "followers" or "imitators" (*muqallidūn*; pl. of *muqallid*) of the former. In other words, anyone who is

<sup>58</sup> On this question, see Imām al-Haramayn 'Abd al-Malik Abū al-Ma'ālī al-Juwaynī, *Kitāb al-Ijtihād*, ed. 'Abd al-Ḥamīd Abū Zunayd (Damascus: Dār al-Qalam, 1408/1987), 34–64; Ibn Barhān, *Wuṣūl*, 341–51.

<sup>59</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1075 ff.; Ghazālī, *Mustaṣfā*, II, 378–82.

not a *mujtahid* is a *muqallid*. The class of *muqallids* is in turn divided into those who are jurists and those who are laymen. The chief characteristic common to both is their inability, when faced with a question of law, to reason on the basis of textual evidence. Their access to the law can be had only through referring to the reasoning of the *mujtahid*, whose opinion they are obliged to follow. This obligation is deemed necessary because it cannot be expected of all members of the community to rise to the level of *mujtahids*, for this would require that they devote all their energies and time to attaining a sophisticated knowledge of the law which would in turn mean that no one would be able to acquire any other skill. As a consequence, society, whose functioning depends on all sorts of professions, would become impossible. And since *ijtibād* is a *farḍ kifāya*, a duty to be fulfilled by only a limited number of qualified persons, all laymen and non-*mujtahid* jurists are under the obligation to follow the guidance of the *mujtahids*. This obligation is further justified by the Companions' practice as well as by Q. 16:43 which states: "Ask the people of Remembrance if you do not know." Here, the "people of Remembrance" is taken to refer to the *mujtahids*. Some of the Companions are reported to have been less than proficient in legal matters, and they were in the practice of asking the other Companions for opinions on matters that had befallen them. The complete absence of the latter's disapproval of this practice indicates that they were in unanimous agreement, in what is considered a consensus, that *taqlid* is perfectly legitimate.<sup>60</sup>

Although the layman's knowledge of the law is perceived to be insignificant, a group of theorists maintained that he is under the obligation to seek the advice or follow the opinion of the more learned *mujtahid*, if there are two or more of them. This was contested by other theorists who insisted that imposing this obligation upon the layman is unduly demanding, for it would require of him that he know what constitutes legal knowledge and who stands in possession of this knowledge. The aforestated verse 16:43, they further argue, does not make distinctions between the classes of learned men who should be consulted, and its generalizing nature indicates that asking any of the people of Remembrance is endorsed.<sup>61</sup>

That the layman must follow a *mujtahid* is a requirement subject to no dispute. The layman is charged with the responsibility of enquiring about the credentials of the legist whom he consults. He must ask at least one, and preferably two, persons whom he considers of trustworthy character. If only one *mujtahid* is to be found in the layman's town, then he may consult him without conducting such an enquiry. If more than one is avail-

able, the majority of theorists maintained that he may consult any one of them, with the proviso that he establish the *mujtahid's* credentials.<sup>62</sup>

The *mujtahid* himself, however, is not entitled to follow the doctrine of another *mujtahid*, whether or not the solution to the case he is presented with is required urgently. Some theorists espoused the view that if the *mujtahid* cannot provide an immediate answer to the case under consideration, and this case requires an immediate solution, then he may resort to an opinion already formulated by another *mujtahid*. Still others, who seem to have been a minority, maintained that he may follow such an opinion whether or not a solution is immediately required. In support of their view, the first group of theorists argued that for the opinion to be valid, it must be the product of the jurist's own *ijtibād*. This condition is perfectly analogous to the requirement of ritual ablution in prayer; without the performance of ablution, prayer can never be valid. Since *ijtibād* is established as a religious obligation (*farḍ*), it must be practiced in every case by those who are qualified. If it is not practiced, then their opinion would have no validity. But what if the case under consideration is of some urgency, and the *mujtahid* cannot provide a solution in time? The answer given by some theorists is this: the layman should act as he sees fit, and when the *mujtahid* arrives at a solution at a time when the problem still persists, then the layman must adhere to that solution. This argument draws on the law appertaining to prayer. If the Muslim believer finds neither water nor sand to perform ablution, he must still pray, without ritual cleansing. If he, at a later time, comes by water or sand, then he must pray again after having washed himself with either substance.<sup>63</sup>

#### THE JURISCONSULT (*MUFTĪ*)

By now it should become clear that our theorists equate the *mujtahid* with the *muftī*, the jurisconsult proper. Throughout their writings, the two terms are used synonymously.<sup>64</sup> Whatever scholarly credentials the *mujtahid* must possess, the jurisconsult must enjoy too, but with one difference: the latter, according to the majority, must not only be of just and trustworthy character, but he must be known to take religion and religious matters quite seriously. If a person meets all these requirements, then it is his obligation to issue a legal opinion (*fatwā*; pl. *fatāwā*) to anyone who comes before him for this purpose. Interestingly, he is equally under the obligation to teach law to anyone who wishes to acquire legal knowledge, for disseminating legal

<sup>60</sup> Shīrāzī, *Luma'*, 84–85; Ghazālī, *Mankūb*, 472–73, 488–94.

<sup>61</sup> Ghazālī, *Mustasfā*, II, 390–92; Juwaynī, *Burhān*, II, 1342–43.

<sup>62</sup> Juwaynī, *Burhān*, II, 1342.

<sup>63</sup> Ghazālī, *Mustasfā*, II, 384–86; Juwaynī, *Burhān*, II, 1339–40.

<sup>64</sup> Wael B. Hallaq, "Ijtihād and Ijtihād in Sunni Legal Theory: A Developmental Account," in Khalid Masud, Brinck Messick and David Powers, eds., *Islamic Legal Interpretation: Muftis and their Fatwās* (Cambridge: Harvard University Press, 1996), 33–43.

(=religious) knowledge was perceived to be as meritorious as issuing legal opinions. In both activities there was involved a promotion of religion, the ultimate form of worship. The obligation to teach law seems to be an idealized requirement reflecting the reality of legal education and legal practice where professors of law in the medieval colleges normally held the office of *muftī* as well.<sup>65</sup>

We have taken note of the obligation imposed on those who are qualified to perform *ijtihād*. The jurisconsult is thus under the obligation, when he is the only one available in a certain locality, to issue legal opinions and teach whenever he is asked to do so. Only when other *mujtahids* are available is he absolved of this duty. For only when such a request is met is the obligation dispensed with, and the community at large would then be considered to have fulfilled its duty.<sup>66</sup>

A group of theorists maintained that the jurisconsult must be prepared to exercise *ijtihād* a second time with regard to a case of law for which he had already provided an answer. Others rejected this view, arguing that his first *ijtihād* would be valid for the same case if it were to occur again.<sup>67</sup>

It often happened that a layman obtained more than one opinion for the particular problem that had befallen him. When the opinions were identical, it was a proof, in a court of law, that the case had no other solution. But what if the solutions were at variance? Three positions were taken in this regard. The first was that the layman may choose any one of them and discard the others, for *mujtahids*, as we have seen, are equal in their attempt to unravel the law of God. They all operate within a sphere of probability. The second position did not allow the layman this freedom, but dictated that he must adhere to the opinion of the jurisconsult who is most just, trustworthy and learned in the law. This position seems to reflect what was indeed the actual practice, where the opinions of distinguished jurists seem to have unfailingly had the upper hand. The third required the layman to adopt the least lenient of the opinions, the reasoning being that it is safer to do so. If the legality of a certain beverage was in question, and two opinions were issued on this matter, one prohibiting and the other permitting its consumption, then it is safer, according to this position, to adhere to the rule of prohibition. If he follows the rule of permission, and it happened that God meant it to be prohibited, then he would be in sin. This, however, does not seem to have been the opinion of the majority. It appears that the first position was the most prevalent of all.<sup>68</sup>

<sup>65</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1033–35; Ghazālī, *Mustasfā*, II, 350–53.

<sup>66</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1035.

<sup>67</sup> Juwaynī, *Burhān*, II, 1343–44; Shīrāzī, *Sharḥ al-Luma'*, II, 1035–37.

<sup>68</sup> Shīrāzī, *Sharḥ al-Luma'*, II, 1038–39; Juwaynī, *Burhān*, II, 1344–45.

## 4

### THE LEGAL TEXT, THE WORLD AND HISTORY

#### INTRODUCTION: THE THEORETICAL CONSTANTS

As a theoretical construct, the Sunnī theory of law has, since its beginnings, operated on two levels of discourse between which a clear distinction must be drawn if we are to gain an adequate understanding of what this theory and its history are about. The first level of discourse represents a sub-structure that is thoroughly bound by the unalterable proposition of the divine command. Here, no amount of interpretation or intellectual manipulation could change the basic givens underlying, or the presuppositions governing, this discourse. The components of the discourse surrounding this first level may thus be characterized as theoretical constants, incapable of transmutation despite the changing pressures of time and social exigencies. Conceptually, any change in the fundamental assumptions operating on this level was thought to be tantamount to a complete abandonment of (Sunnī) Islam as a religion.

Sunnism as a religious and, thus, a legal identity was defined by the founding principles of legal theory. That is to say, the acceptance or rejection of these principles, which squarely belong to the first level of theoretical discourse, determined, respectively, one's affiliation to, or dissent from, the Sunnī fold. It was not without good reason that this fold was labeled *ahl al-sunna wal-jamā'a*, referring to the main body of Muslims (*jamā'a*), the Sunnīs, who united around a set of principles and tenets upon which they agreed (*ijmā'u 'alā*) in the form of a consensus (*ijmā'*), to uphold as the distinguishing mark of their identity. This designation therefore bespeaks the sanctioning effect of consensus on the basic ingredients of Sunnism; and this is why rejecting these ingredients – the principles making up the first level of theoretical discourse – amounted to rejecting the *jamā'a*, the Sunnī fold.

Aside from certain rudimentary theological tenets – the acceptance of