Asians were not always able to keep themselves from crossing the line between sober analysis and theological fantasy.

One can also question the prospects for the success of such a drastic program of ideological purification. On the questionable assumption that Muʿtazilī influences on legal theory could always be readily recognized, how far could these revisionists carry out their program without incurring the risk of drastically upsetting the inherited body of legal concepts, principles, and rules? Since no such revolutionary aim is discernable in their writings, one must recognize the constraints under which they acted.

It is worth noting, too, that that the ʿIraqi Ḥanafīs, whose doctrines the Central Asians so vigorously attacked remained for them respected Ḥanafīs. The *ahl al-sunnah wa 'l-jamāʿah* were understood to be the backbone of the Ḥanafī legal tradition, those Ḥanafīs truest to the teachings of Abū Ḥanīfah and by virtue of that those whose beliefs were beyond hint of heresy. Still the contributions made by Iraqi Muʿtazilīs to the transmission and development of Ḥanafī law did not go unrecognized. ʿĪsā b. Abān, al-Karkhī, and al-Jaṣṣāṣ are not spoken of with any sign of contempt in these Central Asian texts even when their opinions in legal theory are being condemned.[108]

The full vigor of this effort at the theologizing of legal theory was of remarkably short duration, a brief flowering under al-Māturīdī then the revival of two generations in the time Abu 'l-Muʿīn al-Nasafī and ʿAlāʾ al-Dīn al-Samarqandī. The subsequent reconfiguration of *ahl al-sunnah wa 'l-jamāʿah* to include the Ashʿarīs came after this effort had lost its momentum. But once orthodox belief could incorporate such previously despised doctrines as the infallibility of the *mujtahids*, all prospects of a further revival of this campaign of "de-Muʿtazilization" were doomed.

[108] As we have noted, the same cannot be said of their attitude toward one of their own, Abū Zayd al-Dabūsī.

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IMĀMĪ SHĪʿĪ REFUTATIONS OF *QIYĀS*

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Refutations of the validity of *qiyās* are to be found in Imāmī Shīʿī collections of reports (*akhbār*), all available Shīʿī works of *uṣūl al-fiqh*, polemics against Sunnī thought and not infrequently in works of *furūʿ al-fiqh*. This sustained tradition of criticism rarely falters, and whilst certain elements of Sunnī legal theory were incorporated into the Shīʿī juristic tradition (notably, *ijtihād*), *qiyās*, at least terminologically was never accommodated. Whilst rejections of *ijtihād* in early Shīʿī sources were amenable to reinterpretation without causing a rupture in the Imāmī intellectual tradition, such a casuistic project was not attempted with respect to *qiyās*. It appears that the *akhbār*, in which *qiyās* was condemned by the Imāms, proved too stubborn to admit of reinterpretation. With the die cast against *qiyās*, Shiʿites embarked on extensive justifications of their position, the twists and turns of which form the subject matter of this article.

One striking feature of Shīʿī discussions of *qiyās* is the fluidity of the term's definition and reference. Though Shīʿī *akhbār* concur on the illegitimacy of *qiyās*, its meaning and the associated types of legal reasoning are less stable. From Sunnī discussions of *qiyās*, it is clear that the ubiquitous translation of the term as 'analogy' is insufficiently nuanced. The parameters of *qiyās* were a debated issue; for some analogical reasoning was the exclusive referent, whilst for others non-analogical arguments might also be subsumed under the term.[1]

Shīʿī *akhbār*, the reports attributed to the Prophet and the Imāms, are also ambiguous, though not identically so. There are points at which *qiyās* (and its derivatives) refer to analogical reasoning, and are therefore criticised. In other passages *qiyās* is used without opprobrium, and 'comparison' is perhaps a better translation than 'analogy'.[2]

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[1] W. Hallaq, "Non-analogical arguments in Sunni Juridical *Qiyās*", *Arabica* 36 (1989): 286–306; W. Hallaq, *Introduction to Islamic Legal Theories* (Cambridge: Cambridge University Press, 1998), 96–99; B. Weiss, *The Search for God's Law* (Salt Lake City: University of Utah Press, 1992), 488–490.

[2] For example, Imām Jaʿfar al-Ṣādiq was asked who was to bear the compensatory payment (*diyah*) for a murdered man found between two villages. He replied

Recognising such non-analogical uses of *qiyās* is unproblematic in most cases.[3] The occasions when *qiyās* refers to 'analogical reasoning' (in its broadest sense) are numerous and usually obvious, for example:

> Muḥammad b. Yaʿqūb relates from ʿAlī b. Ibrāhīm, from his father, from Ibn Abī ʿAmīr from al-Ḥasan b. Rāshid, who says: I said to Abū ʿAbd Allāh [Imām Jaʿfar al-Ṣādiq], "Should a menstruating woman repeat her prayer?" He said, "No". I said, "Should she repeat her fast?" He said, "Yes". I said, "Why is this so?"[4] He said, "The first to use *qiyās* was the devil (*awwal man qāsa Iblīs*)".[5]

The legal reasoning is not difficult to reconstruct here. A woman, during her menstrual period, is excused from the duty of prayer without the requirement for a compensatory prayer after the end of her menstrual period. However, the same woman is excused the fast during the month of Ramaḍān, but is required to perform compensatory days' fast at a later date. Both prayer and fasting are duties, the performance of which are affected by menstruation, and yet the legal consequences are quite different. The rulings pertaining to prayer and fasting were both known to be the law: Ibn Abī ʿAmīr asked the questions, not to discover whether or not a menstruating woman is obliged to repeat her prayer or fast, but to discover why apparently similar cases do not lead to analogous legal rulings.

Later Sunnī writers used this example (though obviously not the Imāmic report) to demonstrate one of the restrictions on the application of analogy; the reason for a particular ruling must be known to be transferable to other situations, and not specific to that case.[6] The Imām's enigmatic response to Ibn Abī ʿAmīr's question is, how-

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that the distance "between the two villages is calculated (*yaqās*). Whichever is nearer to him is responsible for the payment". Shaykh al-Ṣaduq Ibn Bābūya, *Man lā yaḥḍuruhu al-faqīh*, 4 vols. (Qum: Jamāʿat al-Mudarrisīn fi al-Hawzah al-ʿIlmīyah, 1404/1983–4), 4:101, and a variant, Muḥammad b. Yaʿqūb al-Kulīnī, *al-Kāfī*, 8 vols. (Tehran: Dār al-Kutub al-Islāmīyah, 1388/1968), 7:356.

[3] However, see Kulīnī, *Kāfī*, 7:323 and al-Shaykh al-Ṭūsī, *Ṭahdhīb al-aḥkām*, 10 vols. (Tehran: Dār al-Kutub al-Islāmīyah, 1390/1970), 10:266. Does *yaqāsu* here mean "this is calculated according to the compensatory payment due for an eye" or "this is analogous to the payment due for an eye?" Is there a difference between these translations?

[4] This staged question clearly concerns the legal reasoning of the Imām.

[5] Shaykh al-Ṭūsī, *al-Istibṣār*, 4 vols. (Tehran: Dār al-Kutub al-Islāmīyah, 1390/1970), 2:93.

[6] As Weiss puts it, "the occasional factor behind the original rule must be unrestricted in its operation as a rule-occasioning factor" to make the analogy valid; Weiss, *God's Law*, 566.

ever, a rejection of the whole analogical process. The law simply does not work in such a regular fashion. By using *qiyās* (here meaning a simple analogy between apparently similar cases), one falls into the sin of Satan himself.[7]

The Imāms' rejection of *qiyās* is found in other *akhbār*, which are more equivocal:

> Ābān asked the Imām about the compensation to be paid by a man who severs the finger of a woman. He [Ābān] said: The Imām said, "Ten camels". I said, "and if he severs two fingers?" He said, "Twenty." I said, "and if he cuts off three?" He said, "Thirty". I said, "and four?" He said, "Twenty camels". I said, "Praise be to God! He cuts off three and the *diyah* is thirty camels, but for four fingers, the *diyah* is only twenty camels. If we had heard this in Iraq, we would have forgiven the one who said it, and maintained that Satan must have put the words in his mouth!" The Imām said, "Relax. This is indeed the ruling of the Prophet of God. A woman is due the equivalent of a man until a third of the *diyah* is reached. When it reaches one third, the woman is given one half. O Ābān, you took me to be using *qiyās*, but if *qiyās* is used on the Sunna, religion is ruined".[8]

The legal reasoning attributed to the Imām can, once more, be constructed. The compensatory payment due for the severance of one finger is 10 camels; hence there are analogous payments for two and three fingers of twenty and thirty camels respectively. With four fingers, an additional (Prophetic) ruling comes into force. Compensatory payments to an injured woman are equal to that of a man until one third of the compensatory payment for homicide is reached. After this amount, the woman is due half that due to a man. Since payment for homicide is 100 camels (a third of which is 33 and 1/3 camels), the analogy from 1,2 and 3 severed fingers to four severed fingers is invalid. The amount due to a man would be 40 camels, but a woman only receives 20 camels.

The resultant ruling, in Ābān's eyes, is unjust as the man can save camels by severing an additional digit. But the Imām states that this is the ruling of the Prophet of God (*ḥukm rasūl allāh*), and hence is not subject to alteration. The report might, then, seem to be a rejection of analogy. However, on further consideration, mere analogy

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[7] The reference here is most probably to Satan making the invalid analogy between being an angel (created from light, whilst man is created from mere clay), and himself being greater than Adam. Whilst it might seem logical that angels are placed higher than human beings, this does not accord with the wishes of God.

[8] Ibn Bābūya, *Faqīh*, 3:118.

cannot be meant by *qiyās* here. The analogy between the compensation for one finger, and that for two fingers is acceptable to the Imām (as it is for three fingers also). Analogy is, then, employed by the Imām. However, an additional piece of revelatory evidence (a Prophetic report) restricts the extension of the analogy to the fourth finger (and beyond). In this context, the verb *qāsa* means not 'to employ analogy', but rather 'to employ analogy without regard to restriction imposed by other revelatory material'. It is this that is condemned.[9] *Qiyās* here refers to a restricted analogy.

A final example from the *akhbār* will demonstrate the lexical scope of *qiyās*:

> Muḥammad b. al-Qāsim relates from Abū al-Ḥusayn al-Nakha'ī from Ibn Abī ʿAmīr from ʿAbd al-Rayḥān b. al-Ḥajjāj from Abū ʿAbd Allāh [Imām Jaʿfar al-Ṣādiq] concerning the man who fires a shot at prey which is walking towards the sacred area (*ḥaram*). The shot is successful and the prey carries the injury until it enters the sacred area, where it dies. He said, "He is not due a penalty. He is in the position of the man who sets up a trap outside of the sacred area, and prey falls into it. The prey, having escaped from the trap staggers into the sacred area and dies there".
> I said, "This is a type of *qiyās* in their opinion".
> He said, "No. I only likened (*yashabbih*) one thing with another".[10]

What does *qiyās* mean in this report, and how is it distinguished from likening or similarity (*shabah*)? The two cases are similar, it appears, because they are both categorised under the general heading "hunting outside the sacred area". Activities in this category do not carry a punishment penalty (though hunting inside the sacred area is prohibited). If the two cases had been analogous, then one would have been able to deduce the ruling in the case of the man who shoots at his prey in the following manner:

> C1. A man lays a trap outside the sacred area. Prey is injured in the trap, but survives long enough to enter the sacred area and dies there.
> R1. This man is not due punishment [perhaps because his intention was to perform the permitted action of hunting outside the sacred area].

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[9] The procedure recommended here seems close to one of the Ḥanafī conceptions of *istiḥsān: "takhṣīṣ al-ḥukm maʿa wujūd al-ʿillah"* (restriction of the legal ruling despite the presence of its *ratio*). This is found in the earliest Ḥanafī works of *uṣūl al-fiqh* (on the discussions of this type of *istiḥsān* see, M. Bedir, "The Early development of Ḥanafī uṣūl al-fiqh" (Ph.D. diss., University of Manchester, 1999), chap. 5.)

[10] Al-Ṭūsī, *Istibṣār*, 2:206–207.

C2. A man shoots at prey. Both he and the prey are outside the sacred area. The prey is walking towards the sacred area at the time of attack. It is injured but survives long enough to enter the sacred area and dies there.
R2. The second man is not due any punishment [because his intention was also not to hunt inside the prohibited area].

Implicit in this reasoning is the assumption that the circumstances in case C1, which lead to the ruling R1, also pertain in C2 (and lead to R2). However, one cannot, as a humble believer, know whether the circumstances which lead to rulings R1 and R2 are common to both cases. One does not even know whether R1 was 'caused' by the circumstances of C1. The ruling may not be explicable by the laws of causality. In short, one only knows that rulings R1 and R2 pertain to cases C1 and C2 respectively because the Imām has revealed this to be the case. The comments about similarity were not to aid future deduction by jurists, but were strictly *obiter dicta*, with no relevance to the legal reasoning behind the rulings. It is as if the Imām was expressing a casual interest in the fact that these two different cases happen to have the same ruling. Why they have the same ruling is accessible only to God (and, through God, the Imām).[11]

Qiyās, then, in this report is the procedure whereby an ungrounded ruling in one case is supposedly derived from presumptions about the causes of a ruling in a known case. To express it (anachronistically) in later juristic terminology, *qiyās* here is the derivation of a *ḥukm* for a *farʿ* by a supposed *ʿillah* shared between the *farʿ* and the *aṣl*. Here *qiyās* means a strict juridical analogy.

Though the term *qiyās* is employed in different senses in different *akhbār*, analogical reasoning does appear as a constant element. An examination of other *akhbār* in which *qiyās* (or its derivatives) occur would, no doubt, produce additional nuances. However, a provisional conclusion on the use of *qiyās* in the Imāmī Shīʿī *akhbār* is that when it is used to describe a procedure rejected by the Imāms, it refers to a form of analogical reasoning (be it in simple, restricted or juridical form).

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[11] In fact, the rulings differ between the cases, according to al-Ṭūsī. In an exegetical note, he adds that though the man in case C2 deserves no punishment, he is due penance (*kaffārah*), since killing prey which is walking towards the *ḥaram* is considered reprehensible (*makrūh*) for which there is penance (but no judicial punishment). See Ṭūsī, *Istibṣār*, 2:207.

On those occasions when *qiyās* is rejected in the *akhbār*, the reasoning is less than precise. The rejection appears to be based on an assumption that the law is not a system bound by the logical rules of analogy. God is not forced to be consistent in his rulings, and though at times rules may appear similar, one cannot predict God's decision on any matter through an understanding of other (known) elements of the law.

One of the aims of legal theory is, however, to describe the internal logic of the legal system. Understanding the internal logic may aid in the derivation of new rulings, or justify known rules, or resolve existing disputes over the law. Alternatively, understanding the logic of the law may be an intellectual exercise, or act of religious devotion, with little or no practical application. Which of these possibilities accurately expresses the function of Islamic legal theory (and in this I include *uṣūl al-fiqh*) is not relevant here. My point is that the reason, as far as we can discern it from the *akhbār*, for rejecting *qiyās* involved a resistance to the view that the law of God forms a coherent logical system. This position inhibited the development of a legal theory within the Shīʿī juristic tradition, since the law was seen as a series of atomised rules with no necessary logical relationship to one another. When one has a living source of legal knowledge (the Imām), such a meta-system is surplus to requirement. With this attitude it is, perhaps, unsurprising that Shīʿī works of *uṣūl al-fiqh* did not emerge until some time after the first wave of Muslim *uṣūl* works. When the Imām goes into hiding, some coherence becomes both a practical and intellectual desideratum.

The rejection of *qiyās*, inherited by early Shīʿī *uṣūl* writers as the Imāmī position, could not be justified on the grounds of the fundamental incoherence of the law (as seen in the case of the *akhbār*), since the whole point of *uṣūl al-fiqh* was to explain the law in a coherent manner. Hence additional arguments had to be found. The argument of al-Shaykh al-Mufīd (d.413/1022) in his work of *uṣūl al-fiqh* (unfortunately lost) is summarised by Abū al-Fatḥ al-Karājikī (d.449/1057). *Qiyās* and *raʾy* (both are undefined in the text we have, though the latter implied some concept of personal opinion) are linked together:

> *Qiyās* and *raʾy*:
> It is our view that *qiyās* and *raʾy* have no place in the derivation of legal rulings (*istikhrāj al-aḥkām al-sharʿīyah*). Nothing correct (*ṣawāb*) can be known [from them] concerning the nature of [the legal rulings]. Whoever relies upon [*qiyās* and *raʾy*] in the fulfilment of their legal duties has erred.[12]

The reason for the inadequacy of *qiyās* and *raʾy* is given elsewhere in Karājikī's summary:

> As for *qiyās* and *raʾy*, it is our view that with respect to the Sharīʿa, they are irrelevancies (*sāqiṭān*) which do not produce knowledge (*ʿilm*), cannot particularise a general statement, cannot generalise a particular statement and do not provide an indication of the literal meaning [of a word].[13]

From these densely worded comments, it is clear that Mufīd, if accurately summarised by Karājikī, rejected *qiyās* on epistemological grounds. *Qiyās* did not bring knowledge of the law. *Qiyās* is not necessarily an illegitimate procedure in itself. It is an illegitimate procedure because its results fail Mufīd's strictures on knowledge. It is epistemologically inadequate. Mufīd seems to have accepted that the law is coherent. *Qiyās*, however, can never bring knowledge as to the nature of that coherence. It has nothing pertinent to say on the general and particular nature of rulings, and cannot aid in discovering the meanings of words in the revelatory texts (these are obviously the areas where the law might be said to be coherent in Mufīd's view). One recognises here a shift in the argument against *qiyās*. In the *akhbār* the argument appears to be based on a rejection of the law's coherence. In Mufīd's text (as we have it), *qiyās* can provide no knowledge (*ʿilm*) of the law's coherence.

Interestingly, amongst Mufīd's pupils, this argument is considered ineffective. Both Sayyid al-Murtaḍā (d.436/1044) and al-Shaykh al-Ṭūsī (d.460/1067) consider *qiyās* to be an illegitimate procedure, but not as a result of its failure to bring knowledge. They both argue that *qiyās* is rejected because it is unsupported by any textual indicator (*dalīl*). These two arguments against *qiyās* (epistemological inadequacy and insufficiency of textual support) dominate Imāmī thinking on *qiyās* in the subsequent tradition, passing in and out of fashion.

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[12] Abū al-Fatḥ Muḥammad al-Karājikī, *Kanz al-fawāʾid*, 2 vols. (Beirut: Dār al-Adwāʾ, 1985), 2:28.

[13] Karājikī, *Kanz*, 2:23.

Both Murtaḍā's *al-Dharīʿah ilā uṣūl al-sharīʿah*, and Ṭūsī's *ʿUddat al-uṣūl*, contain substantial chapters on *qiyās*. This fact alone indicates the influence of the more developed Sunnī tradition of *uṣūl* writing. That Shīʿī writers include extensive discussions of legal ideas they reject is an indication of the reactionary nature of Imāmī *uṣūl* thought. There is some debate over which of the works was written first. Though Murtaḍā taught Ṭūsī, Devin Stewart has argued that Murtaḍā's mention of a work of *uṣūl* by a scholar in the preface to the *Dharīʿah* is a reference to Ṭūsī. Therefore Ṭūsī must have completed the *ʿUddah* first. Textual evidence (organisation of material, structure, terminology and expression and duplication of material) places Ṭūsī's chapter on *qiyās* later than that of Murtaḍā.[14] Passages in Murtaḍā's analysis are reproduced verbatim in Ṭūsī's work; indeed at times the chapters appear as manuscript variants. However, Ṭūsī's presentation is better organised and focused, whilst Murtaḍā digresses into matters of tangential relevance to juristic *qiyās*. Ṭūsī also employs a sophisticated and consistent terminology in his presentation, whilst Murtaḍā's chapter represents a stage when terminology had not yet been stabilised.[15]

Murtaḍā's discussion of *qiyās* is divided into six sections (*fuṣūl*):

1. An introduction.[16]
2. A section on whether, by informing the Prophet (or a subsequent scholar) that whatever he chooses is correct, God in fact allowed the Prophet (or scholar) to decree legal rulings on the basis of his own reasoning and not on the basis of legal indicators.[17]
3. A section on the meaning of *qiyās, ijtihād* and *raʾy*.[18]
4. An examination of the different views on *qiyās*.[19]

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[14] See further below, note 39.

[15] This does not necessarily disprove Stewart's position, since he adds the caveat, "Al-Ṭūsī must, therefore, have written *ʿUddat al-uṣūl* initially during Murtaḍā's lifetime, before 480/1038–9, and subsequently redrafted sections of the work after Murtaḍā's death, though he left the original introduction intact". (D. Stewart, *Islamic Legal Orthodoxy* (Salt Lake City: University of Utah Press, 1998), 136. To demonstrate this theory, a detailed comparison of Murtaḍā's and Ṭūsī's works would be necessary. If accurate, the chapters on *qiyās* would be one example of such "redrafting".

[16] Sayyid Murtaḍā, *al-Dharīʿa ilā uṣūl al-sharīʿa*, 2 vols. (Tehran: Danishgah-i Tihrān, 1376/1956–7), 2:656–658.

[17] *Dharīʿah*, 658–669.

[18] *Dharīʿah*, 669–673. In this section Murtaḍā, aware of the confusion within Shīʿī thought over these matters, distinguishes between these terms, making it clear that *qiyās* refers, broadly speaking to analogical reasoning, defining it as *ithbāt mathal ḥukm al-muqīs ʿalayhi lil-muqīs* (*ibid.*, 669).

[19] *Dharīʿah*, 673–675.

5. A section on the possibility that the Lawgiver has made it a duty to act in conformity with what *qiyās* dictates.[20]
6. A section on the denial of the incumbency of *qiyās*.[21]

The second section, at first blush, appears out of place, but the inclusion of a discussion of this is justified in the introduction. The legitimacy of *qiyās* is first a matter of dispute between those who consider it to be a legal indicator (*dalīl sharʿī*) and those who do not. The former claim that *qiyās* can justify a legal ruling in the same way that a piece of textual evidence justifies a particular ruling; that is, it is an indicator of a legal ruling just as the texts are indicators. Murtaḍā wishes though to take the argument one step backwards, by asking whether or not a legal indicator is always a necessary support for a ruling. Evidence that this may not be the case is examined in the second section. The argument runs that since the Prophet was, due to theological considerations, sinless, whatever he decided in response to a legal dispute or question was correct, even if he had no indicator (i.e. no communication from God) to guide him. That is, did his sinlessness obviate the need for him to act on the basis of a *dalīl*? The theological question at the root of this dispute is the relationship between God and the Prophet: did the Prophet have choice (*ikhtiyār*) in deciding legal issues, or was every decision dictated to him by God? The legal question concerns whether or not God has a complete Sharīʿa, or merely a partial one (leaving some matters up to the Prophet's decision)? Murtaḍā argues that the Prophet did not have the faculty of choice with regard to legal matters, and that all his legal decisions were based on *dalīls* from God. By arguing in this way, Murtaḍā is heading off, at the outset, a possible argument for *qiyās*: that even though *qiyās* is not a legal indicator, it is, at times, permitted to make legal decisions without legal indicators, because the Prophet himself did this, as he was given choice in such matters by God. If the Prophet was delegated choice, then it is possible also for the scholar to be delegated choice. Even if *qiyās* is not a legal indicator, it may be possible to make legal decisions on its basis. This possible line of argument is clearly linked to the much debated issue of *hal kull mujtahid muṣīb* (are all mujtahids correct in

[20] *Dharīʿah*, 675–697. I am influenced in my translation of *al-taʿbbud bi'l-qiyās* by Weiss's translation based on Ibn Ḥājib's gloss on the phrase. Weiss, *God's Law*, 634–635.

[21] *Dharīʿah*, 2:697–791.