THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

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CHAPTER 6

Legal theory expounded

From our discussions thus far, we have seen that by the beginning of the third/ninth century, the judiciary had reached a mature stage of development, with all its essential features having taken final shape. By this time, legal doctrine (or substantive law) had also become more comprehensive and detailed in coverage, with virtually no eventuality or case escaping the domain of religious legal discourse. Yet, while in other circumstances these two developments would have allowed us to declare a given legal system complete and fully developed, in the case of Islamic law it would be premature to do so; for the beginning of the third/ninth century set the stage for what might be called the pivotal scene in this legal drama. Put differently, while legal developments during the first two centuries of Islam were no mean feat, they were only the foundation of what was to be erected later. For there remained two absolutely essential and fundamental features of the law that had yet to emerge, or at least had not done so in any meaningful form. And it was not until a century and a half later – namely, until the middle or second half of the fourth/tenth century – that these two features took final hold and shape. These features were, first, the emergence and fundamental articulation of legal theory and, second, the formation of the doctrinal schools. This chapter will treat the first of these, while the second will be taken up in the next chapter.

1. THE GREAT RATIONALIST–TRADITIONALIST SYNTHESIS

The genealogy of legal theory, the so-called *uṣūl al-fiqh*, dates back to the momentous conflict between the rationalists (*ahl al-ra'y*) and the traditionalists (*ahl al-ḥadīth*). We have said that the latter movement experienced an unprecedented upsurge during the last quarter of the second/eighth century, thereby subjecting the former to immense pressure that

resulted in partial decline. Shāfiʿī's project signaled the need for readjustment, namely, to account for both the rising tide of Prophetic *ḥadīth* and for the hermeneutical implications of this new phenomenon. His project thus reflected not so much the emergence of a legal theory as his interpretive reaction to the traditionalist challenge. We will do well to remember that, up to the middle of the second/eighth century, *raʾy* was the driving trend in legal reasoning – in effect, the standard. The traditionalists began to assert themselves after this period, becoming a force to contend with by the end of the century. By the middle of the third/ninth century, *ḥadīth* had won the war against *raʾy*, leaving only a few battles to be fought and won thereafter. Long before this century ended, there emerged six "canonical" *ḥadīth* collections, designed – in their contents and arrangement – to service the law.

Furthermore, a clear pattern of scholarly affiliation with these two movements began to manifest itself. Whereas a few jurists of the second/eighth century were seen as traditionalists (and many of these acquired such descriptions *ex post eventum*, decades after the century came to a close), the third/ninth century produced more traditionalists and traditionists than rationalists, and they were clearly identified as such. It is also significant that, during this century, migration (or conversion) from the rationalist to the traditionalist camp was frequent, whereas movement in the opposite direction was rare to nonexistent. An illustrative case is that of Ibrāhīm b. Khālid Abū Thawr (d. 240/854), who is reported to have been trained in the *raʾy* school of the Iraqians, and who became a traditionalist and a "school founder" in the latter part of his career.[1] While we are unable to unearth examples of conversion to the rationalist camp from this century, the sources tell of such movement for the preceding century. The famous Zufar b. al-Hudhayl, for example, began his career as a traditionalist (again, an *ex post eventum* characterization), but before long he was attracted by the Kūfan rationalists, one of whose leaders he became.[2]

While exclusive affiliation to one or the other camp was common by the early part of the third/ninth century, the standard affiliation among jurists had shifted dramatically by the end of that century. Most jurists are reported to have combined the two in some way, and the Muslim historians and biographers made it a point to mention this synthesis in

[1] Taqī al-Dīn Ibn Qāḍī Shubha, *Ṭabaqāt al-Shāfiʿiyya*, 4 vols. (Hyderabad: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1398/1978), I, 3–4.

[2] Ibn Khallikān, *Wafayāt*, I, 342.

the biographies of jurists who flourished between ca. 250 and 400 H (ca. 870–1000 AD). After this period, however, only a few are described as exclusively belonging to one camp or the other. Even fewer jurists who lived before and after this period are described as having "combined" the ideologies of the two camps. In other words, this designation was most relevant during the period in question, and, as we will show, for a good reason.

On both the ideological and legal levels, the history of Islam between 150 and 350 H (ca. 770 and 960 AD) can be characterized as a process of synthesis, with the opposing movements of traditionalism and rationalism managing (though not without a considerable struggle) to merge into one another so as to produce a "third solution" – what we have called here the "Great Synthesis." But the Synthesis was not reached without sharp swings of the pendulum. After Shāfiʿī, the traditionalist movement gained significant strength, attracting many jurists who can easily be described as staunch opponents of rationalism. Aḥmad b. Ḥanbal (d. 241/855), the reputed founder of the Ḥanbalite legal school, was amongst the most renowned of this group. So was Dāwūd b. Khalaf al-Ẓāhirī (d. 270/883), the reputed founder of the literalist Ẓāhirite school, which did not survive for long. The doctrines of these two scholars, as reflected in their attitudes to rationalism, signified the constantly increasing power of traditionalism. While both generally approved of Shāfiʿī, they went much further in their emphasis on the centrality of scripture and on the repugnant nature of human reasoning. For them, the latter detracted from knowledge of revelation which, in Dāwūd's eyes, could be gleaned from the revealed language itself without impregnating these texts with human meaning. Yet, the respective positions of Ibn Ḥanbal and Dāwūd on reasoning – perhaps the best gauge of their legal tendencies – were by no means identical. Ibn Ḥanbal, who was most active some three decades before Dāwūd and three decades after Shāfiʿī, accepted *qiyās* only when absolutely necessary, placing far more restrictions on its use than Shāfiʿī did. But Dāwūd rejected it categorically, and in fact refuted it as a flawed method.

Thus, during the seven decades between Shāfiʿī and Dāwūd, the traditionalist movement took a sharp turn towards a total opposition to rationalism, including its use of the method of *qiyās*. The Inquisition (Miḥna), pursued by the caliphs and rationalists between 218/833 and 234/848, was not only about whether or not the Quran was created, but also about the role of human reason in interpreting the divine texts. The final defeat of the rationalists was exemplified both in the withdrawal of the Miḥna and

in the emergence of its victims as heroes, with Ibn Ḥanbal standing at the forefront. With this defeat, there was implied an acknowledgment that human reason could not stand on its own as a central – much less exclusive – method of interpretation and was, in the final analysis, subservient to revelation. The Miḥna thus brought to a climax the struggle between two opposing movements: the traditionalists, whose cause Ibn Ḥanbal was seen to champion; and the rationalists, headed by the caliphs and the Muʿtazilites, among whom there were many Ḥanafites. The forms that these two movements took by the end of the Miḥna represented the most extreme positions of the religious/hermeneutical spectrum, and if conflict between them was about anything fundamental, it was, at the end of the day, about hermeneutics.

The majority of the Muslim intellectual and religious elite did not necessarily subscribe to either of the two positions as they emerged at the end of the Miḥna or even later. The traditionalism of Ibn Ḥanbal was seen as too austere and rigid, and the rationalism of the Muʿtazila and their supporters among the *ahl al-raʾy* as too libertarian. When Ibn Ḥanbal and the traditionalists won the Miḥna, moreover, they did not prevail on account of their interpretive stand, or by virtue of their doctrinal and intellectual strength (although their tenacious piety no doubt won them popular admiration). Rather, their victory was due in part to the weakening of pronounced rationalism and in part to the withdrawal of political support from a stance that was becoming unpopular. Hence, the limited success of the traditionalists was largely a function of the weakness of the rationalists. Indeed, if the conflict represented by the Miḥna signified anything, it was that extreme forms of traditionalism and rationalism did not appeal to the majority of Muslims. It was the midpoint between the two movements that constituted the normative position of the majority; and it was from this centrist position that Sunnism, the religious and legal ideology of the majority of Muslims, was to emerge. Later Muslims were right when, with the benefit of hindsight, they called this majority "the middle-roaders" (*al-umma al-wasaṭ*).

The middle point between rationalism and traditionalism was thus the happy synthesis that emerged and continued, for centuries thereafter, to represent the normative position. The end of the Miḥna was the take-off point of this synthesis. By the middle of the fourth/tenth century, the synthesis was fully in place, not to be questioned again until the second half of the nineteenth century.

But how did the synthesis come about? Or, at least, how did it manifest itself? By the middle of the third/ninth century, it became clear that

Prophetic *ḥadīth* was there to stay. The internationalization of legal scholarship – i.e., the intense geographical mobility of legal scholars within the wide expanse of Muslim territory, from Andalusia in the west to Transoxania in the east – began early on, but became a truly normative practice by the end of the second/eighth century. And with this crucial phenomenon in place, loyalty to the sunnaic practice diminished. A scholar who traveled far and wide found the variations in regional sunnaic practice difficult, if not impossible, to transpose. A Kūfan jurist who moved to Old Cairo and then to Khurāsān would expect to be less bound by the Kūfan sunnaic practices in towns and cities that did not abide by traditions that had evolved in the Iraqian garrison towns from the earliest phase of Islam. In other words, the Islamicization of such regions as Khurāsān or Transoxania could not depend on the sunnaic practices of the Kūfans, Baṣrans or Medinese. A universally transmitted *ḥadīth* from the Prophet proved more appealing as a material and textual source of the law than the living sunnaic practice as defined by specific cities or legal communities, since the latter had developed their own judicial and juristic peculiarities in keeping with their own particular environment (peculiarities that all Muslim regions were to develop later). Prophetic *ḥadīth* was free of these peculiarities, and was, as a *textual entity*, more amenable to use in new environments. Medina, Mecca, Kūfa, Baṣra and Damascus ceased to be the only major centers of the Muslim empire, and came to be rivaled, after the first century of Islam came to a close, by major new centers, such as those in Khurāsān, Transoxania, Egypt and North Africa, not to mention Baghdad.

The *ḥadīth* thus emerged as a dominant, even paradigmatic, genre that defined the Prophetic exemplary conduct for all places and times. More specifically, it provided cities and towns all over the Muslim lands with a textual source that did not need to be culled from the living juridical experiences of a particular community. Even the latter were finally to succumb to this genre, acknowledging that their doctrines could not continue to withstand the mounting pressure from the *ḥadīth*. Their positive legal doctrine may not have undergone significant change due to the influx of *ḥadīth*, but it needed to be anchored afresh in the rock of this imposing material.

Among the rationalists, the jurist who seems to have initiated this process of re-grounding was Muḥammad b. Shujāʿ al-Thaljī (d. 267/880), an Iraqian jurist whose training and scholarly interests reflected the new reality in which not only *ḥadīth* had to be reckoned with but where acceptance within mainstream Islam meant espousing a middle-of-the-road stance between traditionalism and rationalism. Thaljī was a master of both *raʾy*

and *ḥadīth* and he is identified in the biographical sources clearly as such. Although he was more inclined to rationalism than to traditionalism (sufficiently so to anger the radical traditionalists), he seems to have understood that espousing one or the other might be harmful to the cause of his school, in this case the Iraqian Ḥanafites. If there is any contribution for which he is remembered in the sources, it was his grounding of Ḥanafite positive law in Prophetic *ḥadīth* and his recasting of legal reasoning according to this new genre.[3]

On the other hand, the radical traditionalists had to moderate their ways of thinking at the peril of extinction. They, too, had to meet rationalism halfway. Ibn Ḥanbal's jurisprudence – restrictive and rigid – was soon abandoned by his immediate and later followers. The later Ḥanbalite school adopted not only *qiyās*, abhorrent to Ibn Ḥanbal, but also, in the long run, *istiḥsān*, originally a Ḥanafite principle that Shāfiʿī had severely attacked as amounting to "human legislation."[4] In other words, for the Ḥanbalite school to survive, it had to move from conservative traditionalism to a mainstream position, one that accepted a synthesis between traditionalism and rationalism. The Ẓāhirite school, by contrast, which remained steadfast in its literalist/traditionalist stand and adamantly refused to join this synthesis, was left behind and before long expired.

The end of the third/ninth century thus marked the beginning of the final compromise between rationalism and traditionalism (which is not to say that a minority of scholars of either camp abandoned their strong leanings toward one position or the other). The majority had come to embrace the synthesis, and it is with this development that *uṣūl al-fiqh* (legal theory) was at last defined. Expressed differently, though somewhat tautologically, legal theory emerged as a result of this synthesis, which itself embodied, and was reflected by, this theory.

One of the first groups to begin propounding legal theory in its organic and comprehensive form was a circle of Baghdadian Shāfiʿites, headed by the distinguished jurist Ibn Surayj (d. 306/918). He and his disciples were tradition(al)ists, jurists and speculative theologians, a combination that was uncommon in the preceding periods, but that had now become largely normative. This group was to conceptualize legal theory as a synthesis between rationality and the textual tradition, that is, between reason and

[3] Ibn al-Nadīm, *al-Fihrist* (Beirut: Dār al-Maʿrifa lil-Ṭibāʿa wal-Nashr, 1398/1978), 291; ʿAbd al-Ḥayy al-Laknawī, *al-Fawāʾid al-Bahiyya fī Tarājim al-Ḥanafiyya* (Benares: Maktabat Nadwat al-Maʿārif, 1967), 171–72.

[4] On *istiḥsān*, see section 2 below.

revelation. Thus, Ibn Surayj must be credited with paving the way for his students, who would discourse on this synthesis and elaborate it in greater detail. This explains why the earliest Shāfiʿite authors to write works on *uṣūl al-fiqh* were his students, such as Abū Bakr al-Fārisī (fl. ca. 350/960), Ibn al-Qāṣṣ (d. 336/947), Abū Bakr al-Ṣayrafī (d. 330/942) and al-Qaffāl al-Shāshī (d. 336/947). However, it must be emphasized that the legal theory produced by this circle of scholars was not the product of an ongoing process of elaboration based on an established tradition, as later theory came to be. Instead, it was largely the product of the specific historical process that had begun a century or more earlier, and that had culminated under the influence of the Synthesis formed at the close of the third/ninth century and the first half of the fourth/tenth. Their theory can thus be characterized as the child of its environment, and it owed little more to Shāfiʿī than nominal affiliation.

In the next chapter, we will show how the authority of Shāfiʿī as founder of the Shāfiʿite school (as well as that of others) was both constructed and augmented, but for now we must be content to assert that the achievements of Ibn Surayj, of his generation and of the generation to follow were projected back onto Shāfiʿī as the first synthesizer – namely, as the architect of the all-important *uṣūl al-fiqh*. The fact is that Shāfiʿī had very little to do with the elaboration of *uṣūl al-fiqh*, although he happened to advocate the Synthesis in a rudimentary form. But his theory was not accepted by the community of jurists, and his followers, until Ibn Surayj's time, remained few. It is likely, however, that it was his own modest thesis that made it convenient for Ibn Surayj and his students to impute the achievement of *uṣūl al-fiqh* to him.[5]

By the middle of the fourth/tenth century, therefore, an elaborate and comprehensive theory of *uṣūl* had emerged. The next century and a half witnessed a phase in the history of this theory that produced the standard works on which later expositions heavily depended, but the essential developments had already occurred by 350/960 or thereabouts. We shall now attempt to sketch the outlines of this theory as they stood by that time.

2. LEGAL THEORY ARTICULATED

Along with legal development, Islamic civilization saw a major advance in the theological sciences. The synthesis that law accomplished was likewise

[5] For a detailed discussion of these issues, see Hallaq, "Was al-Shafiʿi the Master Architect?"

matched by a theological synthesis, represented in part by the Ash'arite and Māturidite schools (both standing somewhere between the rationalist Mu'tazilites and the early Ḥanbalites and other traditionalists). *Uṣūl al-fiqh*, by its very nature theoretical, was not impervious to theological influences. During the fourth/tenth century, law was already seen as an integral part of a universal scheme. Theology established the existence, unity and attributes of God, as well as the "proof" of prophecies, revelation and all the fundaments of religion. Law presupposed these theological conclusions and went on to build on them. The Quran was shown by theology to be the Word of God, and the Prophetic Sunna was established as a religious foundation by virtue of the demonstrative proofs of Muḥammad's Prophecy. These two sources were therefore shown to be demonstratively true by means of theological argument – a process with which legal theory had no direct concern. Thus established, the two primary sources were taken for granted, and constituted in principle the final authority on all matters legal.

Consensus, on the other hand, was a purely juristic tool, requiring, from within the law, conclusive authorization as the third legal source. Since the Quran and the Sunna logically constituted the only demonstrative, certain sources, it was from these two veins that arguments for the authority of consensus were to be mined. As it turned out, and after several initial attempts to support consensus with Quranic provisions, the jurists realized that the Quran did not possess the arguments necessary to accomplish the task. It was finally through Prophetic *ḥadīth*, which supplied the premise that the Islamic community as a whole could never err, that consensus found its textual support as a certain source of law.[6] Similar was the case of *qiyās*, the fourth formal source of the law. While the Quran proved somewhat more useful here, it was again the Sunna and the practices of the Companions (perhaps as an extension of Prophetic authority) that permitted the jurists to formulate an authoritative basis for this source.

Clearly, certainty was a juristic desideratum, at least insofar as the legal sources (rather than the individual opinions of positive law) were concerned. Islamic law, it must be stressed, rests squarely on the distinction between probability and certainty. Knowledge of God must be certain for one to be a true Muslim; in other words, one cannot claim membership in the Islamic faith if one is not sure that, for example, God exists or whether or not He created the world or sent Muḥammad as His Messenger. Nor

[6] For a detailed discussion of juristic developments on this issue, see Hallaq, "On the Authoritativeness of Sunni Consensus."

can one claim such membership if one entertains doubts about the Quran as the Word of God, or the Sunna of Muḥammad as that of a true prophet. By the same token, there is no place for doubt about consensus or *qiyās*, whose certainty must be accepted without any qualification. Doubts raised about any of these sources would mean that the entire edifice of the law, the foundation of the community, is subject to uncertainty; and any such doubt would therefore give rise to the possibility that there is a disjunction between God and His creation, and that His followers constitute a community of pretenders.

Yet, while the sources themselves, as sources, had to be known with certainty, the particular legal conclusions or opinions drawn from them did not need to be more than probable, i.e., more likely true than not. Outside the four sources, therefore, probability dominated. As a set of rules applied to society, positive law was mostly an exercise in probability, since a jurist could only conjecture what the law might be in a particular case. For God did not reveal a law but only texts containing what the jurists characterize as indications (or indicants: *dalīl*s). These indications guide the jurist and allow him to *infer* what he thinks to be a particular rule for a particular case at hand. And since each qualified jurist (*mujtahid*) employs his own tools of interpretation in undertaking the search for God's law, his conclusions might differ from those of another. One jurist's inference is therefore as good as that of another, hence the cardinal maxim: "All qualified jurists are correct." All jurists are assumed to be "doing the right thing" in exerting their juristic effort (*ijtihād*) in reaching a rule or an opinion. This individual *ijtihād* explains the plurality of opinion in Islamic law, known as *khilāf* or *ikhtilāf*. Each case may elicit two, three, sometimes up to eight or more opinions, all of which remain "opinions" that are equally valid, although one of them must be viewed as superior to the others (considered weak) and is thus chosen by a jurist or his school to be the authoritative opinion to be applied in law courts and issued in *fatwā*s. The "weak" opinions, on the other hand, are subject to verification or revision, although for other jurists or schools these very opinions are deemed to possess the highest authority. In theory and logic, however, a given problem can have only one correct solution, irrespective of whether or not the community of jurists knows which one it is. Obviously, in all cases outside the purview of consensus, the jurists cannot decide which is the correct solution, for the matter remains inherently subjective. Hence the other cardinal maxim: "The *mujtahid* whose opinion is correct is rewarded twice [i.e., both for exercising his effort and for getting it right], while the *mujtahid* whose opinion is incorrect is rewarded only once [for his effort]."

As accurately reflected in legal theory, Islamic law is thus a hermeneutical system of the first order. Using the tools of interpretation prescribed in legal theory, the jurist goes about finding solutions for hitherto unsolved problems, i.e., the acknowledged purpose of *uṣūl al-fiqh* (although reevaluation and reinterpretation of existing solutions was also a discrete part of this theory's function).[7] The purpose of the jurist is thus to work out the legal indications (*dalīl*s) in the sources in order to arrive at a normative rule which was seen to fall into one of five categories: the obligatory (*wājib*), the recommended (*mandūb*), the permissible or indifferent (*mubāḥ*), the repugnant (*makrūh*), and the prohibited (*ḥarām*). The obligatory represents an act whose performance entails reward, and whose omission requires punishment. The recommended represents an act whose performance entails a reward but whose omission does not require punishment. The permissible or indifferent, as the name suggests, requires neither reward nor punishment for commission or omission, respectively. This category was intended to deal with situations in which textual indications are either silent on an issue or lacking in clear provisions as to the status of the case. The principle underlying the indifferent is that whenever the texts fail to provide clear indications as to the commission or omission of an act, the Muslim has a free choice between the two. An act falling into the fourth category, the repugnant, is rewarded when omitted, but is not punished when committed. Finally, the prohibited obviously entails punishment upon commission.

All human acts must thus fall into one or another of these categories, although juristic opinions would differ as to the value of a particular act. One jurist may reach the opinion that a certain act is prohibited, while another may declare it merely repugnant. However, it was relatively rare that opinions differed dramatically, where one jurist would deem a certain act prohibited while another jurist would declare it permissible.

The classifiability of human acts into the five norms did not cover another group of legal acts pertaining to validity, invalidity or nullity. For example, a contract – say of lease – concluded in a lawful transaction is not, in terms of validity, subject to the taxonomy of the five norms. Although itself classifiable in terms of the five norms (in this case permissible), a lease's effects cannot be deemed either valid or invalid. As long as a contract of this type is valid, it is binding and produces full legal effects, such as delivery of the leased object and the payment of the fee. But when

[7] Further on this, see section 3 below.

invalid, it ceases to be binding. Being invalid, however, does not necessarily mean that it is entirely null and void, i.e., productive of no effect whatsoever, a category known as *bāṭil*.

But how does the jurist arrive at a legal norm or a ruling regarding a specific act? In other words, what are the materials and interpretive tools at his disposal that permit him to derive one rule or opinion but not another? To answer these questions, we begin with a brief account of legal language and the hermeneutical principles that govern its use.

Legal language

In attempting to find a solution to a hitherto unresolved legal problem, the jurist begins with texts that constitute his ultimate frame of reference. His analysis of these texts comprises, first, the identification of passages applicable to the case at hand and, second, the determination of the semantic force and implication of these passages as they bear on that case. This latter constitutes part of *qiyās*, which we shall take up later. The former, however, involves a linguistic interpretation in preparation for *qiyās*, with a view to determining whether words within the relevant text are univocal, ambiguous, general, particular or metaphorical. In other words, before any inference is made, the text must be established as relevant and fit for such an inference.

Despite its problematic nature, language often does contain univocal, clear expressions that engender certitude in the mind. For instance, when we hear the word "four" we understand, without a shade of doubt, that it is not five, three or seven. To know what "four" means, we need not resort to any principles of interpretation, nor to other explicative language. The language is self-evident. The clarity and certitude it generates makes it the most evincive, a category labeled as *naṣṣ*.

But most expressions are not so clear, even when they appear to be so. One such linguistic type is metaphorical terms. It is the general assumption of jurists that words are originally coined for a real meaning, e.g., "lion" signifies a member of the species of big cats. A word is used in a metaphorical sense when applied by extension to something that is not the original referent; thus, the expression "lion" may be applied in the Arabic language to a man who is courageous. Legal examples of this use of language include words such as "today" or "tomorrow," which may be used metaphorically when promising to perform a duty at a certain time. In their real usage, the expressions "today" or "tomorrow" can include late night hours, but they normally mean – in business transactions, for instance – daytime hours.

The challenge for the jurist here is to determine whether a particular word in legal language is used as a metaphor or in its real sense.[8]

Metaphorical or otherwise, words may also be clear or ambiguous. When ambiguous, they can brook different interpretations, due to the fact that the referent of such words includes several attributes or different genera. One such ambiguity is found in homonymous nouns, which refer to more than one object, such as the word "spring," which may refer to the season of the year, an artesian well or a coil of wire. Yet, a word may not be a homonym and still retain ambiguity. For example, Quran 17:33 reads: "And he who kills wrongfully, we have given power to his heir." The term "power" here is markedly ambiguous, since it may include pardoning, the right to retaliate or entitlement to monetary compensation. If the ambiguity can be solved by seeking the help of another text, then the ambiguity is resolved in favor of one meaning or another. If not, the rule would by necessity encompass all possible meanings, as in the case of Quran 17:33. In the absence of further clarification, the heirs in the case of homicide are in fact given the full range of the term "power," granting them the free option of choosing which of the three "rights" they should exercise.

General terms are also problematic in the sense that they refer to two or more individuals, as in the case of plural nouns and general statements that include more than one genus. When confronted with such language, the jurist is faced with the task of particularization, namely, determining which genus or genera is meant by the general statement. A classic example of particularization occurs in Quran 5:3, where it is stated: "Forbidden unto you [for food] is carrion." This was particularized by a Prophetic *ḥadīth* allowing the consumption of dead fish. That the Quran can be particularized by a *ḥadīth*, as this example illustrates, is obvious; so can a *ḥadīth* be particularized by the Quran, epistemologically a more secure source of law.

Imperative and prohibitive forms

As a system of obligations, law depends heavily on prescriptive textual expressions of the type "Do" or "Do not do," known, respectively, as imperatives and prohibitives. Such expressions were not devoid of interpretive problems either, as their effects were often ambiguous. For example, when someone commands another, telling him "Do this," should this command be construed as falling only within the legal value of the

[8] Abū ʿAlī al-Shāshī, *Uṣūl* (Beirut: Dār al-Kitāb al-ʿArabī, 1402/1982), 42–50.

obligatory norm, or could it also be within that of the recommended and/or the indifferent? The position of the majority of legal theorists seems to have been that imperatives, as a rule, are assumed to engender obligation, unless shown otherwise by circumstantial or contextual evidence. Furthermore, an imperative form that is non-specific does not require performance at a particular time, as long as what is commanded is performed within the widest definition of the allotted time.

Some theorists viewed prohibitives as encompassing commands not to do either of two types of acts: sensory and legal acts. An example of the former is "Do not drink wine," and of the latter, "Do not sell one gold coin for two gold coins" (since this would involve prohibited usury). The former acts are prohibited because they are inherently evil, whereas the latter are prohibited for a reason external to themselves. Drinking wine or fornication are inherently evil acts, but selling gold is not, since it is prohibited only when it is transacted in a particular situation resulting in unlawful consequences.[9]

Transmission of revealed texts

The jurist's interpretation of legal language would be meaningless without knowledge that this language has been transmitted with a certain degree of credibility. A text that has been transmitted via a dubious or defective chain of transmitters, or transmitters who are known to be untrustworthy, was held to lack any legal effect even though its language may be clear and unequivocal. Thus all texts must pass the test of both linguistic analysis and transmission before they are employed as the raw material of legal reasoning.

The general principle with regard to the duality of interpretation/transmission is that probable conclusions of legal reasoning are the result of lack of certainty in either the denotation of a term or the transmission of the text encompassing that term. A particular language may thus be univocal (*naṣṣ*) in meaning, but transmitted by a chain of transmission that is merely probable, rendering its overall legal effects probable. The same is true of a text transmitted by a multiplicity of channels that render the text certain in terms of knowledge that it originated with the Prophet, but deemed only probable if its language is equivocal or ambiguous, since the certainty gained in transmission is lost through its lack of clarity.

[9] Ibid., 165 ff.

The Quran is deemed to be wholly certain in terms of transmission, since it has been consistently transmitted by multitudes of Muslims who could not conceivably have conspired in either forging or distorting it. Thus, for a text to be deemed credible beyond a shadow of doubt (i.e., to have certainty), it must meet this requirement of multiple transmission, or recurrence, known as *tawātur*. Any text transmitted through channels fewer than *tawātur* is termed *āḥād* (lit., solitary), although the actual number of channels can be two, three or even more. The Quranic *tawātur*, however, cannot guarantee that all its language is certain, since the meanings of many of its provisions were acknowledged to be ambiguous or lacking in decisive clarity.

Unlike the Quranic text, Prophetic material generally did not possess the advantage of *tawātur*.[10] As we saw earlier, there were far more fabricated, and thus weak, *ḥadīth*s than there were sound ones. But even these latter did not always engender certainty, since most were of the solitary kind and therefore yielded only probable knowledge.

In order for a report to yield probable knowledge, i.e., to be deemed fit to be applied in practice, all its transmitters, from beginning to end, must be reliable and trustworthy, and each must have met the next link in person, so as to make it credible that transmission did occur. Throughout the third/ninth century, and probably the fourth/tenth, the jurists held that interrupted *ḥadīth*s are nonetheless sound, "interrupted" meaning that one or more transmitters in the chain are unknown. But this was predicated on the assumption that the transmitter with whom the report resumes after the interruption had the reputation of transmitting only those *ḥadīth*s that are sound. This assumption rests on another, namely, that such a person would not have transmitted the *ḥadīth* had he known it to be inauthentic or fabricated. The later jurists, however, seem to have rejected such *ḥadīth*s, classifying them as unsound or defective.

It is thus clear that the trustworthiness of individual transmitters played an important role in the authentication of *ḥadīth*s. The attribute that was most valued, and in fact deemed indispensable and determinative, was that of being just (*ʿadl*), namely, being morally and religiously righteous. A just character also implied the attribute of being truthful (*ṣādiq*; n. *ṣidq*), which made one incapable of lying. This requirement was intended to preclude either outright tampering with the wording of the transmitted text, or interpolating it with fabricated material. It also implied that the

[10] See Wael Hallaq, "The Authenticity of Prophetic Ḥadīth: A Pseudo-Problem," *Studia Islamica*, 89 (1999): 75–90.

transmitter could not lie as to his sources by fabricating a chain of transmitters or claiming that he had heard the *ḥadīth* from an authority when in fact he did not. He had also to be fully cognizant of the material he related, so as to transmit it with precision. Finally, he must not have been involved in dubious or sectarian religious movements, for should he have been so involved, he would have been liable to produce heretical material for the sake of the movement to which he belonged. This last requirement clearly suggests that the transmitter must be seen to be loyal to Sunnism, to the exclusion of any other community. (This latter requirement suggests that many – though not all – of the fabricated *ḥadīth*s originated with sectarian scholars, as modern scholarship has demonstrably shown.)

Transmitters are also judged by their ability to transmit *ḥadīth*s verbatim, for thematic transmission may run the risk of changes in the wording, and thus the original intent, of a particular *ḥadīth*. Furthermore, it was deemed preferable that the *ḥadīth* be transmitted in full, although transmitting one part that is not thematically connected with the rest was acceptable.

In attempting to arrive at a solution to a particular case, the jurist may encounter more than one *ḥadīth* relevant to that case. The problem that arises is when these *ḥadīth*s are contradictory or inconsistent with one another. If he cannot reconcile them, the jurist must seek to make one *ḥadīth* preponderant over another by establishing that a particular *ḥadīth* possesses attributes superior to, or lacking in, another. The criteria of preponderance are relative to the mode of transmission as well as to the subject matter of the *ḥadīth* in question. For example, a *ḥadīth* transmitted by mature persons known for their prodigious ability to retain information is superior to another transmitted by young narrators who may not be particularly known for their memory or precision in reporting. Similarly, a *ḥadīth* whose first transmitter was close to the Prophet and knew him intimately is superior to another whose first transmitter was not on close terms with the Prophet. The subject matter also determines the comparative strength or weakness of a *ḥadīth*. For instance, a *ḥadīth* that finds thematic corroboration in the Quran would be deemed preponderant over another that finds no such support. But when preponderance proves to be impossible, the jurist resorts to the procedure of abrogation, whereby one of the *ḥadīth*s is made to repeal, and thus cancel out the effects of, another.

Abrogation

Abrogation was unanimously held as an authoritative method of dealing with contradictory texts. Just as Islam as a whole came to abrogate earlier

religions without denying their legitimacy, abrogation among and between revealed Islamic texts was also admitted and in fact practiced, without this entailing the diminution of the status of the repealed texts as divine scripture. This method was specifically approved in Quran 2:106: "Such of Our Revelation as We abrogate or cause to be forgotten, We bring [in place of it] one better or the like thereof."

It is important to stress that the Muslim jurists espoused the idea that it is not the texts themselves that are actually abrogated, but rather the legal rulings embedded in these texts. For to admit that God revealed contradictory and even conflicting statements would mean that one of the statements is false and that God, therefore, revealed an untruth.

The basic principle of abrogation is that a text repeals another contradictory text that was revealed prior to it in time. But abrogation may be propelled by a decidedly clearer consideration, especially when the text itself is made to supersede another. An example in point is the Prophet's statement: "I had permitted for you the use of the carrion leather, but upon receipt of this writing [epistle], you are not to utilize it in any manner." Yet another consideration is the consensus of the community as represented by its scholars. If one ruling is adopted in preference to another, then the latter is deemed abrogated, since the community cannot agree on an error. However, in the post-formative period, a number of jurists tended to object to this principle, arguing that a consensus that lacks textual support does not possess the power to abrogate. Consensus, they asserted, must rest on revealed texts, and if these texts contain no evidence of abrogation, then consensus cannot decide the matter. Consensus, in other words, cannot go beyond the evidence of the texts, for it is only the texts that determine whether or not one ruling can abrogate another. If a ruling subject to consensus happened to abrogate another conflicting ruling, then the assumption is that abrogation would be due to evidence existing in the texts, not to consensus.

The epistemological strength of texts also plays a central role in abrogation. A text deemed presumptive or probable cannot repeal another having the quality of certitude. On the other hand, texts that are considered of equal epistemological value may abrogate one another. This principle derives from Quran 2:106 which speaks of abrogating verses and replacing them by similar or "better" ones. Hence, Quranic verses, like recurrent *ḥadīth*s, can repeal each other. The same is true of solitary *ḥadīth*s. Furthermore, by the same principle, the Quran and recurrent *ḥadīth*s may abrogate solitary *ḥadīth*s, but not vice versa.

That the Quran can abrogate *ḥadīth* is evident, considering its distinguished religious and epistemological stature. And it is perfectly

understandable, on the basis of the epistemological principles just outlined, why solitary *ḥadīth* cannot abrogate Quranic verses (although a minority of jurists permitted this type of abrogation). However, the question that remained controversial was whether or not recurrent *ḥadīth* can abrogate Quranic verses. Those who denied this power to the *ḥadīth* argued their case on the basis of Quran 2:106, in effect claiming that *ḥadīth* can never acquire a status equal to the Quran. Its proponents, on the other hand, couched their arguments in epistemological terms, maintaining that both recurrent *ḥadīth* and Quranic materials enjoy the status of *mutawātir*, and since this rank yields certainty, they are both equal in status, and thus can repeal one another. (It must be said, however, that in practice there are a few cases where both solitary and recurrent *ḥadīth* have abrogated Quranic verses.[11])

Consensus

In its mature form, consensus was defined as the agreement of the community as represented by its *mujtahid*s living in a particular age or generation, an agreement that bestows on those rulings or opinions subject to it a conclusive, certain knowledge. But this nearly universal understanding of consensus was not to be reached until the end of the fourth/tenth century, if not later.

In the previous chapter, we saw that by the end of the second-/eighth-century practice-based *sunna* was intertwined with the local consensus of scholars. This consensus, in turn, frequently was based on the idea that unanimous legal practice issued, and continued with regularity, from the conduct and ways of the Companions.

The traces of this sort of consensus may be found in the legal theory of the early fourth/tenth century, which represents a middle point between the untheorized second-/eighth-century practice and the fully mature and developed theory of the post-formative period. For the Ḥanafite Shāshī (d. ca. 344/955), consensus constitutes an authority for practice, meaning that an opinion subject to it permits an individual to adhere to it in religious works, such as prayer, sale transactions, marriage and the like. But it cannot constitute a basis for theological belief, such as the existence of God and the

[11] For a detailed discussion of recurrent and solitary traditions, see Bernard Weiss, "Knowledge of the Past: The Theory of *Tawātur* According to Ghazālī," *Studia Islamica*, 61 (1985): 81–105; Wael Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought," in N. Heer, ed., *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990), 3–31.

validity of Muḥammad's Prophethood, both of which must be demonstrated by rational argument.

In Shāshī's theory, consensus consists of four types that epistemologically and chronologically represent a descending order. The first is the Companions' consensus, which in turn consists of two sub-types: (1) their unanimous consensus on a rule clearly stipulated in the revealed sources; and (2) the consensus of some of them, and the silence of, and absence of objection by, the rest. (These two sub-types, it must be said, seem to justify and rationalize a good part of Ḥanafite law that was originally based on the Iraqian practice-based and Companion-inspired *sunna*.) The second is the consensus of the next generation either on an opinion that was reached by the Companions or on one reached by that generation itself. Here, the former type yields certitude equivalent to that generated in a ruling stipulated by a clear Quranic text, whereas this second type of consensus – which does not involve the Companions – also yields certitude even though it was reached by some scholars and tacitly approved by the rest (i.e., no objections to it are known to have been voiced). Its certitude, according to Shāshī, amounts to knowledge generated by *tawātur*, namely, the recurrent narration of *ḥadīth*. The third type is the consensus of the third generation of scholars, which yields knowledge equivalent to that generated through the transmission of *ḥadīth* in the so-called widespread (*mashhūr*) form, a distinctly Ḥanafite category of transmission that stands between the solitary and the recurrent modes. Finally, the fourth type of consensus is that of subsequent generations on an opinion reached by (but remaining subject to the disagreement of) earlier generations of scholars. This type yields a probable degree of knowledge, amounting to that generated by the sound solitary reports.[12]

Shāshī's theory of consensus hardly reflects a mature stage in the development of the doctrine in *uṣūl al-fiqh*, in terms of either substance or coverage. Later theory, in other words, differed substantively from Shāshī's discourse and was far more comprehensive, encompassing countless other issues. Although some traces of Shāshī's Ḥanafite understanding is to be found in the writings of a minority of much later theorists, the common doctrine as it stood by the early fifth/eleventh century – and probably somewhat earlier – was different, at least epistemologically. The later theory granted the instrument of consensus the authority of certitude, no matter how or by whom consensus is reached.

[12] Shāshī, *Uṣūl*, 287–91.

But the Ḥanafites were not the only jurists to attempt to rationalize their own, perhaps unique, experience of the Iraqian past. Mālikite legal theory too invoked the history of the school in Medina, attempting to rationalize that experience by fitting it within that school's development during later centuries. The Mālikite jurists insisted that the consensus of the scholars of Medina, the hometown of Mālik, constituted a binding authority, an insistence that gave rise to a discussion of whether or not any region of Islamdom could independently form a consensus. Against the Mālikites, theorists of other schools argued that the Quran and, particularly, the Sunna attest to the infallibility of the entire community, and that there is nothing in these texts to suggest that any segment of the community can alone be infallible. Furthermore, they maintained that the recognition of the consensus of a particular geographical area would lead to a paradox, since the opinion of a *mujtahid* who partook, say, in a Medinese consensus would be authoritative in Medina but not so once he left the city. The Mālikite claims, these jurists argued, give rise to another objectionable conclusion, namely, that a particular geographical locale possesses an inherent capacity to bestow validity and authority upon the products of *ijtihād*, the cornerstone of consensus. This claim not only makes no sense rationally, but also cannot be justified by the revealed texts: consensus is either that of the entire community (as represented by all its *mujtahid*s who live in a particular generation) or it is not a consensus at all.[13]

Qiyās

Before embarking on inferential reasoning, the jurist must establish the meaning and relevance of the text employed and ascertain its validity insofar as it was not abrogated. Knowledge of cases subject to consensus was required in order to ensure that his reasoning did not lead him to results different from, or contrary to, the established agreement in his school or among the larger community of jurists. The importance of this requirement stems from the fact that consensus bestows certainty upon the cases subject to it, raising them to the level of the unequivocal texts in the Quran and the recurrent *ḥadīth*; thus, reopening such settled cases to new solutions would amount to questioning certainty, including conclusive texts in the Quran and recurrent *ḥadīth*. Inferential reasoning is therefore legitimate only in two instances, namely, when the case in

[13] On this theoretical discussion, see Hallaq, *History*, 80.

question had not been subject to consensus (having remained within the genre of juristic disagreement – *khilāf*) or when it was entirely new. Shāshī defines *qiyās* as "a legal rule resulting – with regard to a case unstipulated in the revealed texts – from a meaning that constitutes the *ratio* for a legal rule stipulated in the texts."[14]

Now, the most common and important form of reasoning that is generally subsumed under the term *qiyās* is analogy. As the archetype of all legal argument, *qiyās* was seen to consist of four elements: (1) the new case that requires a legal solution; (2) the original case that may be found either stated in the revealed texts or sanctioned by consensus; (3) the *ratio legis*, or the attribute common to both the new and original cases; and (4) the legal norm that is found in the original case and that, due to the similarity between the two cases, must be transposed to the new case. The archetypal example of legal analogy is the case of wine. If the jurist is faced with a case involving date-wine, requiring him to decide its status, he looks at the revealed texts only to find that grape-wine was explicitly prohibited by the Quran. The common denominator, the *ratio legis*, is the attribute of intoxication, in this case found in both drinks. The jurist concludes that, like grape-wine, date-wine is prohibited due to its inebriating quality.

Of the four components of *qiyās*, the *ratio legis* (*ʿilla*) occasioned both controversy and extensive analysis, since the claim for similarity between two things is the cornerstone and determinant of inference. Great caution, therefore, was to be exercised in determining the *ratio*.

Locating and identifying the *ratio legis* is not always an easy task, for although it may be stated explicitly, more often it is either merely intimated or must be inferred from the texts. 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 reportedly remarked that such a barter is unlawful. The *ratio* in this *ḥadīth* was deemed explicit since prohibition was readily understood to be predicated upon the dried dates losing weight, and a transaction involving unequal amounts or weights of the same object would constitute usury, clearly prohibited in Islamic law.

On the other hand, the *ratio* may be merely intimated. In one *ḥadīth*, the Prophet said: "He who cultivates a barren land acquires ownership of it." Similarly, in 5:6, the Quran declares: "If you rise up for prayer, then you

[14] Shāshī, *Uṣūl*, 325.

must wash." In these examples, the *ratio* is suggested in the semantic structure of this language, reducible to the conditional sentence "If . . . , then . . . ." The consequent phrase "then . . . " indicates that the *ratio* behind washing is prayer, just as the ownership of barren land is confirmed by cultivating it. It is important to realize here that prayer requires washing, not that washing is consistently occasioned by prayer alone. For one can wash oneself without performing prayer, but not the other way round. The same is true of land ownership. A person can possess a barren land without cultivating it, but the cultivation of – and subsequent entitlement to – it, is the point.

The sequence of events in Prophetic narrative may also help in unraveling the *ratio* of a rule. If it is reasonably clear that the Prophet behaved in a certain manner upon the occurrence, for example, of an event, then it is assumed that the *ratio* of his action is that particular event. Similarly, any act precipitating a ruling by the Prophet is considered the *ratio* behind that ruling.

The *ratio legis* may also be known by consensus. For example, it is the universal agreement of the jurists that the father enjoys a free hand in managing and controlling the property of his minor children. Here, minority is the *ratio* for this unrestricted form of conduct, whereas property is the new case. Thus, the *ratio* may be transposed to yet another new case, such as the free physical control of the father over his children.[15]

Whether explicitly stated or inferred, the *ratio* may either bear upon a class of cases belonging to the same genus, or it may be restricted in its application to individual cases. In other words, the *ratio* may not be concomitant with the entire genus, but only some cases subsumed under that genus. In homicide, for example, capital punishment is meted out when the elements of both intentionality and religious equality (i.e., that the murderer and victim, for instance, are both Muslim or both Christian) are present. But it must not be assumed that capital punishment is applicable only where homicide is involved. For example, adultery committed by a married person as well as apostasy also elicit this punishment.

To be sure, analogy is not the only method of inference subsumed under *qiyās*. Another important argument is that of the *a fortiori*. For instance, Quran 5:3 states: "Forbidden unto you are carrion, blood, flesh of the pig." The jurists took "flesh of the pig" to include all types of pork, including that of wild boars, although the original reference was to domestic pigs.

[15] Ibid., 333.

Furthermore, it was argued that "the flesh of wild boars is forbidden" is a proposition that needs no inference since it is clearly understood from the very language of the Quran.

The *a fortiori* also includes other varieties of argument, namely, the *a minore ad maius* and the *a maiore ad minus*, thought to be the most compelling forms of *qiyās*. An example of the former type may be found in Quran 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 was 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 simply an atom's weight. An example of the latter type, the *a maiore ad minus*, is the Quranic permission to kill non-Muslims who engage in war against Muslims. From this permission, it was understood that acts short of killing, such as confiscation of the unbeliever's property, are also lawful.

A third argument subsumed under *qiyās* is that of the *reductio ad absurdum*. This argument represents a line of reasoning in which the converse of a given rule is applied to another case on the grounds that the *ratio legis* of the two cases are contradictory. The cornerstone of this argument is the determination of a rule by demonstrating the falsehood or invalidity of its converse. In other words, if a rule standing in diametrical opposition to another is proven invalid or unwarranted, then the latter emerges as the only sound or valid rule. Of the same type is the argument that proceeds from the assumption that the nonexistence of a *ratio* leads to the absence of the rule that must otherwise arise from that *ratio*. For example, in the case of a usurped animal, the usurper – according to the Ḥanafites – is not liable for damages with regard to the offspring of the animal since the offspring, unlike its mother, was not usurped.[16]

From a different perspective, *qiyās* may be typified not according to the logical structure of its arguments but rather according to the strength of the *ratio legis*. From this perspective, *qiyās* is classified into two major types of inference, the causative and indicative. In the former, the *ratio* and the rationale behind it are readily identifiable, but in the latter, the rationale is merely inferred or not known at all. Wine is pronounced prohibited because of its intoxicating quality, and the rationale behind the prohibition is that intoxication leads to repugnant behavior, including carelessness and neglect in performing religious duties. Here the rationale is known. In

[16] Ibid., 388.

indicative inferences, however, the rationale is known merely by conjecture, such as positing that the *ratio* behind the prohibition of usury is edibility (according to the Shāfiʿites) or measurability by weight (according to the Ḥanafites). But no revealed text clearly states that one or the other (or both) constitutes the rationale behind the prohibition. Nonetheless, the difference between the two types is often one of form, not substance. God could have said: "Pray, because the sun has set," or he could have said "When the sun sets, pray." The former injunction gives rise to a causative inference, whereas the latter merely allows for an indicative one. The relationship between prayer and sunset is not, at any rate, causal but rather a matter of concomitance.

Istiḥsān

In the preceding chapter, we saw that second-/eighth-century Iraqian reasoning was not always based directly on the revealed texts, a fact that prompted Shāfiʿī to launch a scathing criticism of what he labeled "human legislation." A substantial part of this reasoning – which originally fell under the rubric of *raʾy* – became known as *istiḥsān*.

With the traditionalization of the Ḥanafite school, a process whose beginnings seem to have been associated with the contributions of Muḥammad b. Shujāʿ al-Thaljī, Ḥanafite theorists after the third/ninth century took steps to dissociate themselves from the reputation of being arbitrary reasoners. Following the normative practice that had evolved as the unchallenged paradigm of juridical reasoning, they insisted that no argument of *istiḥsān* can rest on any grounds other than the texts of revelation. In fact, they never acknowledged that discretionary reasoning had ever existed in their methodology. The resulting technical modifications that were introduced into *istiḥsān*, however, rendered it acceptable to other schools, notably, the so-called conservative Ḥanbalites.

In legal theory, *istiḥsān* was little more than another form of *qiyās*, one that was deemed to be – in some cases – "preferred" to the standard form. Simply stated, *istiḥsān* is reasoning that presumably departs from a revealed text but that leads to a conclusion that differs from another that would have been inferred through *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 becomes void, since food has entered his body, whether intentionally or not. But *qiyās* in this case was abandoned in favor of a Prophetic *ḥadīth* which pronounced the fasting valid if eating was the result of a mistake.

Istiḥsān is not always grounded in revealed texts, however (and it was this fact that earned it Shāfiʿī's wrath). It can also be based either on consensus or the principle of necessity. For example, to be valid, any contract involving the exchange of services or commodities requires immediate payment. But some contracts of hire do not fulfill the condition of immediate payment, a fact that would render them void if *qiyās* were to be used. But the common practice of people over the ages has been to admit these contractual forms in their daily lives, and this is viewed as tantamount to consensus. This latter, as an instrument that engenders certainty, becomes tantamount to the revealed texts themselves, thereby bestowing on the reasoning involved here the same force as the Quran or the *ḥadīth* would bestow on it.

Likewise, necessity often requires the abandonment of conclusions by *qiyās* in favor of those generated by *istiḥsān*. Washing with ritually impure water would, by *qiyās*, invalidate prayer, but not so in *istiḥsān*. Here, *qiyās* would lead to hardship in view of the fact that fresh, clean water is not always easy to procure. The acceptance of necessity as a principle that legitimizes departure from strict reasoning is seen as deriving from, and sanctioned by, both the Quran and the Sunna, since necessity, when not met, can cause nothing but hardship. Thus, *istiḥsān* in the context of necessity is viewed as legitimized by the revealed texts, reflecting the reasoned distinction of textual evidence.

Maṣlaḥa

Like the Iraqian Ḥanafites of the second/eighth century, the Medinese, including their chief jurist Mālik b. Anas, resorted to reasoning that did not appear to be directly based on the revealed texts. This procedure became known as *istiṣlāḥ*/*maṣlaḥa*, loosely translated as "public interest." Later Mālikite theory even denied that their Medinese predecessors had ever reasoned without such a support. They argued that to proceed thus on the grounds of public interest must, at the end of the day, boil down either to a universal principle of the law or to a specific, revealed text. On the basis of a comprehensive study of the law, the jurists came to realize that there are five universal principles that underlie the law, namely, protection of life, mind, religion, private property and offspring. In one sense, therefore, the law has come down to protect and promote these five areas of human life, and nothing in this law can conceivably run counter to these principles or to any of their implications, however remotely. Thus, in a case appertaining to private ownership a choice may be made not to judge it according to

the letter of a particular revealed text, but instead to solve it by *istiṣlāḥ*, on the principle that private property is sacred in the law and must therefore be protected.

Ijtihād *and* Mujtahids

Of prime concern to legal theory is the idea that only qualified jurists can perform legal reasoning, especially when new cases arise. But what are the conditions that a jurist must fulfill to rise to the rank of *mujtahid*? Or, to put it differently, what legal qualifications are required to allow a jurist to perform *ijtihād*? It must first be stated that *ijtihād* is an epistemic attribute, revolving around the quality and quantity of knowledge that a jurist must have accumulated. First, he must have expert knowledge of about 500 Quranic verses that embody legal subject matter. Second, he must know all legal *ḥadīth* and must acquire proficiency in *ḥadīth* criticism, so as to be able to sort out credible and sound *ḥadīth*s from those that are not. But he may also rely on those canonical works that have already recorded the *ḥadīth*s that are considered sound. Third, he must be knowledgeable in the Arabic language so that he can understand the complexities involved, for example, in metaphorical usages, the general and the particular, and in equivocal and univocal speech. Fourth, he must possess a thorough knowledge of the theory of abrogation and of those verses that have been abrogated by others. Fifth, he must be deeply trained in the art of legal reasoning, in how *qiyās* is conducted and in the principles of causation (i.e., establishing the *ratio legis* and using it in inferences). Sixth, he must know all cases that have been sanctioned by consensus, as he is not permitted to reopen any of these cases and subject them to fresh legal reasoning. However, he is not required to know all cases of positive law, although this is recommended, especially those cases subject to disagreement. Nor is he required to be of just character, even though the absence of the quality of rectitude does have an effect on the authoritativeness of his opinions, for judges and laymen are perfectly permitted to ignore them.

Once a jurist rises to the rank of a *mujtahid*, he can no longer follow the *ijtihād* of others and must exercise his own reasoning and judgment. This requirement stems from the assumption that all *mujtahid*s in principle are correct in their legal reasoning, and that his opinion is as valid as that of any other. Yet another rule that follows from the principle of equality of *ijtihād* is that a *mujtahid* must never follow the opinion of another less learned than he is.

Taqlīd

Any jurist who is not a *mujtahid* is, by definition, a *muqallid*, someone who practices *taqlīd*. A *muqallid* is a jurist who follows the *mujtahid* and who cannot perform *ijtihād* by himself (although juristic discourse outside legal theory did recognize various levels of qualification ranging between the two, thus allowing for middle-range *mujtahid*s or *muqallid*s capable of partial *ijtihād*).[17]

In the terminology of legal theory, laymen are also *muqallid*s . It is their inability to reason independently on the basis of the revealed texts that consigns them to the status of jurist-*muqallid*s. The laymen's access to the law can be had only through referring to the opinion of the *mujtahid*, whose opinion is transmitted to them by the jurist-*muqallid* and which they must follow.

The jurisconsult

Theorists generally equate the *mujtahid* with the *muftī*, or jurisconsult, who issues expert legal opinions (*fatwā*s). Whatever scholarly credentials the *mujtahid* must possess, the *muftī* must possess too, but with a single difference: the latter must be pious and of just character and must take religion and law seriously. A person who meets all these requirement falls under the obligation to issue a legal opinion to anyone who solicits it from him. As a master of legal science, he is even under the obligation to teach law to anyone interested, this being considered as meritorious as the issuing of *fatwās*.

3. CONCLUDING REMARKS

A bird's-eye view of the development of legal thought throughout the first four centuries H shows significant change. *Ra'y* during the first century after the Prophet's death was increasingly challenged by traditionalism, represented in the proliferation and gradual acceptance of a notion of Prophetic Sunna expressed in the narrative of *ḥadīth*. Between the end of the second/eighth century and roughly the middle of the third/ninth, this traditionalism was to gain the upper hand, to be tempered in turn by the acceptance of a restrained form of rationalism. By the end of the latter

[17] See Hallaq, *Authority*, 1–23.

century, a synthesis was struck between rationalism and traditionalism, manifested in the legal theory (*uṣūl al-fiqh*) that was beginning to emerge. The major preoccupation of this theory with *qiyās* (to which subject, on average, more than one-third of the works was allotted) no doubt reflected its importance as a carefully crafted hermeneutical method charting the role of human reason as exclusively dependent on the revealed texts. But this dependence found expression in virtually every other part of this theory. Legal language, abrogation, consensus and the very method of *qiyās qua* method were, among others, anchored (in terms of authoritativeness) in the two textual sources of the law, the Quran and Sunna. Thus, the main characteristic of legal theory was that human reasoning must play a significant role in the law, but can in no way transcend the dictates of revelation. It was this particular marriage – nay, balance – between a well-defined scope of human reasoning and a carefully sorted out body of revealed texts that marked the most distinctive characteristic of this theory. This characteristic balance proved untenable by the end of the third/ninth century, except perhaps in the case of Shāfiʿī, whose theory did propound a rudimentary version of this balance. The fact that his theory was neglected for nearly a century after his death shows that the community of jurists had not yet, as a legal community, reached that synthesis. Furthermore, by the middle of the fourth/tenth century, legal theory was sufficiently developed as to make of Shāfiʿī little more than a theorist *manqué*. In other words, by the time he was "rediscovered," his theory – in its outline – had not only come to be taken for granted, but must have also been seen as rudimentary and basic.[18]

As the product of a synthesis, *uṣūl al-fiqh* was articulated in a double-edged manner. It was both descriptive and prescriptive. It expounded not only the methods and *modus operandi* of juristic construction of the law as the later *mujtahid*s carried them out, but also the proper and sound ways of dealing with the law. In other words, the theory culled out what was seen as the best methods of actual legal practice and made them the prescribed methods of "discovering" the law; for, after all, the declared purpose of this theory was, in essence, to lay down the methodology by which new legal cases might be solved. It is curious that this theory never formally acknowledged any other purpose for its *raison d'être*.

This theory provided the jurists with a methodology that allowed them not only to find solutions for new cases, but also to articulate and maintain

[18] See n. 5 above.

the existing law. Even old solutions to old problems were constantly rehabilitated and reasoned anew. The later jurists belonged to legal schools which, as we shall see, each had a legal doctrine to maintain and protect. Maintenance of legal doctrine required defense, and this defense meant no less than the finest possible articulation of one's position regarding a point of law. A Shāfiʿite jurist, for example, might deem Shāfiʿī's opinion on a particular case of law to be, among many others, the authoritative one, but he might also find Shāfiʿī's reasoning in justification of that opinion wanting. Thus, he might retain the solution but give it a fresh line of reasoning based on evidence perhaps different from that originally adduced by Shāfiʿī himself. None of this could have been done without the tools of legal theory.

Nor could jurists handle anything but the most basic of cases without training in this methodology. Oftentimes, legal cases were unique and complex. For the jurist to be able to distinguish the nuances of such cases, he had to resort to his knowledge of this methodology and the principles of reasoning and hermeneutics that it offered. Most of the *fatwā* literature (which often includes the so-called "difficult" cases) exhibits unique variations of legal reasoning, all drawing heavily, if not exclusively, upon the principles of legal theory. Without this theory, therefore, not only could new cases not be solved, but already-established positive legal doctrine could not be maintained, articulated and renewed. Equally important, without this theory no law could be extended from within established positive legal doctrine (in contradistinction to a fresh confrontation with the revealed texts) to cover the multitudes of cases that seem to be variations on older ones, but that nonetheless require, owing to their complexity, the tools of the *mujtahid*.