Wael B. Hallaq

Law and Legal Theory in Classical and Medieval Islam

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PREFACE

The twelve studies that make up this volume are among a larger group of articles on the subject written during the decade following 1982 and published between 1984 and 1993. They constitute explorations in a field of research that is still in its infancy, and as such they reflect the development of the author's own understanding of the subject. It should not come as a surprise therefore that in one article certain assumptions may be taken as valid while in another these very assumptions are modified if not wholly refuted. One obvious case in point is Shāfi'ī's legacy in the evolution of legal theory during the century or so after his death. In certain articles I follow conventional wisdom in taking Shāfi'ī to be the founder of the science of legal theory. In article VII, however, I challenge this thesis and argue that the image of Shāfi'ī as the 'master architect' of legal theory was a much later creation. Thus, the explanation of any seeming contradiction must be sought in the chronological sequence of these studies.

Nevertheless, the studies have not been arranged chronologically, but rather around themes which bestow unity on three groups of articles. The first is the group consisting of I–IV which expound the interrelated issues of legal reasoning, legal logic and the epistemology of the law. The second group, V–IX, contains articles that are all historical in nature, questioning, in one way or another, theses or assumptions widely prevalent in the field. This revisionist approach, I must add, is also characteristic of II and XII. Finally, the last three articles explore various substantive issues of legal theory, including questions of methodology.

Wherever possible, errors in diacritical marks have been corrected. It will be noted, however, that I have not attempted to add the missing macrons over long vowels at the end of Arabic names in articles I and VI. At the time I wrote these articles, I thought such an exercise to be superfluous.

It is my pleasant duty to thank the editors and original publishers of the journals for permitting the reproduction of my articles in this collection, and for their prompt response to my enquiries. I should also like to record my thanks to Dr John Smedley whose efficiency and patient cooperation ensured the smooth production of this volume. Last, but by no means least, I should acknowledge an immense and long-standing debt to Ghada Bathish-Hallaq who took a close interest in my work

over the years. Perhaps there is not a single page in this collection that has not been affected by her perspicacious and constructive comments.

W. HALLAQ

McGill University, Montreal
February 1994

PUBLISHER'S NOTE

The articles in this volume, as in all others in the Collected Studies Series, have not been given a new, continuous pagination. In order to avoid confusion, and to facilitate their use where these same studies have been referred to elsewhere, the original pagination has been maintained wherever possible.

Each article has been given a Roman number in order of appearance, as listed in the Contents. This number is repeated on each page and quoted in the index entries.

References in the Addenda and Corrigenda are indicated with an asterisk.

I

THE LOGIC OF LEGAL REASONING IN RELIGIOUS AND NON-RELIGIOUS CULTURES: THE CASE OF ISLAMIC LAW AND THE COMMON LAW

I. INTRODUCTION

It is only reasonable to assume that dissimilar legal systems possess dissimilar patterns of legal reasoning. Inasmuch as two legal systems differ in their structure and function, they also differ in the types of arguments they employ in their service. It may well be argued that law is, in the final analysis, the product of the premises and methods from and through which it is derived. Two such legal systems which display a vast difference in their overall structure and function are Islamic law and the common law.[1] This paper proposes to shed some light on the logic of legal

[1] Islamic law and the common law are treated here synchronically rather than diachronically. The convenient point of departure, insofar as this paper is concerned, is the phase of intellectual maturity of both systems falling in Islamic law, in the period after the tenth century A.D., and in common law, in the end of the last century and the present one. It is not implied that common law could reach intellectual maturity only toward the end of the nineteenth century; the concern of this paper is with analytical jurisprudence and the role of logic in law. Therefore, one cannot speak of such mature theory in common law before the latter part of the past century.

reasoning in both orders as well as to analyze the reasons and background which give rise to differences and similarities in their methods of reasoning. This will be done with the intent of bringing out some of the major factors which operate on the level of the judicial process and which contribute to the creation of differences in legal orders. The focal comparison in such a study must be the relationship between the logic of the law and the amount of emphasis given to social change in secular and religious cultures.

This, it must be pointed out, is a preliminary investigation which awaits a more thorough and comprehensive study—primarily because legal logic in Islam has not yet been analyzed, and our knowledge of the methods of legal reasoning subsumed under what is commonly known as *qiyās* is still rudimentary. This is particularly evident from the fact that, with very few exceptions, modern scholars of Islamic law translate *qiyās* as analogy without realizing the existence of other arguments (e.g., *a fortiori* argument in both its forms, the *a minori ad maius* and *a maiori ad minus*, *reductio ad absurdum* and induction) which are comprised by that nomenclature. This paper is not aimed at arguing for the existence of these arguments in *qiyās*; rather, it presupposes them. This presupposition, however, is fully justified by the sources cited herein.[2]

By way of introduction, it must be noted that the general attitude of Islamic and common law lawyers[3] towards logic cannot be described as positive. Although lawyers from both systems find logic an indispensable tool for the systematization and consistency of legal concepts and doctrines, logic generally remains suspect.[4] Surely, in each case, this attitude is the result of different causes. The Islamic lawyer resists logic because he views it as an offshoot of Greek philosophy. For him the unqualified acceptance of logic entails the acceptance of metaphysical conclusions which run against the fundaments of his belief as Muslim. Only when logic is stripped from its theological implications and used merely as a tool does the Islamic lawyer consider it legitimate.

In common law, logic is also rejected whenever it is conceived as a

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* [2] Subsequent to the submission of this Article to press, further investigation of the arguments subsumed under *qiyās* led to the conclusion that, to the exclusion of the *argmentum e contrario*, which was considered as a linguistic argument, *qiyās* encompassed the arguments enumerated above. For a documented account of this investigation, see the author's *Non-Analogical Arguments in Sunnī Juridical Qiyās* (forthcoming).

[3] For purposes of convenience, the terms "lawyers," "judges," and "jurists" will be used loosely in this paper. The judges are primarily responsible for the development of common law, while the jurists undertake such a responsibility in Islam. Islamic law, like Roman law, is jurists' law. Despite usages such as "the Islamic lawyer," this distinction must always be kept in mind. On Islamic law as jurists' law, see J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 209 (Oxford 1964); Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 201-03 (1978).

[4] H.J.M. BOUKEMA, JUDGING 180 (1980); Goldziher, *The Attitude of Orthodox Islam Toward the "Ancient Sciences,"* in STUDIES ON ISLAM 198-209 (M.L. Swartz ed. & trans. Oxford 1981); Guest, *Logic in the Law*, in OXFORD ESSAYS ON JURISPRUDENCE 176 (1961); Simitis, *The Problem of Legal Logic*, 3 RATIO 1, 94 (1960).

rigorous tool of inference. Of great concern are the results to which logic may lead against the constantly changing social reality. Law, Justice Holmes said, is "the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust."[5] By this statement, Justice Holmes implied that logic brings about formal consistency of concepts irrespective of the consequences when applied to concrete matters of fact. The heart of the problem, common law lawyers argue, is compromising the necessary logical deduction from non-contemporaneous premises with contemporary problems, while simultaneously taking into account social and ethical questions.[6] Although this is a major problem facing the common law lawyer, the question of the serviceability of logic in law as a normative system[7] constitutes yet another insurmountable difficulty. To this last point we shall return later.

II. Role of Logic

Although the notion of "high authority" as a source of law lingers in the background of the common legal tradition, it would be accurate here, for all intents and purposes, to state that common law is rooted in, or grafted to, sociology. As such, it is to be construed in sociological terms. Common law is an instrument of social control and its relevance to society is an ever-present element in the mind of counsel as well as of the court. On the other hand, law in Islam is conceived not as a means employed in the service of society, but, rather, in the service of God, who alone knows what is best for society. Islamic law delineates the dictates of divine will, and it is perceived as the ideal way in which man can worship his Creator. It is an all-encompassing law which covers every conceivable human act, from liturgical forms to neighborly conduct, to partnership and homicide. Its sources are the Quran, the Sunna of the Prophet, the consensus of the community and its scholars, and the method of inference known as *qiyās*. Through the latter, which is the primary concern of this paper, the law is derived from the former three sources. Whatever these sources dictate becomes the law governing all Muslims. The changing social reality, at least in theory, has no effect whatsoever on the process of judicial reason-

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[5] Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 20 (1924).

[6] J. Stone, Legal System and Lawyers' Reasonings 285-86 (1964); J. Stone, The Province and Function of Law 170 (1946).

[7] As a normative system, law contains propositions which function as major premises in syllogistics. Norms are not statements; therefore, they are neither true nor false. The difficulty stems from this very fact because the validity of deductive logic hinges on the necessary relation between the truth of the premises and the truth of the conclusion. *See* C. Wellman, *Deduction in Legal and Moral Reasoning*, in Reasoning on Legal Reasoning 193 (A. Peczenik and J. Uusitalo eds. Helsinki 1979); Guest, *supra* note 4, at 183-86. For a general discussion of the normative character of law, see F. Castberg, Problems of Legal Philosophy 24 (Oslo 1957).

ing. Only when these religious sources enjoin the protection of a certain human need does the law allow for that need and for those analogous to it. Should this need change because of new circumstances and conditions, the Islamic lawyer stands helpless in the face of the omnipotent sources. For example, one cannot alter a rule based on an explicit textual injunction and still characterize that rule as Islamic. Islamic law is not a law enacted by Muslims; rather, it is enacted by God, for Muslims. Human reason cannot make law; it only functions as the means by which law is discovered. Thus, instead of being organically tied to social exigencies, Islamic law is rooted in divine volition and authority, whether or not this authority takes cognizance of social reality.

Legal reasoning in common law thus differs from its Islamic counterpart in that it is bound by facts and norms which, while relevant to the conclusion, are not entirely intrinsic to the premises. Reasoning in common law recognizes the validity of a legal norm (conclusion) although such norm may not follow entirely from the given, established rules (premises). Admittedly, this somewhat lax procedure is often insisted upon in common law in exchange for a more mutable and flexible law. In Islamic law, on the other hand, the jurist is bound only by those premises which are prescribed by the religious sources, and, unless a certain ambiguity in the premises allows the inclusion or exclusion of certain material facts, nothing that does not follow from the premises can or should be joined to the conclusion.

Common law lawyers conceive logic as the organ by which one seeks to discover the conditions under which a conclusion follows from given premises. In other words, logic is viewed as concerned with the validity of the conclusion as it relates to the premises from which it is derived. Common law lawyers, interested as much in the truthfulness and validity of the legal premises and their relevance to changing situations, have always attempted to curb the overuse of formal logic in law. Although to a certain extent Muslim lawyers expressed their own reservations about logic, they have been considerably less successful in resisting the influence of logic on law.

III. Types of Arguments Used in Both Common Law and Islamic Law

A. Deduction

Admittedly, both legal systems use deductive logic, particularly when general principles and rules are laid down.[8] Under a broad principle, the

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[8] O.C. Jensen, The Nature of Legal Argument 25 (1957); R. Cross, Precedent in English Law (3rd ed. Oxford 1977); Abu Ḥāmid al-Ghazālī, Miʿyār al-ʿIlm fī Fann al-Manṭiq 154 (H. Sharāra ed. Beirut 1966); Ibn al-Ḥājib, Mukhtaṣar al-Muntahā al-Uṣūlī 9-16 (Cairo 1326 H.); Abdel-Rahman, *La Place du Syllogisme Juridique dans la*

judge subsumes the case which needs a solution, and applies the general legal principle to that particular case. Such an operation, though purely deductive, seems so intuitive that one need not be thoroughly familiar with logic to conduct it. When it is established, for instance, that things intoxicating are forbidden in the Quran, little analysis is needed to reach the rule that whisky, vodka, etc., are forbidden by law. Similarly, it takes common sense to deduce from Quran V:96 which reads, "And I permit to you the catch of the sea . . .," that feeding on fish, shellfish, and other animals which inhabit the sea is permissible. Judge Cardozo has asserted that, when the Constitution or a statute supplies the rule which fits the case, "the judge looks no further."[9] In the works on Islamic legal theory and jurisprudence, the role of deductive logic in the process of legal reasoning is seldom discussed. Perhaps this is because Muslim jurists reckon that there is little mental endeavor involved in deductive-legal operations. For them it is simply a question of subsumption. In cases where deduction is used, however, the role of the judge is still significant. To reach a decision, the judge must first undertake the difficult task of establishing the exact meaning of the relevant law, and then ascertain its applicability to the new case from a purely legal standpoint.

Perhaps as a result of the impact of modern formal logic, common law lawyers, as well as other Western legal theorists, have gone well beyond their Muslim counterparts in discussing the relevance of deductive logic to law. An articulate treatment of this subject has not been undertaken in Islam,[10] although Western lawyers have dealt with it somewhat unsuccessfully. The judgment that *A* is guilty of offense *X* and must therefore be punished by *Y* can be a conclusion of a syllogism in which the major premise is a statute and the minor premise is a set of facts about *A*. This conclusion certainly differs from the conclusion in the classic syllogism "All men are mortal; Socrates is a man; therefore, Socrates is mortal." The latter conclusion is a factual statement, whereas the former's factuality hinges upon several conditions yet to be fulfilled. Such a distinction between legal and non-legal syllogism does not seem to disturb some common law lawyers. Sir Rupert Cross, for instance, has observed that "[o]ne allowance must certainly be made for this distinction, but it may yet be the case that there is a sufficient resemblance between the methods by which the conclusion is reached to justify the description of each of them as an example of deductive reasoning."[11] The acceptance of non-factual or

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Méthode Exégétique chez Gazali, in LE RAISONNEMENT JURIDIQUE 185-94 (H. Hubien ed. Bruxelles 1971). *See also infra* note 43 (further on the deductive character of some *qiyās* arguments).

[9] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1964).

[10] Two of the few jurists who discussed this problem are Abu Ḥāmid al-Ghazāli and Taqi al-dīn Ibn Taymiyya. *See supra* note 8 and *infra* notes 37 & 48.

[11] R. CROSS, *supra* note 8, at 178.

normative statements in legal deduction is the result of the fact that the logic of norms has not yet been worked out.[12]

The lack of a practical solution for this and other problems[13] in deductive legal reasoning has prevented common law lawyers from dwelling too long on them. Deduction remains the most central, though by no means the only, method by which general legal principles are applied to questions of fact. Notwithstanding all difficulties, both legal systems find deduction an indispensable tool of legal reasoning.

In addition to syllogistics, both Muslim and common law lawyers use other arguments which take the form of deduction. The first is *reductio ad absurdum*, which is often used to reach a conclusion about a case by making a certain assumption and then proving that this assumption contradicts an established legal norm. The judge asserts, for instance, that *X* is a goal that the law *ought* to promote; but *Y* impedes, or would impede, the realization of *X*; therefore, *Y* ought to be prevented by law. Another instance of this argument may be the assertion that *X* is a goal which the law ought to promote; accepting *Y* as legal would defeat the realization of *X*; therefore, *Y* ought not be legally recognized. This argument abounds in both legal systems.[14] Also very common is the *a fortiori* argument by which a law governing a certain situation is extended to another more obvious situation. This is of two types: *a minori ad maius* and *a maiori ad minus*. An example of the first type is the inference from the Quranic injunction "Say not 'fie' to them (i.e., to parents) nor repulse them, but speak to them graciously"[15] that mistreating or beating parents is forbidden. Here the legal norm is transferred from a limited act to a more general one. The second type requires a reversal of this process, i.e., from the general to the particular. For instance, from the rule that the consumption of large quantities of wine is prohibited, it is ruled that the drinking of the smallest particle of wine is also prohibited.[16]

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[12] Guest, *supra* note 4, at 185; Summers, *Logic in the Law*, 72 MIND 257 (1963).

[13] Following Aulis Aarnio, Carl Wellman has succinctly analyzed eight problems which arise in legal as well as moral deductive reasoning. *See* C. WELLMAN, *supra* note 7, at 193-98.

[14] M. GOLDING, LEGAL REASONING 55-60 (1984). Muslim jurists term this argument *qiyās al-ᶜaks*, and logicians *qiyās al-khulf*. *See* SAYF AL-DĪN AL-ĀMIDI, III AL-IḤKĀM FĪ UṢŪL AL-AḤKĀM 3 (Cairo 1968); ABU ḤĀMID AL-GHAZĀLI, *supra* note 8, at 118-19; IBN AL-ḤĀJIB, *supra* note 8, at 15; IBN ABI AL-ṢALT AL-DĀNI, TAQWĪM AL-DHAHN 48 (C.G. Palencia ed. Madrid 1915). The application of this argument is also evident in the formulation of the general principle of *maqāṣid* (or *maqṣūd*) *al-sharᶜ* (the aims of the law). *See, e.g.*, ABU-ISḤĀQ AL-SHĀṬIBI, II AL-MUWĀFAQĀT FĪ UṢŪL AL-AḤKĀM 127-28 (Cairo 1970); SAYF AL-DĪN AL-ĀMIDI, III *al-Iḥkām fi Uṣūl al-Aḥkām* 71-76 (Cairo 1968); MUḤAMMAD B. ᶜALI AL-SHAWKĀNI, IRSHĀD AL-FUḤŪL ILÁ TAḤQĪQ AL-ḤAQQ MIN ᶜILM AL-UṢŪL 214 (Cairo 1909).

[15] Quran XVII:23.

[16] Later Muslim scholars often refer to the *a fortiori* argument as *bil-aḥrā*. Shāfiᶜi, the "master architect" of Islamic jurisprudence, uses it but under the general term *qiyās*. *See* RISĀLA, ISLAMIC JURISPRUDENCE 307-08(M. Khadduri trans. 1961) (It is to be cautioned that Khadduri consistently translates *qiyās* as analogy); IBN ḤABĪB AL-MĀWARDI, I ADAB AL-

The nature of law and its sources in the Islamic and common legal traditions make it difficult to work out legal concepts solely by means of formal arguments. Lawyers from both systems have acknowledged that deduction is only one of several arguments employed in legal reasoning.[17] Primarily, the lack of universal or general principles contributes chiefly to the relegation of strictly formal arguments to a secondary, often negligible, position. Despite the increasing entrenchment of the legislature on the common law, case law still constitutes the major segment of the common law system. Similarly, Islamic law is characterized by its concern with individual cases rather than with general precepts, a resultant manifestation of the material structure of its two primary sources: the Quran and the Sunna. The Quran was revealed to Muhammad piecemeal in order to fulfill and answer the specific needs which arose during the period of his Mission. Likewise, the Sunna, expressed in a collection of reports of the utterances and deeds of the Prophet, came to answer similar needs in later times. Characteristically, these two sources deal with specific issues and, strictly speaking, contain relatively few general legal principles. It is therefore clear that, like common law, Islamic law is, in a large measure, case law. This fact determines the type of argument and logic which best fits and serves common case law and Islamic law.

B. Legal Analogy

One of the most commonly used arguments in both systems, and one which answers most of the law's needs, is reasoning from part to part or case to case, an argument known as legal analogy.[18] The basic course of reasoning is the extension of a legal rule from one case to another due to a similarity which is deemed by the judge to be a material similarity. The form of this argument is as follows:

A has the properties *X*, *Y* . . . .
B has the properties *X*, *Y* . . . .
A has the rule *J*.
X, *Y* . . . are relevant properties in inducing *J*.

Therefore, *B* must have the rule *J*.

Such an argument gives rise to serious problems. For the logician, this argument, however meticulous it may seem, remains imperfect at best.

QĀḌĪ 587-92 (Baghdad 1971); IMĀM AL-ḤARAMAYN AL-JUWAYNI, AL-WARAQĀT (printed with the commentary of Jalāl al-Dīn al-Maḥalli, on the margin of SHAWKĀNI, *supra* note 14, at 199-200) (Cairo 1909)).

[17] C. WELLMAN, *supra* note 7, at 193. See the types of arguments as discussed by ABU ḤĀMID AL-GHAZĀLI, *supra* note 8, at 102-37.

[18] SAYFAL-DĪN AL-ĀMIDI, *supra* note 14, at 3-10; L. CARTER, REASON IN LAW 12 (1984); E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949).

Muslim logicians and philosophers discard it because it is conjectural and merely leads to probable (*ẓannī*) knowledge. The Muslim and common law lawyers, while realizing its shortcomings, have no choice but to accept it. Undoubtedly, they have striven, within the limits imposed by the nature of such an argument, to strengthen it by supporting arguments with a view toward realizing its utmost potential. The crucial problem posed is determining the element of similarity which justifies the transference of the rule of one case to another. For it is this element which determines the validity of the conclusion.[19] How, in light of such considerations, the common element in analogy is decided in Islamic and common law is perhaps the most illustrative differentiation, not only of the legal reasoning in both systems, but also of their function and goal.

Whether it is taken to be "[t]he ground or reason of decision," or "[t]he point in a case which determines the judgment,"[20] or, as the Muslim jurist would put it, "that which induces the judgment,"[21] the *ratio decidendi* and the Islamic *ʿilla* (the relevant similarity which justifies the transference of the judgment from the precedent to the new case) have remained the most illusive doctrines in common law and Islamic law. In Britain and the United States, this doctrine has been a major concern of a number of experts since the beginning of this century; in Islam, it occupied major portions of jurisprudential theories for several centuries. The first major attempt at defining the rules for finding the *ratio* of a case was made by Professor Goodhart in 1930. He concluded that the *ratio* is neither found in the reasons given in the judge's opinion nor in the rule of law set forth in that opinion. Nor is it necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision. Rather, Goodhart argued, the *ratio* is to be found by taking account of (1) the facts treated by the judge as material, and (2) his decision as based on them. In finding the *ratio* it is also necessary to establish what facts are held to be material by the judge.[22] In other words, Goodhart proposes that a later court is bound by the presumably applicable precedent and its ruling, as an outcome of the judge's consideration of the material facts determined in the earlier case.

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[19] The German scholar Urlich Klug properly remarked that the difficulty in using analogical argument lies in the obscurity of the distinction between essential and unessential respects. *See* J. HOROVITZ, LAW AND LOGIC 32 (1972).

[20] BLACK'S LAW DICTIONARY 1135 (rev. 5th ed. 1979). *See also* R. CROSS, *supra* note 8, at 76-79 (adopts any rule of law expressly or impliedly treated by the judge as a necessary step in reaching a conclusion and discusses means of ascertaining the *ratio decidendi* from a case).

[21] *See, e.g.*, ABU ḤUSAYN AL-BAṢRI, II AL-MUʿTAMAD FĪ UṢŪL AL-FIQH 704-05 (Damascus 1964-65); MUḤAMMAD B. ʿALI AL-SHAWKĀNI, *supra* note 14, at 207.

[22] Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930). A summary of this article may be found in Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959).

After lengthy polemics in the *Modern Law Review* about the *ratio decidendi*,[23] Professor Julius Stone argued that Goodhart was attempting to set forth a prescriptive theory rather than a descriptive account for determining the *ratio decidendi*.[24] Stone found this unacceptable. He maintained that in each precedent there is implicit a number of *ratio decidendi*, and it is left to the deciding judges to determine, in light of current exigencies (e.g., public policy, ethics, justice), the "appropriate level of generality" in the precedent which must prevail in the new case.[25] It is not the material facts in the earlier case which must dictate the decision of the later court but rather "the analogical relevance of the prior holding to the later case," which requires "the later court to choose between possibilities presented by the earlier case."[26] Representing what may be termed "the sociological school of jurisprudence," Stone emphatically argued that the later court is the final arbiter of which *ratio* is applicable to the case in question.[27]

> In short a "rule" or "principle" as it emerges from a precedent case is subject in its further elaboration to continual review, in the light of analogies and differences, not merely in the logical relations between fact situations, and the problems springing from these; but also in the light of the import of these analogies and differences for what is thought by the later court to yield a tolerably acceptable result in terms of "policy," "ethics," "justice," "expediency" or whatever other norm of desirability the law may be thought to subserve. No ineluctable logic, but a composite of the logical relations seen between legal propositions, of observation of facts and consequences, and of value-judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which "the rule of *stare decises*" confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.[28]

Thus, "wisdom" and, as Justice Holmes stated, "good sense," must be employed in determining the *ratio* rather than a mechanical or fixed set of

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[23] Some of the articles include: Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959); Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587 (1957); Montrose, *Ratio Decidendi and the House of Lords*, 20 MOD. L. REV. 124 (1957); Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413 (1957); Simpson, *Ratio Decidendi of a Case*, 21 MOD. L. REV. 155 (1958).

[24] Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959). For a useful summary of the main thesis of this article, see J. FARRAR, INTRODUCTION TO LEGAL METHOD 69-71 (1977).

[25] Stone, *supra* note 24, at 618.

[26] *Id.* at 604-05.

[27] *Id.* at 618.

[28] *Id.*

logical rules.[29] The lack of serious attempts in the Anglo-American legal tradition to "prescribe" methods by which a *ratio* of a case can be decided is an eloquent testimony to the disinterest of common law lawyers in a permanently defined and inflexible set of rules which might control and limit the ability of law to adapt itself to the changing reality.[30]

On the other hand, the Islamic lawyers, being acutely conscious of the religious character of their law, stress the dictates of the sources of law rather than the needs of the new cases to which they seek to find the "sound" solutions. Divinity has expressed its will in the Quran and sunna which are deemed not only the ideal guides in man's life but also the final revelation to mankind. Thus, insofar as deciding a new case is concerned, the Muslim jurist can operate on two levels which are determined by the nature of these two sources. On the first level, the jurist is bound by the explicit textual statements and commands. What determines the judgment in the new case is solely the explicit *ratio* in the original text, i.e., the precedent. There is little latitude for deciding the case in light of current exigencies. On the second level, however, the jurist is allowed a certain, although limited, freedom of interpretation in deciding the new case, due to the ambiguous nature of the textual precedents.

This paper is not concerned with the linguistic principles which come into play in determinating the *ʿilla*; it focuses on the logical and perhaps semi-logical tools employed for this purpose. The first condition set forth for finding and establishing the *ʿilla* is its efficiency, that is, its causal relationship with the judgment. The property or properties which constitute the *ʿilla* must bring about a judgment. Joining an inefficient property to the *ʿilla* will no doubt spoil that *ʿilla*. Intoxication, for instance, is an efficient property which necessitates the judgment of prohibiting the consumption of wine. Should it be assumed that redness is a property which together with intoxication effects the judgment of prohibiting red wine, it must then always be assumed that in any judgment of prohibiting

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[29] *Id.* at 619.

[30] The increasing concern with the flexibility of law brought about certain changes in the effect of precedent in the House of Lords. In 1966, Lord Gardiner, the Lord Chancellor, representing the Lords of Appeal in Ordinary, declared the following:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decision of this House as normally binding, to depart from a previous decision when it appears right to do so.

M. ZANDER, THE LAW-MAKING PROCESS 104 (1980).

intoxicants the property of redness must be present in conjunction with the property of intoxication. Otherwise, the *ʿilla* which is extended to a new case, say white wine, becomes invalid because the property of redness is inefficient due to its absence from white wine, while the same judgment of prohibition remains in effect. Since part of the *ʿilla* has no efficiency beyond the case of red wine, the *ʿilla* as a whole is rendered invalid.[31]

The second method is coextensiveness (the presence of the *ʿilla* when the judgment is present) and coexclusiveness (the absence of the *ʿilla* when the judgment is absent).[32] Like efficiency, this method seeks to emphasize the causal connection between the judgment and its *ʿilla*. A valid causal relationship must have both the coexistence of the cause and its effect and the absence of one when the other is absent. This method also guarantees the exclusion of an additional, unnecessary *ʿilla*. If two different *ʿillas* are claimed to induce the judgment, it is inconceivable that when one *ʿilla* becomes absent, the judgment becomes absent as well.[33]

In conjunction with these methods, Muslim jurists employ a third theory which may be termed the "joined method of difference and agreement."[34] By the method of difference, it is demonstrated that certain properties, say *A, B, C* . . ., constitute the only difference between the *ʿilla* in the precedent and the *ʿilla* in the new case. It is then proved that these properties are inefficient and irrelevant in inducing the judgment. In other words, such an analogy first assumes the total sum of differences between the *ʿillas X* and *Y* are *A, B, C* . . . . The second premise is that *A, B, C* . . . have no weight insofar as the judgment, *J*, is concerned. Since *X* and *Y* are identical save for *A, B, C* . . ., *J* is the judgment.

As a prerequisite to the method of difference, the method of agreement must come into play. By this method, the similarity between *X* and *Y* is found. Then the judgment of the precedent is transferred to the new case.[35] The method of difference and agreement can be implemented only by use of what the logicians call disjunctive and conjunctive syllogism. Put schematically, the course of reasoning by analogy is as follows:

P has properties *A, B, C, D, E, F*.
Q has properties *A, B, C, D, E*.
P has the rule *J*.
F is not a property in *Q*.
A, B, and *C* are not relevant similarities.
D and *E* are relevant similarities and efficient in *J*.

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[31] ABU ḤUSAYN AL-BAṢRI, *supra* note 21, at 789-90.

[32] ʿALI SĀMI AL-NASHSHĀR, MANĀHIJ AL-BAḤTH ʿINDA MUFAKKIRĪ AL-ISLĀM 111 (Cairo 1966).

[33] *Id.* at 112.

[34] This is reminiscent of Mill's methods of agreement and difference. *See* E. NAGEL, JOHN STUART MILL'S PHILOSOPHY OF SCIENTIFIC METHOD 211 (1974).

[35] MUḤAMMAD B. ʿALI AL-SHAWKĀNI, *supra* note 21, at 213-14, 219, 220-22.

D and *E* are present when *J* is present and absent when *J* is absent.

Therefore, *Q* has (or must have) the rule *J*.

The effort expended in establishing the *relevant* similarity which, in turn, determines the validity of transferring a judgment of one case to another must be seen in light of the conflict between formal logic and the actual needs of the law. Both Western and Muslim lawyers recognize the insuperable difficulties encountering conclusions by analogy. Some idealists in the West have gone so far as to say that a conclusion by analogy can be valid only after *modus barbara*.[36] The Muslim logician, Farabi, also argued that to be valid, analogy must be converted to the following syllogistic form: All *S*'s are *X*'s; all *A*'s are *S*'s; therefore, all *A*'s are *X*'s. This is so, he insisted, because valid analogy amounts to syllogistic inference. And when a syllogism cannot serve, analogy cannot be valid.[37] However, the imprecise nature of legal propositions and the law's actual requirements prevent jurists from accepting, much less adopting, such arguments. In real life it is rarely possible to ascertain conclusively the exact similitude between all aspects of two cases. Thus, to convert an analogy to strict syllogism would be tantamount to forging a link which is justified neither by the facts in the precedents or in the new case.

Another argument to which Muslim and common law lawyers resort is *argumentum e contrario*.[38] In analogy, the two cases possess a similarity which justifies extending the rule from the precedent to the new case. In the *argumentum e contrario*, the absence of such a link and the diametrical opposition of the two cases brings about a conclusion.[39] The argument may take one of two forms. The first is "*S* is a *P*; therefore, no non-*S* is a *P*." An example of this may be the following: From the rule that several legal residences are allowed for private persons, it is inferred that several legal residences are not allowed for corporations.[40] The second

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[36] See the discussion in Simitis, *supra* note 4, at 70; Abu Naṣr al-Fārābi, *Kitāb al-Qiyās al-Ṣaghîr*, in 16 REVUE DE LA FACULTÉS DES LANGUES, D'HISTOIRE, ET DE GÉOGRAPHIE DE L'UNIVERSITÉ D'ANKARA 266-68 (1958); AL-FARABI'S SHORT COMMENTARY ON ARISTOTLE'S PRIOR ANALYTICS 93-98 (N. Rescher trans. 1963).

[37] Abu Naṣr al-Fārābi, *supra* note 36, at 267-68; AL-FARABI'S SHORT COMMENTARY, *supra* note 36, at 95. Also see the argument of ABU ḤÂMID AL-GHAZÂLI, *supra* note 8, at 123-25; ABU-ḤÂMID AL-GHAZÂLI, MIḤAKK AL-NAẒAR 31 (Cairo ——). Urlich Klug also argues that in sound analogy the minor premise is subsumed under the major premise just as in any syllogism. Horovitz agrees and argues that analogical inference eventually reverts to syllogism and has no special logical structure of its own. *See* J. HOROVITZ, *supra* note 19, at 33.

[38] SAYF AL-DÎN AL-ÂMIDI, *supra* note 14, at 3; J. FARRAR, *supra* note 24, at 50-51; J. HOROVITZ, *supra* note 19, at 44.

[39] ABU ḤUSAYN AL-BAṢRI, *supra* note 21, at 698-99; ABU ḤUSAYN AL-BAṢRI, KITÂB AL-QIYÂS AL-SHAR^{c}Î, printed with AL-MU^{c}TAMAD 1031-32.

[40] J. HOROVITZ, *supra* note 19, at 44.

form, often claimed to be the most important argument in Islamic law after analogy,[41] may be best illustrated by the well-known example about the purity—or impurity—of pets. The ruling that dogs are impure is reached on the basis of a Prophetic report making the Prophet refrain from visiting a residence in which a dog is present, but allowing him to visit another residence in which there is a cat. The Prophet then remarks that "(the cat) is not impure." This statement, coupled with the fact that he withheld his visit to the residence of the dog's owner, led to the conclusion that dogs are impure.[42]

C. Induction

The last of the major arguments common to both systems is induction[43] which, unlike deduction or analogy, bases itself more often than not on conclusions reached by other arguments. Except for a relatively few cases in the Quran and the Sunna where ready-made solutions are given, cases in Islamic law are ordinarily solved either through analogy from case to case, or by deduction through the subsumption of a case under a general

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[41] ABU ḤUSAYN AL-BAṢRI, *supra* note 39, at 1031-32; SAYF AL-DĪN AL-ĀMIDI, *supra* note 14, at 3.

[42] ABU ḤUSAYN AL-BAṢRI, *supra* note 39, at 1036.

[43] Guest, *supra* note 4, at 188-90; ABU-ḤĀMID AL-GHAZĀLI, *supra* note 37, at 62-63. Notably, Muslim legal theoreticians do not always agree with regard to the types of arguments subsumed under *qiyās*. Only in a few works, such as those of Abu Naṣr al-Fārābi, Abu Ḥāmid al-Ghaẓali, and Taqi al-Dīn Ibn Taymiyya is one presented with more or less a full account of these arguments. However, a close examination of the definitions of *qiyās* in the jurists' writings reveals that these definitions are left broad enough to allow the inclusion of many types of arguments. Some of the common definitions of *qiyās* are the following: (1) "predicating a known thing to another (known thing) on grounds of a common matter [i.e. cause] in order to establish, or negate, a rule for both of them" (*ḥamlu maᶜlūmin ᶜalā maᶜlūmin fī ithbāti ḥukmin lahumā aw nafyihi ᶜanhumā bi'amrin jāmiᶜin baynahumā min ḥukmin aw ṣifa*); (2) "applying the rule of the precedent to the new case on grounds of a similarity between the two cases" (*taḥṣīlu ḥukmi al-aṣli fī al-farᶜi li'shtibāhihimā fī ᶜillati al-ḥukmi*); (3) "the subsumption of a particular under a general" (*idrāju khuṣūṣin fī ᶜumūm*). MUḤAMMAD B. ᶜALI AL-SHAWKĀNI, supra note 14, at 198. *See also* ABU AL-WALĪD AL-BĀJI, AL-HUDŪD FI AL-UṢŪL 69-70 (N. Ḥammād ed. 1973). For other, but similar, definitions, see F. KHOLEIF, A STUDY ON FAKHR AL-DIN AL-RAZI 151-52 (1966) .

Such definitions are indicative of the inclusiveness of *qiyās*. In his chapter on legal reasoning, ᶜAbd al-Jabbār notes that the form of judicial *qiyās* does not differ from that of non-juridical *qiyās* (*wa-ṭarīqatu al-qiyāsi al-sharᶜiyi lā tukhālifu ṣūratuhā ṣūrata al-qiyāsi al-ᶜaqlī*). Ghazāli held the same view and added that the difference between the two is only in the premises. "The premises which are good for rational *qiyās* are good for juridical *qiyās*, but not all the premises which are good for juridical *qiyās* are good for rational *qiyās*" (*lā mukhālafata baynahumā fī ṣūrati al-qiyāsi wa'innamā yatakhālafāni fī al-mādati, bal mā yaṣluḥu an yakūna muqaddimatan fī al-ᶜaqliyyāti yaṣluḥu lil-fiqhiyyāti, walākin qad yaṣluḥ u lil-fiqhiyyāti mā lā yaṣluḥu lil-ᶜaqliyyāti*). ᶜABD AL-JABBĀR AL-ASADABĀDI, XVII AL-MUGHNI FI ABWĀB AL-TAWHĪD WAL-ᶜADL 280 (Cairo 1963). *See* ABU ḤĀMID AL-GHAZĀLI, *supra* note 8, at 154. *Se See also* author's article *Non-Analogical Arguments in Sunnī Juridical Qiyās* (forthcoming).

principle. In induction, the common rule for a number of cases is extended to another case because this case is similar or identical in relevant aspects. Induction is then possible only when a number of identical cases exist. The form of the argument is: *A, B, C, D* . . . are cases which have the common characteristic *X* and the rule *J*; all cases which have the characteristic *X* must have the rule *J*; *S* has the characteristic *X*; therefore, *S* has (or must have) the rule *J*. A concrete example of induction from Islamic substantive law is the case of interest (*ribā*). The Prophet was said to have prohibited the exchange of gold for gold, silver for silver, date for date, wheat for wheat, and barley for barley unless they were equal in quantities and delivered immediately. The *ʿilla* for this prohibition was determined (e.g., in the Ḥanafi School) to be their nature as fungible commodities sold by weight and measure. For this reason, exchange by unequal amounts was prohibited.[44] In accordance with this line of reasoning, all goods possessing this *ʿilla*, such as raisins, must be subject to prohibition if exchanged under the aforementioned conditions.

The question then becomes: What differentiates induction from analogy in legal reasoning? The legitimacy of this question derives from the fact that the relevant similarity between the new case and the already solved cases is the same. This being so, an analogy between the new case and a single precedent would suffice. However, the common law lawyers would object that the extention of the rule by induction leads to a degree of certainty which is higher than that attained in analogy. The multiplicity of cases (instances) gives inductive support to the rule of the new case which analogical inference fails to provide. Thus, as in scientific induction, legal induction in common law belongs to a class of arguments superior to that of analogy; it stands in the middle position between analogical and deductive arguments.

In Islamic law, induction ranks even higher on the scale of certainty. It can be complete (perfect), leading to the same degree of certainty yielded by deduction. The entire corpus of common law is, as a practical matter, unlimited, making complete induction infeasible. In Islam, however, the sources of the law are defined and exhaustible. A complete enumeration of the instances supporting or negating a point of law yields the highest degree of certain knowledge about that point, provided counter-evidence does not exist. In the context of religion where a single explicit statement in the sources has a force of finality, it may be argued that multiple propositions should lead to a degree of certainty at least tantamount to that yielded by deduction. Such an inductive process would simply constitute a multi-deductive argument. For this reason a number of Muslim jurists hold complete legal induction to have a force equal to deductive arguments. However, even when incomplete, induction derives its force

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[44] ʿAbd Allāh b. Maudūd al-Mūṣili, II al-Ikhtiyār li-taʿlīl al-Mukhtār 30-33 (Cairo 1951).

from the relative number of instances which can be observed with regard to a particular case. "The larger the number of pieces of textual evidence is, the stronger our knowledge becomes."[45]

In addition to its function as a method of reasoning, induction in Islamic law plays the significant role of reinforcing uncertain or weak premises. The equivalent of such a role is not to be found in common law. In the Islamic legal system, uncertain propositions from the Sunna (which alone constitutes the greatest bulk of the legal sources) may gain an added aggregate support by use of the inductive method, transforming them into certain premises.

How does this process work? To answer this question, it must first be observed that the dicta of sunna are divided into two basic categories: the *mutawātir* and the *āḥādī*. The *mutawātir* traditions are transmitted by countless persons who hear or see the Prophet say or do a certain thing. The large number of transmitters makes it inconceivable that the witnesses or the transmitters could have agreed on falsifying the report. Due to the authenticity of such a report and the certitude surrounding its transmission, the *mutawātir* traditions are said to lead to certain knowledge of what they contain. Traditions transmitted by fewer people than those who have witnessed and transmitted the *mutawātir* traditions are called *āḥādī*. The latter, when taken individually, do not lead to certain knowledge of the information they convey. Accordingly, when used individually as premises in an argument, a *mutawātir* tradition with an explicit meaning leads to certainty while an *āḥādī* tradition with the same clarity of meaning leads only to probable knowledge. Thus, rules based on individual *āḥādī* traditions are only tentative and experimental. Many Muslim jurists, however, argue that *aḥādī* traditions can lead to certain knowledge if they are supported by other pieces of circumstantial evidence (*qarā'in*) which may include other traditions of the same type and indecisive or ambiguous Quranic verses.[46] These textual pieces of evidence must, when interpreted, have the same meaning as the tradition which they purport to support. Another precondition for reaching certainty in such an arrangement is the number of supporting traditions and verses: They must be altogether as numerous as those in the *mutawātir* category. But unlike the latter which cannot, whether individually or collectively, be dubious, an *āḥādī* tradition can only be probable insofar as its authenticity is concerned. The aggregate of *āḥādīs*, however, cannot be

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[45] *See* ABU ḤAMID AL-GHAZĀLI, *supra* note 8, at 120.

[46] Indicisive or ambiguous (*mutashabihāt*) verses are capable of more than one interpretation. If an indecisive verse can be interpreted in such a way as to support the meaning of an *āḥādī* tradition, this verse is said to be a *qarīna*, a supporting piece of evidence. An unambiguous Quranic verse cannot be used as a *qarīna* to support an *āḥādī* tradition, because, by itself, it constitutes indisputable evidence which need not be supported by any *qarā'in* (plural of *qarīna*). However, a deductive or analogical argument based on an unambiguous verse can always become inductive if other ambiguous verses conveying the same meaning are available. *

dubious because Muslim jurists reason that a multitude of reports transmitted through so many channels and by so many transmitters who could not have known each other cannot possibly constitute a lie or a conspiracy in fabricating the report. In their multiplicity, the *āḥādī* traditions gain a strength tantamount to that of the *mutawātir*.[47]

The doctrine of inductive support is undoubtedly the product of a compromising approach to blend the elements of form and material substance in legal argument. Unlike the Aristotelian logicians who were primarily concerned with form, Muslim jurists paid equal attention to the material substance of the premises in relation to the degree of certainty to which they can lead. The emphasis that Islamic law places on the premises as the determinant of the degree of certainty of the conclusion may be illustrated by discussing the views of the influential Ibn Taymiyya on this subject.

Ibn Taymiyya's argument must be seen as a response to the traditional view which holds syllogistics superior to analogy. Against this view, he argues that syllogism and analogy are equivalent because any analogical argument can be converted to first figure syllogism.[48] Writing in the Islamic tradition, Ibn Taymiyya sees the analogical argument as consisting of four terms: (1) the *aṣl*, the precedent which is extracted from the scripture; (2) the *farᶜ*, the new case requiring a solution; (3) the *ᶜilla*, the similarity common to the *aṣl* and the *farᶜ*; and (4) the *ḥukm*, the rule which is transferred from the former to the latter. The weakness of analogy does not lie in its form since it can be converted to syllogism. Rather, the weakness lies in the material substance of the premises and, more particularly, in the *ᶜilla*. "If the subject matter (of the premises) is certain, whether the form of the argument is analogy or syllogism, then (the conclusion) is certain."[49] For instance, should the jurist conclusively establish that the consumption of wine was forbidden in the Quran because it is an intoxicant, he would be able to convert this possible analogy to a syllogism in which the major premise is "All intoxicants are forbidden;" the minor premise is "Vodka is an intoxicant;" the conclusion is "Vodka is forbidden;" with the middle term being the property of intoxication.[50]

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[47] ABU BAKR AL-SARAKHSI, I UṢŪL 292 (Abu al-Wafa al-Afghāni ed. Cairo 1372 H.); BAYḌAWI, II MINHĀJ AL-WUṢŪL 197-205, with Sh. Ismāᶜīl's II TAHDHĪB SHARḤ AL-ISNAWI (especially last paragraph of p. 205) (Cairo 1976). In fact, Shāṭibi went so far as to say that induction is the only method by which certainty can be reached in law. *See* SHĀṬIBI, I MUWĀFAQĀT 10-15 (1969).

* [48] TAQI AL-DĪN IBN TAYMIYYA, JAHD AL-QARIḤA FĪ TAJRID AL-NAṢIḤA (an abridgement by JALĀL AL-DĪN AL-SUYŪTI OF NAṢIḤAT AHL AL-ĪMĀN FI AL-RADD ᶜALĀ MANTĪQ AL-YŪNĀN 289, 299-300, 328, 331 (Cairo 1947). *See also* N. HEER, IBN TAYMIYAH'S EMPIRICISM (unpublished).

[49] TAQI AL-DĪN IBN TAYMIYYA, *supra* note 48, at 289.

[50] On the classes of textual premises, see ABU ḤĀMID AL-GHAZĀLI, *supra* note 8, at 155-56. Examples cited are not those of Taqi al-Dīn Ibn Taymiyya but correspond perfectly to his arguments.

Here, the conclusion is formally and materially valid. Thus, whatever form of argument is used, a *certain* middle term will surely lead to a *certain* conclusion. In answer to the question of how one can know for certain whether or not a universal proposition is true, Ibn Taymiyya argues that statements derived from an infallible source (e.g., the Quran) are always certain.

The fundamental idea underlying Ibn Taymiyya's theory of logic in general, and legal logic in particular, is that the knowledge of the external world results from the observation of particular things.[51] Universal propositions are inferred by analogy and induction from particular propositions. If it is true that analogy and induction yield probable knowledge, our knowledge of the external world can only be probable. The only exception, however, is scriptural knowledge, which by virtue of being decreed by God, can only be certain.[52]

IV. CONCLUSION

This brief analysis of the logic of legal reasoning in Islamic law and common law has shown that the ultimate causes for difference between the two systems stem from the obvious fact that Islamic law is steeped in religion, whereas common law is a product of an essentially secular culture. The effect of this fundamental difference manifests itself in two main areas, the first of which is deductive and analogical reasoning. Law in the common legal tradition is conceived as a man-made instrument of social control which is in need of constant modification in line with social change. Accordingly, judges in common law have persistently endeavored to reason in keeping with the primal need of adapting law to current reality. Deductive logic, as one method of reasoning, is viewed as sufficiently stringent to disallow a gradual change in legal formulations. This is why deduction is often rejected and referred to as "dry logic." The ramifications of this attitude are even more evident in analogical reasoning. The similarity between two cases can justify an analogy on the basis of a *ratio* which the new case dictates, rather than on the basis of a *ratio* which the judge in the earlier case determined. Therefore, the similarity between the two cases becomes that similarity which the current policy of "ethics" and "justice" require. A change of this policy will most likely call for a change in the similarity which will result in a different rule.

Islamic law can be said to be more consistent in the application of logical principles, mainly because of the marginal importance of the element of change in Islamic law. Being strictly religious, law is bound by the letter and spirit of the fixed sources from which it is derived. In the

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[51] Taqi al-Dīn Ibn Taymiyya can be said to have anticipated the theory of J. S. Mill. *See* E. NAGEL, *supra* note 34, at 120-35. *

[52] TAQI AL-DIN IBN TAYMIYYA, *supra* note 48, at 319, 341; N. HEER, *supra* note 48.

process of formulating the law, the Muslim jurist has no choice but to abide by the prescription of these sources. In accordance with this conception, the current needs of society have no particular importance in determining the similarity between the two cases. The material similarity is that which is dictated by the sources; any analogy to be drawn subsequently (which has been determined by scholars to be valid) must be based on the already established similarity. Thus, logical consistency takes priority over other considerations, including change.

Induction is the second area in which the difference between Islamic law as a religious system and common law as a secular system manifests itself. While induction serves as a method of legal reasoning in common law, Islamic law takes induction beyond this limited scope to employ it for the reinforcement of uncertain legal propositions. As demonstrated, induction can bring greater certainty into law because the bulk of the legal sources in Islam is defined and exhaustible.

All in all, Islamic law can be described as more "logical" than common law. This is clearly the result of the absence of the consideration for change in Islamic law. This seemingly positive characteristic of "logicism" has cost Islamic law a high price, manifesting itself in drastic reforms in the modern era, including the wholesale borrowings of European codes to replace the inoperative traditional laws. Common law, on the other hand, proved flexible enough to forestall the need for such radical reforms.

ADDENDA

p. 80, n. 2: see article II in this collection.

p. 93, n. 46: on *qarā'in*, see article X in this collection.

p. 94, n. 48: Nicholas Heer's article was published in *A Way Prepared: Essays on Islamic Culture in Honor of Richard Bayly Winder*, eds Farhad Kazemi and R.D. McChesney (New York: New York University Press, 1988): 109–115.

p. 95, n. 51: on Ibn Taymiyya's empiricism, see the Introduction to Wael B. Hallaq, trans., *Ibn Taymiyya Against the Greek Logicians* (Oxford: Clarendon Press, 1993), pp. xx ff., xxviii ff.; id., 'Ibn Taymiyya on the Existence of God', *Acta Orientalia*, 52 (1991): 51 ff., 62 ff.

II

NON-ANALOGICAL ARGUMENTS IN SUNNI JURIDICAL *QIYĀS**

I. Introduction

That the Sunnī juristic conception of arguments can generally be characterized as nonformal is due to the fact that the validity of arguments rests primarily upon the epistemological value of the revealed premises from which they are constructed[1]. The linguistic and legal structure of these premises determine the type of argument to be used in reaching the legal norm, the *ḥukm*. Accordingly, methods of reasoning employed in the construction of positive and substantive law range, as we shall see, from syllogistic to inductive arguments, including irregular deductions such as relational arguments[2]. These arguments, though often disguised by the seemingly impenetrable and unique formulations of the *uṣūlists*, can with the assistance of logic and dialectic be deciphered, and subsequently labeled with the corresponding designations given to them in these fields. Without such a procedure the identity of arguments prescribed in the works of *uṣūl al-fiqh* will remain in the realm of the obscure.

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* A slightly shorter version of this paper was presented at the Center for Middle Eastern Studies, Harvard University, February 1986.

[1] This conception differs to a significant extent from the principles of formal logic where the validity of an argument is measured by the structure of premises and quality of the relationship between the propositions which justify the conclusion. On the centrality of the epistemological value of revealed premises in legal argument see, for instance, Muḥammad Ibn Idrīs al-Shāfiʿī, *Risāla*, ed. Muḥammad Sayyid Kīlānī, Cairo, 1969, par. 1482; Muḥammad b. Aḥmad Ibn Rushd (al-Ḥafīd), *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2 vols., Cairo, 1329 H., I, 2; Abū Ḥāmid al-Ghazālī, *al-Mankhūl min ʿIlm al-Uṣūl*, ed. Muḥammad Ḥasan Haytū, Cairo, p. 336; idem, *Miʿyār al-ʿIlm*, ed. Sulaymān Dunyā, Cairo, 1961, pp. 155-156; Taqī l-Dīn Ibn Taymiyya, *Jahd al-Qarīḥa fī Tajrīd al-Naṣīḥa*, an abridgement by Jalāl al-Dīn al-Suyūṭī of *al-Radd ʿalā Manṭiq al-Yūnān*, ed. ʿAlī Sāmī l-Nashshār, Cairo, 1947, p. 289.

[2] On the logical properties of relational inferences see section IV below.

Muslim legal theoreticians conceive the material sources—the Quran, the Sunna and consensus[3]—as linguistically consisting of two basic categories: one encompassing clear premises, subject to only one interpretation, and the other ambiguous, capable of varying interpretations. Premises in the first category, unlike the second, yield necessary and thus certain knowledge (*ʿilm ḍarūrī qāṭiʿ*). Necessary or immediate knowledge is defined as the cognition which compels itself upon the mind without inference, such as the knowledge of the law of the excluded middle, the feeling of illness and the hearing of a particular sound[4]. Through the sense of hearing, for instance, knowledge of certain revealed 'clear speech' necessarily obtains in the intellect. Furthermore, necessary knowledge is said to obtain even with regard to matters unspecified by the sources, but matters which are tacitly subsumed under a categorical textual statement. An excellent case in point is Quran V:3 «forbidden to you are carrion, blood, pork (*laḥm al-khinzīr*)...». Sunnī jurists unanimously argued that the term *'khinzīr'*, though it was originally intended to mean only 'pork', covers all types of swine meat, including that of wild boars (*khinzīr barrī*). Though reasoning in this case can be clearly reduced to a syllogistic form, the jurists insisted that reaching the conclusion 'The meat of wild boars is forbidden' needs no inference since it is understood from the language of the Quranic statement itself (*min jihati dalālati al-lafẓ*)[5]. Thus matters specified in the material sources and those which can be immediately subsumed under them were considered to be purely linguistic and certainly outside the sphere of inferential reasoning. Only points of law and fact that were not covered by the sources were to be the object of reasoning through what is known as *qiyās*. The domain of the operation of *qiyās* was therefore predetermined to a significant extent by the volume of textual statements which were deemed to have been imbued with *dalālāt al-naṣṣ*. Admittedly, however, the constitution of such statements

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[3] Although consensus cannot be considered as a revealed source of law, the great majority of *uṣūlists* argued that once a consensus has been reached on a case of law, the case itself becomes an authoritative precedent upon which a further *qiyās* can be based. See the introduction to my «On the Authoritativeness of Sunni Consensus,» in the *International Journal of Middle East Studies*, 18, 1986, pp. 427-454.

[4] Sulaymān b. Khalaf al-Bājī, *Kitāb al-Ḥudūd fī al-Uṣūl*, ed. Nazīh Ḥammād, Beirut, 1973, pp. 25-27; Muḥammad b. ʿAlī al-Tahānawī, *Kashshāf Iṣṭilāḥāt al-Funūn*, 2 vols, Calcutta, 1862, s.v. «*ḍarūrī*», I, 880 ff., especially p. 882, 11. 3 f.

[5] Ibn Rushd, *Bidāya*, I,3; Tahānawī, *Kashshāf*, s.v. «*mafhūm*», II, 1153, 11. 20 f.

amounted only to a fractional portion of the body of legal propositions[6]. The size of their portion was further narrowed down by the objections that were raised concerning those legal propositions which fell on the fine line between what is viewed as 'clear speech', capable of being applied intuitively to particular factual situations, and 'less clear speech', the latter's application being subject to legal analysis and inferential reasoning.

Consisting chiefly of the second category, legal propositions required the instrument of *qiyās* for extending the law embodied in them to unprecedented facts. But the linguistic and legal structure of these propositions was by no means uniform, a fact which had a significant effect on the evolution of varying types of arguments within *qiyās*. This essay seeks to explore these types to the single exception of analogy. The subsumption of analogy under *qiyās* is not only beyond dispute, but has been so predominant that the great majority of modern scholars conceive of *qiyās* as a term which exclusively denotes analogy[7]. Though unjustified, this conception is to a certain degree understandable, for analogy is the single argument that was unqualifiedly accepted by all mainstream Sunnī jurists[8]. That other arguments were not universally embraced in medieval jurisprudence must neither lessen from their importance nor be a cause for their neglect. In fact, one of the most vital discus-

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[6] This is inferred from the *uṣūlists'* assertion that the great majority of the rulings of Sharīʿa are reached through the medium of *qiyās*. See, for instance, Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, ed. ʿAbd al-ʿAẓīm al-Dīb, 2 vols., Cairo, 1400 H., II, 743, par. 767.

[7] Hasan Abdel-Rahman and Joseph Schacht are among the very few scholars who observed the existence of other arguments in *qiyās*. However, they payed little attention to the logical structure of these arguments thereby confusing their identity and lumping them altogether under inductive arguments. See H. Abdelrahman, «L'argument *a maiori* et l'argument par analogie dans la logique juridique musulmane,» *Rivista Internazionale di Filosofia del Diritto*, 98, Ser. 4, 1971, pp. 127-148, especially at 133; idem, «La place du syllogisme juridique dans la méthode exégétique chez Gazali», *Le raisonnement juridique*, ed. H. Hubien, Bruxelles, 1971, 185-194, at p. 186; Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford, 1950, p. 99. See also Emile Tyan, «Méthodologie et sources du droit en Islam,» *Studia Islamica*, X, 1959, p. 82. It is noteworthy that in his later work *An Introduction to islamic Law*, Oxford, 1964, P. 208, 11.26-29, Schacht reverts to the mistaken assertion that «the method of ḳiyās.....is purely analogical.»

[8] The phrase «mainstream Sunnī jurists» is intended to exclude all those who rejected *qiyās* altogether, such as the Ẓāhirīs and some Muʿtazilīs. On the opponents of *qiyās* see Muḥammad b. ʿAlī al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min ʿIlm al-Uṣūl*, Cairo, 1909, p. 199-200; Roger Arnaldez, *Grammaire et théologie chez Ibn Ḥazm de Cordoue*, Paris, 1956, pp. 165-194.

sions that arose in legal theory was with regard to methods of linguistic interpretation and legal reasoning in those cases which fell in the gray area between the explicit specification of revelation where reasoning was said to be superfluous, and the total absence of such revelation where analogy was deemed indispensable.

II. The *a fortiori* Arguments

Perhaps one of the most evincive arguments known to the *uṣūlists* is the *a fortiori* argument in both of its forms, the *a minori ad maius* and the *a maiori ad minus*. In expounding the modes of reasoning that come under the umbrella term *qiyās*[9], Shāfiʿī (d. 204/820) remarks that the strongest form of *qiyās* may be illustrated by the following example: when God or his messenger forbids a small quantity of a certain matter, we conclude that a larger quantity of the same matter is also forbidden. Similarly, if, say, the consumption of a large quantity of a certain foodstuff is declared permissible, then a smaller amount of that foodstuff would also be permissible[10]. As an example of the first type of inference, known to Western jurisprudence as *a minori ad maius*, Shāfiʿī gives Quran XCIX: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 it is understood that the reward for doing more than an atom's weight of good and the punishment for doing more than an atom's weight of evil are more substantial than that promised for an atom's weight. An example of the second argument, the *a maiori ad minus*, is God's revelation permitting the killing of non-Muslims who engage themselves in war against Muslims. From this text one infers that acts short of killing, such as the confiscation of the property of non-Muslims, are allowed.

Some scholars, Shāfiʿī remarks, refuse to term such inferences *qiyās*. They argue, he says, that the meaning of the texts encompasses these cases, that is, they come directly under the clear intention of revelation. The term *qiyās* must be used only to designate arguments in which the assimilated case (*farʿ*) resembles, but is not subsumed under the meaning of the original, revealed case (*aṣl*)[11].

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[9] Shāfiʿī, *Risāla*, par. 1482.

[10] *Ibid*, pars. 1482-1485. Also see ʿAbd al-Qāhir al-Baghdādī, *Uṣūl al-Dīn*, Istanbul, 1928, p. 18, 11. 7-10, who subsumes this argument under *qiyās*.

[11] Shāfiʿī, *Risāla*, pars. 1492-1494.