Studies in Islamic Law and Society

27

Ahmad Atif Ahmad

Structural Interrelations of Theory and Practice in Islamic Law

A Study of Six Works of Medieval Islamic Jurisprudence

Brill

STRUCTURAL INTERRELATIONS OF THEORY AND PRACTICE IN ISLAMIC LAW

STUDIES IN ISLAMIC LAW AND SOCIETY

EDITED BY

RUUD PETERS AND BERNARD WEISS

VOLUME 27

STRUCTURAL INTERRELATIONS OF THEORY AND PRACTICE IN ISLAMIC LAW

A Study of Six Works of Medieval Islamic Jurisprudence

BY

AHMAD ATIF AHMAD

BRILL
LEIDEN · BOSTON
2006

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

A C.I.P. record for this book is available from the Library of Congress.

ISSN 1384–1130
ISBN-13: 978-90-04-15031-7
ISBN-10: 90-04-15031-5

PRINTED IN THE NETHERLANDS

To my mother *Asmā'* (1944–), my first and most significant teacher; to my father *ʿĀṭif* (1942–), who told me as I turned 13, "you are no longer just my son; from now on, you are also my friend"; to the memory of my grandpa *Aḥmad* (1906–2006), whose presence and views gave me a different perspective on *continuity and change;* and to my nephew *Yūsuf* (2004–), who will likely inhabit a world quite different from that inhabited by all of the above . . .

I dedicate this work

Ahmad

CONTENTS

ACKNOWLEDGEMENTS

This work benefited from the advice of three scholars at Harvard University: Wolfhart Heinrichs, a philologist/Arabist, William Graham, a religionist, and Frank Vogel, a lawyer. Each of these scholars' perspectives made an important contribution to my thinking about the subject, and I have greatly appreciated their intellectual support. Each one of these scholars has a claim to the merits of this work.

As an editor for the Series of Islamic Law and Society, published by Brill, Professor Bernard Weiss read an earlier version of this work, which greatly contributed to its improvement, and I thank him for his invaluable input.

Last but not least, my gratitude goes to my wife, Elizabeth Lee-Hood, whose support during my writing of this book was twofold: moral and personal as my partner and closest friend and intellectual and editorial through her reading and commenting on the entire manuscript before its submission. Liz' editorial input probably saved me much embarrassment, and I am thankful to her for her contributions to the work as it now stands.

GLOSSARY OF TERMS

Adā':
'Regular performance', e.g., a prayer performed in its usual time.

ʿAzīma:
'Regular duty', e.g., a noon (*dhuhr*) prayer performed with its regular 4 units (*rakʿa*s).

Bāṭil:
'Invalid', an act (of worship, trade, etc.) that has a fatal condition that makes it impossible to validate.

Farḍ:
(In Ḥanafī law): 'obligatory' based on inconclusive legal argument.
(In other schools): = *wājib*, a generic term for the 'obligatory.'

Farḍ ʿAyn:
'A duty to be carried out by each Muslim', e.g., daily prayers.

Farḍ Kifāya:
'A collective duty to be carried out by some members of the Muslim community but not incumbent on each individual', e.g., congregational prayers for the dead.

Fāsid:
'Susceptible to invalidation', an act that has not ful lled all conditions of correctness but may be corrected.

Ḥukm Taklīfī:
'A legal ruling in practical matters; a classi cation of human actions into categories, i.e., degrees of desirability and undesirability according to Islamic law.'

Ḥukm Waḍʿī:
'A legal ruling related to human actions but not a classi cation of these actions.'

Iʿāda:
'Redoing', e.g., a prayer redone because of a condition that made it invalid.

Makrūh:
'Reprehensible.'
Makrūh Karāha Taḥrīmiyya:

(In Ḥanafī law): 'prohibited based on inconclusive legal argument.'

Makrūh Karāha Tanzīhiyya
(In Ḥanafī law): 'reprehensible.'

Mandūb:
'Recommended.'

Mānᶜ:
'Impediment'. e.g., impurity of clothes is an impediment to the correctness of the prayers.

Mubāḥ:
'Neutral; permissible', acts resulting in no reward or punishment.

Muḥarram (= Ḥarām):
(In Ḥanafī law): 'prohibited' based on conclusive legal argument.
(In other schools): 'prohibited' in general.

Qaḍā' (in rituals):
'Performance after the assigned time has passed', e.g., a noon (*dhuhr*) prayer performed after the sun sets. Noon prayer must be performed in the early afternoon.

Rukhṣa:
'A duty given in extenuating circumstances', e.g., a noon (*dhuhr*) prayer performed with 2 units or *rakᶜas* at the time of traveling. Regular noon prayer includes 4 units.

Sabab (lit. reason, cause, impetus):
A heterogeneous group is subsumed under this category, e.g., sunset is a *sabab* for doing the *Maghrib* prayers and committing adultery is a *sabab* for its punishment.

Ṣaḥīḥ:
'Valid', an act (whether of rituals or trade or a marriage contract, etc.) that fulfilled all the conditions of correctness.

Sharṭ:
'Prerequisite', e.g., ablution is a prerequisite for performing the prayers.

Uṣūl al-Fiqh:
The science that deals with extracting practical legal decisions from the appropriate sources of the law, such as Scripture and Tradition.

Wājib:
(In Ḥanafī law) 'obligatory' based on inconclusive legal argument.
(in other schools) = *farḍ*, a generic term for the 'obligatory.'

PROLOGUE

Not unlike lawyers of other legal traditions, Muslim lawyers' main concern is how their law should govern human behavior. This is what jurists refer to as questions of legal practice. Here is an example: *What are the conditions under which a marriage contract would be valid and binding?* This question of legal practice must be answered based on theoretical legal principles. That is, there has to be a systematic answer to this question deriving from an area of the law that explains why a lawyer should answer practical legal questions one way or another. A question of legal theory that relates to the above question of legal practice would be: *How could one know the conditions under which a marriage contract would be valid and binding?* In this context, practical legal reasoning provides categories that address what is legal or illegal, valid or invalid, or, in very general terms, how legal norms regard a certain circumstance. Theoretical legal reasoning provides the foundations for the normative categories used in practical legal reasoning.

Suppose that legal theory provides that one should look for an answer to the above question on valid marriage (among other questions of legal practice) in the language of Scripture (the Qurʾān) and the Prophet Muḥammad's Tradition (Sunna). Suppose further that the authenticity of the Qurʾān is above questioning, while ascertaining the authenticity of any Prophetic Tradition must be subjected to certain criteria. So far Islamic legal theory identified the Qurʾān and the Sunna as sources of law and provided conditions for the use of the Sunna as a source of law. Add to stipulating the authoritativeness of the Qurʾān and the Sunna and providing the conditions of their authoritativeness *principles of legal hermeneutics* that must be used to ascertain the purport of a text from either Scripture (the Qurʾān) or Tradition (Sunna). Suppose finally that there are other principles of legal theory that may aid the jurist in arriving at a ruling on a practical legal question after relevant Scriptural (Qurʾānic) and Traditional texts have been exhausted. These principles include *inferences of the general objectives of the Qurʾānic or Muḥammadan message* and *principles of common sense or existing local custom that do not directly*

contradict either of these two sources. We thus have the following four (general) principles of legal theory:

1. Scripture and Prophetic Tradition are the prime sources of law.
2. The authenticity of Prophetic Tradition is a prerequisite to using it as a source of legal rulings.
3. Certain principles of hermeneutics must be used to interpret the language of these two sources.
4. Inferring the objectives of the law as well as accepting the continuation of local custom can be considered sources of legal practice, if they do not contradict explicit Scriptural and Traditional language concerning the issue at hand.

Now, suppose that custom or common sense (principle 4) decides for Muslim jurists that binding contracts, including marriage contracts, are usually concluded by two parties. Who are the two parties to conclude a marriage contract? Two possibilities arise: 1) the prospective husband and wife and 2) the husband and a male representative of the prospective wife.

— Jurist A argues that Prophetic Tradition has stipulated that "No marriage (may be valid) without (the approval of) a male guardian (*walī*) and two male witnesses." According to principle 1 (Scripture and Prophetic Tradition are the prime sources of law), the practical question of whether the prospective wife can conclude her own marriage must therefore be answered in the negative. Jurist A argues that principle 1 necessitates the appointment of a male guardian from the side of the prospective wife for the marriage to be valid and binding (ruling A).
— Using principle 2 (the authenticity of Prophetic Tradition is a prerequisite to using it as a source of legal rulings), jurist B rejects ruling A based on doubts about the authenticity of the alleged Prophetic Tradition cited in jurist A's argument. Jurist B further points to a Qur'ānic text admonishing male guardians not to "prevent (their female relatives) from marrying (*an yankiḥna*) their (prospective) husbands (*azwājahunna*)" (Q: 2/232). In this verse, the grammatical subject of the verb 'to marry' (*yankiḥna*) is prospective wives. A hermeneutical principle states that attributing an act to a certain subject affirms the full agency of that subject and his or her capacity to carry out that act independently. According to principle 3, this piece of hermeneutics allows us to answer the practical question of a prospective wife's ability to conclude her own marriage

> contract in the affirmative. Thus, jurist B concludes, the answer to the practical question, in light of all salient principles of legal theory, is that the contractors could be the prospective husband and wife rather than the prospective husband and a male guardian representing the prospective wife. The only condition that may reasonably be imposed on the prospective bride here is that she be in full possession of her mental faculties and not be known to make hasty or bad decisions.

In this example, it is clear that arbitrary moves in dealing with legal practice are not acceptable; only through an argument rooted in legal theory can a jurist produce a legal ruling that is a valid option for legal practice, i.e., one that is ultimately fit to govern the actions of the Muslim community.

One must note that the above question about the conditions under which a marriage may be valid and binding represents a category of practical legal questions rather than an actual, specific real-life legal question; everyday practical legal questions often involve numerous details. An example of a specific real-life question may be stated as follows. Male guardian X (father) does not accept Y as a bridegroom for his 25-year-old daughter Z. Can Z conclude her marriage to Y without her guardian's consent? How would jurists A and B answer this more specific question? To adhere to his categorical stipulation that no marriage may be valid without the approval of a male guardian (*walī*), jurist A will answer the question of Z's potential marriage in a manner similar to his answer to the general question (stated above). Jurist A will thus prohibit Z from concluding her marriage without the permission of her guardian X. For jurist B, the question hinges on Z's competence and her possession of the capacity to make sound judgments. Jurist B may still answer the question of Z's potential marriage in the affirmative after offering further details about his criteria for ascertaining Z's competence and ability to make sound decisions. For example, jurist B might say that a 25-year-old is presumptively competent unless specific evidence proving her incompetence is provided.

As specific as the matter of Ms. Z's potential marriage appears, everyday practical questions tend to be even more complex, and this complexity opens the door to employing further layers of theoretical and practical legal reasoning to answer these questions.

In Islamic legal theory, human behavior is classified into broad categories (let us reduce these to *acceptable* and *unacceptable* for a moment), and the sources of the law are charged with the task of deciding which

actions belong in which of these categories. As the above discussion illustrates, these sources include the explicit and implicit content of the revelation the Prophet received (the Qurʾān) and the example of his life (or his Sunna reported through his statements, actions, and tacit approvals). But the sources of the law are not limited to the Qurʾān and Sunna, which are known as the textual sources of the law. Local customs that do not contradict these two textual sources are counted among the sources of the law. Moreover, new ideas or new 'ways of doing things' are presumptively acceptable by default, unless a clear prohibition for them can be found in the textual sources of the law. This presumptive lawfulness is known as the principle of *istiṣḥāb*. With these tools of theoretical legal reasoning, a Muslim jurist sets out to 'rule' on human behavior, that is, to provide classifications or categorizations for human actions: this is acceptable and this is unacceptable, or this should be done this way and not that way. This 'ruling' or 'categorization' of human behavior is offered in works of law that address the broad array of human affairs from rituals to business and from marriage and family affairs to crime and punishment. A classification of human affairs into subjects often discussed in chapters (rituals, marriage, trade, crime) can always be revised as life offers new questions and makes other questions irrelevant and obsolete. But the basic structure of Islamic legal thought remains explicable in terms of categories of human behavior and sources of normativity for that behavior.

The central aim of this study is to explain the basic structural interrelations of theoretical and practical legal reasoning in Islam. For legal theory and legal practice to be 'interrelated' means that they maintain an organic relationship that links each one of them to the other. Theoretical legal reasoning must maintain a structure for legal thought that preserves the integrity of the legal system in which it functions, and the structure of theory must accommodate the variety and diversity of reality; otherwise the theory loses its relevance to the practice. Thus, the interrelatedness of theory and practice in a legal system does not contradict that legal system's protean dynamism if jurists are given a measure of freedom in the ways in which they employ their legal theory and apply it to legal practice. The links of the principles of legal theory to the categories of human behavior in practice create *structural interrelations* between legal theory and legal practice.

An elucidation of the structural interrelations of Islamic theoretical and practical reasoning seems to have been ignored by scholars of Islamic law for a long time, or worse, confused with the more complex

issue of the consistency of principles of legal theory and legal practice in history *en termes généraux*. I distinguish *structural interrelations* of theory and practice from *perfect consistency* of theory and practice in order to avoid this common pitfall in Islamic legal studies. Structural interrelations pertain to the basic cohesiveness of a legal system and must be the starting point for any full-fledged testing of its consistency in actual everyday practice. Perfect consistency of theory and practice is an *ideal* rather than a *reality* in any legal system, medieval or modern (the consistency of legal theory and legal practice varies in different cases, and no functioning legal system has exhibited full consistency between legal theory and legal practice at all times). Testing the consistency of legal theory and practice in this strict sense requires demanding historical analysis, which would be meaningful only when sufficient data could be deemed available. Sources of social history provide hints as to the extent to which real-life questions have actually been governed by stated legal theory. In the case of Islamic law, one must consult records of legal rulings in the manner of *fatāwā* (legal *responsa*) that address specific questions such as the question of Z's marriage or even more detailed questions.

The task of assessing the relationship between theoretical and practical legal reasoning in a given legal system is a difficult task whether attempted by participants in the pertinent legal system (judges, lawyers, etc.) or by non-participant observers. In any legal system, the participants' ability to analyze how the system works varies tremendously. Advanced jurists and judges do not look at how theory and practice interrelate in the legal system the same way local lawyers and judges do. For non-participants in a legal system to judge its consistency or address the theory-versus-practice theme within it, they must be aware of the fact that participants in the legal system differ in their perception about how it works. Thus, the student of a legal system must not credulously assign the same value to the assumptions of participants in the legal system about its nature and mechanisms. All this assumes that one has access to a great deal of data about the actions and thoughts of participants in the legal system under question. To complicate matters further, when we deal with the history of legal systems, this is not the case. We often find ourselves trying to infer *too much* from limited data. The courage required to infer from limited data must be balanced against carefulness. Thus, for a historian to try to recover a picture of how a legal system of the past may have functioned requires both courage and care. This is a central difficulty in the writing of legal history.

INTRODUCTION

Why would six Sunnī Muslim jurists from different schools of law (*madhhab*s), geographic areas (Central Asia, Iraq, Syria, Palestine, Egypt, and Algeria) and eras (10th – 16th centuries)—each write a book on the interrelation of questions of legal theory and legal practice? One may also ask how these authors' schools of law and temporal and local context influenced their treatment of the subject. A detailed answer to the latter question would involve writing a great deal of the history of at least six centuries of Islamic legal thinking with commentaries on its attendant social, political, and intellectual milieus, and, were this to be attempted in a few volumes, the treatment would inevitably be sketchy and reductive. This study undertakes a project of a more reasonable scale: it introduces these six works of jurisprudence, which share a unity of subject justifying their study as a distinctive group within Islamic legal literature, and employs their content in order to suggest an approach to the study of Islamic legal thought through the structural interrelations of its theoretical and practical components.

Here is a list of the titles of these six works of jurisprudence:

— The Ḥanafī jurist al-Dabbūsī's (d. 1036) *Ta'sīs al-Nazar* (Establishing the Foundation of Legal Thought).
— The Shāfiʿī jurist al-Zanjānī's (d. 1258) *Takhrīj al-Furūʿ ʿalā al-Uṣūl* (Linking Practical Legal Decisions to the Precepts of Legal Theory).
— The Mālikī jurist al-Tilimsānī's (d. 1369) *Miftāḥ al-Wuṣūl ilā Binā' al-Furūʿ ʿalā al-Uṣūl* (The Key to Providing Practical Legal Rulings Based on the Precepts of Legal Theory).
— The Shāfiʿī jurist al-Isnawī's (d. 1370) *al-Tamhīd fī Takhrīj al-Furūʿ ʿalā al-Uṣūl* (An Introduction to Linking Practical Legal Decisions to the Precepts of Legal Theory).
— The Ḥanbalī jurist Ibn al-Laḥḥām's (d. 1402) *al-Qawāʿid wa-l-Fawā'id al-Uṣūliyya wa mā yataʿallaq bihā min al-Aḥkām al-Sharʿiyya* (Principles of Legal Theory and Related Practical Legal Decisions).
— The Ḥanafī jurist al-Timurtāshī's (d. after 1599) *al-Wuṣūl ilā Qawāʿid al-Uṣūl* (Comprehension of the Principles of Legal Theory).

I shall refer to these six works as works of *takhrīj al-furūʿ ʿalā al-uṣūl* (or in a more abbreviated form: the *takhrīj* literature). The label *takhrīj al-furūʿ ʿalā al-uṣūl* is taken from the title of some of these works, as can be seen from the above list of the works' titles. The terms of this label require detailed explanation, which will be offered in Chapter One, but suffice it now to say that the term *uṣūl* refers to theoretical legal reasoning and the term *furūʿ* refers to practical legal reasoning, while *takhrīj* refers to a process through which the interrelation of these two is pointed out. The chosen label captures these works' focus on pointing to examples of the connections between theoretical legal principles (*uṣūl*) and practical legal rulings(*furūʿ*) instead of offering a systematic presentation of either the *uṣūl* alone or the *furūʿ* alone.

Three considerations contributed to my choice of sources and limiting my study to them. First, my six sources are sufficiently varied to encompass large areas of the Muslim World, a long time span, and all of Sunnī Islamic law's four main schools. Second, these sources are accessible and can be consulted by students of Islamic law without expensive trips to the manuscripts' libraries of the Muslim World, Europe, and the United States. I believe that publishing similar works will benefit the study of Islamic legal history, and I encourage students of Islamic legal history to do that. In this study, however, I chose to study these accessible works and point to their importance as a distinctive group within Islamic legal literature. The third and last consideration behind limiting my study to the aforementioned six works is my desire to ensure that any claim I make about the importance of the *takhrīj* literature can be stated as plainly and simply as possible. Therefore, I decided to focus on a limited group of works and make clear statements about their nature and contribution to our understanding of the nature of Islamic legal thought.

One of the obvious objectives of my project is to introduce a class of legal literature that may have escaped the radar screen of scholars of Islamic legal studies. Scholars may be familiar with the term *uṣūl al-fiqh* (a term used as an umbrella for the science of Islamic legal theory or theoretical jurisprudence) and *qawāʿid fiqhiyya* (legal maxims, a genre of legal theory) but *takhrīj al-furūʿ ʿalā al-uṣūl* will not make a similar claim to familiarity among them. A clear disadvantage of ignoring *takhrīj al-furūʿ ʿalā al-uṣūl* as a distinctive class of Islamic legal literature is that scholars will tend to classify all works that include theoretical legal reasoning as works of *uṣūl al-fiqh* or *qawāʿid fiqhiyya*. Many works that are judged, based on their title or a quick perusal of their content, to be works of

uṣūl al-fiqh or *qawāʿid fiqhiyya* should be seen as works of *takhrīj al-furūʿ ʿalā al-uṣūl* upon good reading. The *Uṣūl* of al-Shāshī (d. 13th cent.)[1] is one of these works. Shāshī's work introduces a selection of legal principles with applications in practical legal matters and does not attempt a systematic presentation of the *uṣūl*.

As important as it may be, the aim of taking note of the variety of Muslim legal literature is not my main or more important goal. My work aims to aid historians of Islamic law in exploring how the assumptions of legal theory were juxtaposed with practical legal thought and vice versa. My work will also support the thesis that this juxtaposition stimulated advanced juristic minds to consider the need for constant adjustment of both the theoretical and practical aspects of the law—a process that might be called legal dialectic. One manifestation of this dialectic was the development of hypothetical legal cases based on questions of legal hermeneutics designed to test the consistency between legal theory and legal practice (see a further discussion of hypothetical cases in Chapter Eight). Another manifestation of the same process was the effort to consider whether exceptions in practical legal opinions required reconsideration of some of the assumptions of legal theory. Some of the authors of the sources examined in my work make efforts to demonstrate their skills both in generating theoretical legal principles from practical legal opinions and in generating legal opinions in practical matters from theoretical and philosophically conceived legal principles.

---

[1] This work has been attributed to and/or confused with writings by several authors known as al-Shāshī, including Isḥāq Ibn Ibrāhīm al-Shāshī (d. 937), Aḥmad Ibn Muḥammad al-Shāshī (d. 956), Muḥammad Ibn ʿAlī al-Shāshī al-Qaffāl (d. 977), while it is likely a work by Niẓām al-Dīn al-Shāshī al-Ḥanafī (d. 13th cent.). Two publications of this work with that ascription appeared in the years 2000 and 2001, one in Beirut (by Dār al-Gharb al-Islāmī, edited by Muḥammad Akram al-Nadwī) and the other appeared with a commentary by Walī al-Dīn Ibn Muḥammad Ṣāliḥ al-Farfūr in Damascus in 2001 under the title *al-Shāfī ʿalā uṣūl al-Shāshī*. In its prospectus, the work by Niẓām al-Dīn al-Shāshī I indicate reads:

> "Indeed, *uṣūl al-fiqh* (the foundations of legal practical determinations and reasoning) are four: the Book of God, the Sunna of His messenger, the consensus of the [Muslim] Community, and analogy. And one must inquire into each one of these divisions to know (*yuʿlam bi-dhālik*) the way to understand the sources of legal determinations in practical matters (*takhrīj al-aḥkām*)."
> (See page 16, Beirut edition; 34, Damascus edition).

See also Walī al-Dīn Ibn Muḥammad Ṣāliḥ al-Farfūr, *Takhrīj al-Furūʿ ʿalā al-Uṣūl Dirāsa Muqārina wa Taṭbīq* (Damascus, 2003), 102.

By introducing the abovementioned six works of Islamic jurisprudence, I add my voice to those who have questioned the adequacy of the two predominant modern perspectives on the study of Islamic legal history. One of these two perspectives, influential in Muslim academies, emphasizes the derivation of Islamic law from texts of the Qurʾān and Sunna through a simple process of interpretation of these texts. In interpreting these texts, according to this view, a jurist refers mainly to principles of grammar and rhetoric that are, in essence, generalizations about common and metaphorical uses of the Arabic language. The other perspective is represented by many Western scholars of Islam, who speak of a dichotomy between *Islamic legal theory* that reflects the ideals of the Qurʾan and Sunna and *Islamic legal practice* that often falls prey to pragmatism and stratagems of jurists who were unable to faithfully apply the excessively idealistic legal theory to everyday practical questions.

While challenging prevailing notions in the field of Islamic legal history, my project contributes to Islamic legal studies in several important respects. First, it highlights the heterogeneity of Islamic legal theoretical principles and demonstrates how the principles of legal theory in the Islamic tradition are rooted in theological, logical, and linguistic assumptions as well as other principles that defy easy classification. Second, it suggests that the propositions of Islamic legal theory have been characterized by flexibility and practicality rather than the rigid idealism often attributed to them. Third and most important, it provides evidence for the teleological interrelation between theoretical and practical legal reasoning in Islam and suggests that the propositions of legal theory have been developed to address practical legal considerations.

An approach to Islamic legal history that emphasizes the relationship of concepts (such as the good and the allowed and the bad and the forbidden or *maṣāliḥ* and *ibāḥa; mafāsid* and *ḥurma*) tend to lead to an unrealistic picture of how Islamic legal thought has evolved and ignores the details of its development. On the other hand, approaches that emphasize the free movement of legal concepts in history and reject the possibility of a continuity of structure and purpose (broadly defined) over time are as guilty of distorting the story of the development of Islamic law and legal theory. The notion of structural interrelations of theoretical and practical legal reasoning attempts a discriminating approach that does not fall into either extreme. It acknowledges the elasticity of concepts in historical movement, while allowing a flexible notion of cohesiveness to be applied in reading legal texts, hopefully illuminating these texts and adding to the engagement of their readers.

Thus, the utility of introducing the notion of structural interrelations of theory and practice in Islamic law is twofold. First, it clarifies our understanding of the nature of Islamic legal thought and helps identify our objectives in the study of its history (are we looking at the basic structure of Islamic legal thought or are we testing aspects of its consistency?). And second, it maximizes our engagement with and appreciation of the legal texts we study, as we will be able to exercise a deeper reading of legal texts by understating the links between theoretical and practical legal reasoning in Islam.

Though relevant to any study of the evolution and interrelation of *uṣūl* and the *furūʿ* in Islamic legal history, the *takhrīj al-furūʿ ʿalā al-uṣūl* literature has neither weighed heavily in Muslim students' study of Islamic legal history nor been introduced as yet to English-speaking audiences. This study attempts to ameliorate this state of affairs.[2]

In this study, I provide a full taxonomy of the principles of Islamic legal theory that are explained and juxtaposed with practical legal determinations in my sources (Chapters Four through Seven). I provide examples of how Islamic legal theory has offered a theoretical framework for normative behavior and responsibility (Chapter Four) and regulated the semantic analysis of texts of Scripture and Tradition, whose content had to be extended in order to provide practical legal determinations on everyday legal questions (Chapter Five). I also provide examples of legal theoretical principles addressing extra-textual sources of the law, including Muslim jurists' theory of communal utility and the extent to which social practices can alter "normative" legal principles (Chapter Six). Finally, I discuss meta-legal and theological components of legal theory and explain their relationship to practical legal determinations

---

[2] Regarding works dealing with works of *takhrīj al-furūʿ ʿalā al-uṣūl* in Arabic, I am aware of three contemporary books that deserve mention. The first is a Ph.D. dissertation completed at al-Azhar University in 1971 by Muṣṭafā Saʿīd al-Khinn, titled *Athar al-Qawāʿid al-Uṣūliyya fī Ikhtilāf al-Fuqahā*, which presents principles of *uṣūl* and how they relate to juristic disagreement over *furūʿ*. Al-Khinn achieves this by relying on a variety of legal literature that addresses the link between *fiqh* and *uṣūl al-fiqh* after presenting introductory remarks on the nature and development of legal reasoning. The second is an M.A. thesis completed in the Faculty of Sharīʿa in Riyadh in 1998 by ʿUthmān Ibn Muḥammad al-Akhḍar Shūshān (*Takhrīj al-Furūʿ ʿalā al-Uṣūl*) dealing with the nature of these works and their relationship with other types of juristic writing. The third is a similar (albeit briefer) work by Walī al-Dīn Ibn Muḥammad Ṣāliḥ al-Farfūr, *Takhrīj al-Furūʿ ʿalā al-Uṣūl Dirāsa Muqārina wa Taṭbīq* (Damascus, 2003). None of these studies addresses the question of the structural interrelations of the *uṣūl* and the *furūʿ*, which I hope to achieve in my present study.

(see especially Chapter Seven). Throughout, I rely on the six works of Islamic jurisprudence I mentioned at the beginning of this introduction.

How may one situate these six works as intellectual events in Islamic legal and intellectual history? When the Ḥanafī jurist al-Dabbūsī (d. 1036) decided to write his *Ta'sīs al-Naẓar*, almost four hundred years since the Prophet's death had elapsed, during which much theoretical and practical legal reasoning had been produced. Dabbūsī was aware of the breadth of practical legal reasoning (it deals with every aspect of human life from prayers to marriage and from business to crime and punishment, etc). He states that this breadth of practical legal matters may be forbiddingly vast for those who want to understand the basis of legal opinions in practical matters. Dabbūsī also states that these practical legal opinions are not the result of endless reflection on a case by case basis without any theoretical foundation. Thus, he sets out to explain the theoretical foundation of legal opinions in practical legal matters. Dabbūsī refers to the legal doctrines of the major jurists of the first two centuries of Islamic legal history, which gave his work quite a large scope, including the views of Ibn Abī Laylā (d. 765), Abū Ḥanīfa (d. 767), Mālik Ibn Anas (d. 795), Abū Yūsuf (d. 798), Muḥammad Ibn al-Ḥasan al-Shaybānī (d. 805), and Shāfiʿī (d. 820).

More than a hundred years later, the Shāfiʿī jurist al-Zanjānī (d. 1258) wrote his *Takhrīj al-Furūʿ ʿalā al-Uṣūl*, where he confines himself to the two rival schools: the Ḥanafī and Shāfiʿī school of law. Zanjānī takes for granted the link between theoretical and practical legal reasoning and sets out to explain the details of the disagreement between Ḥanafī and Shāfiʿī lawyers in theoretical and practical legal matters.

By the fourteenth century CE, writing books like Dabbūsī's and Zanjānī's will become by no means a rarity. Within the time-span of about three decades, the Mālikī jurist al-Tilimsānī (d. 1369), the Shāfiʿī jurist al-Isnawī (d. 1370), and the Ḥanbalī jurist Ibn al-Laḥḥām (d. 1402) will have written three books dealing with the links between theoretical legal principles and practical legal rulings, each with a different scope and with the same eclecticism of Dabbūsī and Zanjānī. Each book still presents something new. Tilimsānī compares the views of three schools of law: the Ḥanafī, the Mālikī, and the Shāfiʿī and provides a larger number of theoretical legal principles with terser, more effective locating of related practical legal issues. Ibn al-Laḥḥām puts his Ḥanbalī school on the map by providing evidence that theoretical and practical legal reasoning within that school has possessed qualities similar to those enjoyed by other schools of Sunnī law. Isnawī focuses on theory and practice within Shāfiʿī law and within that focuses on the process of legal hermeneutics or the interpretation

of texts of the Qur'ān and the Sunna in the making of law, which allows him to speak of the applications of hermeneutical principles in generating opinions in some hypothetical cases of practice.

Isnawī's focus on legal hermeneutics stimulated others to write books of *takhrīj al-furūʿ ʿalā al-uṣūl* with the same focus. At the end of the sixteenth century CE, the Ḥanafī jurist al-Timurtāshī (d. after 1599) decided to emulate Isnawī and write a hermeneutics-based work of *takhrīj al-furūʿ ʿalā al-uṣūl*, which will prove that Ḥanafī law is as rich as Shāfiʿī law in its hermeneutical apparatuses.

Plan

This study consists of eight chapters and a conclusion. *Chapter One* deals with basic terminology and presents important theoretical frameworks. These include an explanation of the Arabic terms *takhrīj*, *furūʿ* and *uṣūl* as well as English terms like law, legal theory, and legal philosophy. *Chapter Two* points out common misconceptions in academic writings on the relationship between theory and practice in Islamic law in both the Muslim world and the West. *Chapter Three* provides an overview of the works of *takhrīj al-furūʿ ʿalā al-uṣūl* I introduce in this work and short biographies of their authors. The following four chapters employ my six sources in order to delineate a structure for Islamic legal theory accompanied by applications of its theoretical assumptions in practical legal thought. *Chapter Four* deals with the theory of practical legal rulings as the fruit of legal reasoning (theoretical and practical) and the theory of human agency and responsibility in relation to the law in Islam. *Chapter Five* discusses the general theory of legal hermeneutics in Islamic legal theory, which consists of principles of interpretation applied by jurists to the texts of the Qur'ān and the Sunna in order to derive practical legal rulings that govern everyday life. *Chapter Six* discusses extra-textual sources of the law and how they are used to provide practical legal rulings. *Chapter Seven* discusses other types of *uṣūl* presented in my sources, including definitions of basic concepts of importance to theoretical and practical legal reasoning as well as theological and meta-legal principles of legal reasoning that can be tied to applications in legal practice. *Chapter Eight* deals with the scope of the *furūʿ* within the sources of this study, which are either answers to everyday life legal queries or to hypothetical questions. *The Conclusion* offers a statement on the interrelation of the *furūʿ* and the *uṣūl* as presented in my sources.

CHAPTER ONE

TERMINOLOGY AND THEORETICAL FRAMEWORKS

This chapter offers a discussion of basic Arabic and English terms that will be used in this study. Chief among these Arabic terms are *takhrīj*, *uṣūl* and *furūʿ*, and among English terms are law, legal theory, and legal philosophy. The chapter will also touch upon theoretical points of importance to the nature of law, legal theory, *uṣūl* and *furūʿ*. These include a discussion of the sources, components and *telos* of *uṣūl al-fiqh* in the view of Muslim jurists and scholars of Islamic legal history. Finally, the chapter deals with the possibility and potential utility and disutility of applying the notion of "genre" to legal writings. Thus, this chapter serves as an essential preparation for a discussion in Anglo-American vernacular of the interrelation of theatrical and practical legal reasoning in Islamic law as it is presented through a study of the *takhrīj al-furūʿ ʿalā al-uṣūl* literature.

Takhrīj, Uṣūl, *and* Furūʿ

The term *takhrīj* is derived from the root "kh-r-j," the basic meaning of which is "to exit; come out of." The causative verb (form II), *kharraja*, means to extract (to cause to exit or come out of), and *takhrīj* is a verbal noun from that verb.

In the terminology of scholars of *ḥadīth*, the verbal noun *takhrīj* can indicate the reporting of a Prophetic Tradition by an author of a collection of Traditions, as Aḥmad Ibn Ḥanbal (d. 855) and Bukhārī (d. 870) did in their *Musnad* and *Ṣaḥīḥ*, respectively. Reporting a Tradition in this sense involves extracting (*takhrīj*) the Tradition from oral or written sources and may involve making a judgment about the value of its chain of authorities or pedigree and presenting it to the reader in one's collection. In the vernacular of *ḥadīth* scholars, the term *takhrīj* can also be used to indicate locating a Prophetic Tradition in one of these collections, i.e., extracting (*takhrīj*) it from its source and citing that source.

In legal terminology, a *takhrīj* is usually a process of drawing on "legal theory" to generate and explain practical legal decisions. In a common

use of this term in Shāfiʿī law, the *takhrīj* (extraction) of a legal opinion refers to ascribing a practical legal decision to a jurist (often of a previous generation) in a case where he has not issued a ruling by using views similar to those which he is known to have held as a basis for issuing a ruling on his behalf. The term *takhrīj* here therefore means attributing a ruling to a certain jurist by means of an inference regarding the assumptions of legal theory underlying his known views on matters of legal practice. *Takhrīj*, then, is extraction of a practical legal decision from other practical legal decisions through the inevitable mediation of theoretical legal principles. This process rests on the assumption that the jurist should judge similar cases similarly and apply his theoretical legal principles consistently. Occasionally, the jurist to whom a decision in a given case is ascribed may have given a decision on this case himself, one that is not known to the performer of the *takhrīj*. This can result in two opinions by the same jurist on the same question. Jurists refer to this by saying that there are two views ascribed to jurist X, one based on a direct reporting of his view and one extracted based on his views in similar cases (*qawlān qawlun bi-nnaql wa qawlun bi-ttakhrīj*). This can happen in one of two circumstances: the jurist may have contradicted himself and judged similar cases differently or the *takhrīj* may have failed to predict this jurist's correct position.

In many legal sources, including the sources examined in this study, *takhrīj* indicates a process of linking practical legal decisions (*furūʿ*) to governing legal principles (*uṣūl*). The legal principle (*aṣl*) that directs an answer to a practical legal question may be a major theoretical principle of a hermeneutical nature; for example, the answer to the practical legal issue at hand may be based on an interpretation of a text of Scripture or Tradition (examples can be found in Chapter Five). Alternatively, the governing legal principle (*aṣl*) may be based on logical reasoning or it may be based on custom (*ʿurf*). Moreover, a legal principle (*aṣl*) may be based on extending the logic of practical legal decisions in similar cases (analogy; *qiyās*) or may be a legal maxim based on a generalization from previously known legal rulings in similar cases, some of which may have a textual basis (examples are offered in Chapters Four, Five, Six, and Seven). In all these cases, the *takhrīj* of *furūʿ* by juxtaposing them with *uṣūl* amounts to an explanation of their rationale with reference to legal theory. Existing *furūʿ* may require explanation with reference to existing *uṣūl* in a given school of law by an able jurist who can explain how these *furūʿ* and *uṣūl* belong to a consistent legal framework. If theoretical legal principles do not sufficiently explain the legal

views held by jurists in the school, then the *uṣūl* of legal theory itself must be developed to fit the demands of the *furūʿ* of legal practice. The sources of this study offer examples of the full spectrum of *takhrīj*, but this can also be found in works on legal maxims (*qawāʿid fiqhiyya*),[1] which give many examples of these types of *takhrīj*.

From this discussion of the meaning and uses of *takhrīj*, it must have become apparent that the term *aṣl* can be used differently. It can indicate a category of *uṣūl* or sources of the law (Qurʾān, Sunna, etc.), a single source of law such as a specific text from the Qurʾān, or a legal maxim or theoretical principle of legal reasoning. More curiously, as I indicated above, an *aṣl* can indicate reasoning based on a *farʿ*. Thus, a *farʿ* is an *aṣl* in that it leads to a process of theoretical legal reasoning that involves a test of the consistency of the *furūʿ* with one another. This is most clear in analogical reasoning where a jurist looks for the rationale behind deciding a given legal case and extends that to other cases. It may be appropriate here to point out that works of *furūʿ* are full of theoretical legal reasoning that must be seen as part of the *uṣūl*. Finally, in its plural form, i.e., *uṣūl*, the term can indicate the whole process of legal interpretation and reasoning in its theoretical level.

Furūʿ is a plural noun (singular *farʿ*) derived from the root (f-r-ʿ), which conveys the notion of branches and ramifications, whereas *uṣūl* (from the root ʾ-ṣ-l) denotes roots and foundations. In the realm of legal theory and legal practice discussed thus far, the term *furūʿ* applies to practical legal decisions, while the *uṣūl* refers to theoretical legal principles. The *furūʿ* or practical legal decisions are thus implicitly an "outcome" of a process of legal reasoning founded on some basis or underpinning. However, from the above explanation of the uses of *takhrīj*, we also know that a practical legal decision may constitute the basis or foundation (*aṣl*) of another practical legal decision (*farʿ*) if the first (foundational) decision offers guidance concerning the underlying theoretical legal principles (the real *uṣūl*) from which *furūʿ* may be derived. Thus, a *farʿ* that is inconsistent with the *uṣūl* must be discarded from the legal structure; otherwise, it might spread inconsistency to other parts of that legal structure.

The term *tafrīʿ* is another related term that is similarly a verbal noun derived from the verb *farraʿa* (meaning "to make or generate a *farʿ*.)" In

[1] Ibn Nujaym (d. 1573) (ed. Muḥammad Muṭīʿ al-Ḥāfiẓ), *al-Ashbāh wa-l-Naẓā'ir* (Beirut, 1999), 151.

juristic use, *tafrīʿ* usually indicates the generation of *furūʿ* based on well-known theoretical legal principles (*uṣūl*).

The above explanation of the three basic terms *takhrīj*, *uṣūl* and *furūʿ* shows the variety of their use and hints at the centrality of the notion of *uṣūl* in the process of Islamic legal reasoning. The *uṣūl* emerge as the glue that ties together scattered opinions in practical legal matters (*furūʿ*). Central among the various *uṣūl* are those principles of theoretical jurisprudence to which a genre of legal writing is dedicated (*uṣūl al-fiqh*). The components and *telos* of *uṣūl a-fiqh*, thus, deserve the following treatment.

The Sources, *Components*, *and* Telos *of* Uṣūl al-fiqh

Uṣūl al-fiqh has evolved from a scattered and heterogeneous assortment of grammatical, logical, and other principles and abstractions from practical legal thought into a well-defined genre of legal writing. I refer to the contents of this well-defined genre as "grand-legal-theory (GLT) *uṣūl al-fiqh*." GLT *uṣūl al-fiqh* has three components: 1) a theory of practical legal determinations (*aḥkām*), which are considered the fruits of legal thinking; 2) the sources of the law, both textual and extra-textual; and 3) principles of legal hermeneutics and other forms of legal reasoning that link the sources of the law to practical legal determinations (i.e., aid the jurist in deriving the *aḥkām* from the sources).

Discussion of legal determinations (*al-ḥukm al-sharʿī*) in late works of *uṣūl al-fiqh* includes questions about the nature of the legal ruling, its classification, and other questions that have a theoretical appearance. However, theoretical treatment of the practical aspect of the law provides a strong link between the theoretical and the practical. Actual practical legal decisions constituted the backdrop against which Muslim legal theorists developed the theoretical questions about practical legal determinations which ultimately resulted in the constitution of what may be called the theory of legal determinations. This theory of legal determinations is also linked to legal hermeneutics. The same can be said of links between textual and extra-textual sources of the law and their interpretation, on the one hand, and questions of legal practice, on the other. This insight should contribute to a better reading of *uṣūl al-fiqh* sources, one that does not focus solely on the theory of legal reasoning while paying little attention to its connections with the actual law it is supposed to serve.

Nonetheless, it must be acknowledged that the developed form of *uṣūl al-fiqh* (GLT *uṣūl al-fiqh*) gives an impression of a theoretical form of legal philosophy that does not always bear a strong relationship with the concrete concerns of legal practice. According to later Muslim legal theorists, GLT *uṣūl al-fiqh* is rooted in theological speculations, the study of the Arabic language, and legal reasoning of a mixed nature (i.e., semi-practical and semi-theoretical). Traditional introductions to GLT *uṣūl al-fiqh* state that the sources of *uṣūl al-fiqh* are *fiqh* (legal determinations accompanied by supporting legal reasoning), *ʿilm al-ʿarabiyya* (the sciences of the Arabic language), and *ʿilm al-kalām* (philosophical theology).[2] This means that two of the three sources of legal theory are unrelated to the immediate needs of legal practice. What makes theology and the study of the Arabic language so important in the study of Islamic law?

According to al-ʿAlāʾ al-Samarqandī (d. 1144), theology (*kalām*) is the basis of theoretical legal reasoning in the sense that one's beliefs in matters of authority in the Islamic religion are always reflected in one's theoretical legal reasoning.[3] For one thing, belief in the authority of the texts of Scripture and Tradition is presupposed in using them to derive law. Furthermore, theological beliefs on matters such as free will and the discretionary authority of the human intellect inevitably color one's reading of Scripture and Tradition. Even further, the details of one's belief about the authoritativeness of Prophetic Tradition will have an impact on the process of inferring the details of the law from Scripture and Tradition and attempts to resolve conflicting messages within them. Samarqandī decided to write a book on *uṣūl al-fiqh* for Māturīdī audience (those of a similar theological persuasion to Samarqandī), since books written by Muʿtazilī authors did not provide the necessary theological premises on which to base sound legal theory. Samarqandī was certainly aware that many books on *uṣūl al-fiqh* written by Ashʿarī authors (whose theological doctrines are quite close to those of the Māturīdīs) were available in his time, but these books were also apparently not adequate in his view. Despite the slimness of the difference between Maturīdī and Ashʿarī theologies, Samarqandī felt the need to articulate a legal theory

---

[2] This is taken from what is known as the ten points of departure (*al-mabābiʾ al-ʿashara*), which will be examined in Chapter Two.

[3] ʿAlāʾ al-Dīn al-Samarqandī (ed. ʿAbd al-Malik al-Saʿdī), *Mīzān al-Wuṣūl fī Natāʾij al-ʿUqūl fī Uṣūl al-Fiqh* (Baghdad, 1987), 97.

that fits his school's theology, which gives us an idea of the strength of the relationship between *uṣūl al-fiqh* and *kalām*—at least from the vantage point of theologians and legal theorists like Samarqandī.

Browsing works of *uṣūl al-fiqh* must draw our attention to the strong links between *uṣūl al-fiqh* and *kalām*. In addition to the central questions of authority (the authority of texts and the authority of the human intellect), one can note theological inquiries that found their way into *uṣūl al-fiqh*. Here are three examples. *First*, the question of whether the blessings God has given to human beings can be recognized by the unaided intellect and whether this creates a duty of "gratitude" which every human being has to fulfill (*mas' alat wujūb shukr al-munʿim ʿaqlan*). *Second*, the question of whether those who lived before the revelation of the Muḥammadan message could have arrived at answers to legal questions through their intellects unaided by revelation (*ḥukm al-ashyā' qabl al-sharʿ*). *Third*, the question of whether non-Muslims will be held responsible on the Day of the Final Reckoning for their failure to comply with the specific duties of Islamic law or whether they will be held responsible only for their failure to recognize the prophecy of the Prophet Muḥammad (*hal al-kuffār mukhāṭabūn bi-l-furūʿ*). [We will later note that answers to these and other theological questions that became part of legal theory have ramifications in practical legal questions.]

If theology is foundational to the study of the *uṣūl* or legal theory, what about the relevance of the study of the Arabic language? To answer this question, we must remember that the two main sources of Islamic law (the Qur'ān and the Sunna) consist of Arabic texts, and the interpretation of these sources occupies a central position in Islamic legal theory. Furthermore, the relevance of language to law has another important dimension. It is through language that people enter into the commitments that the law protects, such as contracts and legal confessions. People's utterances and pronouncements are regarded as significant acts of consequence. Qur'ānic verses and Prophetic reports will reinforce the value of the *word* and consecrate it as a vital part of the Islamic ethos. Note also that the Arabic-speaking people seem to have always enjoyed studying and savoring *words and sentences* (in the sense of the artistic use of language) and put considerable emphasis on the value of one's *word* (in the sense of pledges and promises). Muslim jurists will, therefore, say that the initiation and termination of commitments is effected by utterances or pronouncements signifying the will of the speaker. This makes both divine and human utterances a rich source of discussions relevant to the law.

This may be sufficient to establish the relationship between theology and the sciences of the language, on the one hand, and Islamic legal theory, on the other. But what aspects of the sciences of the language and theology have been relevant to Islamic legal theory? Zarkashī (d. 1392) asks whether Muslim legal theorists have confined their interest in theological and linguistic study to the areas typically of interest to theologians and grammarians/linguists. Answering this question in the negative, Zarkashī sets out to refute the claim that *uṣūl al-fiqh* is nothing but a *mélange* of questions from theology and grammar or the language sciences.[4] Those who claim *uṣūl al-fiqh* to be an amalgamation of inquiries from other fields overlook the fact that these imported questions have been almost fully integrated into a different discourse, the discourse of legal theory. Nor is every theological or linguistic concern deemed relevant to *uṣūl al-fiqh*, since the latter is by no means an encyclopedia of theological and linguistic inquiries. The relationship of Islamic legal theory to these foundational sciences is, therefore, a selective and dynamic one, involving careful picking and choosing, elaboration and exclusion, and, indeed, modification and invention.

It seems, however, at least from Ghazālī's (d. 1111) standpoint, that the transfer of questions of *kalām* and grammar into *uṣūl al-fiqh* was occasionally excessive.[5] Ghazālī complains about stuffing *uṣūl al-fiqh* with questions of theology and grammar, emphasizing to his reader that *uṣūl al-fiqh* was developed to serve practical juristic thinking. In other words, the concern with the fruits of practical legal thinking—the legal determinations that govern social behavior—must not be forgotten when legal theorists take up the task of elaborating their legal theories. Almost two hundred years later, al-Qarāfī (d. 1285) further emphasizes, at the beginning of his law compendium, *al-Dhakhīra*, that offering an introduction on legal theory (*uṣūl al-fiqh wa qawāʿid al-sharʿ*) at the outset of a book of law and jurisprudence (*fiqh*) is essential, so that the *furūʿ* may be based on the *uṣūl*, since any *fiqh* that is not based on principles is nothing! (*kull fiqh lam yukharraj ʿalā al-qawāʿid falaysa bishayʾ*).[6] Along these lines, al-Shāṭibī (d. 1388) argues in his *Muwāfaqāt*[7] that discussions

---

[4] Al-Zarkashī (ed. Muḥammad Tāmir), *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Beirut, 2000), I, 9.

[5] *Al-Ghazālī*, *Mustaṣfā* (Beirut, 1980), I, 7.

[6] Shihāb al-Dīn al-Qarāfī, *al-Dhakhīra*, edited by Muḥammad Ḥajjī (Beirut, 1994), I, 55.

[7] Al-Shāṭibī, *Muwāfaqāt* (Cairo, 1956), I, 17.

of legal theory that cannot be linked to practical questions of law must be seen as foreign to legal theory, since these are borrowed from other fields (*ʿāriyya*).

It would therefore be unfair to depict *uṣūl al-fiqh* as theorization for the high-minded with little interest in legal practice. *Uṣūl al-fiqh*, as it grew and developed over time, was influenced to a great extent by the juristic concern with practical legal decisions (the fruits or ultimate products of legal reasoning) as well as by what one might call the hermeneutical drive.

Any further discussion of the nature of Islamic legal theory and its interrelation with the practical determinations that make up Muslim law will take us beyond the bounds of these introductory remarks. Introducing cases which demonstrate the teleological interdependence of Islamic law and legal theory is one of the aims of this study, and this will be achieved through presentation of legal debates on legal theory and practice within the works of *takhrīj al-furūʿ ʿalā al-uṣūl*. I will note that debates among jurists have led them to modify their positions and reconsider their views on matters of law and legal theory. Sometimes both parties in a legal debate insist on a certain principle of legal theory or *aṣl* (because of its theoretical validity or the fact that it applies properly in most cases of *furūʿ*), but still acknowledge the possibility of exceptions to this principle when they discuss the *furūʿ*. Remarking on a rare case, where a disagreement between two schools of law lead these schools' members to realizing the limitations of their assumptions in the field of legal theory, Tilimsānī notes that, "(when they discussed their applications), both sides made exceptions to the principles of legal theory they had adopted."[8] This might lead to a reconsideration of the notion that books of *fiqh* are devoid of legal theory, an assumption that has limited our insight into the nature of Islamic law and legal theory.

The six works I present in this study provide important data for the historian of Islamic law interested in exploring the development of legal theory from proto *uṣūl al-fiqh* to *uṣūl al-fiqh* or from unclassifiable principles into a well-defined theory. My study will lend support to the proposition that GLT *uṣūl al-fiqh* did not develop out of theoretical speculation about the sources of the law without reference to practical legal determinations. On the contrary, the tripartite body of legal thought I called GLT *uṣūl al-fiqh* was the result of a process of accumulation, classification,

[8] *Miftāḥ*, 26.

consideration, and reconsideration of principles of legal reasoning by jurists who were acutely aware of their tasks both as lawyers and as legal philosophers. Simultaneous reflection on questions of legal theory and questions of legal practice gives rise to a form of legal dialectic whereby both the theoretical and the practical aspects of the legal system evolve. Practical needs and pragmatic considerations are not foreign to the imperatives of this legal dialectic; yet these imperatives also reflect highly sophisticated and complex philosophical efforts.

Legal Theory and Legal Philosophy

Throughout this study, I shall use the term "legal theory" in a sense slightly different from that of "legal philosophy." In my use of these terms, "legal theorists" share many convictions about both the substantive claims of theoretical legal thinking and its underlying logical assumptions. "Legal philosophers," by contrast, tend to consider most or all presuppositions open to question. In short, fewer presuppositions in legal philosophy are made.[9]

Islamic legal theory may inquire into whether the unanimous consent of the entire Muslim community is required to institute a legal ruling by consensus or whether the agreement of all jurists or even all but one or two may be sufficient to establish a binding consensus. By contrast, to go beyond debating the technical requirements of consensus and to question the value of all forms of consensus within the Muslim community involves an inquiry of legal philosophy rather than legal theory. Similarly, legal theorists may disagree on specific principles of legal hermeneutics as these apply to a textual source of the law from Scripture or Tradition. Yet, to debate the very authoritativeness of textual and extra-textual sources of the law is to enter into the arena of legal philosophy.

The core of Sunnī *uṣūl al-fiqh* represents legal theory *par excellence*. Within this core, the discussions mainly revolve around establishing the conditions and character of a certain text or extra-textual form of legal reasoning as authoritative. But some of *uṣūl al-fiqh* falls within the

[9] A similar distinction between "political philosophy" as a branch of moral philosophy and "political theory" as an application of a certain standard of political scientific inquiry was made by Ted Honderich in his *Terrorism for Humanity* (London, 2003), 1–3.

domain of legal philosophy rather than legal theory. In *uṣūl al-fiqh* as Islamic legal philosophy, one may find a juristic-philosophical disagreement over whether the "right" established by a judge's ruling derives from the judge's own authority or from an understanding of the ruling as a *simulacrum* of an eternal, divine ruling.[10] Legal theory would not answer this question either way; it will not tell us whether we hold the judge to be merely a conveyor of God's ruling, since this question pertains to the metaphysics of law rather than theoretical principles of legal reasoning. It may be noted that in the context of Islamic legal theory, neither the Hobbesian formula *auctoritas*, *non veritas*, *fecit legem* (authority, not truth, makes the law) nor its opposite, *veritas*, *non auctoritas*, *fecit legem*, is applicable, since authority and truth are seen as joined in a theological bond, albeit one toward which the modern eye has grown increasingly suspicious.[11]

Theoretical legal reasoning by Muslim legal philosophers and theorists can be studied in the terminology of modern rational reasoning if differences between an "Islamic" and a "modern" form of legal reasoning are noted. After all, the relationship between law and theology in

---

[10] This interesting philosophical question has consequences in legal practice. If the judge's ruling can be seen as relying on its own authority, then a Muslim subject who does not believe in the correctness of the ruling cannot deny the authoritativeness of the ruling and its binding nature. Thus, a man who was stripped of a certain property based on what he considers false evidence cannot act as though he still possesses it, even if he is absolutely sure of the falsity of the evidentiary foundation of the ruling. For further treatment of this subject, see Chapter Seven.

[11] Authority is one of the most recurring words in Hobbes' *Leviathan*, where the author acknowledges the existence of different types of authority, including authority in matters of politics, religion, and education. Here I simply point to the foreignness in Islamic law of this familiar formula, though I am acutely aware of the fact that the problem of reconciling different authorities in Islamic law, even theoretically, is far from resolved. To deny that the opposite of this Hobbesian formula applies in Islamic law is to insist that real authority never diverges from the truth. Muslim jurists, however, debate whether a judge's manifestly erroneous ruling (e.g., one based on false testimony) may be seen as applicable only in the realm of material reality and may therefore be countered based on religious conviction or even opposed in practice by subjects who recognize its erroneousness. This discussion (known as the *ḥukm al-qaḍā'* vs. *ḥukm al-diyāna* dilemma) admits the possibility of human misinterpretation of worldly facts. As for the misinterpretation of texts, however, there are various controversies about whether conflicting interpretations may all be seen as essentially correct or whether only one of them may be considered correct and the rest necessarily erroneous. This is what is indicated by the question: *hal yataʿaddad al-ḥaqq*? (Is the correct interpretation one or many?). Despite such controversies, the authority of those qualified to interpret the textual sources of the law cannot be thrown entirely into question, and authority, truth, and text maintain their close connection.

the Muslim worldview remains different from that between modern law and theology. In most modern legal systems, the authoritativeness of theology or even the metaphysics of law seems to be assigned a much lower status. Modern law appears to have assumed the level of authority accorded to theology in medieval Europe.[12] This must be taken into account when writers (or even readers) consider comparisons between the medieval Muslim law and modern Western legal systems.[13]

Distinctions between legal theory and legal philosophy may also be found in the writings of legal theorists from other legal traditions. Some

---

[12] Bernard Weiss, "Law in Islam and in the West" in *Islamic Studies for Charles Adams* (Leiden, 1991).

[13] Interest in identifying the sciences concerned with practical and theoretical religious thought and the relationship among them has not been confined to theologians and legal scholars. Here are brief remarks about the interrelation of the religious sciences from points of view that are not purely theological or legal, as this may illuminate the broader context for the question under consideration.

Fārābī (d. 950), for example, offers the following remarks on the nature of the crafts of *fiqh* and *kalām*. Fārābī first defines *fiqh* as a faculty that allows a jurist or a *faqīh* to infer legal rulings that are not explicitly stated by the lawgiver. *Kalām*, according to Fārābī, is intended to provide arguments to defend the belief system of a given religion or the creed of a community. This makes both intellectual fields (*fiqh* and *kalām*) connected to the doctrinal and practical aspects of a religious tradition but not necessarily to one another, except inasmuch as practice in many religious traditions may take for granted certain theoretical doctrines as foundational. This Fārābī makes explicit when he points out that a *faqīh* or scholar of *fiqh* takes for granted the principles of the religion (*milla*), which it is the task of the *mutakallim* or scholar of *kalām* to defend. The *mutakallim* defends the principles the *faqīh* employs, but does not mention the implications of all the general principles he defends. Thus, Fārābī accepts in principle the assumption that *kalām* is foundational to *fiqh*. [Fārābī (ed. ʿUthmān Yaḥyā), *Iḥṣāʾ al-ʿUlūm* (Cairo, 1968), 130-2.]

The idea of the link between *kalām* and *fiqh* is fairly complex, and in many ways, the relationship between *kalām* and *fiqh* can only be known by studying the history of the two, since each of the two fields has taken steps sometimes towards and sometimes away from the other. An aspect of the relationship between *kalām* and *fiqh* stems from the fact that certain *kalām* principles have a strong link to meta-legal principles, and Chapter Seven of this study can claim to have taken a clue from Fārābī when it deals with these meta-legal/theological questions as they appear in the sources examined here. But let us consider for a moment other general statements about the relationship among different theoretical and practical religious sciences.

Khārazmī (d. 997) begins his *Mafātīḥ al-ʿUlūm* with a statement about *uṣūl al-fiqh* (i.e., the sources of legal rulings), which he identifies as the Qur'ān, the Prophet's Sunna, consensus, analogy, *istiḥsān* (juridical preference), and *istiṣlāḥ* (reasoning based on utility). Khārazmī then briefly hints that these *uṣūl* are foundational to legal opinions. Later Khārazmī delves into an identification of the major areas of *fiqh* or knowledge of the law, including rituals, trade, family law, criminal law, etc. Finally, he identifies the major aspects of Islamic credos or *uṣūl al-dīn* without explicitly linking these to practical legal thought. [Khārazmī, *Mafātīḥ al-ʿUlūm* (Cairo, 1924), 6–28.]

American jurists consider legal theory a larger umbrella that includes legal philosophy, since they would like to include the contribution of the modern social sciences (especially economics) in their analysis of all legal phenomena. "Legal theory," a prominent American judge writes, "includes legal philosophy but is broader, because it also includes the use of nonlegal methods of inquiry to illuminate specific issues of law; it

---

Thus, Khārazmī finds it sufficient to hint at the foundational nature of the sources of law, which are characterized by considerable variety. Some of these sources are texts (Qur'ān and Sunna), some are techniques of juristic reasoning (*istiḥsān* and *istiṣlāḥ*), and at least one (consensus) consists in a historical fact of agreement among jurists. Exclusive reliance on Khārazmī's remarks, however, does not assure us that the doctrines of the religion are linked directly to the practical legal rulings of the religious law. Other authors take up the difficult task of making that link explicit.

Ibn al-Akfānī (d. 1348) reiterates what Fārābī said about *kalām*, but calls it *uṣūl al-dīn*. For Ibn al-Akfānī, *uṣūl al-dīn* explains and defends the belief system given by the Creator. Ibn al-Akfānī also mentions *uṣūl al-fiqh*, the science through which are known "the sources of practical legal rulings and how they can be derived through legal reasoning." *Fiqh* is the science that offers knowledge of these practical legal rulings in matters of ritual, trade and other human forms of interaction and habits. [Ibn al-Akfānī (ed. ʿAbd al-Laṭīf al-ʿAbd), *Irshād al-Qāṣid ilā Asnā al-Maqāṣid* (Cairo, 1978), 100-5.] Since the sources of both the belief system and the practical guidance which constitute the Islamic religion are the same, namely, the Qur'ān and the Prophet's Sunna, and since belief is foundational to action, it follows that the three sciences of *kalām* (*uṣūl al-dīn*), *uṣūl al-fiqh*, and *fiqh* can be placed in a hierarchy: *Kalām* (*uṣūl al-dīn*) is foundational to both *uṣūl al-fiqh* and *fiqh* and *uṣūl al-fiqh* is foundational to *fiqh*. In this hierarchy, therefore, legal theory (*uṣūl al-fiqh*) stands in the middle, between *kalām* and *fiqh*.

Here is a simple example of how each science presupposes the assumptions of the sciences preceding it in the hierarchy. *Fiqh* tells you that drinking intoxicants is prohibited, which presupposes accepting a particular interpretation of Scripture (establishing the prohibition of wine) and the use of analogy (equating all intoxicants with wine), which are a function of *uṣūl al-fiqh*. Moreover, *uṣūl al-fiqh* builds its assumptions on *kalām*'s (*uṣūl al-dīn*'s) presupposition of Scripture as a source of correct doctrine and practice.

Puzzling and controversial statements about the relationship between *kalām* and *fiqh* are by no means lacking. Al-Taftazānī (d. 1390), for instance, draws an analogy between the relationship between *kalām* and *fiqh* and that between logic and philosophy. [Taftazānī (ed. Claude Salāma) *Sharḥ al-ʿAqā'id al-Nasafiyya fī Uṣūl al-Dīn wa-l-Kalām* (Damascus, 1974), 5.] The sense in which the two relationships are analogous may be that *kalām* sets the rules for acceptable arguments for a *faqīh* in the same way that logic sets the rules for acceptable arguments for a philosopher. Controversial analogies and exact descriptions of the relationship among religious sciences aside, one must acknowledge that these scholars' concern for identifying the connections among the various religious sciences is significant. Obviously, one of the dangers of the hierarchy framework is that it might seem to suggest chronological precedence of a given foundational science over those subordinate to it in the hierarchy. Yet, a diachronic view of the evolution of any intellectual tradition will invariably show the evolution of interrelated sciences as a process of constant revision, adjustment, and adaptation.

excludes only doctrinal analysis."[14] In this use, legal theory is concerned with all explanations of the phenomenon of law and its making, including abstractions related to law, such as legal hermeneutics and the different schools of legal philosophy such as legal positivism, legal realism, and natural law. Thus conceived, legal theory must be as minimalistic in its adoption of the postulates of the social sciences as general philosophy is in its adoption of principles of general or logical reasoning. In my view, a distinction that makes legal theory a larger umbrella encompassing legal philosophy is counterintuitive and goes against the general and technical uses of the words "philosophy" and "theory."

Law: Islamic and Non-Islamic

As used in the American legal tradition, the term "law" can indicate: 1) the whole of the American legal system; 2) a particular legal provision (legislative, judicial, etc.); or 3) simply the prevailing legal opinion in the legal system on a given question.[15] Similarly, one may speak of "Islamic law" and refer to the whole of the Islamic legal system or to legal opinions that deal with practical questions issued by competent jurists. These opinions mainly take one of two forms: 1) *responsa* (*fatwās*) addressing real-life queries by questioners or 2) decisions in general paradigm cases (*furūʿ*) addressing real or hypothetical queries which make up the main body of books of *fiqh* or jurisprudence. Nevertheless, a full comparison between the components of Islamic law and legal theory, on the one hand, and those of modern Western law and legal theory, on the other, is neither desirable nor even possible.

The concept of law in the term "Islamic law" has no equivalent in the concept of law as applied to any modern Western legal system. Whether it is meant to indicate the legal system as a whole or a prevailing legal opinion, *law* in the modern context is narrower in scope than *law* in the Islamic context. For one thing, the subject of law in Islam is human actions, all human actions. Islamic law assigns one of five value judgments to all human actions: prohibited (e.g., theft), reprehensible (e.g., wasting time), recommended (e.g., charity), or obligatory (e.g., daily prayers), or neutral (e.g., traveling and touring different places). Punishment in the

---

[14] Richard Posner, *Frontiers of Legal Theory* (Cambridge MA, 2001), 91.
[15] Ronald Dworkin (ed.), *The Philosophy of Law* (Cambridge, 1977), 2–3.

hereafter ensues when one fails to fulfill an obligation or violates a prohibition, while rewards are given to those who perform acts that are obligatory or recommended act as well as to those who refrain from what is prohibited or reprehensible. According to one view, actions classified as neutral lose their neutrality when the intent of their doers is taken into account, becoming either desirable or undesirable based on whether they were done for good or bad ends.

Another difference between law in Islam and in modern legal systems concerns what is referred to as the political nature of the phenomenon of law in the modern era. Islamic law is assumed to exist regardless of any governmental enforcement. That is, since the law in Islam is the result of a process of legal hermeneutics (relying mainly on knowledge of religious texts and social reality), a competent, trustworthy jurist could "enact law" which it becomes the duty of pious people to follow regardless of governmental enforcement or lack thereof. Punishments and remedies imposed by the government in a Muslim society do exist, but are not the only basis for the existence of law in Islam. Some of what is seen as part of the law in Islam cannot really be imposed by anybody other than those who apply it to themselves (e.g., the duty of fasting in the month of Ramaḍān).

Sherman Jackson tackles an important comparison between the Islamic and Western legal traditions concerning the making of law. He points out that the "makers" of Islamic law are mostly private jurists holding no official position in the State. This may incorrectly tempt us to compare lawmaking in the Islamic legal tradition to the same in the Civil Law tradition, since in both of these, some authority in advancing legal opinions that impact the substance of the law was conferred upon individual jurists who were not government officials. This comparison is at best incomplete, Jackson argues, citing A. Watson's *The Making of the Civil Law*, which states that, for their opinion to have any binding value, jurists in the Civil Law tradition have to be licensed to offer such opinions.[16] Of course, what is meant by licensure here cannot be compared to a juristic license in the Islamic legal tradition. Institutional learning in the Islamic legal tradition relied on no more than the personal authority (based on scholarly achievement) of the teacher/jurist. Despite the fact that state-sponsored schools teaching Islamic law and other religious sciences have

[16] Sherman Jackson, *Islamic Law and the State* (Leiden: Brill, 1996), xv. Jackson cites A. Watson's *The Making of the Civil Law* (Cambridge: MA, 1981), 173

existed over the long course of Islamic history and across its wide geography, it remains a fact that state sponsorship has never been a prerequisite for the authoritativeness of the schooling of the teachers/jurists who offer juristic licensure to their students. In fact, in the early stages of Islamic legal history, the idea that such licensure would be necessary was not even contemplated.

In the final section of this chapter, I must address the theoretical question of the value and meaning of *genres* in any literature, whether legal, philosophical, or any other type and whether the literature I present here can be called a genre.

The Question of Genre in Legal Writing

Inasmuch as this is possible today, it may not be controversial to call "poetry" and "novel" genres, and the same may apply to "film" and "theater." But would it be harder to agree on what makes a genre a genre? What are the conditions under which one can speak of the existence of a genre? This question tends to be answered in different ways, and the longer a given tradition of art or literature persists, the more perspectives on the issue of genre within that tradition are generated.

A tendency to deny the sustainability of the notion of genre has become prominent among literary critics and philosophers in the last few decades. Once the emphasis is placed on *difference* and the uniqueness of each work of art, literature, etc., the very notion of genre becomes questionable. Therefore, to consider a work of art or literature as part of a genre is to reduce its significance and do a disservice to its author and the audience it addresses. In this view, one should always look at a notion like genre as an attempt to impose a certain interpretation on a given work. No reader should be entitled to direct other readers as to how to make sense of a certain work. Even if this interpretation is offered by the author of that work, that also must be rejected. Authors' identification of the genre of their work makes them act as authors and readers at the same time, which is unacceptable. Furthermore, if the purpose of identifying the genre of a given work is to facilitate the understanding of the work, and if such identification is in itself an act of interpretation, then one would, in essence, be making a circular argument about the nature and meaning of the work under consideration, and such identification would ultimately be useless for those who read that work differently.

There is some validity to the notion that identifying the genre of a given work may tend to some extent to reduce the work to something that it is not. However, emphasizing differences among works of art or literature to the extent of denying all similarities is anything but useful. As the arch-postmodernist, Jacque Derrida, argues, when people emphasize, they tend to overemphasize, and this type of emphasis on difference may be a good example of this tendency. The recognition of the existence of a genre stems from a recognition of similarities among certain works of art or literature rather than a denial of their distinctiveness.

The notion of genre in Sunnī Islamic legal writings faces its own challenges. There is no equivalent to the term "genre" in the writings of Muslim jurists or historians of law, and equating the term "genre" either with *ʿilm* or *fann* is misguided in my view. The terms *ʿilm* and *fann* do not normally indicate a body of literature (even when they are used in an academic context). In addition, the meaning of these two terms is all but stable, and even agreeing on what is to expect when authors write in the genre of "*uṣūl al-fiqh*," for example, may be difficult. At any rate, an application of the term "genre" to Islamic legal writing may be best attested in later works of law and legal theory rather than be presumed to find examples throughout Islamic legal literature. Among the genres of Sunnī Islamic legal writing, the two genres of *fiqh* and *uṣūl al-fiqh* occupy positions of prominence. A later summa work of *fiqh* or *uṣūl al-fiqh* (as opposed to early works such as Shāfiʿī's (d. 820) *al-Umm*) is typically a commentary on a concentrated textbook (*matn*). For scholastic purposes, this provides the advantage of exposing students who study that work to two intellects, that of the author of the *matn* and that of the author of the commentary. *Fiqh* and *uṣūl al-fiqh* are not the only identifiable genres of juristic Islamic writing; works on legal maxims (*qawāʿid fiqhiyya*), juristic disagreement, and comparative law (*ikhtilāf al-fuqahāʾ*) may also be seen as constituting juristic genres.

The majority of the sources examined in this study share a similar objective, and instances of inter-textuality appear among the works (Timurtāshī cites Isnawī as the impetus behind the writing of his book in his statement of purpose and repeatedly cites the content of Isnawī's work throughout his book). All six works, with the exception of Dabbūsī's *Taʾsīs al-Nazar*, are products of the twelfth century or later. Thus, five of the six works this study introduces were written with a certain notion of the nature of *uṣūl* and *furūʿ*, one that seems to roughly correspond to scholastic definitions of these two concepts in the Sunnī *fiqh* and *uṣūl al-fiqh*. In Dabbūsī's *Taʾsīs*, the *uṣūl* do not fully correspond to

the *uṣūl* of legal theorists in the Sunnī *uṣūl al-fiqh* tradition. This does not, however, mean that Dabbūsī's *Ta'sīs* differs in every respect from the other works. Dabbūsī's *Ta'sīs* is based on a distinction between theoretical legal principles (*uṣūl*) and practical legal determinations (*furūʿ*). Indeed, Dabbūsī's *Ta'sīs* adds an interesting dimension to the study of the historical evolution of the interrelation of the *uṣūl* and the *furūʿ* in Sunnī law and legal theory, and studying Dabbūsī's work as one of a piece with the other five works remains reasonable.

Dabbūsī's *Ta'sīs al-Nazar* begins with a statement about the importance of understanding the theoretical foundation of juristic disagreement in practical legal matters. Based on this emphasis on juristic disagreement, some readers (including the first publishers of the book in the twentieth century) identified the work as a compendium of juristic disagreement. Works on juristic disagreement span a broad spectrum: some are elaborate (e.g., *Ikhtilāf al-ʿUlamā'* by Ṭaḥāwī or *Bidāyat al-Mujtahid* by Ibn Rushd), others are less elaborate (e.g., *Ikhtilāf al-ʿUlamā'* by Ṭabarī), while still others provide a sketchy form of comparative law (e.g., *Ikhtilāf al-ʿUlamā'* by Marwazī). Dabbūsī's *Ta'sīs al-Nazar* must be seen as an example of the more sketchy type. But Dabbūsī's work remains less systematic in its treatment of juristic disagreement compared to its juxtaposition of theoretical legal principles (*uṣūl*) and practical legal determinations (*furūʿ*). While it is generally untenable to rely on the title of a work to determine the workīs genre, it is worth noting that Dabbūsī's title (*Ta'sīs al-Nazar*) emphasizes the theoretical foundation of the law rather than the disagreement among jurists in theory or practice.

In the second chapter of this study, I will critique a notion of limiting the writing of *uṣūl al-fiqh* to two paradigms, the paradigm of the *rationalists* and that of the *jurists*, a notion I trace back to Ibn Khaldūn's *Prolegomenon* or *Muqaddima*. Some consider works of *takhrīj al-furūʿ ʿalā al-uṣūl* a third method of writing in the genre of *uṣūl al-fiqh*, which makes a third paradigm of the writing of *uṣūl al-fiqh* added to the paradigm of the *rationalists* and that of the *jurists*.[17] If some attempt to subsume *takhrīj al-furūʿ ʿalā al-uṣūl* under *uṣūl al-fiqh*, some would attempt to subsume works of *qawāʿid fiqhiyya* under *uṣūl al-fiqh* or to *fiqh*. There are limitations to the value of these classifications and generalizations, and focusing on the significance of these different types of Islamic legal writings is more valuable than squeezing them into identifiable genres.

---

[17] Al-Shahīd al-Thānī (d. 1559) (ed. Maktab al-Iʿlām al-Islāmī in *Qumm*), *Tamhīd al-Qawāʿid* (Qumm, 1996), 9–11 (in the editors' introduction).

Of the six works that are the sources of this study, some adopt comparative approaches among different schools of law (*madhhabs*) while others concentrate on one school. Comparative approaches are useful in accentuating the importance of legal theory in comparative law, while focusing on one school of law is helpful in providing a test for consistency within a single school. This variety within *takhrīj al-furūʿ ʿalā al-uṣūl* works may offer support for the notion that emphasis on the interrelation of legal theory and legal practice invites questions about the consistency within one school of law as well as about the sources of disagreement in practical matters and how they are related to disagreement in theoretical matters.

Whether we want to call it a genre or a subgenre of Islamic legal theory (with *uṣūl al-fiqh* and *qawāʿid fiqhiyya*), awareness of the availability of the *takhrīj* literature is essential to an understanding of the nature and development of Islamic legal thought. Scholars of Islamic law will do well to carefully inspect a manuscript before they judge it to be either a work of *uṣūl al-fiqh*, *qawāʿid fiqhiyya*, or *takhrīj* (and in my view we have to be open to the idea of the transgeneric, those works that defy simple classification). At any rate, checking titles in manuscript lists will not suffice.

In this chapter, I attempted to touch upon several theoretical questions of relevance to my study of the *takhrīj al-furāʿ ʿalā al-uṣūl* literature. In the following chapter, I attempt to offer general remarks about what I refer to as existing "perspectives" in the study of Islamic legal history in Muslim and Western academic contexts.

CHAPTER TWO

IMPRESSIONS AND MISCONCEPTIONS IN THE STUDY OF ISLAMIC LEGAL HISTORY

Many positive developments have taken place recently in the field of Islamic legal studies both in the Muslim world and the West. In Muslim academe, comparative legal studies aimed at clarifying points of intersection and divergence between Islamic law and Western legal systems are growing more sophisticated. In the West, the work of many scholars of Islamic legal history is becoming more nuanced and more historically grounded. Scholars in the field have expanded their interest in the diversity of Islamic intellectual traditions in general and legal traditions in particular. This growing interest in the variety of Islamic legal thought as well as in comparative legal studies has resulted in more breadth and heterogeneity in Islamic legal studies in the Muslim world and the West. However, Islamic legal studies in Muslim and Western academic institutions continue to face challenges.

In Muslim academe, Islamic legal history still enjoys a secondary status as compared with efforts to advance new methods of legal thinking and apply them to contemporary legal cases. Moreover, the scientific study of Islamic legal history is still subject to untested assumptions based on generalizations that pre-modern scholars of Islamic law bequeathed to the current generation of historians, even though the latters' scholarly interests and agenda have gone well beyond those of their medieval and early modern forebears. Muslim academic institutions are certainly endowed with many competent scholars of Islamic law, some of whom have dedicated five or six decades to its study. A student of Islamic law in a Muslim academy enjoys a number of advantages, including engaging with legal texts early in his or her life, undergoing supervised training with experts, and having the opportunity to practice Islamic "lawmaking" in the real world. Yet the training of an Islamic legal historian cannot be limited to textual/philological or legal analysis. A historian of Islamic law must aspire to combine thorough training in Islamic law with training in historical methodology, admittedly a tall order. Far from meeting this standard, scholars of Islamic law in Muslim academe have yet to synthesize the enormous amount of information about the

content and context of Islamic legal thought—accumulated over a period of fourteen centuries—into a distinct scientific field. Moreover, some Muslim scholars have tended to confuse exposure to "information" about Islamic legal history with systematic study of the field.

Scholars in Western academe have faced a different set of challenges when studying Islamic legal history. Western scholars have generally been keen on applying to the arena of Islamic legal thought perspectives which scholars of European intellectual history have applied in their work, even when such perspectives are not clearly applicable to the Muslim context. Later critical studies in Western intellectual history have shown weaknesses in a number of these perspectives, leading either to their abandonment or to the acknowledgement that they have significant limitations. Western writing on Islamic legal history, however, tends to lag behind the latest wave of critical studies.

The study of Islamic legal history in the West has been characterized by two themes or "motifs" that can be discerned in the writings of Western scholars of Islamic law despite differences in their approaches and methodologies. The first of these two themes is Western scholars' fascination with *the origins of Islamic law* at the expense of studying the full extent of its development. The second theme is Western scholars' emphasis on the notion of a *divergence between theory and practice in Islamic law*. Scholars may debate the precise reasons for the prevalence of these two themes in Western studies of Islamic law. Suffice it here to make some brief comments about them.

In my view, the fascination with the origins of Islamic law stems at least in part from two considerations. The first is a (now outmoded) dogma among European historians that understanding the origins of a phenomenon is the best way to understand its characteristics. According to this theory, the early evolution of Islamic law explains the nature of Islamic legal thought more than do its later developments.[1] The second consideration is that focusing on the origins of the Islamic tradition increases opportunities for comparative work with other fields of religious

[1] Marc Bloch quotes Renan as stating that the origins of all human affairs deserve to be studied before anything else: "Dans toutes les choses humaines, les origines avant tout sont dignes d'étude." Marc Bloch, *Apologie pour l'histoire ou métier d'historien* (Paris, 1974), 37. Bloch has criticized this fascination with origins for various reasons, including the fact that it creates the havoc of mistaking ancestry for explanation: "A quelque activité humaine que l'étude s'attache, la même erreur guette les chercheurs d'origine: de confondre une filiation avec une explication." Ibidem, 39–40.

study, which were also influenced by the same origins theory. Such comparative work juxtaposes, for example, Islamic and Jewish or Christian histories, Jewish and Islamic law, Christian and Islamic theology and spirituality, and Qur'ānic and Biblical studies. Yet this narrow focus on origins has impoverished our understanding of the nature and development of Islamic legal thought. Indeed, studying the early history of Islamic legal thought in an attempt to understand its nature is as inadequate as studying the first five years of the life of Socrates in an attempt to understand the nature of his thought.[2]

While theory-versus-practice analysis has long been prominent in Western legal studies, the tendency to emphasize divergence between theory and practice has come into question. Over time, Western historians of law have begun to propose that the complexity of the interaction between law and society often makes a focus on "inconsistencies" between theory and practice in rich legal systems pedestrian and unfruitful. Interestingly, some Western scholars of Islamic law have attempted to make distinctions between Western legal systems and Islamic law based on the degree of inconsistency between theory and practice in the two, asserting that divergences between theory and practice are greater in Islamic law than in Western legal systems (see Coulson's view below). In recent years, the field of Islamic legal studies has begun to catch up with the more recent critical studies that problematize these distinctions.

In addition to their focus on origins and theory-versus-practice analysis, Western scholars have tended to put less emphasis on gaining acquaintance with the ways in which traditional Islamic legal scholarship addresses contemporary legal questions. Yet ignorance of the present manifestation of a phenomenon can hardly be seen as a virtue in scholarship interested in the history of that phenomenon, as Marc Bloch has aptly argued:

> Mais il n'est peut-être pas moins vain de s'épuiser à comprendre le passé, si l'on ne sait rien du présent . . . Car le frémissement de vie humaine, qu'il faudra tout un dur effort d'imagination pour restituer aux vieux textes, est ici directement perceptible à nos sens.[3]

Historians' task is to use their imagination to understand and describe the phenomena of the past, and both historical and contemporary

---

[2] This analogy is clearly incomplete, since Socrates is, after all, only one man, and not an entire tradition. However, I particularly like one aspect of the analogy, which is that the scantiness of our knowledge of Socrates' childhood parallels the scantiness of our knowledge of the beginnings of Islamic law.

[3] Ibidem, 47–8.

sources can provide crucial information to aid them in this endeavor. For modern historians of Islam to confine themselves to medieval sources of Islamic law and ignore how the legal system operates in modern times is to significantly handicap their own efforts.

In this chapter I attempt to offer general remarks about what I refer to as existing "perspectives" in the study of Islamic legal history in Muslim and Western academic contexts. The chapter examines two influential perspectives. The first perspective is to be found predominantly in the teaching of Islamic legal history in modern Muslim academies, which purport to preserve their traditional character as they carry the Muslim medieval tradition into the modern world. The second perspective is promulgated in Western universities and has grown out of efforts to revise the Schacht thesis on the origins of Islamic law[4] while nevertheless sharing its rejection of prevalent Muslim meta-discourses on the nature of Islamic legal thought and its historical evolution. My goal in this chapter is to point out the limitations of both perspectives in order to pave the way for a presentation of a more complex picture of the development of Islamic legal thought. Throughout this chapter, I shall use the terms *the Muslim perspective* and *the Western perspective* for the sake of simplicity. It must be noted, however, that it is not my intention to deny the diversity and complexity of perspectives within Muslim and Western scholarship or to deny that there has been an exchange of ideas and methods between Muslim and Western scholars of Islamic legal studies. Rather, my intention is to uncover the nature of major influential trends in the field and highlight the need for caution when conducting research in Islamic legal history that relies on assumptions founded upon these perspectives.

On the Muslim Perspective

The modern era has brought many changes to the Muslim world. Amidst changes in the political and intellectual atmosphere, the Muslim legal tradition, its champions, and the people who apply it in their lives have been anything but stagnant. Among the Muslim intellectuals who champion the Muslim legal tradition and support its continuity, one finds many approaches and tendencies. One can identify *traditionalists* of

[4] Joseph Schacht, *On the Origins of Muḥammadan Jurisprudence* (London, 1952).

varying stripes, *fundamentalists* or back-to-the-texts advocates, and *modernists* of a number of orientations. In general terms, traditionalists have advocated preserving the complexity of the legal tradition and emphasized its ability to stand the test of time into and beyond modernity through reliance on its medieval tools. These traditionalists tend to glorify existing institutions such as the schools of law (*madhhabs*) and medieval methods of reasoning. Fundamentalists emphasize "renewal" (somewhat ironically) only through a complete and faithful return to *the roots*, namely, the religious texts and their early interpretations. Finally, modernists have devised ways to integrate modernity into the tradition, leaning sometimes towards giving a contemporary cast to their views and sometimes towards emphasizing tradition against 'undesirable fruits of modernity.'

In order to explain what I mean by *the* (*modern*) *Muslim perspective* in the study of Islamic legal history, I must describe the nature and development of Islamic legal studies in Muslim academia in the recent past. The main concern of modern Muslim scholars of Islamic law has been the development of Islamic law as a tool for asserting Muslim identity and providing answers to pressing contemporary questions from the Islamic point of view. Beginning in the 19th century, many Muslim countries encountered well-developed foreign (Western) legal systems—accompanied by new ways of life—and began to adopt these systems as alternatives to Islamic law. In response, Muslim scholars focused on offering solutions to the social and legal problems that allowed these foreign legal systems to appear more relevant to the new ways of modern life. In this context, calls for free thinking and independent reasoning have flourished and been accompanied by questioning of the authority of the major schools of law or *madhhabs*. This focus on reform and the needs of the present have relegated the scientific study of Islamic legal history to second-class status in legal scholarship and made it appear a concern less than worthy of major Muslim juristic minds.

Nonetheless, in modern Muslim academia, lack of interest in developing Islamic legal history as a critical field of study has not implied an absence of inherited theories about the history of Islamic law. Such theories have been associated with the traditionalists, who have opposed *undisciplined* calls for renewal and dismissed such calls as having arisen from students with undeveloped juristic talent. Despite its adverse impact on the advancement of the study of Islamic legal history, the aforementioned renewal movement has not ended the influence of traditional scholarship in providing "default" notions about Islamic law and the course of its development.

In modern times, traditional legal scholarship has continued to exist and generate skillful jurists, who emphasize—against general calls for renewal—the importance of mastering the legal tradition and belonging to one of its existing schools of law as the only way of participating meaningfully in its development. The rich heritage of traditional scholarship in the field of Islamic legal history already provided *its own version of a history* of Islamic law and legal theory. I will discuss aspects of this heritage when I introduce the "ten points of departure" (*al-mabādi' al-'ashara*), assumptions about the nature and development of Islamic law and legal theory with which the novice at *al-Azhar*[5] must begin his or her study of the field.

Those traditional and renewal-minded scholars of Islamic law who have shown interest in the critical study of the history of Islamic law have relied heavily on the historical model developed by Ibn Khaldūn (d. 1406) in his *Muqaddima* (*Prolegomenon*). To be sure, some of Ibn Khaldūn's ideas about the nature of Islamic law and its early development have been partly critiqued by Muslim legal historians, and new ideas have come to replace his occasionally inadequate or misleading remarks. However, Ibn Khaldūn's ideas continue to function as the "default" lens through which traditionally-trained scholars view Islamic legal history and institutions and have yet to undergo comprehensive reconsideration.

It is this state of affairs that I refer to as *the Muslim perspective* in modern scholarship in the field of Islamic legal history. That is, lack of critical study of Islamic legal history, reliance on a host of traditional views of the nature and history of Islamic law, and use of the Ibn Khaldūn model to supplement traditional paradigms in the study of Islamic legal history. In what follows, I shall explain both the conceptual and historical frameworks underlying the views currently prevalent in Muslim institutions of higher learning where Islamic law and legal history are taught. I shall elaborate especially on the "ten points of departure" (*al-mabādi' al-'ashara*) for the study of Islamic legal theory and Ibn Khaldūn's historical model. The critique I present should not be taken as an attack on the quality of the minds of modern Muslim historians of Islamic law. Rather, it should be taken as an attempt to understand the sources of certain inadequacies in the views about the nature and development of Islamic law presented in modern Muslim academies thus far. Later I will address certain shortcomings in Western scholarship in the field with the same objective in mind.

---

[5] Al-Azhar is a university-mosque that was established in 970 CE and continues to function to the present time.

Traditional Approaches to Islamic Legal History and the Mabādī *of* Uṣūl Al-Fiqh

Before embarking on serious study of the Arabic and Islamic sciences, such as grammar, rhetoric, theology, and law, al-Azhar students are advised to begin with "points of departure" consisting of answers to ten basic questions about each science. The answers are known as "the ten points of departure" or *al-mabādi'* (often *al-mabādī*) *al-'ashara*. The ten points of departure set forth the name of the field/science, its subject, definition, utility, sources, relationship with other sciences, evolution, etc. With respect to the question of the relationship between theory and practice in Islamic law, the most relevant set of "points of departure" are those offered at the outset of studying *uṣūl al-fiqh*. As shall become clear presently, these ten points of departure provide the basic frame of reference for understanding the complex relationship between legal theory and law from the point of view of traditional Muslim scholarship. I shall introduce these points of departure and analyze the picture they present of the history of the relationship between theory and practice in the Islamic legal tradition.

It is hard to determine whether these ten points of departure are reminiscent of a philosophical and pedagogical habit of beginning the inquiry about a phenomenon by identifying its basic qualities. The Greek word *skopoi* in the sense of qualities of an object of study would be the relevant term here. True, the Greek word *skopos* (pl. *skopoi*) usually refers to a goal,[6] but σκοπός (*skopos*) may also indicate the object of study or its mark.[7] A given phenomenon may be identified or marked by four basic qualities (corresponding to the four causes of a phenomenon, i.e. maker, matter, form, and end or final cause, i.e. τέλος/*telos*.) In Islamic philosophical writings, the four *skopoi* have become answers to the following questions regarding a phenomenon: 1) whether it exists, 2) what it is, 3) how it is, and 4) what it is for. Over time, the *skopoi* may have become ten in the Muslim scholastic tradition.

---

[6] Attested, for example, repeatedly at the beginning of Aristotle's *Ethics* (1094a). *Skopos* is often understood to mean 'goal' and is translated by Terence Irwin as 'end.' Aristotle (tr. Terence Irwin), *Nicomachean Ethics* (Indianapolis, 1985), 1.

[7] Roswitha Alpers-Gölz, *Der Begriff* σκοπῶς *in der Stoa und seine Vorgeschichte* (New York, 1976), 3–6. This is the 8th volume in Spudasmata (Studien zur Klassischen Philologie und ihren Grenzgebieten).

For the science of *uṣūl al-fiqh*, the ten points of departure may be summarized as follows:[8]

1) *Name* (*ism*) *of the science: uṣūl al-fiqh.*
2) *Subject* (*mawḍūʿ*) (the category comprising "what is predicated in the propositions which the science elaborates")[9]: the sources of law upon which legal rulings may be based.
3) *Definition* (*ḥadd*) (according to one definition):[10] the science that deals with extracting legal judgments from the appropriate sources of the law, such as Scripture (the Qurʾān) and Tradition (the Sunna).
4) *Utility* (*thamara*): understanding the divine revelation and aiding the jurist in issuing rulings that govern human actions.

---

[8] A summary of the issue of the "ten points of departure" as applied to *uṣūl al-fiqh* may be found in: ʿAlī Jumʿa Muḥammad, *al-Ḥukm al-Sharʿī ʿind al-Uṣūliyyīn* (Cairo, 1993), 13–36. The text stating the ten points goes as follows:

inna mabādī kullī ʿilmin ʿashara	*al-ḥaddu wal-mawḍūʿu thumm-a-ththamara*
wal-faḍlu wan-nisbatu wal-wāḍiʿ	*wa-l-ismu l-istimdādu ḥukmu-shshārīʿ*
masāʾilun wal-baʿḍu bil-baʿḍ iktafā	*wa man dara-l-jamīʿa ḥāza-shsharafā*

Al-Bayjūrī's (d. 1860) commentary on the text of *Jawharat al-Tawḥīd* by Ibrāhīm al-Laqqānī (d. 1631) is a good example of the dutiful treatment of these basic points as applied to the science of *kalām* or theological philosophy. See *Ḥāshiyat al-Imām al-Al-Bayjūrī ʿalā Jawharat al-Tawḥīd* (Cairo, 2002), 39–40.

[9] Scholars of the Arabic and Islamic sciences have traditionally regarded these sciences as consisting of "propositions," which express the main ideas the science elaborates. Propositions are expressed in nominal sentences, which in Arabic consist of a subject and a predicate. For example, the propositions of *uṣūl al-fiqh* are expressed in sentences such as "*the Qurʾān is the first source of the law.*" *Uṣūl al-fiqh* also deals with detailed questions regarding the sources of the law, such as whether a certain Qurʾānic verse or a Prophetic report (a source of the law) is "ambiguous." *Uṣūl al-fiqh*, therefore, includes propositions whose "subject" can be subsumed under the category of "the sources of the law." *Uṣūl al-fiqh* propositions are certainly not limited to textual sources of the law (the Qurʾān and the Sunna). Extra-textual sources of the law, such as analogy, are explained and critiqued and thus made into a subject of juristic discussion as they are given a set of predicates. Therefore, the subject of *uṣūl al-fiqh* is the sources of the law—textual and extra-textual. The subject of the core propositions of *fiqh* is always an action by a human being (e.g., prayer, adultery, etc.) and the predicate is a legal ruling (obligatory, prohibited, etc). Despite the fact that *fiqh* is not limited to mere mention of these rulings or propositions, the fact that the field revolves around them justifies calling "human actions" the subject of *fiqh*.

[10] Definitions of *uṣūl al-fiqh* vary a great deal, and the one mentioned here is an example of a popular one.

5) *Sources* (*istimdād*): the sciences of the language, including grammar (*ʿulūm al-ʿarabiyya*),[11] theological philosophy (*kalām*), and meta-legal and legal principles included in *fiqh*.
6) *Importance* (*faḍl*): its use is essential in the search for God's law.
7) *Position within the sciences of the language and the religion* (*nisbatuhu ilā al-ʿulūm al-ukhrā*):[12]
   a) *Uṣūl al-fiqh* is both a source and a derivative of *fiqh* (which provides legal rulings that govern human actions).
   b) Scriptural exegesis and Tradition (*Ḥadīth*) methodology provide important insights for legal theory, since *Ḥadīth* methodology deals mainly with the authenticity of Prophetic Tradition (Sunna), which is regarded as the second major source of the law in *uṣūl al-fiqh*.
8) *Whether its study is a religious duty* (*ḥukmu-shshāriʿ*): studying *uṣūl al-fiqh* is *farḍ kifāya*, that is, it must be studied by some members of the Muslim community but not necessarily all of them.
9) *Detailed questions* (*masā'ilu*): the ones specified in references of *uṣūl al-fiqh*, including the study of the sources of the law, such as Scripture, Tradition, consensus, analogy, and various forms of sound legal reasoning; determining preponderance among conflicting indications in the sources; and the study of the nature of legal opinions and those qualified to deliver them.
10) *Inventor and early evolution* (*wāḍiʿ*): the science of *uṣūl al-fiqh* began in the time of the Prophet's Companions (7th century) and underwent development in subsequent generations up to the first articulation of legal theory by Shāfiʿī (d. 820).[13]

Points 5, 7, and 10 are the most relevant to our inquiry. According to these points, Islamic law and legal theory developed simultaneously as natural complements. *Uṣūl al-fiqh* lies at the foundation of the *furūʿ* or

---

[11] For example, legal research requires study of the history of the Arabic language (*ʿilm al-waḍʿ*) and phenomena such as synonymy and homonymy, etc., which go beyond grammar. See also Al-Zarkashī (d. 1392) (ed. Muḥammad Tāmir), *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Beirut, 2000), I, 21.

[12] The list of the relationships between *uṣūl al-fiqh* and other sciences is long. I mentioned only two prominent and relevant examples.

[13] Among the six works we are studying in the following chapters of this work, the *Wuṣūl* mentions these ten points of departure. See Timurtāshī (d. c. 1599), *al-Wuṣūl ilā Qawāʿid al-Uṣūl* (Beirut, 2000), 114.

rulings of *fiqh*, but draws on *fiqh* as well. The Companions of the Prophet, according to the traditional view, reflected simultaneously on questions of everyday life (*furūʿ*) and questions concerning the sources of the law and their interpretation (*uṣūl*) and never lost sight of the connection between the two. Later articulation of *uṣūl al-fiqh* (by Shāfiʿī) comes as a result of the need to explain to later generations of scholars how the pioneers had applied theoretical legal reasoning in generating practical legal rulings. According to this picture, the legal sciences are effectively reduced to two: *uṣūl al-fiqh* and *fiqh*. Genres such as *furūq* and *qawāʿid fiqhiyya* are subsumed under the category of *fiqh* and are thereby classified as practical legal sciences. The richness these sciences contribute to legal theory and their role in emphasizing the link between theoretical and practical legal thought in Islam are thus clearly deemphasized in this view.

The story the ten points tell is neither totally acceptable nor wholly unacceptable. The idea of simultaneous and interrelated development of legal theory and practical law must be accepted on logical grounds, at least to a certain extent. Practical legal rulings are derivable with a measure of consistency only when they are related to a theoretical legal framework. However, the narrative this view presents seems to stem from an ahistorical method. This perspective does not acknowledge any unevenness in the development of legal thought on the theoretical or practical fronts. To many observers, the legal system described here does not look sufficiently "human."

For one thing, the ten points perspective belies the complex relationship between the fields of law and legal theory at their later, more developed stages. In their later stages, law and legal theory look more "independent" than this perspective seems to acknowledge. Later writers in legal theory were anxious to state that the two sciences (*al-furūʿ and al-uṣūl*) had each accumulated a body of distinctive materials and could be studied separately. Al-Subkī (a late Shāfiʿī legal theorist concerned mainly with writers in his *madhhab*, d. 1354), for example, stated that a good definition of *uṣūl al-fiqh* should not give the false impression that knowledge of *uṣūl al-fiqh* includes knowledge of the detailed arguments (*al-adilla al-tafṣīliyya*) used in establishing the *furūʿ*. According to Subkī, a scholar of law (*faqīh*) who is not a legal theorist (*uṣūlī*) may be able to understand rulings of *fiqh* without learning every aspect of *uṣūl al-fiqh*, and a legal theorist may merit the title without being knowledgeable about the details of the law.

By emphasizing the teleological interrelation of law and legal theory, the view reflected in the ten points reduces the complexity of the

development of Islamic theoretical and practical legal thought. Subkī's comment opens our eyes to the need to take into consideration the moment in history at which a legal historian comments on the connection between law and legal theory in Islam.

When later jurists begin to speak about separating the fields of law and legal theory, one must ask how this may be reconciled with the presumption of an inseparable teleological link between these two fields. In addition, Subkī's statement is a description of the fields of *uṣūl* and *furūʿ* as they were known in the writings of *late Shāfiʿī legal theorists*, who elaborated a form of legal theory that was tied significantly more to theological and grammatical inquiries than to questions of positive law. Thus, one must also consider the type of literature a legal historian is describing when he discusses the relationship between law and legal theory.

Subkī is speaking here of the possibility of being educated in the field of legal theory without deep knowledge of the law (and vice versa, to a lesser extent) and is not commenting on either the development of the two fields or their teleological interrelation. The need to create boundaries among the different fields of juristic thought for heuristic purposes is understandable, as is the need to provide a clear idea about the subject matter of each science and its teleology for pedagogical purposes. Satisfying this need for pedagogical distinctions need not be taken as counter to a description of these fields' teleological connection or their gradual, dialectical evolution. Indeed, Subkī himself states that, in order to be qualified to offer informed and independent legal opinions as a *mujtahid* or jurist with high qualifications, a *faqīh* must also be a legal theorist (*uṣūlī*) so as to be able to make effective arguments for his *fiqh* rulings.[14] Hence, we must also consider whether a comment about the relationship between law and legal theory is meant to describe a historical reality or emphasize a pedagogical need.

The ten points view presents *uṣūl al-fiqh* as the only legitimate form of theoretical juristic thinking. This does injustice to the variety of Islamic legal genres, which transcend simple binary categorization. The genres of *furūq* (distinguishing ostensibly similar legal cases) and *qawāʿid fiqhiyya* (legal maxims) are but two examples of Islamic legal writing that cannot be subsumed under the rubrics of *fiqh* and *uṣūl al-fiqh*. These and other

[14] Alī Ibn ʿAbd al-Kāfī al-Subkī & his son Tāj al-Dīn al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj* (Beirut, 1984), I, 22–3. This part of the book is written by al-Subkī the elder.

genres offer important insights into the connection between the *uṣūl* and the *furūʿ*, a point to which I hope to dedicate a future study. Materials within these genres tend to have much in common. Considering together the full range of *uṣūl al-fiqh*, *fiqh*, *furūq*, and *qawāʿid fiqhiyya* gives a more complete picture of the interrelatedness of the genres and highlights their teleological connection.

According to the ten points perspective, the distinction between *uṣūl al-fiqh* and *al-qawāʿid al-fiqhiyya* is that the former are the *a priori* principles of legal reasoning that result in the making of *furūʿ*, while the latter are *ex post facto* inferences from the *furūʿ*. However, this ignores the fact that many principles of *uṣūl al-fiqh* and *qawāʿid fiqhiyya* belong to the same category of theoretical legal principles. Both types have served as *uṣūl* or foundations for the formation of *furūʿ* or practical legal decisions. This partly explains assertions by later jurists that some of *al-qawāʿid al-fiqhiyya* have come to function as the real *uṣūl al-fiqh* or foundations of legal opinions.[15] However, it should be noted that such assertions do not claim that *qawāʿid al-fiqhiyya* have come to replace or supercede *uṣūl al-fiqh*. Moreover, the majority of *uṣūl al-fiqh* that is concerned with the sources of the law is clearly distinguishable from the type of *qawāʿid fiqhiyya* that are abstractions from a small number of legal opinions in one school or another.[16]

The ten points perspective overlooks the important point that the internal cohesiveness of *uṣūl al-fiqh* and *fiqh* as they came to be known as distinct fields of inquiry should not be assumed to have existed at every point in Islamic legal history. While the teleological link between the two fields continued to be a source of their interrelation, the development of these two fields, like that of other legal sciences, has not always been guided by the teleological connection. It is mainly the unevenness of the process of development of the Muslim legal tradition that contradicts the simple scholastic picture presented in the ten points of departure.

The ten points of departure may be sufficient for most al-Azhar students, who study legal history primarily through legal texts rather than through systematic and detailed historical presentation. For universities that do attempt to offer such a presentation, a picture of the evolution

---

[15] Zarkashī, *al-Manthūr fī al-Qawāʿid al-Fiqhiyya* (Beirut, 2000), 13; Ibn Nujaym (d. 1573) (ed. Muḥammad Muṭīʿal-Ḥāfiẓ), *al-Ashbāh wa-l-Naẓā'ir* (Beirut, 1999), 10. Ibn Nujaym speaks of legal maxims on the basis of which legal rulings may be justified and derived: *al-qawāʿid allatī turaddu ilayhā wa farraʿū-l-aḥkāmʿalayhā.*

[16] ʿAlī al-Nadwī, *al-Qawāʿid al-Fiqhiyya* (Beirut, 2000), 69.

and development of Islamic legal thought over the centuries begins with Ibn Khaldūn's notes on Islamic legal history in his *Prolegomenon*. The following section will address Ibn Khaldūn's historical model.

Ibn Khaldūn's Prolegomenon *and the Formation of a Modern Muslim History of Islamic Law*

The recording of Islamic legal history by Muslim scholars is as old as the practice of Islamic law itself. Muslim jurists have often constructed their legal authority by reference to that of earlier authorities. While in theory "authority" rests with none less than God Himself, Muslim jurists of all generations have cited previous authorities, sometimes to support their own views and sometimes to criticize previous positions and build their own on opposing bases.

Moreover, jurists occasionally appended the history of a particular legal matter to a legal opinion they profess, whether in an oral *fatwa* or in a legal text book. The history of relevant legal opinions was occasionally provided in detail. These oral and written forms of legal history and the history of controversies over a certain legal questions *nolens, volens* played an important role in the later, more systematic (thought not fully systematic) writing of Islamic legal history.

Furthermore, many jurists have included in their works of law, legal theory, juristic disagreement, or other genres of juristic writing comments about the evolution of legal reasoning in earlier generations to explain how this legal reasoning was generated and later adopted or critiqued. Some of these comments reached a reasonable level of systematization and have occasionally been quoted or integrated with minor changes into subsequent *histories* of Islamic law, both medieval and modern. One particular presentation of the development of Islamic legal thought, which appeared in a book on the philosophy of history, was destined to play a major role in the formation of the modern genre of Islamic legal history in Muslim academies and universities. This was Ibn Khaldūn's (d. 1406) notes on the evolution of Islamic legal history in his celebrated *Muqaddima* (Prolegomenon), which foreshadowed the construction of a modern Muslim perspective on Islamic legal history.

Ibn Khaldūn's paradigm as developed by modern Muslim historians of Islamic law is an important aspect of what I refer to as *the Muslim perspective* on the field. Ibn Khaldūn devotes little more than a few pages to discussing how a legal tradition evolved within early Muslim communities

and subsequently developed into schools of thought, generated sophisticated methods of reasoning and scholarly debates, and established institutions that came to govern a good part of the inhabited medieval world.[17] Ibn Khaldūn's is, indeed, a markedly good delineation of the differences among a variety of intellectual tendencies in the area of law and legal philosophy and how these tendencies enriched Islamic legal reasoning. This delineation, presented in broad strokes, has proven to be extremely helpful to historians of Islamic law in Muslim and Western academies. However, an analysis of the variety of Islamic legal thinking would need to include a history of the complex processes by which these schools, views, and trends were established and developed as well as a history of the scholars and texts that represented the major trends and views in law. Ibn Khaldūn's presentation does not detail these processes or how they came to being. Modern Muslim historians of Islamic law will later fill in these blanks in order to invent a genre of Islamic legal history according to *the Muslim perspective*. In addition, the way in which modern Muslim historians have elaborated on Ibn Khaldūn's comments and the implications of these elaborations will account for inadequacies in the Muslim perspective in Islamic legal history.

Ibn Khaldūn makes three points that capture the attention of the student of Islamic legal history. The first is the centrality of what came to be known as the textual sources of Islamic law (the Qur'ān and the Prophet's Tradition or Sunna) in the process of lawmaking, which in turn gives rise to a group of practical legal rulings. The second is that the establishment of schools of law (including the four Sunnī schools: the Ḥanafī, the Mālikī, the Shāfiʿī, and the Ḥanbalī) changed the nature of legal reasoning. After the establishment of these schools, jurists had to pay attention, not only to the textual sources of the law and their interpretation, but also to the styles of legal reasoning that had been developed by earlier scholars in their schools. The third point is that Muslim jurists had developed two different methods of legal theory: a) the *mutakallimūn* (theologians) or rationalist style, also named the Shāfiʿī method, since Shāfiʿī jurists and theologians are credited with developing it, and b) the *fuqahā* (jurists') or Ḥanafī style of legal theory, which, by contrast, has been developed mainly by Ḥanafī legal scholars. The *mutakallimūn*/rationalist style begins by testing the validity of the assumptions of legal theory (whether these be generalizations about correct Arabic language use or logical and

[17] Ibn Khaldūn (ed. Darwīsh al-Juwaydī), *al-Muqaddima* (Beirut, 1995), 416–37.

theological assumptions) before applying them to practical legal cases, thus applying rational validity as a criterion for the soundness of the propositions of legal theory. The jurists'/Ḥanafī style reverses the process by adopting the principles of legal theory that have already been employed in legal decisions by early jurists, thus considering earlier generations of jurists' use of these principles of legal theory in issuing practical legal opinions as a *de facto* validation of the soundness of these principles. The two methods are said to have converged in later writings by both Shāfiʿī and Ḥanafī legal theorists, who applied hybrids tests of 'sound legal theory.'[18]

Ibn Khaldūn tells us that, in order to generate practical legal rulings addressing everyday questions, the early generations of jurists, from the time of the Companions of the Prophet on, relied mainly on textual sources (the Qurʾān and the Prophet's Tradition or Sunna). This explains why the textual sources of the law (Qurʾān and Sunna) come high on the list of the sources of the law. The third source of the law, consensus, plays a mainly exegetical role.[19] Consensus is the unanimous agreement of the Muslim community (or the juristic community) to adhere to one of many possible interpretations of a given text from the Qurʾān or Sunna. Thus defined, the consensus of the community serves as a mechanism for stabilizing legal rulings derived through textual hermeneutics by choosing one interpretation of a certain text or group of texts that addresses a given

---

[18] The hybrid method is called *ṭarīqat al-muta'akhkhirīn* (the method of the late ones) and is represented by Ṣadr al-Sharīʿa's (d. 1347) *Tanqīḥ* and the Tawḍīḥ, which is Taftazānī's (d. 1391) commentary on it. See Muḥammad Sharīf Muṣṭafā Aḥmad Sulaymān in the editor's introduction to Timurtāshī *Wuṣūl*, 36–37. For some authors, as we said in Chapter One, the very style of *takhrīj al-furūʿ ʿalā al-uṣūl* represents another method of writing in *uṣūl al-fiqh*. Al-Shahīd al-Thānī (d. 1559) (ed. Maktab al-Iʿlām al-Islāmī in *Qumm*), *Tamhīd al-Qawāʿid* (Qumm, 1996), 9–11 (in the editors' introduction).

[19] There are at least three major theories on the nature and source of the authoritativeness of consensus. The first theory is that consensus is indicative of lost textual sources of the law, since an agreement on a given matter among Muslims or Muslim jurists of an earlier generation indicates that they may have had access to a Sunna text, which is lost to us, and which they agreed to uphold and that is why they unanimously agreed on the matter. The second states that consensus is an agreement to hold an interpretation of a text or a group of texts on a given matter acceptable. This theory fits what may be called exegetical consensus. According to the third theory, consensus institutes rules of the law and categorizations of human actions (a) as a source of law in its own right, i.e., without conveying the content of a lost text or interpreting an existing text or group of texts. On this third theory, the authoritativeness of consensus stands on a Sunna text, where the Prophet declared that the community does not agree on a mistaken view, which establishes the infallibility of the community only as a collective entity.

subject. This stabilization prevents claims that the semantic indeterminacy of language, including the language of scripture, makes consensus unintelligible; it uses the community of jurists as a final judge on when the language of scripture can be seen as indeterminate. Consensus might also be an indirect indication of the existence of a text from the Sunna of which scholars have not been aware, that is, a text that never reached later generations of scholars but must have existed, since such consensus could not have been held without a textual foundation. The fourth source of the law, analogy, is purely exegetical: it allows the jurist extend the application of texts to rule on additional cases not directly covered by these texts. Through the technique of analogy, the rulings of the Qurʾān and the Prophet's Sunna are extended from cases whose rulings are known from the texts to cases to which the same rationales apply. Thus, the two major sources of the law after the Qurʾān and Sunna are basically methods of interpreting these textual sources, and the same can be said about the rest of the sources of the law.

In addition, Ibn Khaldūn points out the importance of the shift from free and independent reasoning that was practiced in the earlier stages of Islamic law into school-bound legal reasoning that came to be the *modus operandi* of juristic thinking after the establishment of these schools. For example, he explains how this shift created a need for generating principles and modes of legal reasoning to be used by jurists within one school of law or *madhhab*. These jurists will follow the specific *madhhab* principles of reasoning so that they could provide legal opinions consistent with those views of jurists from their *madhhab*. As we mentioned earlier, Ibn Khaldūn accounts for the existence of two distinctive methods of legal theory, the *mutakallimūn*/rationalist method and the jurists'/Ḥanafī method. The remaining comments that Ibn Khaldūn dedicates to the history of Islamic legal thinking are concerned with the history of major legal scholars and schools of law.

Ibn Khaldūn, however, does little to account for the complexity of other aspects of the development of Islamic legal reasoning. His presentation reduces the uneasy process of establishing Islamic law in the Middle East and beyond to *a type of textual hermeneutics*. An explanation of the nature of this hermeneutics at different historical stages and in different milieus cannot be found in Ibn Khaldūn's *Prolegomenon*. In addition, his presentation puts jurists affiliated with a certain school of law into one category, thereby unnecessarily assuming a certain degree of homogeneity among the jurists within a given school. Finally, Ibn Khaldūn's emphasis on the two distinctive methods of legal theory (rationalist

versus juristic) does not leave much room for describing the process by which jurists may have arrived at principles of legal theory through rational reflection, utilitarian tests, or other methods. The promulgation of legal principles and rulings has thus involved much more than the application of "rationalist" or "juristic/historical" tests, as Ibn Khaldūn would have us believe. Constant revision of the assumptions of legal theory and legal practice is a task of a jurist who is involved in more than blind application of the law, and this guarantees that the success of a legal paradigm to continue hinges on its ability to undergo the appropriate types of changes. In the following chapters, I shall propose that both styles of legal theory have shared a legal dialectic consisting in the creation of legal principles (based either on texts or on a form of rational thought) which are applied in practical cases and then later tested and adjusted. I shall offer examples of how jurists have juxtaposed theoretical legal principles and practical legal rulings in a manner that betray the details of a process of legal reasoning that cannot be reduced to either rationalist reflection of the validity of principles or the consistency of new practical rulings with those already held in the *madhhab*.

Ibn Khaldūn's story takes a different form in the writings of modern Muslim historians of Islamic law. Following Ibn Khaldūn's lead, modern writings on Islamic legal history speak of different stages through which Islamic law has evolved and place emphasis on the connection between law and text.[20] These modern writers tend to equate the making of Islamic law with a process of "deciphering the texts of the Qurʾān and the Sunna" and applying one's knowledge of the Arabic language as well as "basic logical reasoning" to arrive at legal rulings in practical cases. In order to enact practical legal rulings, Muslim scholars of law required nothing more than a good understanding of the Arabic language and sound logical reasoning, and one may perhaps add an awareness of the valid methods of critiquing the authenticity of the texts of the Qurʾān and Sunna. The three elements of "the interpretation of language," "basic logical reasoning," and what may be termed "authenticity criticism" constitute the basic elements of Islamic legal theory. Law and legal theory, modern Muslim scholars assert,

---

[20] Muḥammad al-Khuḍarī (d. 1927), *Tārīkh al-Tashrīʿal-Islāmī* (Cairo, 1954), 6–362; Aḥmad Ibrahīm (d. 1945), *Tārīkh al-Tashrīʿal-Islāmī* (Cairo, 2001), 11–63; Muḥammad Ibn al-Ḥasan al-Ḥajawī al-Thaʿālibī (d. 1955), *al-Fikr al-Sāmī fī Tārīkh al-Fiqh al-Islāmī* (Cairo, 1977), I, 13–165; ʿAbd al-ʿAẓīm Sharaf al-Dīn, *Tārīkh al-Tashrīʿal-Islāmī* (Cairo, 1972), 32–174. Similar views can also be found in books of legal theory that include remarks on the evolution of Islamic legal thought, e.g., ʿAlī Ḥasaballah, *Uṣūl al-Tashrīʿal-Islāmī* (Cairo, 1971), 6–10.

must have developed from a fairly early stage and that legal theory has been inextricably linked to the development of the legal opinions delivered by Muslim jurists to address everyday questions of the law.

These modern Muslim historians of Islamic law accept the assumption that the Prophet's Companions and their students had knowledge of all the grammatical and logical principles which Muslim legal theorists have subsequently stated in books of legal theory. This paradigm highlights the Companions' proficiency in Arabic, clear-mindedness, and ability to think logically and rationally, and thereby purports to explain their lack of need for an articulated legal theory (which later generations would bring forth and make explicit). The Companions' (and their students') uniqueness was responsible for their ability to use a tacit form of legal theory that allowed them to interpret the sources of the law correctly in order to derive answers to their questions about legal-religious practices. A later articulation of legal theory would, therefore, be a function of the inability to apply a tacit legal theory by competent minds rather than a function of the development of legal thought.

Thus, these Muslim historians of Islamic law distinguish the invention of Islamic legal theory from its subsequent articulation. As explained in the previous section on the 10 points of departure, this assumption resolves the dilemma posed by the fact that the earliest extant treatise on Islamic legal theory was written by al-Shāfiʿī (d. 820), at least four generations after the end of the Companions' era. In this view, Islamic legal theory must have existed (albeit in different forms at different historical stages) when the Companions of the Prophet and following generations of Muslim jurists were issuing practical legal decisions prior to the time of Shāfiʿī. Shāfiʿī's achievement is thus limited to the genius of articulating the tacit assumptions of legal theory. Some modern Muslim historians acknowledge Shāfiʿī's achievement in terms more akin to invention than to articulation. Obviously, the more convincing one may be in the claim that Shāfiʿī has "invented" *uṣūl al-fiqh*, the less convincing one would be in the claim that *uṣūl al-fiqh* had existed in some form before him. At any rate, different Muslim jurists and historians of Islamic law have chosen one of these two positions, and this is not limited to modern Muslim historians of Islamic law. Isnawī (d. 1370), for example, sacrificed the emphasis on the gradual development of legal theory in favor of emphasizing the excellence of Shāfiʿī in inventing it.[21]

---

[21] *Tamhīd*, 45–6.

Once again, in Muslim academies, the study of Islamic legal history still occupies a lower status than the study of how to develop Islamic legal thought to address contemporary needs. This is responsible for the fact that no revision of the aforementioned, simple view of the evolution of Islamic legal theory exists to date. Modern Muslim students who attend schools that teach this type of Islamic legal history are also students of Islamic law, and their main concern is to learn Islamic law in order to function as "jurists," i.e. to offer legal opinions on real-life questions and are much more concerned with the present and future application of Islamic law than with its history.

Ibn Khaldūn's paradigm as developed by modern Muslim historians of Islamic law is an important aspect of what I refer to as *the Muslim perspective* on the field. In more traditional academies, the ten points of departure (*mabādi'*) exercise an influence in the direction of offering ready statements about the relationship between Islamic theoretical and practical legal thought instead an elaborate historical analysis of this phenomenon. The inadequacies of this perspective for explaining the multifaceted process of legal reasoning and the ways in which it combines the concerns of practical and theoretical legal thought will become more apparent as our study progresses. At this point, however, let us turn to *the Western perspective* on Islamic legal history.

Uṣūl *and* Furūʿ *in Western Academia*

There is little doubt that Western scholarship has succeeded in offering perspectives on Islamic legal history that are no mere reflections of traditional Muslim perspectives in the field.[22] In this section I would like to confine myself to discussing some of the uniquely Western views that have influenced the field of Islamic legal history, in general, and the

[22] In some cases, however, Orientalists have stepped (knowingly or unknowingly) on well-trodden territory and ended up repeating familiar (partisan) traditional views. For example, Schacht has expressed the view that Shāfiʿī law evolved as a more *ḥadīth*-based law, as compared to the more opinion-based Ḥanafī law. In this context, Schacht's views and arguments bear stark similarity with a familiar view often expressed by Shāfiʿī jurists in their polemics against Ḥanafī law and jurists, depicting Abū Ḥanīfa as an intellectual who attempted to give his almost secular legal system religious justification through reference to a few texts of the Qur'ān and Sunna but mostly by relying on juristic views of the Companions and his own reasoning.

issue of the relationship between law and legal theory in Islam, in particular. The two aforementioned trends in Western scholarship will be briefly discussed: 1) a focus on the *origins* of the Islamic legal tradition and its early development as a crucially important stage in the whole tradition and 2) an assumption of an inherent tension between theoretical principles of reasoning and practical legal decisions in the area of law. These two themes are not naturally linked, but it bears some thinking whether focusing on the origins of Islamic legal thought, with the substantial amount of conjecture it involves, may have lead some Western scholars to assume a tension between theoretical and practical Islamic legal thought as they found it hard to make sense of early developments of Islamic law and legal theory.

The origins of Islamic law and its early development as well as its development in the modern era have (until recently) occupied many western scholars much more than the history of Islamic legal institutions in the High Middle Ages and early modern times. The influence of biblical studies on this approach may have been a formidable factor in that trend. Discussion of the relationship between *furūʿ al-fiqh* and *uṣūl al-fiqh* has taken its more recent forms in the context of reconsiderations of the Schacht thesis concerning the origins of Islamic law and legal theory. Increasingly, scholars of Islamic legal history point to the limitations of the Schacht thesis when it comes to explaining the complexity and development of Islamic law as a legal system.[23] Yet, the Schacht thesis still exercises some influence on many researchers in the field.

The Schacht thesis focuses on an era where very little can be known about the nature of Islamic legal thought and establishes a misleading sense of comfort with *intuition* as a source of knowledge concerning the history of Islamic law. While much textual evidence (including the excavated Egyptian 7th century papyri) has shaken the faith of historians of Islamic law in the claims of the Schacht thesis, the methodological seeds it planted continue to entice scholars—both new and experienced—to venture premature conclusions on issues about which it would be more appropriate to suspend judgment until more is known about the general outline of the development of Islamic law over the course of its long journey. At this point, very little of substance will likely be added to our

[23] Johann Fück had this realization early on, but his voice has been anything but representative of the mainstream of Islamic studies that were concerned with the early development of Islamic legal doctrines.

knowledge of Islamic law by venturing more speculations or attempts to replace inadequate generalizations with other generalizations based on a new text or a few new texts belonging to the same unclear terrain.[24] A more productive direction for historians of Islamic law would be to focus on those eras that have not been studied, ones for which ample textual evidence is available. Major, influential legal texts have been ignored, and newly-published legal literature from different milieus has gone largely unnoticed. Unless this trend in scholarship is reversed, the field is likely to lose one of its primary *raisons d'etre* by becoming incapable of providing even a rough outline of the development of Islamic law, which is regarded by many as the queen of all Islamic sciences.

Of course, historians are free to choose the periods and subjects that attract them for in-depth study. However, being consumed by a certain era in a long tradition creates many imbalances, notably in the quality of research and teaching in this tradition. In research, judgments are often made about the whole of a legal or an intellectual tradition based only on those periods that happen to have received close examination. In designing courses on Islamic legal history today, we are faced with lengthy monographs and articles on the origins of the Islamic legal tradition but very little substantive work on its mature stages.

This focus on the origins of the Islamic tradition is occasionally exacerbated by other factors. In early orientalistic discourses (e.g, the entry on the Koran in the First Encyclopedia of Islam), scholars have taken 'religious' stances and attempted to refute the truth claims made by the Prophet about his revelation. One may observe this tendency coming up once and gain. Now most Western scholars are reconciled to the assumption that it is futile to express their own views about the value of the Muslim teachings, but one could still see that many contemporary Western scholars fall foul of similar dangers. Some scholars look at early intellectual and political Islamic history the way a polemicists addressed the other party's *theology*. Some Western scholars appear to be preoccupied with dismissing what they perceive as *orthodox* accounts of early

---

[24] Harald Mozki showed the methodological lineage of the Schacht thesis by pointing to similar tendencies to generalize about whole eras from a few texts or speculate about based on slim textual evidence. He points to the works of Burgsträsser and Goldziher (even though, to me, the language at least of Burgsträsser is often more careful than that of Schacht's). Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: ihre Entwiklung in Mekka bis zur Mitte des 2. /8. Jahrhunderts* (Stuttgart: Deutsche Morgenländische Gesellschaft, 1991).

political and intellectual history, which is the new equivalent to the views of the *indigenous* about Islam. The distinction between scholarly criticism and ideological refutation becomes harder to identify. This "refutation mode," in my view, makes some modern legal historians appear to be engaged in a theological endeavor aimed at refuting Islamic theological doctrines for the sake of promoting another belief system. The irony is that critique of any orthodox account of early Muslim history is by no means a new invention. For over a millennium and across different milieus, Muslim scholars have critiqued and argued about the various accounts of early (as well as late) Islamic history and have not elevated such accounts to the status of theological beliefs. Islamic historical sources are replete with debates concerning almost each and every piece of the history of the nascent Muslim community, beginning with the very birthday of the Prophet. Confusing the status of accounts of Islamic history with the status of Islamic theology is itself largely a product of the Western academic study of Islam.

At any rate, focusing on the seventh and eighth centuries (the era of origins) gives us very little knowledge of the relationship between *furūʿ al-fiqh* and *uṣūl al-fiqh* in Islamic legal history more generally. Islamic legal thinking, like other types of complex legal thinking, has evolved beyond its origins in a way that makes attempts at generalizing about its overall development and mature forms based on even the most thorough study of its origins sure to be erroneous. Thus, one could say that meaningful study of the relationship between theory and practice in Islamic legal thought is virtually inaccessible to scholars who restrict their focus mainly to earlier developments in Islamic law.

Beyond the "origins" discourse, one may also note the prominence of the "theory-versus-practice tensions" discourse. In contrasting the Islamic legal system with Western legal systems, some Western scholars have exaggerated the dissimilarities and ignored the similarities. Some contend that, whereas Western laws have reflected the cultures of the societies in which they have evolved, Islamic law was imposed on Muslim societies *from above*. If one accepts this claim, it would be no surprise to hear that Islamic law is characterized by a "tension" between idealism and realism. This is but one of six tensions that are said to characterize Islamic law and distinguish it from Western laws (others include those between revelation and reason, unity and diversity, authoritarianism and liberalism, law and morality, and stability and change).[25] The

[25] N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago, 1969).

root of the idealism-realism tension, according to N. J. Coulson, is the fact that the sources of the law (the Qur'ān and Sunna) and their interpretations have not grown out of the political and social experiences of Islamic society. Coulson writes:[26]

> But with the jurisprudential debate which began towards the end of the eighth century and eventually produced the theory of the sources of the law, came the notion of the Sharī'a as the comprehensive and preordained system of God's command, a system of law having an existence independent of society, not growing out of society but imposed upon society from above.

The truth is that Islamic law shares with many Western legal systems more than Coulson acknowledges. A central reality overlooked by most Western scholars is that in both Islamic and Western legal systems, legal theory must make itself useful and thereby guarantee—by continuing to engage with the practical concerns of the law—that it is not assigned to the realm of the trivial or entirely theoretical.

I shall briefly show later that there are similarities between Islamic law and Anglo-American law that have not been studied by scholars before, especially in regard to forms of legal reasoning used by Muslim and Anglo-American jurists. At this point I will mention only two elements of these similarities: 1) analogical reasoning, which Muslim and Anglo-American laws have applied in very similar ways, and 2) certain details of legal hermeneutics, including the canons of constructions, principles of textual interpretation that were applied mostly to statutes in the Anglo-American case and to Scriptures in the Islamic case.[27]

Some Western scholars have taken the notion of an inherent tension between idealism and realism in Islamic law even farther. One of these scholars, Norman Calder, speaks of inherent tensions in Islamic legal thought resulting from uneasy reconciliation of the idealism of legal theory with the pragmatism of legal practice. Calder contends that the hermeneutics entailed in *uṣūl al-fiqh* served a justificatory function in relation to the actual positive legal rulings of *fiqh*. Calder does not deny that "some creativity" must have existed—perhaps the creativity required

---

[26] Ibidem, 60.

[27] Here are two examples of these principles: 1) the principle that one must find meanings for all words and render none of them useless or superfluous (*reddendo singula singulis*) and 2) the principles that "expression of the one thing in a text is exclusion of the other" (*expressio unius est exclusio alterius*). The Islamic equivalent (the principle of mafhūm al mukhālafa) is almost identical, as we will explain in Chapter Five.

to provide reconciliations between theory and reality that pass the laugh test. In the final analysis, however, such creativity could do very little to create a complex legal system that interacts with the societies in which it functions, since the rigid inherited structure of the law will always ultimately prevail.[28]

Calder's point may be understood further when we consider his treatment of Islamic law as the science of dichotomy between idealism in theory and pragmatism in practice. In his paradigm, only stratagems could relate this lofty, unrealistic *sharī'a* to the lowly world of human beings. *Fiqh* itself is not sufficiently engaged with actual human beings; it is still oriented towards the divine and the ideal. For Calder, the primary function of *fiqh*, which (he acknowledges) is a multi-functional discipline, is "theological."[29] "The law is a timeless structure of concepts, justified by reference to revelation, and fully present, at least by implication, in any articulation within the tradition, whether in a *mukhtaṣar* or in a *mabsūṭ* (i.e. whether in a short or a long law manual)."[30] "But practice, in whatever area or form, could never be more than a clumsy, partial and imperfect realization of the divine command." And, "The cultural complement to juristic literature, with its stress on society, is, within Islam, Sūfī literature, which provides a corresponding stress on the private devotional life of individuals. It is in the integration of these two structures that most Muslims—including the jurists, who were frequently also mystics—have, historically, found self-realization as Muslims."[31]

For Calder, Islamic law cannot be taken seriously on its own terms as a legal system that negotiates the theoretical goals of individuals and societies with their actual life circumstances. Calder presents an almost caricatural view of Islamic law, wherein claims to noble goals find their way only into books, while the Muslim people's behavior and life have been the antithesis of these noble goals. Without a "mystical detour," any Islamic life based on the law of Islam is hardly conceivable.

Calder's idea of *uṣūl al-fiqh*'s justification of the already known law resonates with Robert Gleave, who provides a much more sophisticated picture of the relationship between Islamic law and legal theory. In the

---

[28] Norman Calder, "al-Nawawī's Typology of Muftīs and its Significance for a General Theory of Islamic Law" in *Islamic Law and Society* 3.2 June 1996, 158–61.

[29] Norman Calder, "Law" in Seyyed Hossein Nasr and Oliver Leaman (eds.), *History of Islamic Philosophy* (London, 1996), II, 995.

[30] Ibidem, II, 994.

[31] Ibidem, II, 997.

introduction to his study of the controversy between the rationalists and traditionists in Shīʿī legal theory (known as the *Akhbārī/Uṣūlī* controversy), Gleave points out that the relationship between the various genres of Islamic juristic writing remains to be clearly determined and then remarks:[32]

> The writers of *uṣūl al-fiqh* (both Sunnī and Shīʿī) normally present their works as descriptions of how a jurist might deduce rulings (or opinions) in areas where the revelatory sources of the law (i.e., the Qurʾān and the Sunna of the Prophet, and for Shīʿīs, the examples of the Imāms also) provide no clear rulings. Some writers also present their works as explanations of how the law, which is already known to be true, was deduced by past scholars, who neglected to include their legal reasoning in their writings or rulings. *Uṣūl al-fiqh*, then, is presented as having a prescriptive aim (prescribing the method of interpretation that a jurist should use) and a justificatory aim (justifying the law, as it is already known.)

Gleave cites Calder (in a footnote), where he says "a full account of the 'function' and the value of *uṣūl* would have also to take account of the tendency to make of it a closed and independent science." Gleave informs us that he would adopt an approach that views *uṣūl al-fiqh* as a largely independent genre whose works have been used for pedagogical purposes with the goal of honing the intellectual skills of students of law. Gleave acknowledges that Muslim juristic writing has not been exhausted or carefully studied. The question then becomes how, in the absence of more adequate study, one can be sure about the independence of the fields of law and legal theory?[33]

The "origins" and "tensions" themes are represented in a complex and diverse body of writings in which there is clear disagreement among Western scholars. Nevertheless, the predominance of these themes leaves students of Islamic law with quite a uniform set of mistaken impressions about the nature and development of Islamic law. First, the texts of the Sunna of the Prophet are viewed as the outcome of discussions among the Companions—in other words, the outcome of competing *ideals* among the members of the early Muslim community. Second, much of the reality that Muslims have lived is regarded as having been shaped by Byzantine, ancient Arabian, and Jewish norms. Third, it is

---

[32] Robert Gleave, *Inevitable Doubt: Two Theories of Shīʿī Jurisprudence* (Leiden, 2000), 3.

[33] Despite the fact that my study is confined to Sunnī law and legal theory, my work will point in directions which have applications in Shīʿī law as well.

assumed that the interpretation of the textual sources of the law in Islam (the Qur'ān and Sunna) could not have possibly evolved in the context of a distinctively Arabic and Islamic system of legal thought.

On whatever view of how the Qur'ān and Sunna came to existence, a historian of Islamic law should be open to exploring an interaction between what Muslim jurists refer to as the sources of Islamic law and the interpretation of these sources, on the one hand, and the actual rulings that are given by these jurists in practical, everyday questions, on the other hand. What matters most to a historian of the Islamic legal tradition is the interpretation of the two main textual sources of the law rather than their authorship and the exact date of their historical appearance. The evolution of an authentic and independent system of Arabic and Islamic legal thought is what has made these two texts the foundation of the "religious" Islamic law, while at the same time allowing for complex socio-legal processes to negotiate between cultures and the religious texts.

While some recent Western scholarship may still be methodologically tied to earlier works in the field, some of this recent scholarship may have set us on new paths of inquiry regarding the relationship between Islamic law and legal theory by questioning and transforming the above-mentioned notions about the character of Islamic legal thought. Wael Hallaq has argued that one should speak of Islamic legal theories (though one could also speak of *legal theory* as an aggregate of legal theories) and adduces ample evidence that legal theorists have produced their different legal theories by responding in them to different socio-juridical exigencies. Giving his thesis support through an analysis of Shāṭibī's *Muwāfaqāt*, Hallaq demonstrates that the imperatives of practical law have shaped legal theories, thereby allowing us to speak of an influence of practical law on legal theory.[34]

In the title of an article addressing aspects of the same issue, Mohammed Fadel calls the relationship between *uṣūl* and *furūʿ al-fiqh* (theoretical and practical legal rulings) "puzzling."[35] While the article appears to accept the view that *uṣūl* and *furūʿ al-fiqh* have been intertwined sciences, the puzzlement centers on the contrast between the extreme importance placed

---

[34] Wael Hallaq, "Uṣūl al-Fiqh: Beyond Tradition" in *Journal of Islamic Studies* 3.2 July 1992; *A History of Islamic Legal Theories* (Cambridge, 1997), 162–206.

[35] The title of the article is "Istiḥsān is Nine-Tenths of the Law: the Puzzling Relationship of Uṣūl to Furūʿ in Mālikī Madhhab." See Bernard Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden, 2002), 161–176.

in *uṣūl* works on the revelatory sources of the law, on the one hand, and the tendency in works dealing with *furūʿ al-fiqh* to accord other subsidiary sources of law (which are nevertheless included in *uṣūl al-fiqh*) precedence over the revelatory sources. The sense that the relationship between *uṣūl* and *furūʿ al-fiqh* is "puzzling" has been shared by other scholars and was expressed in discussions among major scholars in the field at a recent conference.[36]

Surprisingly, in none of the treatments of this issue have scholars pointed to the works of *takhrīj al-furūʿ ʿalā al-uṣūl*, which focus on links between legal opinions on practical questions and the fundaments of legal reasoning, as relevant to their inquiries. In fact, I am not aware of much treatment by Western scholars of any of the particular juristic genres that make up the corpus of Islamic legal writings as genres in their own right. Exceptions include Wolfhart Heinrichs' two articles on the juristic genres of *al-furūq* (the art of distinguishing ostensibly similar cases of law) and *al-qawāʿid al-fiqhiyya* (legal maxims/principles).[37]

Uṣūl *and* Furūʿ *from Two Inadequate Perspectives*

The traditional Muslim conception of the *uṣūl* and the *furūʿ* and the relationship between them relies on a well-developed (generally later) model of Islamic legal theory. On this notion, juristic thought is neatly divided into theoretical (*uṣūl*) and practical (*furūʿ*) legal thought. The *furūq* (distinguishing ostensibly similar legal cases) and the *qawāʿid fiqhiyya* (legal maxims) are seen as relevant to the area of the *furūʿ*, since both *furūq* and *qawāʿid* are seen as presupposing the *furūʿ*. The *furūq* shows how cases that may exhibit similarities must be judged differently due to decisive differences between them that may be so subtle that only a jurist can explain them and decide the cases accordingly. The *furūʿ* thus provide the raw material for the *furūq*, and the *qawāʿid fiqhiyya* are also based on the *furūʿ*, since the *qawāʿid* are abstractions from the *furūʿ*. Invention of a legal maxim or *qāʿida fiqhiyya* occurs when a jurist makes a subsumptive

---

[36] The Alta discussion at the end of Bernard Weiss (ed.), *Studies in Islamic Legal Theory*, 385–429.

[37] "Structuring the Law: Remarks on the Furūq Literature": Ian Richard Netton (ed.), *Studies in Honor of Clifford Edmund Bosworth* (Leiden, 2000), I, 332–44 and "Qawāʿid as a Genre of Legal Literature": Bernard Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden, 2002), 365–84.

judgment wherein he identifies what is common to practical legal decisions and thereby classifies them into a class of legal cases governed by certain maxims. The result, the generalized principle or maxim, expresses the rationale for all practical decisions relevant to the maxim. In the sixth chapter of this study, I shall provide examples of these types of legal maxims.

If both the *furūq* and the *qawāʿid fiqhiyya* are aspects of practical legal thinking, then *uṣūl al-fiqh* stands on its own as the science of legal theory *par excellence*. But since the principles of *uṣūl al-fiqh* and those of the *qawāʿid fiqhiyya* both look like abstract legal principles and appear to be of an essentially similar nature, an argument was needed to distinguish the two fields and types of principles embedded in them. The distinction between *uṣūl al-fiqh* and *qawāʿid fiqhiyya* proposed in traditional legal scholarship was that the former are the *a priori* of the *furūʿ*, while the latter are *ex post facto* inferences from these *furūʿ*. In other words, the existence of *uṣūl al-fiqh* is presupposed in the existence of practical legal decisions, while the *qawāʿid fiqhiyya* are contingent on the formulation of these decisions and may be seen as a result of subsumptive judgments that transform categories for specific legal rulings into abstract formulas once again.

The weakness of this view is its inability to provide a plausible description of the process of legal reasoning and lawmaking. The juristic craft at its highest level is responsible for developing the *uṣūl* and the *furūʿ* of *al-fiqh* as parts of one consistent structure of legal reasoning, in which the *furūq* as well as the *qawāʿid fiqhiyya* play complementary and important roles. In this context, theoretical and practical legal thought are intertwined and cannot be classified simply in terms of *genres* of legal writings or *sciences* of law. A group of juristic works will provide support to this very point. By these I mean to indicate the works of *takhrīj al-furūʿ ʿalā al-uṣūl*. By studying these works, it becomes clear that the variety of materials that make up each of these four genres (*uṣūl*, *furūʿ*, *furūq* and *qawāʿid*) does not negate their structural interconnection.

If one is to believe the advocates of the "tension" thesis, with its emphasis on the unease with which legal theory and legal practice have been brought together in the Islamic context, description of the existing genres of legal writing and their potential interrelationship or independence, complete or partial, may be impossible. Indeed, the *tension* thesis would seem to be the beginning and the end of an attempt to describe Islamic law as a legal system and field of intellectual inquiry. The complexity of that legal/intellectual system requires more sophisticated tools to describe it; the tension thesis simply does not provide the necessary tools.

The works of *takhrīj al-furūʿ ʿalā al-uṣūl* has a great deal to contribute to our understanding of the meaning of the *uṣūl* and its relationship with the *furūʿ*. As mentioned earlier, I have chosen to study six works of *takhrīj al-furūʿ ʿalā al-uṣūl* that span all four Sunnī schools of law and a good part of Islamic geography, as they were written by jurists who were born or lived in Uzbekistan, Afghanistan, Iran, Iraq, Syria, Egypt, and Algeria. The authors of these works lived between the tenth and sixteenth centuries; all were children of the age of maturity of Islamic legal thought. Some of these works represent a relatively early stage of Islamic legal development, while others take for granted a high degree of sophistication in the tradition. Together they offer a symposium of Islamic legal thought that I hope will prove more fruitful to the student of Islamic law who wishes to gain a deeper understanding of the interconnection of the elements of legal thinking in the Islamic tradition.

Conclusion

The first impression that a student of Islamic law and legal theory gains from "the ten introductory remarks to the *uṣūl*" and Ibn Khaldūn's presentation of Islamic legal history as elaborated by modern Muslim writers is that the *uṣūl* are those discussions and arguments that stem from theological speculation and linguistic and meta-linguistic inquiry and aim to serve the goal of issuing a *ḥukm sharʿī* (practical legal ruling), i.e., a sound legal opinion from an Islamic point of view. The Western student begins with skepticism about the interrelation of Islamic law and legal theory, having been exposed to an exaggerated presentation of the tension between theory and practice in Islamic law and an undue focus on the beginnings of Islamic law which ignores the Islamic legal system's complex development over more than a millennium. Not surprisingly, this state of affairs has given rise to substantial difficulties when Muslim and Western students of Islamic law have attempted to exchange the results of their research.

The study of Islamic legal history in Muslim academies still occupies a lower status than the study of practical Islamic legal thought. This is responsible for the fact that no revision of the rather simple view of the evolution of Islamic legal theory prevailing in Muslim scholarship has been undertaken to date. Western academies have, by and large, reacted to one extreme by adopting another. Despite the many positive developments that have taken place recently, the influence of the Schacht

thesis continues to disable most serious attempts at rewriting Islamic legal history from the standpoint of in-depth historical analysis. What is striking is that these two ostensibly opposed perspectives (in Muslim and Western academies) are actually quite similar in that they share an ahistorical method. In addition to their failure to accurately describe a complex process that took place over a long period of time, both fail to highlight what Hallaq refers to as the "diachronic variations" of the field.[38] This makes it yet harder for those being trained in either type of academy to appreciate the nature and complexity of the fields of law and legal theory in Islam.

This chapter concludes an admittedly long (though, I contend, necessary) introduction to the core of my study. My message has been that scholars of Islamic legal history should exercise self-critique and questioning about the sources of their working assumptions. One should not generalize about a century of legal history based on a single text or a few texts. My work would be guilty of the same shortcoming, if I should claim that my six texts somehow epitomize Muslim legal discourses between the tenth and sixteenth century. But this cannot be farther from what I intend to convey. I claim that my six sources are guides to a deeper reading of *fiqh* books. Thus, when researchers read these works and see how jurists link practical legal issues to those of the *uṣūl*, the impression of the theoretical nature of the latter should at least be moderated. One cannot help but get the sense (from contemporary historians of Islamic law) that they believe that the *furūʿ* and the *uṣūl* are separate discourses. Why should this impression have occurred at all? I tried to explain that (at least partly) in the second part of this chapter.

The following six chapters present Islamic juristic works which directly address structural interrelations of theory and practice in Islamic law. Five of these chapters (Four to Eight) will introduce and comment on aspects of the content of these six works. As a prelude, the very next chapter will introduce the authors of these works and how they conceived their projects.

---

[38] Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge, 1997), vii.

CHAPTER THREE

AN OVERVIEW OF SIX *TAKHRĪJ* WORKS

This chapter provides an overview of the sources of this study, including biographical information about their authors and these authors' prospectuses when such are available at the beginning of their works. The six works I am studying were written within a period of six centuries by Muslim jurists with different *madhhab* affiliations. Each of these jurists/authors has expressed the objectives of their works in different terms. These objectives can be classified into three categories, which gives us three different ways to speak of the process of *takhrīj al-furūʿ ʿalā al-uṣūl*.

The first is that *takhrīj al-furūʿ ʿalā al-uṣūl* is a process meant to show how juristic disagreement on matters of the practical law is explicable in terms of juristic disagreement on theoretical legal principles. This is what Dabbūsī states to be his objective in *Taʾsīs al-Nazar*. Theoretically, the objective as stated could mean either *revealing* or *devising* theoretical legal principles to which practical legal decisions are reducible. In other words, this could entail an *articulation* of the theoretical legal principles already known to be at work in the making of previous practical legal decisions by the jurists who issued them. Or, it could entail a *creation* of abstract theoretical principles to which practical legal decisions may be reduced, even if the jurists who issued these decisions might not have used these theoretical principles as justification for their decisions. In either case, this form of juristic writing, beyond pointing out the relationship between the fields of *uṣūl* and *furūʿ*, advances this relationship, since some of the theoretical legal principles (*uṣūl*) at work in issuing practical legal rulings (*furūʿ*) may at least be given a clear formulation, which they have not received before. This process resembles the training of first-year law school students in the U.S. in what is known as *unpacking* judicial rulings in the sense of pointing the hidden theoretical reasoning behind them in reference to principles based on the Constitution, precedents, etc.

The second objective set forth by jurists/authors of *takhrīj al-furūʿ ʿalā al-uṣūl* works is to explain the relationship between already existing theoretical legal principles (*uṣūl*) and practical legal decisions (*furūʿ*). This is

what Zanjānī, Tlimsānī and Ibn al-Laḥḥām purport to do in their works. This objective involves pointing to practical legal decisions that have been made on the basis of well-known theoretical legal principles, in which case the author's task is to juxtapose existing *uṣūl* and *furūʿ*, following a descriptive method that brings forth the relationship between already existing *uṣūl* and *furūʿ* together without advancing either of the two fields further. However, whether a *purely* descriptive method that allows for no controversial views regarding the relationship between the *furūʿ* and the *uṣūl* is actually possible is a different matter. Thus, there are at least two possibilities in understanding this objective: either that the author confines himself to descriptive elaboration of the ramifications of theoretical legal principles in practical legal matters or that the author provides an interpretation of these links between theory and practice from his point of view, taking theory as his starting point.

The third objective of *takhrīj al-furūʿ ʿalā al-uṣūl* is to show how principles of legal hermeneutics and other principles of theoretical legal reasoning (*uṣūl*) can be applied to actual real-life questions as well as to hypothetical cases (*furūʿ*). This is what Isnawī attempts to achieve in his work, and later Timurtāshī will write his *Wuṣūl* to follow in Isnawī's footsteps. At the time at which Isnawī wrote his work, both the *furūʿ* and the *uṣūl* as well as all the study of language and theology had already assumed a certain level of independence and accumulated a substantial body of literature. In this context, Isnawī undertakes a synthesis within the study of law, theology, and language, a synthesis that is not limited to stating already existing connections and relationships. Rather, Isnawī's synthesis, in effect, debates and critiques the evolution of these fields in relation to one another. Isnawī also writes a book on the relationship between grammatical principles and practical legal rulings (entitled *al-Kawkab*, which we will mention later), which confirms his commitment to providing a synthesis among the Arabic and Islamic sciences, by and large.

In what follows, I shall offer an overview of the *takhrīj al-furūʿ ʿalā al-uṣūl* works which constitute the sources of this study, accompanied by biographical information about their authors.

Dabbūsī and the Taʾsīs

Abū Zayd ʿUbaydullāh Ibn ʿUmar Ibn ʿĪsā al-Dabbūsī (d. 430 AH = 1036 CE) was a native of Dabbūsa or Dabbūsiyya (today part of Uzbekistan) who became one of the most famous jurists in Bukhārā and Samarqand (the

two major cities surrounding his small hometown) in his time.[1] Some biographical dictionaries offer a chain of teachers for Dabbūsī that links him with the eponym of the Ḥanafī school (i.e. Abū Ḥanīfa) to which Dabbūsī subscribed. Though many questions may be raised about this chain, I shall present it with a few comments and leave an elaborate critique of it for a more appropriate context.

Dabbūsī (d. 430 AH = 1036 CE) ⇒ Abū Ja'far al-Usrūshanī ⇒ Abū Bakr Muḥammad Ibn al-Faḍl al-Kamārī (d. 381 AH = 992 CE) ⇒ 'Abdullāh Ibn Muḥammad Ibn Ya'qūb al-Subadhmūnī (d. 340 AH = 952 CE) ⇒ Abū Ḥafṣ al-Ṣaghīr, Muḥammad Ibn Aḥmad Ibn Ḥafṣ (d. 264 AH = 880 CE)[2] *⇒ the father of the latter, the elder Abū Ḥafṣ, Aḥmad Ibn Ḥafṣ al-Kabīr (d. 217 AH = 830 CE) ⇒ Muḥammad Ibn al-Ḥasan al-Shaybānī (d. 189 AH = 805 CE) ⇒ Abū Ḥanīfa (d. 150 AH = 767 CE).*

All of these teachers/jurists, with the exception of Abū Ḥanīfa and his immediate student Muḥammad Ibn al-Ḥasan al-Shaybānī, were from Bukhārā or its surrounding cities or towns.[3] In addition to their reported dedication to teaching and oral instruction, many of these jurists are known for their books, public debates, and anecdotes.[4] To mention but

---

[1] Ibn Khallikān (d. 1282) (ed. Iḥsān 'Abbās), *Wafayāt al-A'yān wa Anbā' Abnā' al-Zamān* (Beirut, 1994), III, 48; Ibn Abī al-Wafā' al-Qurashī (d. 1373) (ed. 'Abd al-Fattāḥ al-Ḥilw), *al-Jawāhir al-Muḍiyya fī Ṭabaqāt al-Ḥanafiyya* (Cairo, 1993), I, 166; II, 499–500; IV, 35; Ibn Quṭlūbughā (d. 1475) (ed. Muḥammad Khayr R. Yūsuf), *Tāj al-Tarājim* (Damascus, 1992), 94, 176, 279; Ja'far al-Subḥānī, *Mawsū'at Ṭabaqāt al-Fuqahā'* (Beirut, 1999), III, 67; V, 199.

[2] Biographical dictionaries agree that Abū Ḥafṣ al-Ṣaghīr was a teacher of 'Abdullāh al-Subadhmūnī, who was born in the year (258 AH = 872 CE) and died in the year (340 AH = 952 CE). Abū Ḥafṣ al-Ṣaghīr's death year (264 AH = 880 CE) must therefore be mistaken, since we would otherwise have to believe that Subadhmūnī studied with Abū Ḥafṣ al-Ṣaghīr when Subadhmūnī was six years old. A more plausible assumption would be that Abū Ḥafṣ al-Ṣaghīr died in the year (274 AH = 889 CE) instead of (264 AH = 880 CE). This would be consistent with all the data we have from bibliographies of these teachers and may be supported by the fact that 264 could have easily been mistaken for 274 (copiers of manuscripts could have read *sab'īn* as *sittīn* if the words were smudged or unclear in the copies on which they relied).

[3] 'Abd al-Ḥayy al-Laknawī (d. 1304) (ed. Aḥmad al-Zughbī) *al-Fawā'id al-Bahiyya fī Tarājim al-Ḥanafiyya* (Beirut, 1998), 39, 99, 177, 303.

[4] Abū Ḥafṣ al-Kabīr (d. 217 AH = 830 CE) was already an established jurist in Bukhārā, his hometown, when Muḥammad Ibn Ismā'īl al-Bukhārī, the traditionist who later became the most famous of all *Bukhārīs*, was still starting his career as a scholar in the religious sciences. Abū Ḥafṣ is reported to have ordered the young Muḥammad Ibn Ismā'īl to refrain from answering questions of law and jurisprudence, telling him that he (Muḥammad Ibn Ismā'īl al-Bukhārī) was not qualified to do so. Muḥammad Ibn Ismā'īl was adamant and continued to deliver *fatwās* based on his knowledge of the tradition of

two examples of the writings of these jurists, al-Subadhmūnī is known to have written a biography of Abū Ḥanīfa entitled *Kashf al-Āthār al-Sharīfa fī Manāqib Abī Ḥanīfa* (Revealing the Noble Traces in the Good Qualities of Abū Ḥanīfa), and Abū Ḥafṣ al-Ṣaghīr is credited with a book on the refutation of the heretics entitled *al-Radd ʿalā Ahl al-Ahwāʾ*.

Dabbūsī's juristic career seems to have been confined to Transoxanian (Central Asian) academies, where he was a pupil and teacher-jurist as well as a jurisconsult of great fame around the areas of Bukhārā and Samarqand. His two books *Taʾsīs al-Nazar* and *Taqwīm al-Adilla* brought him to the attention, not only of his fellow Ḥanafī jurists (his contemporaries and younger jurists), but also of major Shāfiʿī jurists from the fifth/eleventh century on. In his *Mankhūl* (The Filtered) in legal theory, Abū Ḥāmid al-Ghazālī (d. 505 AH = 1111 CE) sets out to polemicize against Dabbūsī, as the latter was a spokesperson for the Ḥanafī school in questions of both law and legal theory. Ghazālī confesses that he was acquainted with Dabbūsī's *Taqwīm al-Adilla* only through secondary sources, which suggests that a copy of that book may not have been easily attainable in Baghdad by Ghazālī's time. In sum, Dabbūsī's juristic stature was not in question, whether for his fellow Ḥanafī jurists or the Sunnī juristic community at large.

Let us now turn to Dabbūsī's juristic work, *Taʾsīs al-Nazar*. According to its author, *Taʾsīs al-Nazar* is an attempt to identify the points of disagreement among jurists in theoretical legal principles that are responsible for jurists' disagreement in practical legal decisions. Dabbūsī states:

> I found it to be a difficult matter for novices in jurisprudence, may God guide them towards His contentment, to comprehensively know cases of

---

the Prophet until he was asked one day about whether two infants should be prohibited from marrying one another if they drank the milk of the same goat or cow. The Prophet Muḥammad's Tradition teaches that if a male baby and a female baby suckle on a woman's breast, the woman becomes the common mother of the two babies, and the babies become siblings and therefore cannot marry each other. The young Muḥammad Ibn Ismāʿīl al-Bukhārī answered the question given to him (the goat question) in the affirmative, exposing his ignorance of the legal rationale for the prohibition of marriage between babies who shared the breast of one woman (that is, the fact that the babies shared the milk of their breast-feeding mother). Thereupon, the anecdote goes, Muḥammad Ibn Ismāʿīl al-Bukhārī was expelled from his home city. See the former sources. The truth of this story may be doubted because of its overtones disparaging traditionists and vindicating jurists. Even biographical dictionaries written by Ḥanafī jurists express doubt about whether the traditionist Bukhārī would have been capable of making such a mistake. In defense of the anecdote, however, one may say that there is nothing intrinsically impossible about the story, especially when we note that Bukhārī's alleged mistake must have been made when he was fairly young.

> juristic disagreement. And (I found it to be) taxing for them to understand the foundation (of this juristic disagreement) and found their knowledge falling short of comprehending its nature. I (also) found confusion slipping into their debates in these (cases of juristic disagreement). Hence, I have collected in this book of mine statements, which once read and reflected upon, would allow the reader to determine the points of disagreement and the subjects of divergence in the views (*maḥāll al-tanāzuʿ wa madār al-tanāṭuḥ*). Then the readers can direct their energy to organizing their arguments and strengthening their proof for the propositions that are the actual subject of debates.[5]

For Dabbūsī, the points of disagreement and the subjects of divergence (*maḥāll al-tanāzuʿ wa madār al-tanāṭuḥ*) in legal views are best expressed in theoretical or abstract propositions, which are the sources of the disagreement in the first place. As we stated earlier, Dabbūsī's statement does not explain whether he invented these abstract propositions or whether he understands them to be known to advanced jurists. Furthermore, Dabbūsī's language is not explicit as to whether the propositions that should be the actual subject of juristic debates (*al-mawāḍiʿ allatī ʿurifa annahā madār al-qawl wa maḥāll al-tanāzuʿ*) are *a priori* propositions for practical juristic reasoning or whether they are the outcome of reflections on practical legal issues (possibly including reflections that have arisen through clarification of one's views through juristic debates). In other words, whether the *uṣūl* that Dabbūsī introduces in his work are *ex ante* principles or *ex post* abstractions in relation to justice disagreement on the *furūʿ* is not easy to establish.

Thus, Dabbūsī introduces abstract legal principles to explain juristic disagreement, whether as a contribution to articulating the causes of juristic disagreement or an advancement of the same. In the discussion of each *aṣl* or legal principle, the author explains how juristic disagreement on the *aṣl* may facilitate understanding of disagreements on practical legal decisions.

Dabbūsī's *Taʾsīs* is confined to the disagreements of the master jurists of what we might call the long eighth century (ending in Shāfiʿī's death in 820 CE). These master jurists include three pioneers of Ḥanafī law: 1) Abū Ḥanīfa (d. 767) and his students, 2) Abū Yūsuf Yaʿqūb Ibn Yūsuf, later known as *qāḍī al-quḍāh* (lit. Chief Judge, but in practice more akin to Minister of Justice) or simply Judge (*al-qāḍī*) Abū Yūsuf (d. 798), and 3) Muḥammad Ibn al-Ḥasan al-Shaybānī (d. 805). Other important jurists

[5] *Taʾsīs*, 2.

whose views are discussed by Dabbūsī include Abū Ḥanīfa's older contemporary Ibn Abī Laylā (d. 765) and younger rivals: Mālik Ibn Anas (d. 795) and Shāfiʿī (d. 820). Hence the following division of the work into eight sections, followed by an appendix:

Section I: On the disagreement between Abū Ḥanīfa, on the one hand, and his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, on the other. This section includes 22 legal principles (*uṣūl*), which form the basis of many more practical legal questions (*furūʿ*).
Section II: On the disagreement between Abū Ḥanīfa and his student Judge Abū Yūsuf, on the one hand, and Muḥammad Ibn al-Ḥasan al-Shaybānī, on the other. This section includes four *uṣūl*.
Section III: On the disagreement between Abū Ḥanīfa and Muḥammad Ibn al-Ḥasan al-Shaybānī, on the one hand, and Judge Abū Yūsuf, on the other. This section includes three *uṣūl*.
Section IV: On the disagreement between Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī. This section includes four *uṣūl*.
Section V: On the disagreement between the three scholars, on the one hand, and Zufar Ibn al-Hudhayl (d. 775), who is another student of Abū Ḥanīfa. This section includes eight *uṣūl*.
Section VI: On the disagreement between Abū Ḥanīfa and his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, on the one hand, and Mālik Ibn Anas, on the other. This section includes two theoretical legal principles (*aṣlān*).
Section VII: On the disagreement between the jurists of the Ḥanafī school, on the one hand, and Abū Ḥanīfa's older colleague Judge Ibn Abī Laylā, on the other. This section includes five *uṣūl*.
Section VIII: On the disagreement between the jurists of the Ḥanafī school, on the one hand, and al-Shāfiʿī, on the other. This section includes 25 *aṣl*.
Appendix: On how other questions of legal theory have ramifications in the law. This appendix includes 12 *aṣl*.

One can immediately notice that, at least according to Dabbūsī, different jurists could share some of their views on questions of the *uṣūl* and the *furūʿ* while disagreeing with one another on the rest of the *uṣūl* and the *furūʿ*. In the first three sections, each of the three masters of Ḥanafī law stood alone once against the other two. Whenever they change their positions, similarities and dissimilarities among these juristic minds is clarified and explicated. This teaches us that, even within the same school of law, jurists could debate the questions of law and legal theory

without having to fear the implication that they were being inconsistent with one another as jurists (despite being all Ḥanafī lawyers) or were inflicting inconsistency on their school of law in general. Indeed, these debates on both theoretical and practical matters of the law enhance rather than detract from the quality of scholars' views as these scholars reflect on the theoretical and practical implications of their views and test them against one another. The discussion of the *uṣūl* and the *furūʿ* among jurists maximizes consistency between legal theory and practical decisions while producing desirable legal opinions.

If the *Taʾsīs* is to be taken as a book of Ḥanafī *uṣūl*, we must note that it represents a fairly early phase of *uṣūl al-fiqh* as it came to be known in the writings of scholastic jurists. The *Taʾsīs* was preceded by brief works on theoretical legal reasoning, such as Abū al-Ḥasan al-Karkhī's (d. 952) *Uṣūl*, which has been published repeatedly with the *Taʾsīs* in one volume, and more elaborate works such as Aḥmad Ibn ʿAlī al-Rāzī al-Jaṣṣāṣ's (d. 982) *al-Fuṣūl fī al-Uṣūl* (Chapters on the *Uṣūl*), which was edited by ʿUjayl Qāsim al-Nashmī and published in four volumes in Kuwait in 1994. After Dabbūsī came Shams al-Dīn Aḥmad Ibn Abī Sahl al-Sarakhsī (d. 1081), who wrote his *Uṣūl al-Sarakhsī* (edited by Abū al-Wafāʾ al-Afghānī and published in Cairo in 1953), and Fakhr al-Islām ʿAlī Ibn Muḥammad al-Bazdawī (d. 1089) with his *Kanz al-Wuṣūl Ilā Maʿrifat al-Uṣūl* (The Treasure of Arriving at Knowledge of the *Uṣūl*; published repeatedly, including in Beirut in 1997). But the stated objective of Dabbūsī's work and its scope distinguish it from those of other books of Ḥanafī *uṣūl* or legal theory, even those Ḥanafī *uṣūl* works that are replete with practical legal determinations or *furūʿ* accompanying the *uṣūl* (such as Sarakhsī's). However, there are *uṣūl* works by Ḥanafī jurists (such as the *uṣūl* of al-Shāshī (d. 13th cent.)) that resemble Dabbūsī's work more than Sarakhsī's or Bazdawī's works. If one can speak of a canon of *takhrīj al-furūʿ ʿalā al-uṣūl*, then one can suggest that Shāshī's *Uṣūl* (also known as *al-Khamsīn*)[6] be added to it. The *uṣūl* of Shāshī introduces a selection of legal principles with applications in practical legal matters and does not attempt a systematic presentation of the *uṣūl*, such as the *uṣūl* of al-Sarakhsī, for example.

---

[6] As I said before, two publications of this work appeared in the 2000 and 2001, one in Beirut (by Dār al-Gharb al-Islāmī, edited by Muḥammad Akram al-Nadwī) and the other appeared with a commentary by Walī al-Dīn Ibn Muḥammad Ṣāliḥ al-Farfūr in Damascus in 2001 under the title *al-Shāfī ʿalā uṣūl al-Shāshī*. See also Walī al-Dīn Ibn Muḥammad Ṣāliḥ al-Farfūr, *Takhrīj al-Furūʿ ʿalā al-Uṣūl Dirāsa Muqārina wa Taṭbīq* (Damascus, 2003), 102.

Dabbūsī's own contribution to "grand-theory" *uṣūl al-fiqh* (the field concerned with the sources of the law and general propositions of legal methodology) was his *Taqwīm al-Adilla* (Evaluating the Foundations of Legal Reasoning), which was edited by Khalīl al-Mays and published in Beirut in 2001. The *Ta'sīs*, therefore, must be seen as a special case in writings on legal theory, as its author found reason to write it despite his writing another book on legal theory with quite a different structure.

As a book of juristic disagreement, Dabbūsī's *Ta'sīs* comes after a treatise by Muḥammad Ibn Naṣr al-Marwazī (d. 906), *Ikhtilāf al-'Ulamā'* (Disagreement of Scholars; edited by al-Sayyid Ṣubḥī al-Sāmirrā'ī and published in Beirut in 1981), and Muḥammad Ibn Jarīr al-Ṭabarī's (d. 923) *Ikhtilāf al-Fuqahā'* (Disagreement of Jurists, published in 1902 in Cairo; and its sections on war and taxes paid by non-Muslims were edited by Joseph Schacht and published in Leiden in 1933). Dabbūsī's *Ta'sīs*, however, may be the first attempt to link juristic disagreement in questions of law to a form of *uṣūl* or theoretical legal principles.

In Chapter One, I argued that to insist on classifying the *Ta'sīs* as a book of *ikhtilāf al-fuqahā* or a book of *uṣūl al-fiqh* does a disservice both to the work and to Islamic legal writings in general. Granting that speaking of genres of legal writing is a useful idea, this need not deprive us of understanding the unique nature of each work of legal writing. As it stands before us amidst the different genres of writing on Islamic law, the *Ta'sīs* creates a bridge between law as the field of decisions in practical legal cases, legal theory as the field of abstract legal principles, and juristic disagreement as the field of comparative Islamic law.

One may be tempted to speak of the *Ta'sīs* as a transgeneric work of law and legal theory, just as one may speak of the works of the historian Simon Schama as transgeneric, being historical works that employ techniques of fiction, and just as one may speak of Roy Mottahedeh's *The Mantle of the Prophet* as transgeneric for similar reasons. I have no strong objections to that, but I would like to note that for a work to be considered transgeneric, it must appear after the conventions of the genres involved have been established. As for Dabbūsī's *Ta'sīs,* it can be considered transgeneric in that it is a work on law and legal theory that is neither a work of *fiqh* nor of *uṣūl* nor of *ikhtilāf*, as these names of genres may have been understood at the beginning of the fifth/eleventh century, i.e. the time at which Dabbūsī's *Ta'sīs* was written. But this opens the door to considering the *takhrīj al-furūʿ ʿalā al-uṣūl* literature an originally transgeneric endeavor. Again, I have no strong objections to this view, as long as the concepts are clear.

Zanjānī and the Takhrīj

By the time Zanjānī died in the year (656 AH = 1258 CE), he had already ascended in Baghdad to a position that is today's equivalent of a Secretary of Justice (*qāḍī al-quḍāh*), but Zanjān, from which his name is derived, was in a distant country, in today's Azerbaijan.[7] Unlike Dabbūsī, Abū al-Manāqib (or Abū al-Thanā') Maḥmūd Ibn Aḥmad al-Zanjānī received his education in the law according to the Shāfiʿī school of law rather than the Ḥanafī. He also differs from Dabbūsī in another important respect: Zanjānī has been educated mainly in the soon-to-fall Capital of the Abbasid Caliphate, Baghdad (Baghdad fell to Mongol invaders in the same year Zanjānī died, i.e., the year 1258).

Zanjānī was not a prolific jurist, but his *Takhrīj* may safely be seen as one of the most important works of Islamic jurisprudence of his time. Zanjānī was a renowned professor of law at two of the most prestigious schools of the 13th century, *al-Niẓāmiyya* and *al-Mustanṣiriyya* of Baghdad. He had a fine reputation as a jurist of the Shāfiʿī school and a learned legal theorist. He was also recognized for his excellence in the linguistic sciences and Qur'ānic exegesis. His writing, if one relies on biographical dictionaries, spanned most fields of Arabic and Islamic studies, from exegesis to linguistic inquiries, and from law to legal theory. He was especially recognized for his knowledge of Shāfiʿī practical and theoretical legal doctrines as well as the art and science of juristic disputation (*baraʿa fī al-khilāf wa-l-madhhab wa-l-uṣūl*). We might remember that Dabbūsī's statement of purpose in his *Ta'sīs* justified its writing by pointing to how difficult it is for novices in the study of law to identify the foundations and general principles that could serve as summary statements of practical juristic disagreement. Zanjānī's focus was not so much juristic disputation as it was the links between practical and theoretical legal thought, despite the comparisons between Shāfiʿī and Ḥanafī practical legal doctrines one finds in his *takhrīj*. In the introduction to the *takhrīj*, Zanjānī expresses his objective in the following terms:[8] The arguments on the basis of which these legal classifications of human actions are given are called *uṣūl al-fiqh*. It is plain to you that practical legal decisions are founded upon the *uṣūl* and that those who do not know how to apply legal reasoning and do not realize the connection between practical legal

[7] Azerbaijan's name goes back to the name of an old Persian general *Aturpatakān* (Greek form: Atropates).

[8] *Takhrīj*, 34.

decisions and their basis, which are *uṣūl al-fiqh*, would not be able to derive *any practical legal decisions*, *since these—despite their multitude and heterogeneity—have knowable foundations and follow well-structured patterns.* (emphasis mine)

The organization of the *takhrīj* follows the chapters of law manuals, beginning with ritual purity, prayers, almsgiving, fasting, pilgrimage, sale, usury, pawn, delegation in transactions, confession, usurpation, rent, preemption of real estate sales, slave- delegate in contracts, vows and agency, marriage, dowries, jurisdiction of Islamic law outside of Islamic lands, divorce, re-enactment of marriage, spousal maintenance and support, crimes against bodily integrity, capital crimes, robbery, war, oaths, adjudication, testimony, and freeing of slaves. Interestingly, each chapter begins with a statement of a theoretical legal principle or *aṣl* followed by practical legal decisions relevant to the specific area of legal practice. Thus, practical questions relating to sale are mentioned as applications of a principle of legal theory. The book's subject and center of focus, therefore, remain the principles of legal theory.

The *Takhrīj* deals with 97 *uṣūl* or theoretical legal principles. Only a third of the book concerns the textual sources of the law, while the rest deals with other principles of legal theory, some belonging to scholastic (GLT) *uṣūl al-fiqh*, some belonging to legal maxims (*qawāʿid fiqhiyya*), and others lying beyond the bounds of these two fields (as they came to be known to students of Islamic law and legal theory). In its treatment of the *uṣūl* that do not fall under the categories of "grand theory" *uṣūl al-fiqh* (see Chapter Seven), the importance of Zanjānī's *Takhrīj* is second only to Dabbūsī's *Taʾsīs*.

If Dabbūsī dedicates a long section (VIII) in his work to explicating the differences between Shāfiʿī and Ḥanafī legal doctrines in both theory and practice, Zanjānī's entire work is devoted to explaining the link between legal theory and legal practice with illustrations from Shāfiʿī and Ḥanafī law. By Zanjānī's time, the rivalry between these two schools and their prominence in Baghdadī academies had become so prominent as to command a book with this focus. Zanjānī's comparisons in practical and theoretical legal views is expressed in terms of comparing or contrasting Shāfiʿī law to Ḥanafī law,[9] the opinion of al-Shāfiʿī (d. 820) to that of Abū Ḥanīfa (d. 767),[10] or comparing the view

[9] *Takhrīj*, 53.
[10] *Takhrīj*, 291.

of al-Shāfiʿī to that of Ḥanafī jurists.[11] Occasionally, Zanjānī points to the view of the majority of the followers of Abū Ḥanīfa in contrast to the accepted view in his school.[12]

Compared to Dabbūsī's *Taʾsīs*, Zanjānī displays a lack of concern for explicating internal disagreement within Ḥanafī law. His main interest is comparing Shāfiʿī and Ḥanafī legal views in general, without laboring much to insure accurate ascription of the views to specific Ḥanafī jurists. The reader should not be surprised when he/she stumbles upon one of the (rare) instances of inaccuracy in the author's statement of Ḥanafī legal doctrines.

A century after Dabbūsī's *Taʾsīs*, Zanjānī's *Takhrīj* represents an advancement of the *takhrīj al-furūʿ ʿalā al-uṣūl* literature. Another hundred years after Zanjānī's death, a proliferation will take place in the writing of *takhrīj al-furūʿ ʿalā al-uṣūl*: three scholars from the schools of Mālikī, Shāfiʿī, and Ḥanbalī law will write books of *takhrīj al-furūʿ ʿalā al-uṣūl* within the span of half a century. These are the following three sources of my study.

Tilimsānī and the Miftāḥ

The author of *Miftāḥ al-Wuṣūl ilā Binā'al-Furūʿ ʿalā al-Uṣūl*, al-Sharīf al-Tilimsānī (d. 771 AH = 1369 CE), was a Mālikī jurist of the highest caliber. A *mujtahid* (independent legal thinker) according to al-Wansharīsī (d. 1508) and a polymath, Tilimsānī wrote works spanning the areas of Arabic grammar, Islamic theology, and Islamic law and legal theory. His students include: 1) the great Abū Isḥāq al-Shāṭibī (d. 1388), author of *al-Muwāfaqāt* (Congruities) in legal theory; 2) Lisān al-Dīn Ibn al-Khaṭīb (d. 1374), a well-known statesman and kātib (state scribe), who authored *al-Iḥāṭa fī Akhbār Ghirnāṭa* (A Compendium on the History of Granada); and 3) Ibn Khaldūn (d. 1406), who described his teacher as "the knight of the intellectual and religious sciences."

Tilimsānī managed to be in the courts of political rulers of more than one dynasty despite the fact that Tilimsān had been a common target of their military adventures. Tilimsānī is known to have married the daughter of the Zayanid Sultan Abū Ḥammū Mūsā (d. 1359), who established a school for him (known as *al-Madrasa al-Yaʿqūbiyya* or the Jacobean

[11] *Takhrīj*, 333.
[12] *Takhrīj*, 108.

School), where Tilimsānī taught the religious sciences in which he excelled. He also had a strong relationship with Abū ʿInān al-Mutawakkil ʿalā Allāh Fāris (d. 1357), the Marinid ruler to whom Tilimsānī dedicated his *Miftāḥ*. His relationship with the Marinid ruler went through some bad times, resulting at some point in Tilimsānī's imprisonment for months on the ruler's orders. Abū ʿInān later seems to have regretted his inappropriate treatment of the jurist and, according to some sources, apologized repeatedly to him after freeing him from jail.

For the most part, Tilimsānī's life was dedicated to studying and teaching. Among Tilimsānī's works is *Mathārāt al-Ghalaṭ fī-l-Adilla* (The Sources of Mistakes in Argumentation), which was recently published in a critical edition along with *Miftāḥ al-Wuṣūl ilā binā' al-Furūʿ ʿalā al-Uṣūl* in one volume.[13] The two works reveal a legal mind dedicated to clarifying the foundation of practical legal thought and the underpinnings of juristic debates. Tilimsānī's work on legal disputes (i.e., the *Mathārāt*) may prove to be an essential book; up until now, however, the *Miftāḥ* is still Tilimsānī's most well-known and important work.

The *Miftāḥ* includes 189 principles of *uṣūl al-fiqh* with examples of disagreement among jurists representing three different schools in practical legal matters based on their disagreement on these principles. At the very outset of his book, Tilimsānī offers an outline of the main subjects of *uṣūl al-fiqh*, emphasizing the latter's purpose of aiding the jurist in making decisions (*aḥkām*) in practical legal questions (*masā'il fiqhiyya*). The following table shows Tilimsānī's 189 principles of legal theory as classified according to their relevance to the various sources of the law.

THE UṢŪL

REVELATORY	RATIONAL	HYBRID
(Qur'ān and Sunna)	(*Istiṣḥāb*)	(Analogy)
138 principles	3 principles	48 principles

According to Tilimsānī, an argument to establish a decision in a practical question of law must be based on a source of law, be it textual, rational, or mix of the two. Textual sources of the law may be known through direct report (Scripture, Tradition) or indirectly through juristic

[13] *Miftāḥ al-Wuṣūl ilā binā' al-Furūʿ ʿalā al-Uṣūl* and *Mathārār al-Ghalaṭ fī-l-Adilla*, edited by Muḥammad ʿAlī Farkūs (Mecca and Beirut, 1998).

inference. Jurists may infer that a text of Scripture or a Tradition underlies a report of the opinion of the Companions of the Prophet or a consensus of the juristic community of an earlier generation. Therefore, Tilimsānī states that an argument to establish a practical legal decision is of two types: I) an argument in and of itself (*dalīl*) and II) that which contains a *dalīl*. An argument in and of itself (*dalīl*) is an argument that employs an independent source of the law, such as Scripture or Prophetic Tradition, while the second type of argument is based on juristic consensus or the opinion of a Companion of the Prophet, since such a report may be seen as an authoritative indication of a textual *dalīl* that was not reported explicitly. A *dalīl* is either A) *an independent argument*, whether i) textual (Scripture, Tradition) or ii) rational/logical, and B) *a rational argument that draws on a textual argument*, i.e., a hybrid argument (such as legal analogy, which extends the meaning of texts so as to apply them to a large category of cases deemed *analogous* to those addressed directly in the texts).

Based on this view, the sources of the law are: 1) revelation, 2) reason, and 3) a mixture of the two. The revelation may be ascertained in direct reports (Ai) and in juristic consensus or a Companion's opinion indicating the existence of a textual *dalīl* which was not reported (II). An independent rational argument may be accepted as a source of law, even if it does not purport to rely on revelation in any way (Aii). The mixture of textual and rational bases of argument results in hybrid sources of the law, consisting of the use of rational arguments that significantly add to the letter of the text, such as analogy (B).

The following is a classification of revelatory sources, around which the majority of Tilimsānī's juristic discussions (a total of 151 legal principles out of 189) revolve. Discussion of these revelatory sources, as the following table shows, raises questions concerning the authenticity of textual transmission, textual interpretation, the possibility of textual abrogation, and how jurists could determine preponderance among texts or remove any apparent conflict in their content.

REVELATORY SOURCES OF THE LAW

DIRECT (Qur'ān and/or Sunna)				INDIRECT	
a	b	c	d	a	b
Transmission	Hermeneutics	Abrogation	Conflict of Texts	Consensus	Companions
16 principles	84 principles	13 principles	20 principles	3 principles	1 principle

Tilimsānī's *Miftāḥ* puts as much emphasis on textual sources of the law as do other, later works of *uṣūl al-fiqh*. The book details many issues of legal hermeneutics (84 principles) and pays special attention to how disagreement over the criteria for determining the preponderance among conflicting texts results in disagreement in practical questions of law (20 principles). The remainder (about a fourth) of the book is dedicated to providing a fairly detailed picture of how legal analogy works and how each aspect of its conceptualization and application raises issues that caused Muslim jurists to disagree on both theoretical and practical questions. In short, despite its brevity, Tilimsānī's *Miftāḥ* is a veritable encyclopedia of legal theory encompassing a substantial range of the field's questions and problematics.

Isnawī and the Tamhīd

When Tilimsānī was writing his *Miftāḥ* in Marinid and Zayanid Algeria with a clear focus on discussing the interrelation of theoretical legal principles and practical legal rulings, Isnawī was writing in Mamlūk Egypt a different book of *takhrīj al-furūʿ ʿalā al-uṣūl*. Isnawī was a Shāfiʿī legal theorist who would be classified as belonging to the rationalist/theologian school mentioned in Chapter Two and whose major contribution to the writing of *takhrīj al-furūʿ ʿalā al-uṣūl* would be in stressing the importance of the connection between language and law, inextricable elements within the web of Arabic and Islamic sciences.

In terms of the frequency of mention in classes of Shāfiʿī jurisprudence at al-Azhar, the name of ʿAbd al-Raḥīm Ibn al-Ḥasan Ibn ʿAlī al-Isnawī is comparable to names like Māwardī (d. 1058), Shīrāzī (d. 1083), Juwaynī (d. 1085), Ghazālī (d. 1111), Rāfiʿī (d. 1226), Nawawī (d. 1277), Bayḍāwī (d. 1286), and Suyūṭī (d. 1505)—all prominent Shāfiʿī jurists. Isnawī has earned this importance through his achievements as a jurist and legal theorist with a strong interest in the linguistic sciences and the art of disputation.

Isnawī wrote commentaries on manuals of grammar and law as well as a book on linking questions of grammar to practical questions of law (known as *al-Kawākib al-Durriyya fī Tanzīl al-furūʿal-Fiqhiyya ʿalā al-Qawāʿid al-Naḥwiyya* or Luminous Stars on Linking Practical Legal Decisions with Grammatical Principles; also known as *al-Kawkab al-Durrī* or Luminous Star). His *Tamhīd* adopts the philosophy elucidated in *al-Kawkab al-Durrī*, that is, the linking of law to grammar through legal

hermeneutics. Other works by him include *Nihāyat al-Sūl* (The End of Inquiry), an oft-cited commentary on Bayḍāwī's (d. 1286) *Minhāj al-Wuṣūl ilā ʿIlm al-Uṣūl* (The Method of Access to the Science of Legal Theory); *Nihāyat al-Rāghib fī Sharḥ ʿArūḍ Ibn al-Ḥājib* (The Ultimate Source for those with Desire, a Commentary on Ibn al-Ḥājib (d. 1249) on Prosody); and a book on the biographies of Shāfiʿī jurists. The list of Isnawī's mentors approaches twenty names by some accounts, the most famous of these teachers being Taqī al-Dīn al-Subkī (d. 1354). His noteworthy students number a little more than his teachers, and among them al-Zarkashī (d. 1390) stands out as one of the most well-known.

The appointments Isnawī received included one as a teacher of Tafsīr in the Mosque of Aḥmad Ibn Ṭulūn in Cairo starting in (727 AH = 1327 CE) (at age 23). Isnawī did not seem to be as successful in holding public office. He held the post of *Muḥtasib* (Chief of Police) from (759 AH = 1358 CE) until he resigned in (762 AH = 1361 CE). He also served as an advisor in Bayt al-Māl (Treasury) in 759, a post he resigned in (766 AH = 1364 CE). He thereafter dedicated all his time to writing and teaching, to which he always dedicated part of his time since he was 27.[14] Isnawī's major achievement lies in his writings, among which *Tamhīd* is an outstanding example.

Isnawī begins his *Tamhīd* with an introduction in which he states that *uṣūl al-fiqh* is the science on which independent legal reasoning (*ijtihād*) is based. Quoting an authority, Isnawī subsequently reminds us of a statement by Rāzī (d. 1209) that mastery of the science of *kalām* is not a requirement for achieving the status of a *mujtahid*, nor can *fiqh* be considered a prerequisite for achieving such a status (since *fiqh* is the result of the process of legal education rather than its prerequisite). By contrast, *uṣūl al-fiqh*, as knowledge of the sources of the law and the general premises of legal reasoning, is such prerequisite. Isnawī then pays tribute to the founder of Shāfiʿī law as the founder of the field of *uṣūl al-fiqh* and argues against any attempt to belittle Shāfiʿī's achievement by assuming that his work had precursors.

At the end of his introduction, Isnawī states that he had previously written a book on pure *uṣūl al-fiqh*, intimating that the earlier book did not include many practical decisions or *furūʿ* of *al-fiqh*. He then declares his intention to write a book that includes *most* of the questions of *uṣūl*

[14] Taqī al-Dīn Aḥmad Ibn Alī al-Maqrīzī (d. 1442) (ed. Maḥmūd al-Jalīlī), *Durar al-ʿUqūd al-Farīda fī Tarājim al-Aʿyān al-Mufīda* (Dār al-Gharb al-Islāmī: Beirut, 2002), II, 230–4.

al-fiqh and links it to its objective (*al-maqṣūd minhu*), i.e., how to derive legal rulings from these *uṣūl* (*kayfiyyat istikhrāj al-furūʿ minhā*). Then Isnawī states:[15]

> I first mention each theoretical principle (*al-masʾalah al-uṣūliyya*) with all its aspects in a crisp and brief manner. Then I follow it with *some* of the practical decisions based on this principle (*mā yatafarraʿu ʿalayhā*) as a way of hinting to other practical rulings of a similar nature. The practical cases I mention are of three types. 1) In some of them, our fellow [Shāfiʿī] jurists have formulated their decisions based on the relevant theoretical principle. 2) In some of them, the decisions have diverged from the principle. 3) And in some cases, I have not found any decisions that are ascribed to these jurists (*naql*). In these cases, I offer a ruling based on what the theoretical principle entails (*mā taqtaḍīhi qāʿidatunā al-uṣūliyya*), also taking into account specific *madhhab* theoretical principles (*al-qāʿida al-madhhabiyya*) and similar cases decided within the school or *madhhab* (*al-nazāʾir al-furūʿiyya*). Once this is achieved, the reader will understand what our fellow [Shāfiʿī] jurists explicitly stated in questions of law and especially legal theory, and what they may have mentioned in general or specific terms. Whence, the reader will also be able discover what our fellow [Shāfiʿī] jurists may have neglected to mention. The book will be of help to both jurisconsults and teachers, especially those expected to know both sciences (law and legal theory) and fulfill both functions (lawyer and legal theorist). The book includes all that and is sufficient for that purpose, especially given that the legal opinions (*furūʿ*) it contains are worthy of consideration in their own right, and some of these I have found in unknown books or in places where one would not expect them to be found. And some of these legal opinions I have formulated myself.

Thus, Isnawī classifies the *furūʿ* in his work into three categories: 1) ones that are consistent with the principle in question, 2) ones that are exceptions to the principle, and 3) ones that he formulated based on the theoretical principles in cases where no decision is reported in the sources of Shāfiʿī law.

Isnawī then invites non-Shāfiʿī jurists to write books similar to his, in which they juxtapose the theoretical principles of the *uṣūl* with the practical decisions of the *furūʿ*, so that they

> . . . exercise articulating legal arguments and foundations of legal opinions in clear terms (*taḥrīr al-adilla wa tahdhībihā*) and be aware of these arguments' weaknesses and strengths. This way those with interest in legal theory will reach the height of the discipline and its ultimate end, namely,

[15] *Tamhīd*, 46–7.

> paving the way (*tamhīd*) for the extraction of practical legal decisions from the principles of legal theory (*istikhrāj al-furūʿ min qawāʿid al-uṣūl*) and reaching the level of those capable of performing that *takhrīj* (based on the techniques accepted in the *madhhab*). May God fulfill that with His lavish generosity and benevolence! Hence I have named the book *al-Tamhīd*.[16]

Isnawī mentions that he began to write his book *al-Kawkab al-Durrī* after he had begun working on his *Tamhīd*, which may suggest that the idea of writing an entire treatise on the links between grammatical principles and legal questions came to the author while he was thinking about the nature of the link between *uṣūl al-fiqh* legal principles (which are rich in linguistic inquiries) and practical legal decisions.

Isnawī's *Tamhīd* is divided into seven chapters dealing with Scripture, Tradition, consensus, analogy, disputed sources of the law, determining preponderance among conflicting sources of the law (*taʿādul and tarjīḥ*), and independent legal reasoning and opinions (*ijtihād and iftāʾ*). The author dedicates two-thirds of the book to the first chapter on Scripture, which includes an elaborate treatment of legal hermeneutics. Most distinctive is Isnawī's notion of the *furūʿ*, which includes hypothetical questions based on grammatical inquiries. We will address the nature of Isnawī's *furūʿ* (and Timurtāshī's, who follows in the footsteps of Isnawī) in our discussion of the scope of the *furūʿ* within the *takhrīj* literature.

Ibn Al-Laḥḥām and the Qawāʿid

ʿAlāʾ al-Dīn Abū al-Ḥasan ʿAlī Ibn Muḥammad Ibn ʿAbbās Ibn Shaybān Ibn al-Laḥḥām al-Baʿlī was born in Baʿlabakk where he started his studies, which he completed in Damascus by studying Ḥanbalī law with the famous Ibn Rajab (d. 1390). His main scholarly achievement lies in his teaching and writings, which include a compendium on legal theory and a digest of Ḥanbalī law, but he is also known to have ascended to judgeship at one time and to have rejected it at another. Ibn al-Laḥḥām spent his final years in Cairo (after the Mongols' control over Syria diminished his desire to reside there), where he died in (803 AH = 1397 CE).

---

[16] *Tamhīd*, 47.

At the beginning of his book, Ibn al-Laḥḥām states:

> Within the legal sciences, the position of the science of *uṣūl al-fiqh* resembles a focal and unifying point (*wāsiṭat al-nizām*), mediating between the levels of *furūʿ* and *kalām*. It is also a science whose importance has been acknowledged . . . since its fruits are the practical rulings that this lofty, unadulterated law (*al-sharīʿa al-muṭahhara*) comprises, and it is through it [*uṣūl al-fiqh*] that noble authorities systematize their inquiries. Hence, I have consulted God in my prayers in the matter of writing a book in which I write theoretical legal principles and other legal maxims (*qawāʿid wa fawāʾid uṣūliyya*), coupling each principle with the relevant practical legal questions of the *furūʿ*.

Ibn al-Laḥḥām's book is divided into 66 chapters of unequal length, each one beginning with a principle of legal theory. This may give the impression that each of its 66 chapters is concerned with one principle of legal theory and the practical legal decisions relevant to it. But a careful reading of the book will show that most of its chapters begin with a major principle of legal theory but include a number of principles coupled with relevant practical legal decisions belonging to different areas of the law. The term used to designate a principle of legal theory is *qāʿida*, but the author also uses the term *fawāʾid* before offering brief discussions of (mostly similar types of) questions of legal theory and occasionally curious or interesting practical legal determinations.[17] While the terms *qawāʿid* and *fawāʾid* are not completely interchangeable, the heterogeneity of each of the two categories indicated by these terms makes it difficult to distinguish them based on one criterion or another. Ibn al-Laḥḥām's use of the terms is by and large less stcrit than to allow such clear-cut disctinctions.

For his book, Ibn al-Laḥḥām has selected quite freely from the content of *uṣūl al-fiqh*. A cursory look at the book may lead some readers to assume that Ibn al-Laḥḥām's work is the product of notes gathered and organized with little concern for a grand structure or plan for each chapter. Chapter 59, for example, offers a review of practical legal determinations pertaining to slaves in rituals, trade, marriage, war, etc.—all based on a principle concerning the inclusion of slaves in general statements addressing Muslims who have responsibility to apply God's laws. As stated earlier, the length of the chapters and the complexity of the principle (or principles) they treat are not uniform; some chapters consist of one principle which the author discusses in a few lines with examples of practical legal issues governed by this principle, while other chapters provide a constellation

[17] *Qawāʿid*, 260–3, 309–315, 383–94.

of related principles with a few digressions. The book, however, is full of useful insights on the interrelation between theoretical and practical legal principles and rulings.

The book chiefly addresses: 1) the theory of human agency and responsibility, 2) the classification of human actions and normative legal rulings, and 3) the textual sources of the law with an emphasis on legal hermeneutics. The first chapter, which deals with the definition of *fiqh*, may be taken as an introductory chapter (following in the footsteps of Isnawī, who also begins with the legal implications of how *fiqh* may be defined).[18] Chapters 2–8 deal with the theory of agency and responsibility, including questions such as the agency and legal responsibility of those in coma, under threat, or under the influence of alcohol, etc. Chapters 9–22 discuss the theories of the "practical legal determination" (*ḥukm*) including the notion of obligation and prohibition in human actions, validity and invalidity of legal actions, and rulings under normal and extenuating circumstances. Chapter 20 considers whether human actions before the institution of the divine law can be judged as right or wrong (or whether there should be a presumption of the permissibility of all such actions). In addition to its relevance to legal rulings, this issue relates to one aspect of the principle of *istiṣḥāb* (the assumption that no duty exists until proof of its existence is ascertained), one of the extra-textual sources of the law. The principle of *istiṣḥāb* has applications in cases in which jurists are in doubt as to the ruling the law provides. *Istiṣḥāb* constitutes a default position that jurists can take when they fail to find sufficient evidence that the sources of the law prescribe a duty or establish a prohibition. Chapters 23–65 deal mainly with textual sources and legal hermeneutics and include some of the book's longest chapters, making legal hermeneutics a major concern of Ibn al-Laḥḥām's work.

Chapter 23 deals with whether the meanings of words are extendable by analogy (so that the term "adultery," for instance, would include homosexual intercourse), and Chapters 24–28 address regular and metaphorical uses of the language. Chapters 38 deals with the nature of speech (*kalām* or *qawl*). Applications of this discussion occur in cases where the term "speech" appears in divine texts and human utterances. Chapter 39 considers whether "one instance of speech" may be ascribed to more than one person (this principle applies to cases in

[18] *Qawāʿid*, 17–32.

which a speaker qualifies or adds to another person's speech). Chapter 40 addresses the authoritativeness of variant or non-canonical readings of the Qur'ān. Chapter 41 deals with abrogation and Chapters 42–51 deal with the rules of commands and prohibitions. Chapters 52–64 deal with general and particular terms, with the exception of Chapter 59, which discusses whether slaves are part of those addressed with a general obligation. Chapter 65 discusses *mafhūm al-muwāfaqa* (a form of inference by analogy) and *mafhūm al-mukhālafa* (similar in part to a canon of statutory construction that we will discuss later).[19] The last chapter deals with the consensus of the Companions and the opinion of one Companion as sources of Islamic law.

Timurtāshī and the Wuṣūl

Timurtāshī[20] is a well-known name among late Ḥanafī jurists—counted among the jurists of the 21st generation (*ṭabaqa*) out of 24 generations (the last recorded generation includes Ibn ʿĀbidīn (d. 1836). (Note that Dabbūsī belongs in the seventh generation or *ṭabaqa*.)[21] His full name is Muḥammad Ibn ʿAbdillāh Ibn Aḥmad Ibn Muḥammad Ibn Ibrāhim

---

[19] The canon is: *expressio unius est exclusio alterius* (expression of the one thing is exclusion of the other)—one of the canons of statutory construction advocated by at least one contemporary American jurists, Justice Antonin Scalia of the US Supreme Court, the champion of a judicial philosophy termed "textualism." See especially, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997), 24 and the following pages. The use of this canon in statutory construction is controversial for obvious reasons. The assumption that "expression of the one thing, in a text, is exclusion of the other" could be true if, and only if, those who formulated the text have identified—by a comprehensive induction—all the individual cases that belong to the category under which both the expressed and the excluded are subsumed. A more reasonable assumption about what is not expressed in a text is that it is excluded in the sense that its case is not decided. That is why even *deciding what the text includes* awaits a comprehensive induction about all that is expressed in the text and all that is excluded by its language. Therefore, for the canon to signify that what is not expressed is decided in a manner opposite to that which is expressed, one must have specified that which is expressed by reference to its applications in the world.

[20] According to the etymology, the name of the city consists of two parts: (timūr = iron) and (tāsh = stone). Abd al-Ḥayy al-Laknawī (d. 1304) states that it is pronounced al-Tumurtāshī. See *Al-Fawā'id al-Bahiyya fi Tarājim al-Ḥanafiyya*, edited by Aḥmad al-Zughbī (Beirut, 1998), 35.

[21] Muḥammad ʿAbd al-Laṭīf Ṣāliḥ al-Farfūr, *Ibn ʿĀbidīn wa atharuhu fi al-Fiqh al-Islāmī* (Dār al-Bashā'ir: Damascus, 2001) I, 613–29. This work was initially a doctoral dissertation defended at al-Azhar's *Faculty of Sharīʿa and Law* in July 26, 1978.

Ibn Muḥammad al-Ghazzī al-Timurtāshī. He was born in Gaza, hence the surname al-Ghazzī, but his more common surname seems to go to a distant ancestor who lived in Timurtāsh in Turkey. His birth in the year 939 AH (1532 CE) is less controversial than his death year, which may have been 1007 AH (1599 CE) or shortly thereafter.[22]

Interest in religious education seems to have been strong in Timurtāshī's family for many generations, since his grandfather and many of his great grandfathers were known as al-Khaṭīb (the preacher). Of Timurtāshī's mentors and students the Egyptian Zayn al-Dīn Ibn Nujaym (d. 970 AH = 1562 CE) is the most famous. Two of Timurtāshī's sons are counted among his students, and it appears that Timurtāshī's fame as a jurist/teacher did not parallel his fame as the author of *Tanwīr al-Abṣār* (Enlightening the Eyes), a short text in Ḥanafī law which attracted a commentary by al-Ḥaṣkafī (d. 1677) entitled *al-Durr al-Mukhtār* and a super-commentary by the great Syrian jurist Ibn ʿĀbidīn (d. 1836) entitled *Radd al-Muḥtār*, one of the most important commentaries of late Ḥanafī law and jurisprudence. Some non-legal writings on grammar, Sufism, and theology are attributed to Timurtāshī. Some of these are available in manuscript form while others seem to have survived only as names in biographic and bibliographic sources. Most of Timurtāshī's writing are juristic (one may count up to 22 books and booklets); some are books of *fiqh*, others are books of *uṣūl*, and at least one, namely, his *Wuṣūl*, deals with the connection between the two.

Timurtāshī begins his *Wuṣūl* with the following statement:

> Since the book of *Tamhīd al-Uṣūl* by the authoritative jurist and encyclopedic scholar—the scholar of Islam and jurisconsult of humanity—Jamāl al-Dīn ʿAbd al-Raḥīm al-Isnawī al-Shāfiʿī (may God shower him with His mercy and settle him in His paradise) is an unparalleled book, which includes an abundance of both principles of legal theory and practical legal decisions, and since I have not found any book by our scholars (the Ḥanafīs) that is similar to it in its structure or that could be seen as its equivalent in its beautiful organization, the idea came to me to write a

---

[22] In *Khulāṣat al-Athar fī Aʿyān al-Qarn al-Ḥāḍī ʿAshar* (Cairo, 1869), IV, 18–20, Muḥammad al-Muḥibbī (d. 1699) states that Timurtāshī died at the end of the month of Rajab in the year 1004 AH (1597 CE) at the age of 65, but the editor of Timurtāshī's *Wuṣūl* points out that a copy of the author's *Mawāhib al-Mannān bisharḥ Tuḥfat al-Aqrān*, which was written by the author himself, was finished on the 21st of Rabīʿ al-Thānī in the year 1006 AH, and that the author's *Fatāwā* was finished, according to a manuscript, on the 18th of Shawwāl in the year 1007. See the introduction to the *Wuṣūl*, 84.

> book that is similar to it in its unique style, so that students may benefit from it.[23]

Here one finds one of the most explicit instances of inter-textuality.[24] If we do not restrict ourselves to the Sunnī legal tradition, we would find another example of the influence of Isnawī's *Tamhīd* in al-Shahīd al-Thānī's (d. 1559) *Tamhīd al-Qawāʿid*, which was published in *Qumm* in 1996 (note also that al-Shahīd al-Thānī wrote a book entitled *Tamhīd al-Qawāʿid al-Uṣūliyya wa-l-ʿArabiyya*, in which he emulates Isnawī *Kawkab al-Durrī*). As we noted, Isnawī is mostly concerned with language-related principles of legal theory and their interrelation with legal opinions in practical matters.

---

[23] *Wuṣūl*, 113. This is not the only time the author mentions Isnawī or his book. In fact, the author sometimes includes long citations of the Isnawī's work, such as on pages 285–7, where he discusses (through nine practical questions of law) the extent to which one may rely on one's own opinion when knowledge of what is required is available, which is based on the principle whether the Companions have relied on their own opinions in the time of the Prophet. Also see: *Tamhīd*, 22–3, 520.

[24] Some ten years after its coinage by Julia Kristiva in 1967, the term "intertextualité" became a celebrated term in literary criticism and was also introduced into other fields of textual analysis such as biblical hermeneutics. One can be sure that many scholars use it differently. It would be an exaggeration, however, to say, as some scholars do, that it is not a useful conceptual category. As I stated in the opening pages of my work, the sources of *takhrīj al-furūʿ ʿalā al-uṣūl* can lend themselves to further mining and research. One possible avenue of that research is the study of the influence of earlier works of *takhrīj al-furūʿ ʿalā al-uṣūl* on later ones and how this may have affected the development of the genre. Hints at the influence of previous works in the genre become most salient in that type of research.
See: Heinrich F. Plett (ed.), *Intertextuality* (Berlin, 1991): Volume 15 of the series *Untersuchungen zur Texttheorie* (Research in Text Theory), edited by János S. Petöfi.
In the preface, the editor addresses the meaning of intertextuality:

> "For some it represents the critical equivalent of post-modernism, for others the timeless constituent of any art; for some it marks the textual process as such, for others it is restricted to certain exactly defined features in a text; for some it is an indispensable category, for others again it is altogether superfluous—as a term to which the ancient proverb of new wine in old bottles justly applies."

My use of the term here is intended to draw attention to the value of reading cross-*madhhab* intertextuality as an indication of cross-pollination within the Sunnī legal tradition. This is a complex and involved subject, and its thorough study would entail analyzing examples of how some jurists of a certain *madhhab* relied on authorities from other Sunnī *madhhabs* to promote their legal views. In his *al-Ḥāwī li-l-Fatāwī* (treatise: *Tanzīh al-Anbiyāʾ ʿan Tasfīh al-Aghbiyāʾ*), al- Suyūṭī (d. 1505) states that his fellow Shāfiʿī jurist Ibn al-Ṣalāḥ (d. 1245) referred to the view of Abū Ḥanīfa when he found no explicit answer in his *madhahb*. Suyūṭī also refers to cases where Shāfiʿī jurists answered legal questions according to Ḥanbalī law when they found no explicit answer by their fellow Shāfiʿī jurists. Suyūṭī finally mentions that the same happens with reference to Mālikī law in "numerous cases." Ṣuyūṭī, *al-Ḥāwī li-l-Fatāwī* (Cairo, 1959), I, 371.

Timurtāshī does something similar to this in many respects but different in others. The great bulk of the principles Timurtāshī mentions pertain to legal hermeneutics. These are discussed mainly in the first chapter, which deals with Scripture as a source of law, and some are mentioned in the second chapter on the Prophet's Tradition. At the same time, other questions of legal theory are also treated in the *Wuṣūl* and are addressed through a uniquely Ḥanafī approach to the field.

The *Wuṣūl* is divided into an introduction, five chapters, and an appendix-like chapter that is not marked by a number. The introduction offers a definition of *fiqh* (as Isnawī and Ibn al-Laḥḥām did in their works) and deals with two other *uṣūl* that concern the legal judgment. The five chapters are concerned with 1) Scripture (*al-Kitāb*) 2) Sunna 3) consensus 4) analogy, and 5) legal reasoning and decisions (*ijtihād* and *iftā'*). The final unnumbered section deals with considerations affecting the responsibility of the human being addressed by the law (*al-umūr al-mu'tariḍa 'alā al-ahliyya*). Finally, three *uṣūl* are mentioned in a chapter entitled "Miscellany," one of which relates to textual sources of the law and two to non-textual sources.

The book includes 137 questions of *uṣūl* introduced by the term *mas'ala* (inquiry), but the author's presentation of these questions is interspersed with other principles and accompanying ramifications from *fiqh*, such as the definition of Scripture in the beginning of the first chapter and the principle of natural impediments to the competence of those addressed by the law (*'awāriḍ al-ahliyya al-samāwiyya*) at the beginning of the last chapter.

The definition of *fiqh* appears as the first principle or *aṣl*, followed by two *uṣūl* concerning the nature of the legal ruling: 1) the definition of apractical legal determination (*ḥukm*), and 2) the question of whether the terms *farḍ* and *wājib* are synonyms. 94 *uṣūl* concerns the textual sources, if we include the *aṣl* in the miscellany at the end of the book (thus accounting for more than two-thirds of the book), compared to 12 that deal with non-textual sources (also including the two "miscellany" *uṣūl*). Eight *uṣūl* concern legal reasoning and decisions, and 21 *uṣūl* concern competence and responsibility.

Conclusion

Based on the structure, scope, and organization of these works, one must note that only three of them could be considered books of *uṣūl al-fiqh* by scholastic standards. These are Tilimsānī's *Miftāḥ*, Isnawī's *Tamhīd*, and

Timurtāshī's *Wuṣūl*. Zanjānī's *Takhrīj* and Ibn al-Laḥḥām's *Qawāʿid* would be seen as works that contain a selection of *uṣūl al-fiqh* principles but do not meet the standards of well-organized *uṣūl al-fiqh* works. Dabbūsī's work has been classified as a book on juristic disagreement, since it cannot be characterized as a book of *uṣūl al-fiqh*. In the first chapter, I have pointed out the limitations of this classification. I also argued that, the more *boundary-policing essentialists* know about Islamic law and jurisprudence, the more likely they are to abandon their tendency and acknowledge the limitation of their view.[25] One of the most important facts about Dabbūsī's work is its early occurrence in the history of Islamic law. It shows that the interest in linking theoretical legal principles to practical legal determinations has not been a later stage in the evolutionary path of juristic writing (this runs in the face of the view that the *jurists*' way of writing legal theory may have been less developed than that of the *rationalists*, while an amalgamated way or the way of the *takhrīj* may have been the consummation of juristic thought in Islam).

In the following chapters I will begin to provide examples of the *uṣūl* included in these works and how they were introduced in juxtaposition to actual cases of legal practice. I commence with grand-legal-theory (GLT) *uṣūl*, prefaced by the theories of the *ḥukm* (practical legal determinations), legal agency and responsibility, and including legal hermeneutics, and extra-textual sources of the law, such as legitimate utility and custom. This combination of theoretical legal principles is at the core of legal theory as it came to be known in the Islamic scholastic legal tradition. Non-GLT *uṣūl al-fiqh* will follow, and finally a look at the *furūʿ* in the final chapter.

Just as the six books I am studying are meant to be representative rather than exhaustive of *takhrīj al-furūʿ ʿalā al-uṣūl* works, the cases I chose to present in the next chapters are not meant to be exhaustive of these works' content (it is in fact impossible to write one book about six books of the size of my sources that comment on each illustration of an interrelation of theoretical legal principles and practical legal determination they adduce). My interjections will be confined to clarifying the background of the *uṣūl* and the *furūʿ* that are often introduced in thickly packed language with little or no detail. But when my commentary clearly fulfills a different function, such as critique or comparison, this will be indicated.

---

[25] This expression was used by Robert Gooding-Williams in the context of arguing that *philosophy* may be a specific but fluid tradition whose breadth must be appreciated rather than reduced. *Zarathustra's Dionysian Modernism* (Stanford, 2001), 9.

CHAPTER FOUR

AGENCY, RESPONSIBILITY, AND RIGHTS

In the first two chapters, I offered general theoretical frameworks concerning the connection between theory and practice in Islamic legal thought and a critique of two prevalent perspectives that exercise influence on the study of Islamic legal history in Muslim and Western academies. Whether they tend to emphasize how legal theory and practice have revolved around textual interpretation of the sources of the law (Scripture, Tradition) or speak of an inevitable dichotomy between theory and practice in Islamic law, these perspectives, I contend, offer pseudo-historical analyses with results already included in their methodological premises. Consequently, they tend to be of little help to a reader who wants to even get a general idea about how this legal system may have worked. Any study of the nature and development of Islamic law and legal theory beginning with such perspectives is likely to offer a misleading and confused picture of the field. I suggested that dealing with the question of the interrelation of theory and practice begin with studying structural interrelations of legal theory and practice from the point of view of Islamic juristic thinking. In the third chapter, I provided an overview of the sources of this study, which aims to employ six works of Islamic jurisprudence to explain the concept of structural interrelations of theory and practice in Islamic law.

In this chapter, I begin to employ these sources and point to their treatment of what came to be known as *uṣūl al-fiqh*, which is a field that deals with the sources of Islamic law and the methods of their interpretation. According to some definitions of the field, *uṣūl al-fiqh* also provides a general classification of the nature of an Islamic legal ruling in practical matters (*ḥukm*). Some jurists choose to consider the treatment of the *ḥukm* as one of the preliminaries of *uṣūl al-fiqh* rather than an integral part of it, and I shall come to discuss this disagreement shortly. I use the term grand-legal-theory (GLT) *uṣūl al-fiqh* to refer to the *uṣūl al-fiqh* that treats the link between the *ḥukm* and its sources both textual and extra-textual, so as to distinguish GLT *uṣūl al-fiqh* from other theoretical legal principles that are treated in Islamic juristic writing. In this and the following two chapters, I show how my sources have considered principles that

are typically treated in books of GLT *uṣūl al-fiqh* and linked each of them to the *ḥukm* or a group of *aḥkām*. In Chapter Seven, I apply the same analysis to non-GLT *uṣūl al-fiqh*. In the final chapter of the study, I will focus on *furūʿ al-fiqh*, these practical legal determinations that have been cited in juxtaposition with both types of theoretical legal principles in the *takhrīj al-furūʿ ʿalā al-uṣūl* literature.

Grand-Legal-Theory Uṣūl Al-Fiqh

By grand-legal-theory (GLT) *uṣūl al-fiqh* I mean a field of legal theory that deals with 1) the *aḥkām* as the fruit of practical legal reasoning, 2) the sources of these *aḥkām*, and 3) how *aḥkām* are derived from the sources. GLT *uṣūl al-fiqh* is the field of *uṣūl al-fiqh* as it evolved and has been taught in Muslim academies during most of the past millennium. To many students of Islamic law in Muslim countries, one may as well omit the acronym GLT and refer to what we call GLT *uṣūl al-fiqh* as *uṣūl al-fiqh*. To these students, *uṣūl al-fiqh* proper simply indicates the field that offers an extensive treatment of the aforementioned three aspects of legal theory: the *ḥukm* that is the fruit of legal thinking, the sources of the *aḥkām*, and how the former may be derived from the latter.

Why then encumber my prose with this acronym? The main reason is that my work ultimately accepts the argument that Islamic legal theory need not be limited to *uṣūl al-fiqh* as it came to be known to scholars of Islamic law in the Muslim world. To fully understand the interrelation of law and legal theory in the Islamic legal system across different times and places, a historian must take cautionary measures towards the assumptions of previous scholarship in the field, whether they originate in the writings of medieval Muslim jurists or in academic modern scholarship. For a legal theorist trained in a Muslim context, GLT *uṣūl al-fiqh* is simply *uṣūl al-fiqh*. But taking this assumption for granted may imply either a lack of interest in the development of *uṣūl al-fiqh* before it acquired its clear form of tripartite legal theory (*aḥkām*, sources, hermeneutical link), which is embedded in GLT *uṣūl al-fiqh*, or else imply a judgment on non-GLT *uṣūl al-fiqh* as unimportant.

Medieval Muslim legal theorists have disagreed on how to describe the content of GLT *uṣūl al-fiqh*. Some consider the classification of the *aḥkām* "an introduction" to *uṣūl al-fiqh* rather than a component of it, while others provide a detailed theory of the *ḥukm*, speaking of its four elements: 1) The issuer of the *ḥukm* or the law-giver. 2) An action that is

judged in the *ḥukm* as appropriate or inappropriate to different degrees. This also includes, according to some legal theorists, the rights the *ḥukm* is aimed to protect.[1] 3) The one to whom the *ḥukm* applies (the human agent). 4) A statement of the *ḥukm* in the form of a proposition that describes a human action as prohibited, reprehensible, neutral, recommended, or obligatory. One may observe that the four-fold inquiry into the *ḥukm*'s components takes us a little far from the strict study of it as a "classification" that is applied to human actions (the proper subject of the law). In fact, such enlargement of *uṣūl al-fiqh* through including an extensive treatment of these four components of the *ḥukm* enters into other fields of intellectual inquiry. For example, speculations about the law-giver (*component number 1*) take us into the realm of theology, which is the proper area of inquiring into whether the human intellect can provide ethical guidance in the absence of revelation. *Wujūb shukr al-munʿimʿaqlan*, deducing a duty of gratitude for the Benefactor of the Universe, is a theological inquiry that found its way into *uṣūl al-fiqh* works. Some of the inquiries dedicated to the human action (*component number 2*) border on a study of the role of intensions in judging actions, which is the subject of a *qawāʿid* (legal maxims) inquiry that bear similarities to today's discussion of intension in the philosophy of action and the philosophy of mind. In the context of addressing human actions (*still component number 2*), one also occasionally finds discussions of rights and their division into human rights and divine rights. Finally, discussing the human agent (*component number 3*), who is addressed with the law, results in a well-developed theory of agency and responsibility.[2]

---

[1] Saʿd al-Dīn Masʿūd Ibn ʿUmar al-Taftazānī (d. 1392), *Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ limatn al-Tanqīḥ fī Uṣūl al-Fiqh* (Cairo, n. d.), II, 302–11. Al-Tanqīḥ is a text in Ḥanafī legal theory written by Ṣadr al-Sharīʿa ʿUbaydullāh Ibn Masʿūd al-Maḥbūbī (d. 1345).

[2] The section on *ijtihād* and *iftā'* is also seen by some as "an appendix" to the field of *uṣūl al-fiqh*. Thus *uṣūl al-fiqh* becomes the field that studies the *uṣūl* (sources) of *fiqh* (jurisprudence). But this does not mean that the general theory of the legal ruling is not a "prerequisite" to any sound knowledge of *uṣūl al-fiqh*. That is, equating *uṣūl al-fiqh* (as a science and genre) with the *uṣūl* of *al-fiqh* (i.e. the sources around which jurisprudence is constituted) does not trivialize general knowledge of the legal ruling (as opposed to detailed knowledge of the ruling assigned to human actions, which is the concern of *fiqh*) as a prerequisite to knowledge of *uṣūl al-fiqh*. ʿAlī Ibn ʿAbd al-Kāfī al-Subkī and his son Tāj al-Dīn al-Subkī (d. 1354 & 1369), *al-Ibhāj Sharḥ al-Minhāj* (Beirut, 1984, I, 19, 22–5; Shams al-Dīn al-Iṣbahānī (d. 1349) (ed. Muḥammad M. Baqā), *Bayān al-Mukhtaṣar Sharḥ Mukhtaṣar Ibn al-Ḥājib* (d. 1249) (Jiddah, 1986), I, 287–449.

I chose to dedicate this chapter to the (general) theory of the *ḥukm* and the (special) theory of legal agency (*ahliyya*) and responsibility (*taklīf*) as well as what I would call the roots of a theory of rights. I see these theories as important components of practical legal philosophy as developed by Muslim jurists, in which the needs of legal practice drove the theory into being. The six jurists I introduce have presented aspects of these theories accompanied by applications that illuminate these theories' inextricable connection to practical questions.

What are the fundamentals of these theories?

The aḥkām (plural of *ḥukm*) are of two types. One of these includes a classification of human actions into different classes (called *aḥkām taklīfiyya*, or practical legal determinations related to responsibility). I shall offer a detailed explanation of these shortly, but suffice it now to say that these classes of human actions include grades of desirability and undesirability for actions from obligatory to prohibited. The other type (*aḥkām waḍʿiyya*) deals with conditions related to human responsibilities. Therefore, the term *ḥukm sharʿī* (pl. *aḥkām sharʿiyya*) applies both to human actions as well as to "states" or "attributes" of certain objects in the material world that have relevance to normative human behavior. For example, for the time of dawn to be a *sabab* (reason, impetus) for doing the dawn (*fajr*) prayer is a legal determination (*ḥukm sharʿī*) and a part the family of *aḥkām waḍʿiyya* that are conditions of the physical world, which are related to human actions and responsibility.

According to most Muslim legal theorists, there are five degrees of legal responsibility expressed by *aḥkām taklīfiyya*. The following table illustrates these five degrees of legal responsibility before the law.

Muḥarram	*Makrūh*	*Mubāḥ*	*Mandūb*	*Wājib = Farḍ*
Prohibited	Reprehensible	Neutral	Recommended	Obligatory

When an action is classified as "obligatory" or "prohibited" (either of the two extremes), the degree of responsibility is at its highest level. Carrying out an obligatory act (e.g., prayer) results in reward and failing to do it results in punishment, while committing a prohibited act (e.g., wine-drinking) results in punishment and refraining from it results in reward. In the middle (at the *mubāḥ* level), responsibility becomes virtually non-existent; no reward or punishment results from carrying out or refraining from an act under this category. In other words, the human agent enjoys a high degree of choice with regard to actions within this category; whether one chooses to eat fish or vegetables, for

example, is the agent's own business. Between these acts of neutral value and those considered "prohibited," one finds "reprehensible" acts, such as excessive eating. Carrying out reprehensible acts results in nothing in particular, while refraining from them results in reward. Between the "neutral" and the "obligatory" are "recommended" acts, such as charity. Carrying out such acts results in reward, while failing to perform them results in neither reward nor punishment. The category of the recommended also includes all additional acts of piety beyond those religiously required. An act of piety beyond what is required (*opus supererogationis*) is occasionally called *nāfila* and includes acts such as additional non-obligatory prayers and the like.

Aḥkām taklīfiyya, according to Ḥanafī legal theorists, are of seven categories:

1. *Muḥarram* (prohibited based on conclusive evidence.)
2. *Makrūh karāha taḥrīmiyya* (prohibited based on inconclusive evidence.)
3. *Makrūh karāha tanzīhiyya* (reprehensible.)
4. *Mubāḥ* (allowed/neutral.)
5. *Mandūb* (recommended.)
6. *Wājib* (obligatory based on inconclusive evidence.)
7. *Farḍ* (obligatory based on conclusive evidence.)

Aḥkām waḍ'iyya are those that address aspects of the physical world that relate to human responsibility, including qualities of things and events, some of which may be effected by humans. This group of *aḥkām* includes a heterogeneous family of legal propositions, such as calling a given transaction 'valid' or 'invalid' (*ṣaḥīḥ* or *bāṭil*, respectively) and assigning a requirement to normal circumstances (*'azīma*) or to extenuating circumstances (*rukhṣa*).

These are the most commonly discussed *aḥkām waḍ'iyya*:

Sabab (reason, cause, impetus): An array of events is subsumed under this category, e.g., sunset is a *sabab* for doing the *maghrib* prayers and committing adultery is a *sabab* for its punishment

Sharṭ (prerequisite): Ablution is a prerequisite for performing the prayers

Māni' (impediment): Impurity of clothes is an impediment to the correctness of the prayers

Ṣaḥīḥ (valid): An act (whether of rituals or trade or a marriage contract, etc.) that fulfilled all the conditions of correctness

Fāsid (susceptible to invalidation): An act that has not fulfilled all conditions of correctness but may be fixed or corrected
Bāṭil (invalid): An act that has a fatal condition that makes its validation or correction impossible
Adā' (regular performance): e.g., A prayer that is done in its usual time
Qaḍā' (performance after the time): e.g., A noon prayer done after the sun sets
I'āda (redoing): A prayer redone because of a condition that made it invalid
'Azīma (requirement in regular circumstances): e.g., A noon prayer performed with its regular 4 units (*rak'as*)
Rukhṣa (requirement in extenuating circumstances): e.g., A noon prayer performed with 2 units at the time of traveling
Farḍ 'ayn (personal duty): e.g., five daily prayers
Farḍ kifāya (collective duty, to be performed by those available): e.g., prayers for the dead, attending to emergencies in the public space in the absence of the authorities, etc.

A quick note about personal and collective responsibly is in order. As we noted in the classification of the *ḥukm*, responsibility has different degrees. An act may be required/obligatory or simply recommended. An obligatory act may result in a personal duty (*farḍ 'ayn*) or a collective duty (*farḍ kifāya*). Thus, Islamic law admits of personal agency and collective agency, where collective agency is not simply an aggregate of personal agency. In a Muslim or a non-Muslim society, one can imagine an individual who relies on others' performing collective duties on his/her behalf, the so-called free-rider. Free-riders constitute a problem as they benefit from public utilities but do not fulfill their duties in the societies in which they live (sometime by acting illegally, such as avoiding the payment of due taxes). The most basic solution to the problem of free-riders in Islamic law is in reference to otherworldly reward and punishment.

The theory of human agency and responsibility addresses other issues, including the permanent and temporary conditions, which would hinder or impede full agency and responsibility if they befall the human being. These include infancy, insanity, terminal illness, and death. They theory of agency and responsibility also addresses questions about whether legal responsibility could exist without it being given to a fully competent human agent, e.g. whether the responsibility for *zakāh* or almsgiving may apply to property owned by an infant, who is technically not addressed by any responsibility for a religious duty, such as prayers or pilgrimage.

A *ḥukm* presupposing legal and moral responsibilities delivers a judgment of a legal and a moral nature. Such a judgment implies the existence of *rights*, of which some legal theorists speak in their treatises of *uṣūl al-fiqh*. For these jurists, the rights of man and the rights of God may as well be the basis of practical legal determinations. *Muslim jurists speak of two categories of rights*. *Ḥuqūq Allāh* or divine rights, on the one hand, are the basis for prohibitions that do not conform to a liberal philosophy of law that restricts harm to "harm to others." *Ḥuqūq al-ʿibād*, on the other hand, corresponds to the concept of rights as we understand it in the context of modern legal systems, one that can be the basis of the prohibition of transgression over others' body and property. In most cases, elements of both categories of rights exist. The prohibition of adultery, for example, includes an element of a divine right and is not exclusively a defense of human rights. And divine rights can be meaningfully spoken of in cases of prohibitions based on harm to others, since others are also God's creation.

In later writings of *uṣūl al-fiqh*, the above categories of the legal ruling and treatment of legal agency and responsibility are presented as an established matter-of-fact. By contrast, not all early writings on legal theory include a presentation of them or take them for granted. At any rate, in the six works under consideration one finds extensive treatment of these two aspects of mature *uṣūl al-fiqh* even though not all six authors deal with them systematically. Dabbūsī, Zanjānī, and Ibn al-Laḥḥām do not offer a systematic presentation of these two preliminaries of GLT *uṣūl al-fiqh*, but they all have something to offer about them as will presently become clear. In all of the six works I am studying, there are examples of legal principles which legal theorists discuss under the aforementioned rubrics. In this chapter, I will offer examples of these principles and show how the authors of these six works deemed them foundational to legal decisions Muslim jurists made in the context of various practical questions. My presentation will also include examples of these practical legal decisions as they relate to the theoretical principles on the legal ruling and the human agent.

GLT Uṣūl Al-Fiqh *and Legal Determinations in My Sources*

Of the *uṣūl* Dabbūsī discusses in his work, a few concern the *ḥukm* theory. No systematic treatment of these *uṣūl* dealing with the subject of classifying practical legal determinations into those directly concerning human responsibility (*aḥkām taklīfiyya*) and those generally linked to normative

behavior (*aḥkām waḍʿiyya*) can be found. But here Dabbūsī addresses aspects of *aḥkām waḍʿiyya*, viz., the valid, the invalid, and the susceptible to invalidation. Principle (6) in his work states that a contract that contains a significant element of invalidity is wholly invalid. Example: A sale by a person A of two items, item X that is owned by A and another item Y that is not owned by A contains an element of invalidity, since A does not own Y, and a sale by a person of an item he/she does not own is invalid. Taken as a whole, this contract may therefore be deemed invalid. But such a contract may be divided into two deals one of which does not include the elements that make it invalid. In the above example, the price assigned to X and Y must be divided into two prices: one price for X and one for Y. Then the sale of item X, which belongs to the seller, can be validated and the sale of Y deemed invalid. According to the above principle, dividing the sale into two deals to save it partially is unacceptable. Abū Ḥanīfa, who holds the above principle to be correct, would not attempt to recover such a contract in this manner, because he believes that this contract contains a *significant* element of invalidity (the sale by A of something he/she does not own) and, for him, *a contract that contains a significant element of invalidity is wholly invalid*. Abū Ḥanīfa's two older students (Abū Yūsuf (d. 798) and Muḥammad Ibn al-Ḥasan al-Shaybānī (d. 805)), who reject this principle, would rule that such contracts may be recoverable and require that the unacceptable conditions be removed from the contracts to keep them valid and binding.[3] The following table illustrates the disagreement between these jurists in this matter on the level of theoretical and practical reasoning.

Disagreement → Jurists ↓	Theoretical legal principle or *aṣl*	Practical legal determination or *farʿ*
Abū Ḥanīfa	A contract that contains a significant element of invalidity is wholly invalid	A sale by a person A of two items, item X that is owned by A and another Y that is not owned by him is invalid
Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī	The validity of a contract (or aspects of it) that contains a significant element of invalidity may still be recoverable	The above sale can be divided into two sales, one of which is valid and the other is not.

[3] Dabbūsī offers 12 applications for this principle. *Taʾsīs*, 10–11.

Isnawī addresses the issue of whether the concepts of valid (*ṣaḥīḥ*) and invalid (*bāṭil*) create a context that excludes the possibility of a third option. The suggested third option is called *fāsid* (lit. corrupt; usually means partially invalid or susceptible to invalidation). This may remind us of Dabbūsī's treatment of a contract that was neither fully valid (*ṣaḥīḥ*) nor totally invalid (*bāṭil*). Shāfiʿī jurists reject the category of the *fāsid*, while Ḥanafī jurists find it useful. One of the applications of this view in Ḥanafī law is that Ḥanafī jurists hold that certain contracts (the *fāsid* type) may result in financial liabilities although some of their terms remain unenforceable, because these contracts resemble the valid in certain aspects and the invalid in others. For example, a sale by an incompetent person resulting in the transfer of property also results in the liability of the one who took possession of the property, even if the sale itself may never be enforced until its flaws are addressed.[4]

In chapter 21 of his work, Ibn al-Laḥḥām discusses the distinction between *fāsid* (partially invalid) and *bāṭil* (invalid), stating that this distinction was rejected by both Ḥanbalī and Shāfiʿī jurists, while Ḥanafī jurists maintained it. Ḥanbalī and Shāfiʿī jurists insisted that what is not "valid" is simply "invalid," and a third possibility does not exist. Ibn al-Laḥḥām, however, offers examples of exceptions to this Ḥanbalī and Shāfiʿī rejection of the principle. Among these he mentions the marriage that can neither be considered valid in all respects nor invalid in every respect (such as a marriage that was concluded in the presence of untrustworthy witnesses). Ibn al-Laḥḥām states that such a marriage must be treated as "partly valid," which makes it susceptible to nullification but does not make it nonexistent or entirely inconsequential. This makes it look very much like the *fāsid* (partially invalid) in Ḥanafī doctrine, since Ḥanafī jurists simply made the distinction between *fāsid* and *bāṭil* to emphasize practical distinctions between a contract that must be seen as nonexistent and one that is simply defective but recoverable. Ibn al-Laḥḥām states that a woman who wants to get married after concluding a *fāsid* marriage must get divorced first; otherwise, her new marriage itself may be questionable or even susceptible to invalidation by a judge. This shows the influence of the marriage that was not concluded properly (even though we would still insist that it is not a completely valid marriage), which is, in other words, the *fāsid* marriage of which Ḥanafī jurists speak.[5]

---

[4] *Tamhīd*, 59–61.

[5] *Qawāʿid*, 152–156.

This is an example of how juristic debates led jurists to modify their positions and reconsider their views on matters of legal practice through exceptions to a principle. Jurists' legal dialectic could also go in a different direction: the reconsideration of a principle of legal theory or *aṣl* in light of practical legal determinations of the *furūʿ*.

Let us now give an example of legal determinations that are themselves classifications of the degrees of legal responsibility (*aḥkām taklīfiyya*). As we stated earlier, most Muslim jurists agree that all human acts must fall under one of the following five *aḥkām taklīfiyya*: obligatory, recommended, neutral, reprehensible, or prohibited. Obligatory acts encompass a heterogeneous group of acts, including rituals, acts related to financial responsibilities, and other duties. Some of these duties are expected to be fulfilled once created, e.g., paying compensation for property damage. Other duties can be fulfilled within a given time span, that is, they must be fulfilled by the end of a certain time period, rather than upon the occurrence of an event or a condition. For example, the five daily prayers must be performed within a certain time span: the dawn prayer after dawn and before sunrise, the noon prayer after noontime and before the mid-late afternoon, etc. Muslim jurists disagree about whether this time span should be characterized as a grace period, which would mean that the duty of the prayer is actually due at the beginning of its time span but may be fulfilled at the end (making those who delay it blameworthy), or whether the duty is due only by/at the end of its time span, which means that those who do it at any point before that time ends are not blameworthy.

According to Shāfiʿī jurists, Zanjānī states, duties are of two kinds: ones that are due immediately and ones that are not. Ḥanafī jurists deny this distinction and hold that duties can be called duties only if they are due immediately. That is, according to Ḥanafī jurists, a noontime prayer is a duty only by/at the time at which there is just enough time to do it before the time of the following prayer (*ʿaṣr*, mid-late afternoon) begins. Ḥanafī jurists argue that when a human agent is addressed with a duty which he/she should fulfill before a given time in the future, his/her fulfillment of it before that time is not a fulfillment of a duty, but rather a voluntary act (*nāfila*).

This disagreement over the principle has many ramifications. Muslim jurists agree that a child must be trained to perform the daily prayers before he/she reaches adulthood, but they also agree that prayers may be considered a duty only for an adult. Based on the view that duties can be assigned to a time span, Shāfiʿī jurists reason that, if

a child performs, say, a noontime prayer at the beginning of its time and reaches adulthood during that time, the child does not have to redo that prayer. Shāfiʿī jurists see the noontime prayer as a duty to be fulfilled any time within the time between noontime and mid-late afternoon. Therefore, the child cannot be asked to perform the same prayer twice, since she/he had performed it already in its appropriate time. Ḥanafī jurists hold the child responsible for redoing this prayer, since his/her performance of it before its due time counts as a voluntary act and not as a duty.

Another application of the same principle, based on the Shāfiʿī view, is that a person who dies during the time of a given prayer he did not perform incurs a sin for his failure to perform it in its due time. Thus, a person who fails to perform his/her noontime prayers before the late afternoon and dies may be responsible for missing a duty, according to this view. Ḥanafī jurists hold that there is no basis for blaming such a person, since he/she died before the prayer became a "duty" for him/her.

Similarly, Shāfiʿī jurists hold that, if a woman's menstrual period begins during the time span assigned to a certain prayer, which she has not fulfilled, she must redo that prayer when she regains her ritual purity (since she would be unable to perform that prayer after the beginning of her menstruation). If, for this woman, a noontime prayer is a duty only when she reaches the end of its time in a state of ritual purity, then this particular noontime prayer has never been a duty for her. That is the position maintained by Ḥanafī jurists, based on their principle.

The Ḥanafī view flatly denies the possibility of calling an act a "duty" unless it can fit into a specific time in which it is to be performed and which it would exhaust. That is, for Ḥanafī lawyers, the time assigned to the duty has to match the time needed for its performance. This has resulted in Ḥanafī jurists' issuance of many "easy" opinions as we have shown. But Ḥanafī jurists have not always produced easy opinions based on this principle. For example, Ḥanafī jurists hold that, when people create duties for themselves (through vows), these duties cannot be assigned a time span that is longer than what is needed to fulfill them. Thus, these duties are due immediately. The same applies in cases where people delay the performance of certain duties until their assigned time passes, such as delaying noontime prayers until sunset time. This is obviously a violation, but for Ḥanafī jurists, it is more than that. No extra time is given if the actual time assigned to the duty has

passed. In these cases, these duties become due immediately.[6] Thus, a person who overslept and delayed his/her prayer must perform it and not delay it once he/she has woken up.

Tilimsānī does not assign a section to the *ḥukm*, since he structures his work based on his understanding of the classification of the *uṣūl* (qua sources of the law) into textual, rational, and hybrid *uṣūl*/sources. However, Tilimsānī's treatment of the imperative form touches upon *an area* where legal hermeneutics and the theory of practical legal determinations intersect, namely, the area of interpreting commands and prohibitions. Religious commands create two classes of duties: regular duty that is required of all Muslims (*farḍ ʿayn*) and a duty to be performed by some (rather than all) Muslims (*farḍ kifāya*). An example of the first type is the regular five-time prayers, while an example of the latter is the prayer that is offered for a deceased person (*jināza*). These are two types of duty jurists discuss in *uṣūl al-fiqh*. Each individual is responsible for the first type of duty regardless of what others do, and failure to carry them out might result in God's wrath. Some jurists express the difference between these two types of duties as follows: God is said to automatically forgive those who fail to carry out the second type of duty (*farḍ kifāya*) only when others in the Muslim community carry them out.

One of the principles of legal theory Tilimsānī discusses in this context concerns the nature of the commands that establish a *farḍ kifāya*. Two possibilities arise. The first is that a command creates a duty for all Muslims, and those who do not fulfill it are simply excused because it was carried out by others. In this case, for example, if more than those needed to establish a congregational prayer for a deceased person have attended it, they will all have fulfilled a duty. The second possibility is that a *farḍ kifāya* is a duty for only some Muslims from the start, i.e., those needed for it to be performed. In this case, the excess people performed a voluntary act. Now, there are many differences between duties and voluntary acts. For example, ablution for an obligatory prayer is a duty, which must be fulfilled when water is available. If water is scarce, one must turn to the ritualistic act of dry ablution (*tayammum*). However, this is not the case when the prayer in question is an additional voluntary prayer (one other than the daily five prayers or other obligatory prayers). Dry ablution is not required for such a prayer. So, what is a *farḍ kifāya*? Is it an obligatory act or a voluntary one? The category of

---

[6] *Ta'sīs*, 90–4.

farḍ kifāya appears to fall in the middle between a duty and a voluntary act, since it must be fulfilled, but not by all Muslims. If someone does not find water to perform an ablution for a *jināza* prayer (prayer for the deceased), which is a *farḍ kifāya*, he/she may or may not be required to perform dry ablution based on what position is taken on the above theoretical question on the nature of *farḍ kifāya*.[7]

Isnawī's work includes 19 principles concerning practical legal determinations.[8] In this context, Isnawī deals with practical legal determinations that apply directly to human actions (*aḥkām taklīfiyya*). He deals with questions concerning obligations and prohibitions, such as classifying obligations into individual and collective obligations (*farḍ ʿayn* and *farḍ kifāya*, respectively) as well as into definite obligations (*wājib muʿayyan*; e.g., water is the only acceptable substance for ablution if available) and ones that allow choice among a limited number of options (*wājib mukhayyar*; e.g., if one breaks an oath, expiation is required, but this person can fulfill that requirement through fasting or giving charity).

One of the commonly mentioned principles relevant to obligations is what may be called the principle of entailed obligation: an act is obligatory, if it is such that its performance is a prerequisite to the fulfillment of an obligatory act (*mā lā yatimm al-wājib illā bihi fahuwa wājib*, or, alternatively, as Isnawī puts it, *al-amr bi-shshay' amr bimā lā yatimm al-shay' illā bihi*).[9]

The recognition that obligations relate directly to moral or legal requirements or may be indirectly entailed by such requirements looms large in Islamic legal theory. There are equivalents of the discussions of these categories in Western political and legal theory, but the concerns of Western and Muslim legal philosophers quite often seem to diverge. Obligations performed as a means to another obligation correspond to "necessities of the means" (*neccessitatem problematicam*), as opposed to "necessities of purpose or the end" (*neccessitatem legalem*).[10] *Neccessitatem legalem* can also be translated as "necessities of a legal origin," which would mean that they stem from a direct moral explanation; the law makes this category of acts into necessities as they are directly necessitated

---

[7] *Miftāḥ*, 29–30.

[8] *Tamhīd*, 48–108.

[9] Isnawī states that the first form (which looks at the question from the point of view of the action judged by the command) is the formula lawyers or *fuqahā'*, leaving it for us to infer that the formula he uses must be the "legal theory" or *uṣūl* formula which focuses on the command as a question of legal theory. *Tamhīd*, 83.

[10] Paul Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge, 2000), 40.

by an objective which the law recognizes. By contrast, *neccessitatem problematicam* is, at a minimum, at a one-step distance from the ultimate objective. The link between these necessities (*neccessitatem problematicam*) and original necessities (*neccessitatem legalem*) is established through logical inference. *Neccessitatem problematicam*, therefore, captures the basic sense of *mā lā yatimm al-shay' illā bihi* or those that are entailed by a necessity or requirement which the law establishes.

Isnawī states that not all legal theorists believe that commands that render certain acts obligatory also render all their prerequisites obligatory. He then attacks their negative position. For Isnawī, those who reject the principle completely or apply it to some and not all of the prerequisites of commands are mistaken. To him, the favorable view is thus what allows for a general application of the principle: acts entailed by obligatory acts are themselves obligatory. Applications of this principle include considering washing "parts of one's head and neck" obligatory for ritual ablution, since ablution includes the obligatory washing of the face, which can be fulfilled only by washing those parts of the body immediately connected to it. Another application concerns the laws of burial. When corpses of Muslims and non-Muslims are mixed with each other after a battle or a tragic accident, ritual bathing, coffin enveloping, and burial must apply to all corpses so that one can be sure that these procedures have been secured for all deceased Muslims in this situation.[11]

Now let us move to discussing another aspect of the preliminaries of legal theory: legal agency and responsibility.

Agency and Responsibility

Isnawī and Timurtāshī have given abundant attention to theoretical legal principles concerning legal agency and responsibility. However, principles concerning legal agency and responsibility can be found scattered in the rest of the works.

Zanjānī, for example, mentions the principle that (according to Shāfiʿī jurists) responsibility results from commands creating duties for competent human agents. Abū Ḥanīfa's followers, Zanjānī says, disagree with that principle and hold that there are two types of responsibility: one is

[11] *Tamhīd*, 85.

attached to the human agent and one to material objects. Ḥanafī jurists observe that some duties are given to those who are in fact not competent to carry out their responsibility immediately but are expected to fulfill it at some point in the future or to be assisted by others in fulfilling their duties. Ḥanafī jurists argue that a child may inherit responsibilities (such as *zakāh* and taxes) that are due in the money the child inherits. But the child, Ḥanafī jurists continue, is not expected to fulfill these duties on his/her own. Similarly, a person who is asleep during the time at which a given prayer becomes due may be expected to perform this prayer only at a later time (when he/she wakes up). These and other cases made Ḥanafī jurists say that responsibility may indeed be put on the shoulder of those who are incompetent to fulfill them, that is, when these people are not in a state where they can be addressed with legal duties. These people may be in this state temporarily or may be assisted by others in fulfilling their duties, if their incompetence is permanent. This means that legal duties may be directed towards what jurists call *dhimma*, which is an imaginary depository of legal responsibility. Thus, according to Ḥanafī jurists, a human agent who understands and has the ability to carry out their duties is not a concomitant of legal responsibility. In modern law legal personality may be given to a company that incurs legal duties while not being a competent human agent. For this company, something comparable to the *dhimma* of which Muslim jurists speak must be assumed.

Now that Ḥanafī jurists have established the existence of legal responsibility even without identifying a single human being who bears that responsibility in a regular way, they argue that their position is an indisputable fact of law and reality. Ḥanafī jurists argue that Shāfiʿī jurists could not be consistent in denying that legal responsibilities do occur without awaiting for a competent human agent to bear them. Ḥanafī jurists find it inevitable that Shāfiʿī jurists would contradict their theoretical assertion about the concomitance of legal responsibility and full competent human agency. Ḥanafī jurists detect Shāfiʿī inconsistency in the following example. Shāfiʿī jurists accept that those asleep while new prayers become due are expected to carry out their prayers when they get up. Thus Ḥanafī jurists exclamation goes: *here Shāfiʿī jurists make our case on our behalf*. Another case where Ḥanafī jurists believe that Shāfiʿī jurists *have made their case on the Ḥanafī's behalf* is the question of whether children, after they reach adulthood, have a responsibility to pay overdue taxes that were not properly paid from their money. Shāfiʿī jurists agree that they should, which confirms that they understand that

these duties have been contingent on the property rather than the human agent.

Based on their reasoning, Ḥanafī jurists argue that legal responsibility may result from causes that automatically create duties, such as time and the occurrence of certain exigencies rather than a command by the lawgiver. Shāfiʿī jurists would debate that any duties can be created without a command that is given to a competent human agent. Thus, Shāfiʿī jurists would agree that a child has a responsibility to fulfill his financial responsibilities when he becomes an adult, but they would hold that this child is not responsible for other duties while being a child, such as the daily prayers. The child indeed is not required to carry out any ritualistic duties while being an infant. In fact, this child's financial responsibility was an exception to the rules, since the child in reality incurs a duty only when he/she is capable of carrying it out.

One of the practical decisions that are affected by this disagreement is the question of the temporarily insane, that is, when a person goes through a phase of insanity and then retains his/her sanity. Ḥanafī jurists would insist that the fasting of Ramaḍān this person fails to fulfill must be redone upon his/her retention of their sanity. Shāfiʿī jurists would disagree and say that an insane person who retains his/her sanity is not responsible for carrying out any ritualistic duties he/she incurred during their insanity. [12]

It is clear that when Ḥanafī jurists speak of automatic creation of legal responsibility, they describe a reality that Shāfiʿī jurists do not deny. Shāfiʿī jurists understand that duties have to do with material property just as they have to do with human beings. When human agents are required to carry out duties that are contingent on their physical ability, the command is purely addressed to the human agent and its fulfillment is fully contingent on this agent's competence and willingness to carry it out. Financial duties, however, may be fulfilled despite the owner's lack of competence. But the cases in which this competence is retained after a temporary loss force us to make a decision as to whether agency and responsibility should be resumed from the moment it ceased to exist or whether the agent who was temporarily incompetent should fulfill the duties he/she failed to fulfill while incompetent. Shāfiʿī jurists chose to limit legal responsibility (in principle) to cases where a human agent capable of understanding a duty can

[12] *Takhrīj*, 127–31.

fulfill it. They noted, however, the need to attach certain duties to material property rather than the agent, since (for example) it is fair for those who inherit a property that is burdened with a debt to pay off the debt and receive only the remainder. Thus, Shāfiʿī jurists limited the cases where legal responsibility may exist without a competent human agent to those of financial duties. For the sake of consistency, Ḥanafī jurists applied the same rationale in cases such as the temporary insanity case and required the person who retains their sanity to fulfill the fasting they failed to fulfill during their temporary insanity. One should note that Ḥanafī jurists would not extend this rationale to duties such as the daily prayers, since it would be a fairly hard burden to ask people to make up five daily prayers of a long period of time in that case. The temporarily insane eats and drinks and may therefore be expected to redo the fasting he/she failed to fulfill, but the prayer is a different question.

Ibn al-Laḥḥām dedicates chapter (4) to the rules governing the legal responsibility of an unconscious person. There is a disagreement among jurists, Ibn al-Laḥḥām states, as to whether this person's case is analogous to the case of those who are asleep or those with mental deficiency, and many practical legal issues are affected by that disagreement. The person who misses many prayers in his sleep, for instance, has to make up these prayers, while a person with a deficient mind would not have to do that.[13] Jurists disagree as to which route the unconscious person should follow. Similar questions are also mentioned concerning the conclusion of business and marriage contracts and whether falling into unconsciousness ends the person's competence as an agent with legal responsibility (like an insane person) or whether it creates a temporary hindrance to the completion of some legal duties that he may have to complete at a later time.

Compulsion (*ikrāh*) is one of the conditions that impede legal agency. Isnawī discusses one theoretical legal principle and 22 applications for it. The principle states that compulsion is of two types. The first does not leave the agent any choice (*ikrāh mulji'*) and ends or changes legal responsibility. The other kind neither exhausts an agent's choices nor his/her responsibility, which may be called apparent or incomplete compulsion (*ikrāh ghayr mulji'*). One could imagine cases where one would be almost incapable of controlling one's body completely, such as when one falls from a high building. If this instance of falling results

[13] *Qawāʿid*, 57–9.

in somebody's death while the falling person survives, legal responsibility can hardly be imagined to exist. By contrast, when a person B threatens to hurt person A while not being likely to carry out the threat, A retains his/her responsibility, which would be commensurate with the window of freedom he/she retains. Isnawī mentions applications reflecting this complex principle.[14] Compulsion may not be imaginable in some cases and claim of its occurrence will thus be ignored by Muslim jurists/judges, such as the claim one was forced to commit a crime of adultery. Isnawī also discusses how the existence of compulsion of different degrees does not annul all the consequences of the acts taken under compulsion. If a female is forced to breastfeed two: a baby-boy and a baby-girl, they become a brother and a sister and cannot get married, exactly as if she breastfed them voluntarily. By contrast, in some cases the compulsion annuls the consequences of the action taken under compulsion. In Islamic law, when two people bargain and make an initial agreement for a sale agreement, they retain the right to revoke it as long as they are in the same room in which they negotiate the deal. If one was forced to leave a room in which he was negotiating a sale deal, then he would be losing his chances of revoking that deal if his compulsion carries no consequences. Isnawī states that this is one of the cases where the existence of compulsion may change the agent's responsibilities, although some more details and fine distinctions have been given by Shāfiʿī jurists.[15]

Like other Ḥanafī jurists, Timurtāshī offers a systematic presentation of the theory of agency and responsibility (*ahliyya*) that is characteristic of Ḥanafī legal theory. This he treats at the end of his book[16] before what he referred to as a "miscellany," which occupies the last few pages of the book. In the *ahliyya* chapter Timurtāshī elaborates on the so-called "conditions affecting legal responsibility," including those of "heavenly" origin (such as infancy, insanity, forgetfulness, sleep, loss of consciousness, slavery, illness, menstruation (for females), and death) and those of "human" origin (such as drunkenness, traveling, compulsion, and limitation of one's freedom to spend from his/her money by law (*ḥajr*)). One of the most interesting sections in this chapter is the section concerning "death" and the continuation of a presumption of legal

[14] *Tamhīd*, 120–5.
[15] Ibidem, 122, 125.
[16] *Wuṣūl*, 295–316.

personality for the deceased. The author talks about post mortem legal actions in "the here" that are relevant to legal obligations compensated in the hereafter. For example, the duty to pay obligatory alms (*zakāh*) ends with regard to the inheritance of the deceased, so that his inheritors do not inherit a debt corresponding to his unpaid alms. By contrast, one's debts that she/he was supposed to have paid to human agents before her/his death remain a duty due from to her/his property, as many legal applications show.[17]

Rights

Most of today's discussions about law can be expressed in terms of rights. One has a right to bodily integrity, property, privacy, etc. But laws have not always celebrated the "inalienable rights" of which American lawyers, for example, speak today. These natural, inalienable rights stand as moral claims with a certain level of independence from circumstances; to kill somebody, even in self-defense (and be charged with involuntary manslaughter, for example), does not evacuate this person's right *to life*.

But let us think about a simple case where persons A and B contest their rights and obligations before the law, where the rights of A are a reflection of the obligations or responsibilities of B. For example, if A has a right to property X, then B has an obligation not to destroy X or sell it without A's consent. When a judge makes a ruling that assigns rights and obligations to A and B in a given case, this ruling "mediates" between the rights and obligations of A and B. The ruling may therefore be seen as corresponding to the entire moral question the law governs, while rights and obligations are simply elements of this moral question and do not stand on their own. If this is true, then any claim about rights should not be made in isolation from a detailed and complete moral question. It may turn out that somebody who was killed so that the life of thousands could be saved never possessed a right to live *in the circumstance in which his life was ended to save these thousands of people*. If the rights of individuals, or other entities considered worthy of possessing rights by the law, exist only in relation to a ruling that resolves a moral or a legal dilemma, then the concept of inalienable, natural rights

[17] Ibidem, 304.

cannot be invoked except as a subsidiary to a general moral claim that stands, in reality, whether the language of rights is used or not.

Rights in this sense are only the other side of obligations or responsibilities. That lead some Western philosophers (such as the German Samuel Pufendorf and the English Jeremy Bentham) to be skeptical about natural rights and rejecting the notion of rights as inviting a dangerous idea by renaming duties "rights." The danger in the notion of rights, later to become a central notion in American legal and political theory, is that it entitles individuals to a certain kind of "sovereignty" over their moral world. In a modern context, this means giving individuals entitlement to initiate legal motions, not on behalf of the good or utility (notions always subject to balance among individuals as they apply to the whole society), but on behalf of an absolute: 'No one can deny *me* my right to so and so,' and this stands as a moral claim of utmost importance. By contrast, if the rights of a certain person A may be reduced to duties falling on the shoulders of others, which duties are ultimately reducible to higher-order moral principles (higher than individual rights), the aforementioned sovereignty of the individual disappears.[18]

In Islamic law, rights are a subsidiary of obligations or responsibilities before the law, and practical legal determinations acknowledge rights without a subjective reference to an entity that possesses rights in the abstract; only in a context where those possessing the rights are involved in a legal question can their rights be spoken of. But one can speak of the rights of man and the rights of God in the context of practical legal determinations, such as the prohibition of theft as a ruling that acknowledges the right of a person A over her/his property X.

The rights of man and the rights of God are a component of Islamic legal theory, which falls under the category of the subject of the legal ruling, and medieval Muslim jurists have outlined a general classification of these rights of man and rights of God as they relate to specific practical legal determinations, such as the prohibition of crimes against the human body, property, or honor. But the use of rights whose existence is inferred from already-established legal determinations in issuing other legal determinations does not seem to be known to Muslim jurists. That is, rights in Islamic law have been subordinated to the legal ruling, which derives from a textual or an extra-textual source of law, which in turn

---

[18] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), 6.

may be underlain by a moral justification or simply offered as its own explanation, such as ritual practice that cannot be explained rationally.

The existence of *ḥuqūq Allāh* or divine rights is a justification for duties that do not have a clear link with societal or civil utility, such as rituals, for example. But, as we stated earlier, these may also be the only basis for prohibitions that do not conform to a liberal philosophy of law that restricts harm to "harm to others" and turns the category of harm to oneself problematic. A right of men, *ḥaqq al-ʿabd*, could serve as an adequate justification for the prohibition of theft. Some prohibitions, such as the prohibition of adultery, would vacillate between being an application of a divine right and a right of man.

Suffice it at this point to explain the comments my sources made about rights in their discussion of the relationship between legal theory and legal practice.

In the context of impediments to legal agency, Timurtāshī discusses forgetfulness as an extenuating circumstance with regard to certain obligations. Timurtāshī states the principle that the rights of God may be waved in the case of forgetfulness, which waiver is indicated by the presumption that no sin befalls the one who suffered from forgetfulness of her/his duty. A forgetful agent may perform some of her/his religious duties, such as the daily prayers, after their time-window without any blame being directed to them for that delay. The rights of man, however, cannot be waived based on forgetfulness. In the rare and almost theoretical case of a person A destroying a property X, which used to belong to him before he sold it to B, A's liability is not in question.[19]

Timurtāshī also addresses illness as another impediment to full legal agency. One of the differences between forgetfulness and illness is that the latter, in principle, neither turns the rights of man or the rights of God nugatory. Illness, however, may serve as a circumstance in which aspects of the rights of man and the rights of God may be modified. On the divine rights' front, an ill person who cannot perform the daily prayers in the normal standing position may be excused to do it while sitting down. In the area of the rights of man, an ill person forfeits his/her own right to his/her property if their illness may influence their judgment. The beneficiary of such restriction of the ill person's rights are his/her inheritors, who may be affected by the ill person's bad judgment in the circumstance of a terminal illness. To remind us of the power of the general principle

[19] *Wuṣūl*, 298.

that illness is not normally an impairment of legal agency and does not influence the rights of man and God associated with his/her actions, Timurtāshī reminds us that acts such as marriage, divorce, and other similar legally binding behavior is presumed to be valid when performed by an ill person. Timurtāshī thus implies that most practical legal questions will follow the principle he cited at the beginning. This brings us a full circle back to the general rule, with regard to rights, that rights of man and God are not affected by the condition of illness.[20]

We observed earlier that Timurtāshī also addressed whether obligations can exist without full agency. The flip side of that is whether rights could exist despite the lack of full agency of those responsible for acting in accordance with those rights. For example, jurists agree that a right could exist without a human agent who can be addressed with delivering it, such as the right (of man and of God) deserved in land taxes, which are taken from a land owned by an insane person.[21]

Conclusion

The theory of practical legal determinations and the adjacent theory of legal agency constitute an introductory discourse in Islamic legal theory. In many ways, this introductory discourse sets the plan for the more direct forms of legal reasoning whose objective it will be to fill in the slots created by the concepts of legal determinations and legal responsibility. The less significant concept of rights as delimited by Muslim legal theorists adds another aspect to the picture. In it, agents are players who can contemplate their actions and duties as tools for fulfilling the goodness of the Muslim society, which has concerns for the good of the human (delivered by respecting their rights) and the good of the community and its spiritual fulfillment (expressed by the concept of the *maṣāliḥ ukhrawiyya*) for which the metaphor for the rights of God is employed.

---

[20] *Wuṣūl*, 303–4.
[21] *Wuṣūl*, 304.

CHAPTER FIVE

THE *UṢŪL* OF LEGAL HERMENEUTICS

The sources of the law (Scripture, Tradition, consensus, analogy, etc.) encompass the bulk of GLT *uṣūl al-fiqh*. The main divisions of books of *uṣūl al-fiqh* by later legal theorists correspond to these sources; thus, in these works, the first chapter usually deals with Scripture, the second with Prophetic Tradition, the third with consensus, and so forth. Sources of the law other than these four are indicated by the generic term *istidlāl* (reasoning) or are sometimes referred to as disputed sources of law (*al-uṣūl al-mukhtalaf ʿalayhā*). These disputed sources of the law include, *inter alia*, arguments based on subtle analogy or juristic preference (*istiḥsān*), the aims of the law (*maqāṣid al-Sharīʿa*), the Companions' opinions (*qawl al-ṣaḥābī*), and pre-Muḥammadan laws (*sharʿ man qablanā*).

Oft-cited definitions of *uṣūl al-fiqh*, such as Bayḍāwī's (d. 1286), indicate that: *uṣūl al-fiqh* is *knowledge of the sources of the law, how to derive law from these sources, and the qualifications of the one performing that derivation*. In this definition the emphasis on legal hermeneutics (interpretation of the textual sources) in *uṣūl al-fiqh* is evident. (Note that, according to this definition, *uṣūl al-fiqh* also addresses the question of who is qualified to enter into this hermeneutical exercise.)[1] Another definition of *uṣūl al-fiqh* sees it as *knowledge of how to derive practical rulings of law from specific indications in the sources*.[2] This definition, which emphasizes the objective of *uṣūl al-fiqh* more than its thematic divisions, is used by Ḥanafī jurists who emphasize the importance of legal principles and general maxims that are linked straightforwardly to practical legal rulings (*furūʿ*). Both definitions, at any rate, invite us to inquire into the nature of the textual sources of law and their interpretation, the subject to which we now turn.

---

[1] One can find a commentary on this famous definition in the work of Taqī al-Dīn (ʿAlī Ibnʿ Abd al-Kāfī) al-Subkī and his son Tāj al-Dīn al-Subkī (d. 1354 and 1369), *al-Ibhāj Sharḥ al-Minhāj* (Beirut, 1984), I, 19–28.

[2] Ibn al-Laḥḥām, *Qawāʿid*, 17; Timurtāshī, *Wuṣūl*, 114.

The Textual Sources of the Law

Just as Agamemnon's scepter would have been an insignificant piece of metal for Athenians had it not been for the fact that he could claim that the scepter was transmitted to him from Hephaestus—the god of fire and artisans—through a certain pedigree (with which the reader of the *Iliad* will be familiar),[3] for a Muslim jurist, a text with no pedigree or "chain of transmitters" would carry no weight of authoritativeness, and thus any legal ruling based on such a "chainless" text would be seen as irrelevant to legal discussions. Whether the text is from the Qurʾān or the Sunna, its authority must be established in a certain *a priori* manner, that is, it must be established before we even begin to "experience" the text or inquire into its content; the authority of the text must be established through the external criterion of validity, i.e., the chain that conveys it to us as the word of the lawgiver. Internal criteria for critiquing the text (coherence of meaning or compatibility with other similarly authoritative texts) could be applied and would be part of examining the legal value of texts. Thus, for all texts serving as raw material for the law, two *separate* tests must be applied: an external test of the chain of transmitters and an internal test of the content. Yet disentangling external from internal study of the textual sources of the law has not been as simple as it may at first appear.

The hierarchy of the textual sources of the law, the interpretation of those sources, and the possibility that one text is abrogated by another are interconnected questions. When a jurist sets out to decide a legal question to which textual sources are relevant, he must begin by collecting relevant texts and offering an interpretation of each one of them. When the content of the texts seem to be in contradiction with one another, the jurist could consider several possible approaches. The first is reconciliation of the content of the two or more (ostensibly) contradictory texts so as to dispel the (appearance of) contradiction. This process is clearly a hermeneutical one, but it also involves judging whether or not the two texts under consideration are equal in authenticity. The second option for a jurist is to favor one of the texts over the other based on the strength of its authenticity or the explicitness of its content and relevance to the specific legal question at hand. Some jurists would consider a Qurʾānic text simply superior to a Sunna text

[3] This pedigree or "chain of transmitters" is mentioned at the beginning of Book 2 of the Iliad (pages 102 and 103 in the Penguin Classics edition). See: Homer (trans. Robert Fagles), *Iliad* (New York, 1990), 102–3.

by virtue of its general authenticity and nature (the Qurʾānic text is presumed to have been transmitted by a larger number of people), while others deal with Sunna texts in practice as an essential commentary on the Qurʾān and give them priority as explanations of the Qurʾānic text, since they cannot be assumed to contradict Qurʾānic texts. The third possibility for a jurist in this case is to decide that one of the texts must have abrogated the other (when the texts stand in clear contradiction and when the chronological order of the texts can be established). Muslim jurists have disagreed about the order in which these options must be considered. As we may have noticed, in each step, both the content of the texts and their authenticity are relevant. Thus, the authenticity of the texts and their content are related, and both external and internal examinations of texts are performed simultaneously in the context of considering a legal matter. The hierarchy of textual sources of the law, their interpretation, and the possibility that one is abrogated by another are, therefore, interconnected.

How do we begin to consider the texts of the Qurʾān and Sunna for purposes of law and legal theory? It must be noted first that the Qurʾān is a well-defined text, whereas the Sunna consists of scattered, individual reports. The number of transmitters of each part of the Qurʾānic text is naturally higher than the number of transmitters of most texts of the Sunna.

Tilimsānī states that there are different requirements for considering different types of texts to be authentic and authoritative. A Qurʾānic text must meet the standard of *tawātur*, i.e., it must be transmitted in each generation by a large number of transmitters whose multiplicity and distance of residence makes it inconceivable that they would have conspired to make up the text they purport to be transmitting (given that such transmission would have occurred in the seventh and eighth centuries, long before the technology of phone and video conferences was available). Tilimsānī writes:

> To count as Qurʾānic, a text must be *mutawātir* [i.e., must meet the standard of *tawātur*]. A text that does not meet the standard of *tawātur* cannot be considered Qurʾānic. Therefore, to counter an argument using such a text, one would need to refute the claim that such a text may be *mutawātir*.[4]

This means that, for a text to be considered part of the Qurʾān and thus be seen as a valid source of a practical legal determination, it must

[4] *Miftāḥ*, 5.

be transmitted by a number of transmitters who could not have possibly agreed to forge it. By contrast, reports of Prophetic Tradition need not meet that requirement to acquire the status of Sunna texts. Tilimsānī adds:

> As for the Sunna (Prophetic Tradition), one need not require that a Sunna text be *mutawātir*, according to the erudite (*muḥaqqiqūn*)[5] among legal theorists, unless such a Sunna text purports to abrogate the content of the Qurʾān without a doubt.[6]

Tilimsānī does not address juristic disagreement about the exact number of transmitters required for *tawātur* to take place, since he probably relies on the fact that those interested in this aspect of the subject can consult the works of Ḥadīth Methodology. Tilimsānī, therefore, moves on to discuss the principles relevant to this particular requirement and their ramifications in practical legal issues.[7] A brief introduction of the background of the practical legal issues treated in Tilimsānī's text is in order.

The Qurʾān (4:23) establishes that no man can marry a woman who nursed him when he was an infant. That woman is considered to be related to that man as a *mother by nursing*.[8] The same Qurʾānic text also stipulates that a man cannot marry a girl who was nursed by his *mother by nursing*, and the girl is considered to be the man's *sister by nursing*. But how many instances of nursing are required to establish this siblinghood between the two nursing infants? One? A few? Or must the nursing have taken place for a year, for example, to make a man and woman siblings by nursing? And, are there answers to these questions in the Qurʾān?

In Tilimsānī's text there are answers or at least hints at answers. Tilimsānī states that ʿĀʾisha Bint Abī Bakr, the wife of the Prophet, reported that the Qurʾān included a verse stating that, for a male and a female to be considered siblings by means of nursing, they must be nursed by the same woman five times. ʿĀʾisha further mentions that the Qurʾānic verse stating that requirement was revealed to abrogate another Qurʾānic verse, which had stated that the instances of nursing

---

[5] This term usually indicates those who have the capacity to decide the right view on complex questions.

[6] *Miftāḥ*, 6.

[7] *Miftāḥ*, 5–14.

[8] In English, one can use the terms "biological mother," "surrogate mother," and "adoptive mother" to express three types of motherhood (egg-provider, womb-provider, and perhaps the woman who actually raises the child). The concept of a *mother by nursing*, however, is not commonly used in Anglophone societies.

must amount to ten.[9] The fact is that neither of these alleged Qurʾānic verses is transmitted with a chain of transmitters that meets the standard *tawātur*, and the ʿUthmanic text of the Qurʾān does not include either of them. This throws into doubt the claim in ʿĀʾisha's report that Qurʾānic texts specify five or ten instances of nursing as the necessary condition for making two infants siblings by nursing and thus incapable of becoming husband and wife. Tilimsānī explains the practical ramification of the disagreement over the authoritativeness of ʿĀʾisha's report, which purports to establish Qurʾānic authority:

> Shāfiʿī jurists argued that five instances of nursing establish the prohibition [of marriage between siblings by nursing] and that less than five instances of nursing do not establish that prohibition. They argued based on ʿĀʾisha's report in the Collection of Muslim [Ibn al-Ḥajjāj al-Qushayrī al-Naysāburī (d. 875)] that among what was revealed in the Qurʾān was that 'ten verifiable instances of nursing effect prohibition' and that that [verse] was abrogated by a verse specifying five instances of nursing, and that the these verses were being recited as part of the Qurʾān at the time of the Prophet's death. Our fellow jurists [Mālikīs] say: This is invalid! Had that text been part of the Qurʾān, it would have been *mutawātir*, and this text is not *mutawātir*; therefore, it is not Qurʾānic.[10]

In another application of the same principle (that Qurʾānic texts have to meet the standard of *tawātur*), Ḥanafī and Mālikī jurists disagree about a text purported to be part of the Qurʾān. Ḥanafī jurists assert the text's Qurʾānic status while Mālikīs deny it. In response to Mālikīs' insistence on the requirement of *tawātur*, Ḥanafī jurists counter that one can reject the claim by a Companion that a given text is part of the Qurʾān but still accept the content of this text as part of the Sunna. The Companion, Ḥanafīs argue, would not have invented that text *ex nihilo*; he/she must have simply confused its status and called it part of the Qurʾān when it was in fact part of the Sunna.[11]

The task of defining *Scripture* or the Qurʾān for the purpose of legal discussions raises other questions. In this context, Ibn al-Laḥḥām discusses variant readings of the Qurʾān that have not met the criteria of *tawātur*. Such readings may be called mono-chain (*āḥād*)[12], or aberrant

---

[9] *Miftāḥ*, 5.
[10] *Miftāḥ*, 5.
[11] *Miftāḥ*, 5.
[12] The *āḥād* text could be transmitted through one chain or a few chains that do not elevate its status to that of *tawātur*. I will use mono-chain for the purpose of simplicity, just as some jurists refer to the *āḥād* simply as *khabar al-wāḥid*.

(*shādhdha*) readings. The universally accepted Qur'ānic readings differ in some respects from variant readings. Can a jurist use these variant readings as a Qur'ān-based argument for a legal position? For example, the universally accepted Qur'ānic reading makes three days of fasting a required expiation for breaking an oath (Q 5:89). A mono-chain reading adds the qualification "consecutive" before the word "days." This reading is usually ascribed to the Companion Ibn Masʿūd (d. 653). Ibn al-Laḥḥām weighs in on the subject. He writes:

> Is an aberrant (*shādhdha*) reading [of the Qur'ān], such as Ibn Masʿūd's reading [of Q 5: 89] "let him fast three [consecutive][13] days" (*faṣiyāmu thalāthati ayyām*), an authoritative source of a practical legal determination (*ḥujja*)? Our view and that of Abū Ḥanīfa (d. 767) is that it is authoritative. Ibn ʿAbd al-Barr (d. 1071) claimed a juristic consensus on this view. For Āmidī (d. 1233) and Ibn al-Ḥājib (d. 1249)—and it was also attributed to Aḥmad [Ibn Ḥanbal] (d. 855)—it is not authoritative. The Imām of the Two Sacred Mosques [Juwaynī (d. 1085)] said: This appears to be the view of Shāfiʿī (d. 820), and Nawawī (d. 1277) asserted this outright based on Juwaynī's claim. Nawawī's assertion may be found in his discussion of the Prophet's statement "they [unbelievers during the battle of *Khandaq*] have distracted us from the Middle Prayer, the Afternoon Prayer (*ʿAṣr*)" and in other discussions. However, these jurists have attributed to Shāfiʿī the opposite of his [Shāfiʿī's] view and the view of the majority of his [Shāfiʿī's] followers.[14]

Ibn al-Laḥḥām moves on to establish the correct view of Shāfiʿī based on the authority of Buwayṭī, Shāfiʿī's own student. Shāfiʿī's actual view, Ibn al-Laḥḥām asserts, is that he accepts some variant readings of the Qur'ān but may not be convinced of the authoritativeness of certain other variant readings of it.[15] For example, he rejects Ibn Masʿūd's reading as establishing an additional obligatory characteristic (consecutiveness) of expiation fasting (for breaking an oath). Shāfiʿī holds that consecutive fasting in this case is simply recommended rather than obligatory. Ibn al-Laḥḥām supports the added stipulation in Ibn Masʿūd's reading (consecutiveness) and defends Shāfiʿī's adherence to it as a recommended rather than a required characteristic of expiation

---

[13] Ibn al-Laḥḥām mentions the verse as it appears in the universally accepted version, i.e., without the additional adjective 'consecutive.'

[14] *Qawāʿid*, 214–5.

[15] It must be noted that the Prophet's specifying the Middle Prayer as the Afternoon Prayer (*ʿAṣr*) does not purport to be a text from the Qur'ān; rather, the Prophet's statement simply contains a reference to the Middle Prayer (which is also mentioned in the Qur'ān) followed by an interjection identifying it as the Afternoon Prayer (*ʿAṣr*).

fasting. Some jurists have criticized Shāfiʿī's position, arguing that he must either accept the qualification as establishing a normative obligation or not accept it at all. Ibn al-Laḥḥām distinguishes between the acceptance of the reading's authoritativeness and the decision whether to consider the condition mentioned in the reading as a source of obligation (as opposed to recommendation). He states that there may have been considerations that led Shāfiʿī to reject the view that consecutive performance of the fasting in cases of expiation must be obligatory and to accept it instead as recommended.[16]

If determining *which Scriptural texts may be accepted as sources of law* could exercise juristic minds to a certain extent, it is above all the authenticity of Sunna texts that has required elaborate discussions. The transmission of Sunna reports is a subject which Ḥadīth Methodology works treat in detail. These works discuss two conditions pertaining to the transmitters of a Sunna report that must be met for a report to be acceptable: uprightness of character (*ʿadāla*) and good memory (*ḥifẓ*). For a Sunna text to be accepted as sound, all its transmitters must be known to be of upright character and good memory. When a transmitter is accused of a quality that contradicts good character, such as lying, a text relying on the authority of that transmitter cannot be considered sound. In addition, when a transmitter is not known at all (and therefore neither good nor bad character can be established), a Sunna text relying on his/her authority cannot be considered sound. Imperfection of the transmitters' memory makes his/her report unacceptable to varying degrees. In addition to these two conditions, Ḥadīth Methodology requires that each transmitter be a contemporary of the transmitter from whose authority he/she narrates the report—a condition known as the connectedness (*ittiṣāl*) requirement.

Why should this matter to lawyers and legal theorists? The answer is: just as the definition of the Qurʾān has ramifications for what counts as an authoritative source of practical legal determinations, criteria for determining the authenticity or soundness of Sunna reports affect arguments for legal positions on practical matters. Tilimsānī offers a discussion of practical legal issues where juristic decisions hinge on determining whether or not a given Prophetic Tradition is authentic. His discussion encompasses 14 theoretical principles concerning requirements for an authentic Sunna text. While by no means exhaustive of the

[16] *Qawāʿid*, 215–6.

subject, his discussion provides examples of how disagreement over theoretical principles governing the authenticity of Sunna texts results in disagreement on practical juristic issues.[17]

One of these principles concerns the soundness of Sunna reports that do not meet the standard of *tawātur*. We have quoted Tilimsānī as saying that "one need not require that a Sunna text be *mutawātir*, according to the erudite among legal theorists, unless such a Sunna text purports to abrogate the content of the Qurʾān without a doubt."[18] But another caveat is needed, and this Tilimsānī furnishes later. Tilimsānī reports that Abū Ḥanīfa rejects the authenticity of Prophetic *ḥadīth*s which belong to the category of *akhabār al-āḥād* (mono-chain) when these reports deal with matters that concern all or most Muslims, such as ritual purity and prayers. If most Muslims were expected to be concerned with such matters, they surely would have inquired about them, and any knowledge about these matters would have to have been transmitted to us through many sources. At least a good number of the Companions would have been reported to comment on matters of such importance or be aware of the Prophet's statements about them. This raises doubt, for Abū Ḥanīfa, about the truthfulness of Traditions of the *āḥād* type regarding these matters of common interest. Therefore, an *āḥād* Tradition dealing with matters with which the majority of Muslims should be concerned is presumed to be inauthentic. Based on this principle, Abū Ḥanīfa rejects the authority of a Prophetic report stating that touching one's private parts is a breach of ablution. This report, Abū Ḥanīfa argues, was transmitted by a single woman, while one would reasonably expect it to be transmitted by a multitude of people. Shāfiʿī jurists do not share Abū Ḥanīfa's view of presuming any Prophetic Tradition inauthentic based on such reasoning and reject this application as they reject its foundation.[19]

We said earlier that, for a jurist, the authenticity of the textual sources of the law and their interpretation are usually considered parts of one subject. Abrogation is also one of the options a jurist considers to resolve a legal standstill when texts seem to be sending conflicting messages. This is because a jurist regards practical legal determinations as derivable from arguments based on a theoretical legal reasoning. Thus, in considering a practical legal matter, a jurist considers all the relevant

---

[17] *Miftāḥ*, 7–20.
[18] *Miftāḥ*, 6.
[19] *Miftāḥ*, 6.

textual arguments—those dealing with questions of the authenticity of the textual sources, contradiction among them, claims that some of them may have abrogated others, and questions of interpreting the texts (all the while also looking at extra-textual arguments, which we will discuss later).

Abrogation may be an option for a jurist attempting to resolve a contradiction between different texts only when this contradiction is irreconcilable, and when chronological priority between the texts can be established. This means that considering the claim of abrogation involves both a hermeneutical exercise and a historical inquiry. But how hurriedly should a jurist resort to abrogation to resolve an apparent conflict among texts? Assuming chronological order can be established, when can a jurist decide that a certain text abrogates another?

According to Shāfiʿī jurists, Zanjānī states,

> [a]n addition to, or a qualification of, the content of a textual source of law is not a form of abrogation. For Abū Ḥanīfa (God be pleased with him), it is a form of abrogation and should not be accepted unless it meets the conditions of abrogation [meaning that the abrogating and abrogated texts be of the same level of authenticity]. Note that this question is also a question of definition, since the disagreement over it is founded on a disagreement over *what abrogation is*. Abrogation, for us [Shāfiʿī jurists], is a repealing of an established legal determination, while for them [here referring to Ḥanafī jurists as a school] it is a specification of the end of a legal determination. If abrogation could be a qualification or clarification (*bayān*), this would validate their view that an addition to the text is a form of abrogation, since it is merely a clarification of the quantity or quality of an act of worship (*ʿibāda*). If, however, abrogation is a repealing [of the legal determination], then an addition is not a form of abrogation.[20]

For Shāfiʿī jurists, a qualification in a Sunna text that applies to the content of a Qurʾānic text need not be seen as abrogation. This opens up the door for a Shāfiʿī jurist to look at all Qurʾānic and Sunna texts relevant to a certain subject as providing the details for one and the same picture, irrespective of the fact that most Sunna texts are deemed inferior in authenticity to Qurʾānic texts (since many Prophetic reports are transmitted by a smaller number of transmitters than is available in the transmission of the Qurʾān). Ḥanafī jurists, on the other hand, would ask whether a Sunna text that provides a qualification of the content of a Qurʾānic text parallels the Qurʾānic text in authenticity. If not,

[20] *Takhrīj*, 50.

the content of the Sunna text cannot be seen as *completing the picture* provided in the Qur'ānic text. A qualification in a Sunna text applies to a Qur'ānic text when they both meet the standard of *tawātur*. For Ḥanafī jurists, the Qur'ān's silence is a statement against qualification of its content.

Having established the disagreement on the level of theoretical principles, Zanjānī goes on to explain the ramifications of this disagreement in practical matters. The Prophet's statement "*al-aʿmāl bil-niyyāt*" (acts are judged according to the intentions for which they were done) can be seen as establishing that having the correct intention is one of the requirements in all acts, including, for example, ablution. If we do not insist on intention as a requirement or constituent of ablution, we will consider somebody who bathed for comfort ready to perform a prayer that requires ablution, since his bathing included the washing that ablution requires. The Qur'ān (5:6) specifies washing or wiping only four parts of the body (face, arms, hair and feet) as required in ablution and does not mention intention as a constituent of ablution. Ḥanafī jurists have insisted that the Prophet's statement regarding the importance of intention is an abrogation (since qualifications and additions are forms of abrogation) of the Qur'ānic verse that sets forth the constituents of ablution. Rejecting the principle adopted by Ḥanafī jurists, Shāfiʿī jurists reject the idea that a Prophetic report can abrogate a Qur'ānic text that is of higher authenticity. Abrogation, Shāfiʿī jurists insist, would have to be accepted only if the abrogating text is as authentic as the one abrogated.[21] As regards the question whether 'awareness of the intention to do an ablution' is a constituent of ablution, Ḥanafī jurists answer in the negative, since answering in the affirmative would commit them to acknowledging that the Prophet's statement abrogates a Qur'ānic text, which is unacceptable in this case, given the fact that this Prophetic report is less authentic than the Qur'ānic text it would abrogate. Shāfiʿī jurists believe that intention is a necessary constituent of ablution, since they believe that the Prophet's text simply clarifies the Qur'ānic text in this case. Shāfiʿī jurists believe, in fact, that no case where a *mutawātir* Sunna text contradicts a Qur'ānic text exists. Thus, they deny that a Qur'ānic text has ever been abrogated by a Sunna text.

Tilimsānī agrees with the notion that *tawātur* must be required in accepting a Sunna text if the latter stands in contradiction with a

[21] *Takhrīj*, 50–2.

Scriptural text. Among Sunna texts whose authoritativeness was contested because of their contradiction with the content of the Qur'ān are those stating that the Prophet has at least once wiped off his shoes with wet hands instead of washing his feet in ablution. Since the Qur'ān considers washing the feet an obligatory part of ablution, these Sunna texts cannot be used as the basis of an argument against that Qur'ānic text when its transmission does not meet the standard of *tawātur*. Mālikī jurists argue that there are Sunna reports (which amount to the standard of *tawātur* if their chains are aggregated) which—albeit not with the same wording—convey the same message, that is, that the Prophet wiped off his shoes with wet hands instead of washing his feet in ablution.[22] This makes these reports reach the level of *tawātur maʿnawī* (multiple reporting of the same content), and means that they should be accepted here and seen as equivalent in authoritativeness to those reports that posses *tawātur lafẓī* (multiple reporting of exact wording). Thus, Mālikī jurists redefine *tawātur* to allow for the possibility of abrogation of Qur'ānic texts by Sunna texts.

The issue of abrogation of the textual sources of the law raises other questions. Tilimsānī mentions juristic discussions of the extent to which ostensible contradiction among sources of law may be resolved by assuming that one of the sources has abrogated the other. Tilimsānī discusses abrogation of and by textual and non-textual sources of law. Some of the principles of legal hermeneutics are revisited in discussions of abrogation within textual sources since, in order to make a decision about the ostensible contradiction that requires resorting to a claim of abrogation, one must first decide that a conflict between the texts exists. The majority of the principles of abrogation, however, concern the possibility of abrogation itself and how the hierarchy of the sources relates to their ability to abrogate one another. Among non-textual sources that may abrogate textual sources is juristic consensus, which may be seen as implying the existence of a report of a Prophetic text that has been lost to us. According to a juristic consensus, a wine drinker who repeats his/her offense four times must receive the same punishment as a first-, second- or third-time offender. This juristic consensus must be assumed to have abrogated a Prophetic report that states that capital punishment should apply to a fourth time offender in such cases. Some jurists, including Mālikī jurists, hold that juristic consensus cannot ascend to a

[22] *Miftāḥ*, 5–6.

ascend to a level whereby it can abrogate a Prophetic text, but still hold that such a consensus (like the tradition of the people of Madīna) can abrogate a Prophetic report, since they assume that the reporting of such a consensus or community tradition indicates that the Prophetic text in question was abrogated by another Prophetic text that was not reported to us.[23] Tilimsānī also deals with the principle of abrogating a text by an analogy, a principle we will briefly address later.

When textual sources conflict, the date of these texts is an aid in deciding which one may have abrogated the other. The date of conflicting texts may be known by their association with certain events or by inference from biographical information about the transmitters of a Prophetic tradition. For example, if a text is narrated by a Companion who is known to have embraced Islam during the Prophet's later years, this may stand as an indication of its date, in which case it may abrogate a text that reports something known to have occurred at an early date in the Prophet's life. A report by a Companion that such and such text was abrogated may also stand as an indication of abrogation. Some jurists have objected that such a report indicates nothing but the opinion of the person making the claim of abrogation, and whether this person is a Companion is immaterial. Tilimsānī mentions cases where practical legal questions hinge on whether such a claim of abrogation may or may not be accepted.[24]

Tilimsānī also mentions the principle that substituting a legal determination that was made in certain circumstances with another is not an abrogation when the new determination is made in different circumstances. Examples of these include the stipulation of brisk walking during circumambulation of the *kaʿba* (practiced by the Prophet only between two points around the *kaʿba* when hostile Meccans were watching Muslims practice their circumambulation in Mecca). The change of circumstances validates this practice without any claim of abrogation. According to Mālikī jurists, applications of this principle also include the stipulation of washing a cooking pot seven times after a dog licks it, since this ruling was simply intended to end people's attachment to their dogs, but since such attachment is not common among Muslims anymore,[25]

---

[23] Ibidem, 112.

[24] Ibidem, 113.

[25] Some Mālikī jurists who lived in cultures where people are attached to their dogs must have wondered what to do in this question.

people should not be asked to go through elaborate cleaning of their cooking pots when these are touched or licked by a dog.[26]

The General Theory of Legal Hermeneutics

A theory of legal hermeneutics may be identified in the writings of Muslim legal theorists. Islamic legal hermeneutics consists of the *uṣūl* that link the textual sources of the law to practical legal rulings, which include principles concerning how to interpret the language of the lawgiver for the purpose of devising legal rulings on practical questions. The whole range of how *language* can become *law* is discussed, and we will offer examples of this shortly. But let us begin with a brief word about how our six authors have handled legal hermeneutics.

Principles of legal hermeneutics are almost absent from Dabbūsī's work, while both Zanjānī and Ibn al-Laḥḥām have a good number of such principles without any general statement of how they may be situated in a general theory. The other three authors, Tilimsānī, Isnawī and Timurtāshī, offer a structure for these principles that shows how they may constitute a theory of legal hermeneutics.

The extension of legal hermeneutics to the Prophet's *actions* and *tacit approvals* is no aberration in Islamic legal theory. After all, these actions and tacit approvals have been reported as texts (can we read into this practice an anticipation of Derrida's *il n'est pas de text*?) In dealing with the interpretation of Scriptural verses and Traditional reports, Tilimsānī includes 1) a statement (in the Qur'ān or the Sunna), 2) an action taken by the Prophet, or 3) a tacit approval by the Prophet (2 and 3 clearly apply only to the Sunna). Principles addressing the first category include, among others, the interpretation of language indicating commands and prohibitions, the different types of inferences that can be made from a statement in the Qur'ān or the Sunna on various legally relevant issues, the different levels of ambiguity that may be present in these texts, how different (ostensibly conflicting) messages can be inferred from a single text and how a jurist can reconcile them or determine preponderance among them. Some of these materials are considered also under the title of "determining preponderance among ostensibly conflicting texts."

---

[26] Ibidem, 114–5.

Isnawī's legal hermeneutics is almost exclusively covered in the chapter he dedicates to the interpretation of the language of the Qurʾān as the first source of law. Isnawī divides this chapter into five sections. First, he deals with general questions about the existence of language and its development, derivation of Arabic words, synonymy, homonymy, and regular and metaphorical use of words. Second, he addresses commands and prohibitions. Third, he deals with generality and particularity in words and adds several independent chapters on exceptions and conditionals. Fourth, he deals with unqualified and qualified expressions. Finally, he addresses the question of abrogation. Timurtāshī offers a range of principles of legal hermeneutics that is as broad as Isnawī's, beginning with commands and prohibitions.

In what follows, I will give examples of how principles of legal hermeneutics function as inquiries of legal theory linked to legal practical questions. The examples will address the interpretation of commands and prohibitions as well as issues of inference, interpolation, interpreting particles, and ambiguity in the textual sources of the law. These discussions are accompanied by a discussion of the practical implications of interpreting Scriptural and Traditional language.

Commands and Prohibitions

Muslim legal theorists look at commands and prohibitions in Qurʾānic and Sunna texts as the linguistic formulas most relevant to the law. These legal theorists ask about how to interpret the imperative form (the equivalent of *Do*!) and the prohibitive form (*Do not do*!). Does the language of *do* always institute a legal obligation, and does the language of *do not do* always indicate a prohibition? Could the imperative form indicate a mere recommendation rather than an obligation? And, when the imperative indicates an obligation, is the fulfillment of that obligation required immediately or within a certain period of time? And, when appropriate, should one assume that a command requires an obligation to be performed once or multiple times? Does a command include only what is stated explicitly as an obligation or does it require attaining all the means that may be deemed necessary for the fulfillment of that obligation? Does the prohibitive form (*do not do*) indicate strict prohibition or mere reprehensibility? Does prohibition imply the invalidity and inconsequentiality of a prohibited act (e.g., does a prohibited marriage have any consequences similar to permissible marriages)? How

should one interpret a command that qualifies or abrogates a prohibition? These are just a few examples of the questions a Muslim legal hermeneutist asks about commands and prohibitions; the list of similar questions is long.[27]

The imperative form appears often in religious texts and its legal implication constitutes an important practical question for Muslim jurists. Muslim jurists do not accept that all instances of the use of an imperative are meant to create "duties" for Muslims. For example, the Qurʾān (2:282) exhorts the believers to document transactions resulting in financial liabilities. The relevant Qurʾānic verse mentions seeking witnesses: "seek witnesses when you engage in sale/trade" (*wa ashhidū idhā tabāyaʿtum*). The verse also emphasizes the importance of documenting transactions "let you not find it tiresome to document [the transaction], whether significant or not." Yet most jurists agree that the use of the imperative here is not intended to create a duty; rather, it is simply for general guidance (*irshād*).

The form of the imperative and other forms indicating commands have been discussed by Muslim jurists in order to decide whether there is a necessary relationship (in linguistic usage) between these forms and the notion of obligation, and how to interpret these forms if they do not indicate obligation. The imperative is used in Arabic in contexts that clearly have nothing to do with obligations, just as in English one could say "go ahead" or "please do that for me" without contemplating the idea of legal obligation. Muslim jurists have (according to Isnawī) thought of 14 possible different uses for the imperative and similar forms capable of indicating commands, and other authors have gone beyond this number, as later works of legal theory show.[28]

Let us begin with two examples of practical legal matters from two different areas of the law that hinge on interpreting the imperative form. In Islamic law, a divorced couple may decide to resume their marriage within a certain period called *ʿidda* (three menstruation cycles by the woman) without initiating a new marriage contract. Most Sunnī jurists regard the resumption of marriage (within the *ʿidda*) as almost a new beginning and require the presence of witnesses for it, just as they require the presence of witnesses for the initiation of a marriage contract. But disagreement still occurs over whether the exhortation to seek witnesses for the resumption of marriage establishes an obligation of the

---

[27] *Tamhīd*, 264–96.

[28] E.g., *Uṣūl al-Fiqh* by Abū al-Nūr Zuhayr (Cairo, 1992).

same level as the obligation concerning the presence of witnesses for marriage contracts. This disagreement revolves around how to interpret the imperative "*ashhidū*" (seek witnesses) in the context of *murāja'a* (resumption of marriage after divorce), as Tilimsānī indicates.

Another example concerns a Prophetic Tradition which, using the imperative form, establishes that a worshipper must begin his/her prayers with the statement "*Allāhu-Akbar*" (God is greatest). Tilimsānī points out that jurists who do not consider uttering this particular statement at the outset of prayer obligatory (Ḥanafī jurists) would argue on the basis of the principle that the imperative does not always establish duties; rather, it may also establish mere recommendations.[29]

It is noteworthy that practical legal applications of the content of an imperative are not limited to divine language; Isnawī offers applications from both divine and human language.[30] He considers the use of imperatives by people of authority, say, rulers or officials and asks: Does the imperative in their language indicate obligations all the time? Isnawī's preferred view is that a command indicates an obligation unless linguistic or circumstantial evidence indicates otherwise. After stating this principle, he explains another one of its practical implications.

> Having become aware of that, be advised that the ramifications of this principle (*mas'ala*) include the following. If a man was considering a woman for marriage, he must look at her (*yanzur ilayhā*), because the Prophet commanded "look at her!"[31]—etc. But is this recommended or is it simply allowed? [There are] two [inferred] views (*'alā wajhayn*). The more correct one is the first, and these two views are based on *that* (*'alā dhālik*) as the Imām [meaning Juwaynī] said in his *Nihāya* [i.e., *Nihāyat al-Maṭlab*, Juwaynī's major treatise in law]. If it was said, why did not we interpret [the Prophet's command] to indicate obligation? We say, a piece of circumstantial evidence redirected it [the command] to indicate recommendation. In addition, another principle [applies] that was mentioned before this principle, which is the one concerning the motivation of the action.[32]

In this densely packed text, Isnawī indicates a relationship between one practical legal matter and two theoretical principles of legal hermeneutics. The two views Isnawī indicated as *wajhayn* are views

---

[29] *Miftāḥ*, 24–5.

[30] *Tamhīd*, 272.

[31] The text here may have been corrupted, since it reads "look at them" (*unzur ilayhinn*), whereas the Prophet's statement in the known sources is "look at her."

[32] *Tamhīd*, 266–9.

Shāfiʿī's students had inferred from the master's views.[33] His vague hint at the source of the disagreement as 'based on *that*' (*ʿalā dhālik*) refers to these two students' understandings of Shāfiʿī's view on the basic meaning or meanings of the imperative. Finally, *the principle concerning the motivation of the action* refers to the principle that, if the one receiving a command has a natural motivation to act according to that command, then a jurist must rule out the possibility that that command establishes an obligation. Thus, looking at a prospective wife cannot be obligatory, since individuals are likely to incline to do it anyway, and when this is the case, obligation is not needed. Recommendation or permission is sufficient to "give the green light" to individuals to follow their instinct.[34]

If the imperative form can be ambiguous as to whether it indicates an obligation or not, it can also be ambiguous in other respects even if jurists agree that an imperative establishes an obligation in a given case. Zanjānī deals with the question whether a command entails the repetition of the act required by the command. Zanjānī states that a command indicates the repetition of the act which it demands, since an order comprises a category of actions (praying for example). A category of actions encompasses different instances of that action and the acts that belong to it are therefore naturally multiple. In addition, since the verbal form expressing a command cannot be put into the dual or plural form to indicate a demand to repeat the action, multiplicity and repetition are inherent in it. This means that the receiver of the command is responsible for fulfilling this repetition as a part of fulfilling the command itself. A ramification of that is that the ritualistic dry ablution (which is an alternative to a regular ablution when water is inaccessible to the worshipper) cannot serve to prepare a person for more than one prayer. When this person intends to perform another prayer, she/he is addressed with the same requirement of performing ablution before the prayer, and she/he will have to go through the same process of making sure that water is not available and then resort to dry ablution again before performing the second prayer. Shāfiʿī jurists, who uphold this principle, agree that one regular ablution (ablution with water) is sufficient to do more than one prayer, but this is an exception for which there is a specific argument (*dalīl*) that cannot be extended to encompass

---

[33] ʿAlī Jumʿa, *al-Madkhal* (Cairo, 1996), 31.
[34] *Tamhīd*, 269–70.

dry ablution. Ḥanafī jurists disagree with the initial principle (that commands naturally imply performance of multiple acts) and say that a command naturally requires performance of one act. Therefore, Ḥanafī jurists argue, whether it is a regular ablution or a dry one, a person is required to perform it only once and pray as many times as she/he desires until the ablution is breached (such as by excretion).[35]

Is one's obligation fulfilled by doing all one can do at the time of the fulfillment of a duty, even when this falls short of an ideal fulfillment of the duty? For example, if I cannot reach clean water for ablution, may I use dry ablution and perform my prayers without the worry that I will have to redo that prayer with regular ablution when I find water? Tilimsānī mentions other applications of this principle, which takes us to the area of the legal maxim "certainty cannot be repealed with uncertain knowledge or doubt" (*al-yaqīn lā yazūl bi-l-shakk*). If a person prays without ablution, regular or dry, because he could find neither water nor an earth surface (*ṣaʿīd*), did he/she fulfill his/her duty and is he thus not required to do this prayer when water or an earth surface becomes available? The same can be said of someone who prayed towards a direction which he thought was correct: must he/she redo his/her prayer if he/she discovers that his/her guess about the correct prayer direction had been wrong.[36]

Whether a prohibition entails the invalidity and inconsequentiality of prohibited actions is one of the questions that relate to the interpretation of prohibitions. Underlying the complexity of this question is one fact: If there is a presumed link between prohibition and invalidity (that what the law prohibits cannot be valid or consequential), validity and invalidity still apply differently to different prohibited acts. An invalid prayer is invalid in a more simple sense than an invalid marriage or sale. That is, an invalid prayer is simply inconsequential, since it does not serve any purpose. By contrast, an invalid sale may have consequences if it results in transferring property, and the same and more can be said about marriage contracts that lack conditions of validity.

Isnawī relates four opinions on the question of the relationship between prohibition and validity: 1) a prohibition *does* entail the invalidity of the act prohibited, 2) a prohibition *does not* entail the invalidity of the act prohibited, 3) it entails invalidity only in ritual acts, and 4) it entails invalidity in rituals, trade and contracts (*muʿāmalāt*) unless the

---

[35] *Takhrīj*, 75–8.
[36] *Miftāḥ*, 31–2.

prohibition is directed towards something that is not an essential part of the act in question (such the prohibition of trading during the time of the Friday prayers, since this prohibition has to do with the time and must not therefore entail the invalidity of the contract itself). Based on the fourth opinion, Isnawī mentions cases where prohibitions (related to rituals and contracts) may also have no effect on the validity of acts that benefited from the prohibited acts. For example, if a man steals the water with which he/she makes the necessary ablution for prayers, the prayer is considered valid, since the prohibition is directed towards something that is not an essential part of the act in question. By the same token, sales that are concluded despite tentative agreements to sell the same goods to others (a practice which is regarded as unacceptable) are still valid, since the sale contracts in this case do not suffer from any essential deficiency.[37]

Ibn al-Laḥḥām addresses the question of whether a command that is applied to a certain action implies a prohibition of its opposite and whether a prohibition of a certain act implies an obligation of its opposite. The author makes the following distinction: A command entails the prohibition of all the opposites of the thing commanded, whereas a prohibition entails that only one of the opposites of the thing prohibited be obligatory. Ibn al-Laḥḥām attributes this principle to all four Sunnī schools of law and reports a divergence on the part of Abū al-Ḥasan al-Ashʿarī (d. 935). Abū al-Ḥasan al-Ashʿarī's position seems to stem from a reflection on the fact that a divine command or prohibition must correspond to an act or class of acts to be carried out by a human agent (one command/prohibition → one act/class of acts). Thus, extending the meaning of a command or prohibition to apply to what is not meant by it may violate this one-to-one correspondence. Ashʿarī's point is, that, if we were to propose that, say, marriage is obligatory because adultery is prohibited, then we will have created an obligation for which a command cannot be found.

Ibn al-Laḥḥām presents a few applications of the aforementioned principle. One of them is the juristic reflection on whether marriage is a duty, given that it may be considered the opposite of adultery/fornication, which is prohibited by Scripture and Tradition. Against that reasoning, al-Ṭūfī (d. 1316) argued that the opposite of *adultery/fornication* is *abstaining from adultery/fornication*, and marriage is not a necessary condition for

[37] *Tamhīd*, 292–4.

such abstention. Ibn al-Laḥḥām reaffirms the theory that *a prohibition entails that only one of the opposites of the thing prohibited be obligatory* and considers it less than realistic to say that abstaining represents a viable alternative to marriage. Ibn al-Laḥḥām argues that most people are not capable of such abstinence and that, from a practical point of view, the principle (that a command entails the prohibition of all the opposites of the thing commanded, whereas a prohibition entails that only one of the opposites of the thing prohibited be obligatory) may not be as weak as it may seem. Based on the same reasoning, a question arises as to whether the reprehensibility of divorce may be elevated to the level of prohibition, since it ends the marriage relationship and puts the divorced couple in a position of potentially breaching the prohibition of adultery/fornication.[38]

Ambiguity

We pointed out that Dabbūsī begins his work by discussing a disagreement between Abū Ḥanīfa, on the one hand, and his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, on the other. In the opening pages of his work, Dabbūsī mentions the following vague theoretical legal principle:

> For Abū Ḥanīfa, a term indicating generality (*al-ʿumūm*) is not comparable to a term indicating specificity (*al-naṣṣ wal-khuṣūṣ*).[39]

Dabbūsī's illustration of how this theoretical legal principle applies in practical legal matters shows that it has quite a broad range. He writes:

> This [principle] has applications in many questions [of a practical nature] (*masāʾil*). One of these is that, if a man vows (or obliges himself, *awjaba ʿalā nafsihi*) to travel to the Sacred Precinct or the Sacred Mosque, for Abū Ḥanīfa, he is not bound to do anything (i.e., perform a specific act of rituals or pilgrimage), because general terms do not convey the same meaning as specific terms. The House of God (*bayt Allāh taʿāla*, i.e., the *Kaʿba*) is part of the Sacred Precinct (*ḥaram*), but this is not like a specific term, which if mentioned, a pilgrimage would be obligatory for the man making the vow. . . . And one of these [questions of a practical nature (*masāʾil*)]

---

[38] *Qawāʿid*, 250–3. For a detailed treatment of the different aspects of the question, see Tāj al-Dīn al-Subkī (d. 1370) (eds. A. Muʿawwaḍ and A. ʿAbd al-Mawjūd), *Rafʿ al-Ḥājib ʿan Mukhtaṣar Ibn al-Ḥājib* (Beirut, 1999), II, 527–38.

[39] *Taʾsīs*, 8–10.

> is that, if two witnesses testify, one that the defendant owes one hundred [say *dirhams*] and another that he owes two hundred, while the claimant claims he is owed two hundred, then the testimonies cannot be taken to establish [a debt of] one hundred [since the two witnesses seem to agree on the first hundred and disagree on the second hundred]. For the two of them [Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī], the testimony is accepted for the smaller amount [the hundred]. If it is objected that, if a man said to two of his slaves, "one of you is free given a payment of one thousand [say *dirhams*], and the other is free given a payment of two thousands," and one of the two slaves said, 'I accept to be freed for a thousand,' that slave would not be freed, because the master may have intended that slave to pay two thousands. If a slave said 'I accept' or 'I accept to be freed for two thousands,' then he would be freed, even if the master had intended that slave to be freed for a thousand, because the one thousand is part of the two thousands. . . . The response to this objection is that this last case was mentioned in the Supplement (*Ziyādāt* of Muḥammad Ibn al-Ḥasan al-Shaybānī), and this is the view of Muḥammad Ibn al-Ḥasan al-Shaybānī and not that of Abū Ḥanīfa.[40]

Abū Ḥanīfa believed that a jurist cannot reduce the use of a general term whose meaning may encompass the meaning of a more specific term to the specific. This principle has many applications. For Abū Ḥanīfa, a vow to visit the Sacred Precinct does not oblige a man to visit the *kaʿba* that is part of the Precinct. By the same token, a testimony that a man owes a hundred and another testimony that the same man owes two hundreds should not be reconciled to establish a debt of one hundred. For Abū Ḥanīfa's two students, on the other hand, the vow includes the visit to the *kaʿba*, and the testimonies can be reconciled to establish a debt worth the lower amount. An objection arises: Abū Ḥanīfa may have contradicted himself by holding that a statement of commitment to two thousands (in the question of the slaves) is reducible to a commitment to one thousand. Dabbūsī explains that this is in fact the view of Muḥammad Ibn al-Ḥasan al-Shaybānī and not that of Abū Ḥanīfa.

For an author to judge the consistency of a jurist of the past, he/she must be able to verify the views attributed to that jurist, so as to avoid the pitfall of accusing that jurist of inconsistency mistakenly. If Dabbūsī were to find that the master Abū Ḥanīfa had in fact endorsed the view of Muḥammad Ibn al-Ḥasan al-Shaybānī on the slave question, Dabbūsī would have been left with one of two options. The first would be to 'distinguish' the slave question from the question of the two testimonies to

---

[40] *Taʾsīs*, 8–10.

assert the master's consistency. The second would be to acknowledge an instance of inconsistency on the part of the master.

After Dabbūsī, the treatment of generality (*ʿumūm*) and specificity (*khuṣūṣ*) in both divine and human language becomes a concern of Muslim legal theorists who include many more details than Dabbūsī does. The principal difference between the general and the specific is analyzed comprehensively, leading to devising dozens of theoretical legal principles in some later works of *uṣūl al-fiqh*.[41] In Isnawī's work, eleven theoretical legal principles are discussed, including how to resolve apparent contradictions between a general statement and a specific one that may be seen as addressing one and the same issue.[42] Dabbūsī's meager treatment of the subject may be explained in different ways. Whether Dabbūsī believed that these principles are less important or so obvious they do not need mention is anybody's conjecture. Not unlike the other five authors, Dabbūsī did not commit himself to any criteria in choosing his *uṣūl* and only offered guidance about the sources of disagreement among jurists in practical legal matters by explaining their theoretical underpinnings.

Be that as it may, post-Dabbūsī *takhrīj* works include a sizable treatment of legal hermeneutics, in general, and the principles concerning ambiguity in language, in particular. The Arabic term indicating ambiguity in individual words or homonymy is *ishtirāk*. Words may have more than one meaning when they have both an everyday meaning and a technical meaning. In addition, this duality of sense may simply be built into the everyday uses of a given word. But whether the multiplicity of meanings of a given word stems from a word's multiple regular uses or regular-cum-technical uses, multiplicity in meaning causes Muslim jurists to deal with a similar set of questions. The questions arising from ambiguity in the meaning of an individual word constitutes an important topic in later Islamic legal hermeneutics. Both grammarians and legal theorists often reserve the term *mushtarak* or homonymous for the case in which one word is used in multiple meanings in its regular use (i.e., where none of the meanings conveyed by the word is figurative).[43] Some legal theorists extend the meaning of *ishtirāk* to include other levels of ambiguity in words.

---

[41] Shams al-Dīn al-Iṣfahānī (d. 1349), *Bayān al-Mukhtaṣar*, II, 104–234.

[42] *Tamhīd*, 409–28.

[43] Aristotle uses the term homonymous at the beginning of his *Categories* and gives the example of the term "animal" as a homonym indicating both "picture" and "man." Aristotle (trans. J. L. Ackrill), *Categories and De Interpretatione* (Oxford, 1963), 3.

An interesting theoretical question that poses itself here is whether homonymy is a natural phenomenon in language, or whether the native speakers of a given language resort to using one word in multiple senses only as an exception, especially in the case of the Arabic language, the language of the Qurʾān. Muslim legal theorists have taken interest in inquiring into this matter. Tilimsānī, for example, engages in exploring this apparently theoretical question. But in discussing homonymy, Tilimsānī confines himself to the applications of this question in practical legal cases; he does not appear to find room for the niceties of the philosophical and linguistic inquiries associated with it. According to Tilimsānī, the majority of legal theorists hold that homonymy is an exception in language use rather than the prevalent practice. The implication here is that, if a jurist claims that a given word may be used in multiple meanings, while one could do away with that assumption in practice, one should not accept the claim of homonymy. In other words, the burden of proof that a word is used in more than one meaning in a text is on those claiming that multiplicity. An application of this theory can be seen in the interpretation of the following text. The Qurʾān states (24:63), "let those who disagree with [the Prophet's] *amr* (= command; ways and customs) be cautious, for they may be plagued by a harsh test or a painful punishment." Whether the word *amr* should indicate both "command" and "ways" is the question here. Should the word be interpreted as conveying both of its meanings simultaneously? The majority of legal theorists do not embrace this view, insisting that this strong threat is relevant only to deviations from the Prophet's commands rather than his general habits and customs.[44]

Before Tilimsānī, Zanjānī had already touched on the fact that a word may be used in a legal or technical sense that is different from its lexical or everyday use. According to Shāfiʿī jurists, such a word must be interpreted based on its technical use unless proof exists that it is used to indicate its lexical meaning. Ḥanafī jurists argue that the possibility that the lexical meaning is intended takes precedence over other possibilities. When the term *nikāḥ* (lexically "coition" and legally "marriage") is used in Qurʾānic or Sunna texts, we should assume, Ḥanafī jurists argue, that it means "coition," while Shāfiʿī jurists hold that it must be interpreted to mean "marriage." The Qurʾān (Q 4:22) states: "you are not allowed to have sexual relations with/marry (*lā tankiḥū*) those whom your fathers have had sexual relations with/married (*nakaḥa ābāʾukum*)."

[44] *Miftāḥ*, 62.

Ḥanafī jurists argue that a man cannot have a lawful sexual relationship with a woman with whom his father had a sexual relationship, since *nikāḥ* lexically means "coition." Based on the Ḥanafī's view, if a man's father committed adultery with a certain woman, the man cannot marry this woman. For Shāfiʿī jurists, however, *nikāḥ*'s technical meaning is what is intended in the verse. Shāfiʿī jurists further argue that insisting on using the term in its lexical meaning results in undesirable conclusions: it equates marriage with unlawful sexual relations in ways that may be repugnant to sound sensibilities. It is "marriage"—rather than illicit sex—that creates family relationships among people. Person A's stepmother cannot become his lawful wife after divorcing A's father, because she was lawfully married to the father. By contrast, the mistress of A's father is not related to A by virtue of an abomination, that is, an illict sexual relationship between A's father and the mistress. After alluding to this controversy, Zanjānī elaborates on the use of the term *nikāḥ* in other Qurʾānic and Sunna texts.[45]

Tilimsānī provides another example of a homonym in this general sense: the word "*ighlāq*" (lock) in the Prophet's statement "No divorce [is valid if the one who pronounced it has been] at a lock." "Lock" here, Tilimsānī states, could equally mean "insanity" or "compulsion." Thus, if one restricts the word to its first interpretation, as Ḥanafī jurists do, the text does not have anything to say about the validity of divorce under coercion. Shāfiʿī jurists insist that a homonym of this kind can be used in both of its meanings at the same time in one text and would therefore see this text as relevant to the case where a man is forced to divorce his wife. Based on this same text, they would consider such a divorce invalid.[46]

Tilimsānī states that any given term is one of four kinds: 1) a univocal term (*naṣṣ*); 2) a term with multiple meanings, none of which can be said to be preponderant (*mujmal*); 3) a term with multiple meanings, one of which can be said to be preponderant based on textual evidence (*ẓāhir*); or 4) a term with multiple meanings, one of which can be said to be preponderant based on non-textual evidence (*muʾawwal*).

In discussing the *ẓāhir* (a word with multiple meanings with textual clues suggesting preponderance of one meaning in a certain context), Tilimsānī deals with regular and figurative uses of words, stating that

---

[45] *Takhrīj*, 272–4.
[46] *Miftāḥ*, 72.

there are three different kinds of regular uses of words (*ḥaqīqa*) to which three different kinds of figurative uses of words (*majāz*) correspond. These are 1) regular use stemming from the original meaning of a word (*ḥaqīqa lughawiyya*), 2) regular use stemming from a customary meaning (*ḥaqīqa ʿurfiyya*), and 3) regular use stemming from a legal meaning (*ḥaqīqa sharʿiyya*). Corresponding to these are three figurative uses based on lexical, customary or technical legal use.[47] The basic principle of legal hermeneutics pertaining to the phenomenon of homonymy is the following: When the word is capable of conveying any of these meanings, the presumption is that it carries its regular rather than its figurative use. To argue that a certain word is used figuratively in a given legal text requires evidence. Following are examples of texts and legal questions that hinge on how to interpret homonyms.

1) Original (*ḥaqíqa lughawiyya*) versus figurative (*majāz lughawī*) use of terms: The Prophet states, "*The two parties* in a sale transaction (*mutabāyiʿān*) may reconsider the deal until they *part ways* (*yatafarraqā*)." The original meaning of *mutabāyiʿān* is 'the two parties in a sale.' The original meaning conveyed by *yatafarraqā* is 'physical separation.' Shāfiʿī jurists, believing that the two terms (*mutabāyiʿān/two parties in a sale* and *yatafarraqā/they physically separate*) here indicate their original meanings, hold that a license to reconsider the sale transaction extends until the end of the meeting during which the deal is negotiated.[48] Shāfiʿī jurists need only to point to the above hermeneutical principle (that is, that when the word is capable of conveying either of these meanings, the presumption is that it carries its regular rather than its figurative meaning). Mālikī and Ḥanafī jurists hold that the *mutabāyiʿān/the two parties* are the two parties in a deal while they are negotiating the deal and that *yatafarraqā/part ways* indicates the end of their negotiation rather than their physical separation. Note that the *mutabāyiʿān* here could mean "the negotiators of a deal," since the sense conveyed by the form *tabāyiʿa* implies engagement in the activity of selling, which in essence continues to take place as long as the process of negotiation continues, since the act of *selling* may extend in time only as long as the deal is *being* formed. Since they would like to interpret a term in a

[47] *Miftāḥ*, 59–61, 74–6.
[48] Ibidem, 59–60.

metaphorical or non-regular meaning, Mālikī jurists must cite specific reasons for why, in this particular case, one must interpret the words in question in such a manner. Thus, Mālikī jurists cite textual evidence that the Prophet used the word *bayʿ* (= sale) to mean "negotiation for a sale." Based on that, Mālikī jurists argue that the two parties in a sale have a choice to reverse their deal until they end their negotiation and seal the deal.

Another example in which jurists debate whether a word must be taken to indicate its original, regular use (*ḥaqīqa lughawiyya*) or its metaphorical use (*majāz lughawī*) follows. The Prophet states "*ayyumā rajulin aflasa fa-ṣāḥibu-l-matāʿi aḥaqqu bimatāʿihi idhā wajadahu biʿaynih*" (when person A enters into a deal with person B, and person B subsequently becomes bankrupt, if A finds his property in B's possession, the owner/bearer of the property (*ṣāḥib al-matāʿ*) deserves to take it). Ḥanafī jurists argue that, at the point at which A finds his property in B's possession, *ṣāḥib al-matāʿ* is B rather than A. B is the current bearer of the property (*ṣāḥib al-matāʿ*), while A, at this point, is the previous *ṣāḥib al-matāʿ* or bearer of the property. Here Ḥanafī jurists apply the above principle of presumptive application of regular rather than metaphorical use. Mālikī jurists argue that, in this context, it is the original owner of the property in question (A) who deserves it rather than the one who possesses it (B). Mālikī jurists argue that this assumption is reasonable here, since the noun preceding the word in question indicates the possessor (B), and if the Prophet had intended B here, he would have simply used a pronoun rather than the noun. This linguistic clue, they argue, makes us apply the figurative use (*majāz lughawī*) rather than the original one in this context.[49]

2) Regular customary meaning (*ḥaqīqa ʿurfiyya*): The word *yatīm* (fem. *yatīma*), which in its regular use means 'single,' is used customarily to mean 'orphan.' If the regular meaning is intended in the Prophet's statement "no marriage of a *yatīma* can be concluded without her consent," then any female who is not married must be consulted before her marriage is concluded. If the customary meaning is intended here, then only a female orphan is intended in the text.[50] Corresponding to this is the figurative meaning based on

[49] Ibidem, 74–5.
[50] Ibidem, 60–1.

a customary meaning (*majāz ʿurfī*). The Qurʾān stipulates (58: 3) that expiation must be given by "those who vow to refrain from having sexual relations with *their women* (*nisāʾihim*) as if they were their mothers (*yuẓāhirūn*)." The question here is whether *their women* (*nisāʾihim*) indicates wives and excludes concubines. Mālikī jurists argue that the customary regular use (*ḥaqīqa ʿurfiyya*) of the term *nisāʾihim/their women* includes both women and concubines. Ḥanafī and Shāfiʿī jurists insist that the text concerns wives only, since the circumstances of its revelation confine the term to its figurative meaning based on a customary use (*majāz ʿurfī*).[51]

3) Regular use of a word as a legal term (*ḥaqīqa sharʿiyya*): The Prophet states, "a pilgrim who is still in *iḥrām* (the ritualistic state appropriate for pilgrimage) cannot get married/engage in sexual intercourse (= *yankiḥ*), nor can she/he be involved in the marriage of others (= *yunkiḥ*)." As a legal term, the original meaning (*ḥaqīqa sharʿiyya*) of the word *nikāḥ* is the marriage contract, whereas the term is used in a figurative legal sense (as a *majāz sharʿī*) to indicate sexual intercourse. Based on the original meaning, Mālikī jurists hold that a pilgrim cannot get married during the time assigned to the rituals (which lasts for days), while Ḥanafī jurists, who interpret the term according to its figurative meaning of sexual intercourse, find no need to assume that a pilgrim in *iḥrām* cannot conclude his/her marriage or be one of the two witnesses required in concluding the marriage of others.[52]

Isnawī's interest in this hermeneutical issue is considerable. He mentions that one of the sources of ambiguity in language is the fact that one word can have more than one meaning. Isnawī deals with this issue on three different occasions reflecting three *layers* of ambiguity in any given word. *The first layer* is ambiguity resulting from the original use of a given word in more than one meaning. This ambiguity takes place within the *waḍʿ* or the very original use of a given word and not through the extension of the use of the word. In the context of the Arabic language, multiple uses of a given word occurred when one word was used to mean different things in different local (Arabic) languages before their "unification" in what came to be known as *the Arabic language*. The different

[51] Ibidem, 75–6.
[52] Ibidem, 60.

local (mother) languages may assign divergent and even opposite meanings to one and the same word (such as *jawn*, which could mean either white or black); the larger (daughter) language consequently inherits words with these multiple meanings.[53] *The second layer of ambiguity in individual words* results from the fact that a single word can be used in its lexical, customary, or technical sense. The issue of legal use (as opposed to other technical uses) bulks large in legal discussions. For instance, the original meaning of the word *ṣalāh* is "relationship," while its legal meaning is prayer. Other examples can be found in Tilimsānī's discussion of the matter (see above). The distinction between multiplicity of meaning in a word based on *waḍʿ* and multiplicity based on original-versus-customary uses of the word may be debated, but Isnawī assumes that the distinction is reasonable. In his discussion of this layer of ambiguity, Isnawī addresses one theoretical principle with ten legal cases illustrating potential ambiguity resulting from the fact that a word can have an original, a customary, and a technical meaning.[54] *The third layer of ambiguity in words* results from the use of figurative speech. A word may have an original meaning, and may be incapable of conveying a customary or technical meaning, but may still be ambiguous if used figuratively. (Another debate over the distinction between customary and figurative uses of words may be relevant here, though it does not appear to concern Isnawī). Isnawī dedicates ample space to *majāz* (figurative speech), in which he introduces nine theoretical principles covering the forms of synecdoche, metonymy, and other forms of trope.[55] This chapter also includes forms of figurative speech that cannot be subsumed under these forms of trope.[56]

---

[53] *Tamhīd*, 173–84.

[54] Ibidem, 228–36.

[55] Ibidem, 185–205.

[56] Isnawī also distinguishes between three sources of ambiguity in language that overlap with these three layers. The first is *waḍʿ* (multiple original uses in the language), the second is *istiʿmāl* (multiple uses by those speaking the language), and the third is *ḥaml* (multiple interpretations by those who understand the language). On the theory that the [Arabic? or any other?] language was an inspiration from God that was infused into its original users, the distinction between the first two levels is chronological; later users who expanded the uses of the vocabulary of the language added meanings to words. On the theory that language is nothing but a convention among those who speak it, the difference between the first two levels is still chronological, since it is the first speakers of the language who created the *waḍʿ* and the later users who expanded the use (through *istiʿmāl*). The use can be expanded within the realm of customary and technical language, but can also occur on the level of figurative speech. Finally, the second and

The two most controversial issues between Ḥanafī and Shāfiʿī jurists with regard to the ambiguity of single words are the use of the words *qurʾ* (which can mean either *an instance of menstruation* or *the time span between two menstruations*) and the word *nikāḥ* (which can mean either *marriage* or *sexual intercourse*). These two terms are of considerable importance in questions of family law. Let me begin with the more obvious one. The term *nikāḥ* is used in many texts addressing family law issues, and understanding its meaning is essential to making sense of these texts.[57] The importance of the term *qurʾ* may be less obvious.[58] In Islamic family law, Muslim jurists agree that before a woman can get married, a period of three *qurūʾ* must pass after her most recent sexual intercourse (lawful or unlawful). The rationale behind this ruling is to ascertain the lineage of any child that may result from such intercourse. The unit with which this period is measured is the *qurʾ*. If a *qurʾ* is an instance of menstruation, a woman may have to wait for as little as two months if her menstruation begins immediately after she had intercourse. If the *qurʾ* is the time between two menstruations, this woman is likely to wait for more than three months before being allowed to marry a person other than the one with whom she had this intercourse.

In the chapter he dedicates to figurative speech, Isnawī discusses the different relationships between an original meaning of a word and its figurative sense that may justify extending the meaning of the word beyond its original use to its figurative meaning. These relationships include the relationship between cause and effect, part and whole, a thing and its surrounding context, and the history of a thing and its present form. Isnawī also deals with the use of figurative speech in omission and negates the possibility of using prepositions and other particles figuratively. He also deals with figurative speech that involves one word, the relationship between two words, and both the words in themselves as well as their relationship with each other. In addition, Isnawī addresses expressions that are used figuratively more often than they are used regularly. Finally, Isnawī deals with the question of the interpretation of expressions that conclude contracts and whether such expressions are used in a propositional or non-propositional manner. One of the legal

---

third levels of assigning different meanings to words (*istiʿmāl* and *ḥaml*) have to do with what is allowed within the language and accepted among its speakers, whether it has to do with customary, technical, or figurative use.

[57] See e.g. *Tamhīd*, 190.

[58] Find an application of this in *Tamhīd*, 190–1.

cases Isnawī mentions in this context is whether the word *yawm*, which is taken to mean "day," includes the night that precedes it.[59] This entire discussion, however, by no means exhausts the topic of ambiguous uses of language—as further perusal Isnawī's work will show.

Timurtāshī's interest in ambiguity in language appears in several chapters in his work. When discussing the question of analogy (*qiyās*), for example, Timurtāshī discusses whether meanings can be attributed to words based on *qiyās*. Applications of this include the extending the meaning of the word "*khamr*/wine" to indicate all drinks that may affect the mind, extending the word "*zinā*/illicit sexual intercourse" to include sodomy, and extending the word "*sāriq*/thief" to include pickpockets.[60]

One of the principles of relevance to the use of figurative speech which Timurtāshī mentions states that a term must be interpreted according to its figurative use if we would otherwise have to consider a part of the text meaningless. This is a sub-principle subsumed under the general presumption that we must find meanings for all words in a legal text and render none of them meaningless or superfluous. One can find this presumption as one of the canons of statutory constructions in American law (*reddendo singula singulis*).[61]

Interpolation

Issues of interpolation may be addressed in two basic principles. *The first principle* concerns the omission from a text of a statement which people usually understand, since their habits of speaking involve such an omission. It thus becomes the task of the reader of the text to state the omitted words in order for the text to indicate its intended meaning. An example of this from the Qur'ān is the text (Q 4:11) "your mothers are prohibited for you." Customary use here makes it obvious that this prohibition concerns marriage (this reading "[marriage to] your mothers is prohibited for you"). *The second principle* would govern cases in which these types of customary uses cannot be readily discerned. An example of this is the Qur'ānic text "carrion is prohibited for you." Some jurists would rely on the customary use of the word prohibition with regard to animals as specific to eating (thus reading "[eating] carrion is prohibited

---

[59] Ibidem, 194.
[60] *Wuṣūl*, 276.
[61] Ibidem, 236–40, 151–2, respectively. Also, see Crawford, *Canons*, 332.

for you"), while others would point to the ambiguity in the text and hold that the prohibition includes other aspects of prohibition of carrion, such as prohibition of tanning its hide for subsequent use.[62]

Some principles of legal hermeneutics link legal hermeneutics to the theory of legal responsibility. Tilimsānī discusses whether inappropriate actions done inadvertently lie outside the realm of responsibility. The Prophetic statement "inadvertent mistakes and forgetfulness do not affect my community" (*rufiʿa ʿan ummatī al-khaṭaʾ wa-n-nisyān*) must be interpreted to mean that such forgetfulness does not result in accountability rather than that it never happens. The fact that mistakes and forgetfulness happen to the Muslim community just as they happen to other human beings makes it necessary to assume that there is an omission in the text. The text, therefore, must be taken to be stating that the community is not affected by *the responsibility resulting from* mistakes and forgetfulness.[63]

Particles

The interpretation of particles is an integral part of the general theory of legal hermeneutics within Islamic legal theory. This aspect in particular invites comparison with non-Islamic legal theory.

In their treatment of statutory construction, Anglo-American legal theorists discuss the interpretation of disjunctives and conjunctives ("or" and "and").[64] "And" may be read as "or" and "or" as "and," we are told, if the sense requires it.[65] The fact that the particle "or" is sometimes equated with "and" seems to attract more attention than the simple interpretation of "and" in works of statutory constructions, but the interpretation of "and" is also of concern to these legal theorists, especially whether "and" is intended to be the *several* "and" (A and B jointly or severally) or the *joint* "and" (A and B, jointly but not severally).[66] The Arabic equivalent of "and" (that is, the *wāw*) can also be used the way the several "and" and the joint "and" are used. There is a third possibility in the case of the Arabic "and" (*wāw*), namely, that it indicates order between A and B.

---

[62] *Miftāḥ*, 70–1.
[63] *Miftāḥ*, 56.
[64] Earl T. Crawford, *The Construction of Statutes*, 322–3.
[65] Crawford, *The Construction of Statutes*, 765.
[66] F. Reed Dickerson, *The Fundamentals of Legal Drafting* (Boston-Toronto, 1965), 76–85; Elmer A. Driedger, *Construction of Statutes* (Toronto, 1983), 15–8.

Therefore, a sentence in which A and B (as a subject combined through a *wāw*) share a single predicate (e.g., A *wa/*and B fulfilled a duty) can have several possible meanings:

1. The predicate applies to either A or B (A fulfilled a duty and B fulfilled a duty).
2. The predicate applies to A and B jointly but to neither of them by itself/himself/herself (A and B fulfilled a duty together, but neither of them fulfilled it alone).
3. The predicate applied first to A, then to B (A fulfilled a duty, then B fulfilled a duty).

If a jurist interprets the *wāw* in a certain context as indicating order between A and B, then, for example, the text that conveys the command ". . . wash your faces and hands" (Qur'ān 5:6)—as part of the ablution that is a prerequisite to each of the five daily prayers—means that one's face and hands must be washed in the order mentioned.

The issue of whether the *wāw* implies order among the words joined by it opens the door for another question: What are the possibilities for what the *wāw* can indicate with regard to temporal order between two items it joins? The *wāw* could theoretically be indifferent to temporal order between A and B (additive), could indicate temporal order between A and B (sequential *wāw*), or could indicate simultaneity between A and B (simultaneous *wāw*).

Muslim legal theorists have given some attention to the uses of this and other particles and prepositions. Zanjānī states that Shāfiʿī jurists agreed that the particle *wāw* implies sequence between the items it connects. When a text stating that circumambulation between the Meccan hills of *Ṣafā* and *Marwa* is among the rituals of pilgrimage to Mecca and the text mentions the two mountains in this order (*Ṣafā* then *Marwa*), Shāfiʿī jurists argue that circumambulation must begin from *Ṣafā* into *Marwa*. Ḥanafī jurists would agree that the circumambulation must be done in this order, but they would argue that the particle *wāw* is commonly used without the indication of a sequence. In a story about the children of Israel that is told in two verses in different parts of the Qur'an (Q: 2:58 and 7:161), the *wāw* is used to connect two commands to the children of Israel, and the order is different in each verse. In one of the verses the children of Israel are told to "enter the gate humbly and say 'Remove Thou from us the burden of our sins,' " while in the other they are told to "say 'Remove Thou from us the burden of our sins' and

enter the gate humbly." Ḥanafī jurists also argued that the use of the particle does not, in and of itself, imply (to the native speaker) any sense of sequence among the items joined by the particle (even though the particle occasionally conveys that sense in certain contexts). For these jurists, stipulating that the acts of ablution be done in the order in which they are mentioned in the Qurʾān (5:6) is unnecessary, whereas Shāfiʿī jurists insist that these acts must be carried out in the specific order in which they are mentioned based on the above principle.[67]

Isnawī explains that grammarians have disagreed as to whether it is more common for the *wāw* to be sequential, simultaneous, or simply additive. Applications from legally relevant language include the following. If someone makes the occurrence of two events a condition for his fulfillment of a certain commitment and mentions the two events in a certain order, separated by the *wāw* (and), would he/she be obliged to carry out that commitment regardless of the order in which the two acts occurred?[68]

Isnawī discusses three principles addressing the meaning and use of the *wāw* in different cases. From the author's presentation, it seems that Shāfiʿī jurists had not agreed on any one opinion regarding how this particle is usually used. In some cases, extra-textual circumstantial evidence had to be used to help the jurist determine, for example, that this particle indicates order rather than addition or simultaneous correlation. One of these cases is when person A, who has the authority to act on person B's behalf in both financial and family matters, is asked to "take a certain property from the wife of B *and* divorce her on B's behalf." The author states that the deputy has a duty to fulfill these two duties in this order, since a change in order may result in changing the financial position of the two ex-spouses. Thus, when doubt arises as to whether a person has a duty to do two things in a specific order, he/she must do so.[69]

Timurtāshī's interest in the interpretation of the letter *wāw* is addressed mainly in terms of vows and other statements that may be made by human agents (following Isnawī's interest in similar issues) in order to provide applications for them in Ḥanafī law.[70]

In Ibn al-Laḥḥām's *uṣūl*, the interpretation of the definite article "*al*" (the equivalent of "the" in English), is treated as follows. The article "*al*," we are told, followed by a noun in the singular form lends generality to

---

[67] *Takhrīj*, 53–7.
[68] *Tamhīd*, 208–14.
[69] Ibidem, 211.
[70] *Wuṣūl*, 172–6.

that noun. Thus, all kinds of sale are allowed based on the verse: "*wa aḥalla Allāhu al-bay'*" (God allows "all" sale). The English language indicates this generality by 1) the absence of both definite and indefinite articles or 2) adding the word "all," as we indicated. The problem an exegete/jurist faces here is that the definite article "*al*" is often used to refer to a specific, earlier mentioning of the same noun/term in the same context (*al al-'ahd*). This has caused jurists to disagree as to whether the "*al*" in the statement "*al-ṭalāq yalzamunī*" (I commit myself to divorce) makes this divorce a three-time divorce all at once (so that it exhausts all instances of divorce in the husband's power and may be equated with the general use of "divorce," in the sense of "all divorce") or whether it refers simply to the type of divorce familiar to Muslims who follow the teaching of the Prophet, which is one instance divorce.[71]

A fortiori *Analogy*

One way of understanding the main task of legal hermeneutics is to see it as an application of analogy or disanalogy between one case (that is decided based on textual argument) and another. In Chapter 65 of his work, Ibn al-Laḥḥām deals with this issue under the terms *mafhūm al-muwāfaqa* and *mafhūm al-mukhālafa*. When the Qur'ān prohibits saying the word "*uff*" to one's parents—a sound expressing displeasure or anger—*mafhūm al-muwāfaqa* allows us to infer the prohibition of other forms of inappropriate behavior with one's parents. This is, in effect, an inference based on the assumption that a case whose judgment was not mentioned in a text must be decided in a manner similar to that which the text mentions because of the similarity between the two cases. *Mafhūm al-muwāfaqa* technically includes all inferences by analogy based on a textual piece of evidence, but applying the term *mafhūm al-muwāfaqa* in cases of regular analogy (i.e., in cases where a ruling of textual provenance is applied to cases that are similar to those in which the ruling is applied by the text) in addition to cases of *a fortiori* analogy (cases where a ruling of textual provenance is applied to cases that are more relevant to the textual ruling) renders the term *qiyās* superfluous. Therefore, *mafhūm al-muwāfaqa* must be confined to *a fortiori* analogy

[71] *Qawā'id*, 265–71.

(cases like the prohibition of abuse of one's parents based on the prohibition of saying *uff*) and *qiyās* to regular analogy.

Expressio Unius Est Exclusio Ulterius

Another type of inference—this time by assuming disanalogy rather than analogy—is known as *mafhūm al-mukhālafa*, which is inference based on the assumption that a case whose judgment was not mentioned in a text must be decided in a manner opposite to the one mentioned in the text. When a text specifying the amount of *zakāh* taxes to be collected from sheep owners mentions the adjective "grazing on natural grass" (*sā'ima*) after the noun "sheep," a jurist would infer (based on *mafhūm al-mukhālafa*) that the case of sheep that are not grazing on natural grass must be decided in an opposite manner.[72] This is similar to the canon *expressio unius est exclusio alterius* (expression of one thing is exclusion of the other), although this canon of statutory construction is often used when the lawgiver offers a list of things that should be judged in a certain way, whereby it is inferred that things not mentioned in this context are excluded from the judgment. For example, when a statute enumerates the matters over which a given court has jurisdiction, then we must exclude other matters and judge them as irrelevant to that court's jurisdiction.[73]

Isnawī distinguishes between different types of expression of a given thing (or qualifications thereof), since that expression may be made through an adjective, a conditional clause, or in other ways. Most Shāfi'ī legal theorists accept the principle that regular qualifications must be considered in interpreting a text, while legal theorists such as Āmidī and Rāzī doubt the validity of the general form of the principle. Isnawī identifies cases in which this principle can be more valid than others. One such case is when there is textual or circumstantial evidence supporting the idea that the qualification is intended to limit the class that it qualifies to the sub-class delimited by the qualification. This could occur, for example, in the case in which such a qualification is given in an answer to a question, which provides circumstantial clues for the exact meaning of the qualified term in the text.[74]

---

[72] *Qawā'id*, 367–75. See also, 314, where the author deals with the question of whether *mafhūm al-mukhālafa* is general in its indication or not.

[73] Crawford, *Construction*, 335. A reservation about the utility of this canon has been expressed by judges and academic jurists alike. Crawford, 337.

[74] *Tamhīd*, 145–63.

Determining Preponderance among Conflicting Texts

In the section concerning conflict among texts and how to determine preponderance among them, Tilimsānī draws on and augments early discussions he cited concerning internal and external critiques of textual sources of law. External critiques of the textual sources relate to the *sanad* or chain of authorities conveying the text to us, while internal critiques relate to the content of the texts.[75] We have provided examples of the comprehensive considerations of a jurist who sets out to look at a practical legal matter (that is, how such a jurist looks at the authoritativeness of textual sources, their chronological priority, conflict in content, etc.). The final quotation below is an example of how determining preponderance among conflicting textual sources of law may decide a practical legal matter.

When a conflict occurs between two Sunna texts, one relating something the Prophet said and one relating something that he did, the former is presumptively preponderant over the other, according to what Tilimsānī calls the correct view. He states:

> Determining preponderance among texts based on content [of the texts] takes ten forms: First, when one of the two texts relates a statement and the other relates an act, then the statement is weightier, according to the correct view. An application of this is our fellows' [Mālikīs]' favoring of the Sunna report on the authority of ʿUthman (d. 656) which states that the Prophet (peace be on him) said, "let the pilgrim neither marry nor give others in marriage" over the Sunna report on the authority of Ibn ʿAbbās (d. 688) that the Prophet (peace be on him) married Maymūna (d. 672) while performing his own pilgrimage. The reason for this preference is that the act can be specific to certain circumstances and does not constitute a general and continuing legal determination (*ḥukm*), whereas a verbal statement is otherwise.[76]

Conclusion

The examples presented in this chapter provide a glimpse into how legal hermeneutics can be viewed as part of a seamless web of legal reasoning beginning with Qur'ānic and Sunnaic language and ending with answers to everyday practical legal questions. Other aspects of legal theory beyond hermeneutics will be explored in the following chapters.

---

[75] *Miftāḥ*, 118–26.
[76] *Miftāḥ*, 122.

CHAPTER SIX

EXTRA-TEXTUAL SOURCES OF THE LAW

One view of Islamic legal theory considers the two textual sources of the law (the Qurʾān and the Sunna of the Prophet) to be, not only the first and second sources of the law in Islam, but also the core of Islamic legal theory and, ultimately, *the only sources of the law* proper. This raises questions about what it means to speak of extra-textual sources of the law, such as consensus, legal analogy, reasoning based on acceptable utility (*maṣlaḥa*), and other sources of law in Islam.

According to the above view, consensus (*ijmāʿ*), which is generally considered the third source of the law, must be, in effect, a reference to textual sources of Islamic law. The authoritativeness of consensus is founded on a Sunna text, in which the Prophet proclaims that the Muslim community "*does not agree on a mistaken view*" (*lā tajtamiʿ ʿalā ḍalāla*), which establishes the infallibility of the Muslim community as a collective entity. Based on this text, one could argue that every consensus translates the Prophet's will and thus qualifies as a textual source of the law. Further, consensus can be indicative of lost textual sources of the law, since an agreement on a given view among Muslims or Muslim jurists of an earlier generation indicates that those who held that agreed view may have had access to a Sunna text which has been lost to later generations (text-recovering consensus). Consensus can also be an agreement to uphold an acceptable interpretation of a text or group of texts on a given matter (exegetical consensus.) In either case, consensus does not add to the content of the texts; it merely transmits or interprets texts. Legal analogy (*qiyās*) is a tool through which jurists interpret a text as governing cases analogical to those explicitly mentioned in the text. Analogy is, therefore, a tool of legal hermeneutics rather than an independent source of the law. The same can be said about reasoning by *istiṣlāḥ*, which allows jurists to rule based on an understanding of utility that can be deemed legitimate in the eyes of the lawgiver (i.e., utility that is compatible with the Qurʾān and the Sunna). Applying *istiṣlāḥ* ultimately helps jurists decide practical legal cases on the basis of inferences from hints already in the texts.

There is a grain of truth in this view, but, taken as a description of the Islamic legal system as it has developed historically, it suffers from a

number of inaccuracies and obscures important facts. First, consensus can be a source of law in its own right (institutive consensus), i.e., without simply conveying the content of a lost text or interpreting an existing text or group of texts, unless one uses a broad sense of interpretation that finds some (authentic or unauthentic) text from the Sunna as a basis for every consensus. Second, Islamic juristic reasoning has employed numerous rational arguments as sources of the law. Such arguments are independent of the law's textual sources. If Muslim jurists had confined themselves in their legal opinions to direct hermeneutical tools such as the ones discussed in the previous chapter, their ability to develop a sophisticated legal system would have been appreciably impoverished. Sophisticated legal systems must have a stock of juristic tools to answer real-life questions with adequate efficacy. Somewhere between the ideals of the texts and the vagaries of everyday reality, the human capacity for judgment and discernment must work to secure a place for the transcendental in mundane human life. By and large, this seems to have been the predominant view held by practicing Muslim jurists.

In Chapter Two of this study, I offered a critique of the view that reduces *uṣūl al-fiqh* to legal hermeneutics as represented in the writings of Ibn Khaldūn on the history of law and legal theory in Islam. This chapter will be dedicated to offering examples of how extra-textual *uṣūl* play a role in the making of Islamic law. The presentation of sources of law in the six works under study here gives a good idea of the variety of these sources and their utilization in producing legal opinions in practical issues.

Extra-textual sources of Islamic law are abundant. In addition to the Qur'ān, the Prophet's Sunna and the explicitly rational and extra-textual forms of legal reasoning, the sources of Islamic law include the views of the Prophet's Companions, pre-Muḥammadan laws, the general principle of acceptable utility (*maṣlaḥa*), and acceptable Islamic custom and behavior (*'urf*).

Lost Textual Sources

In Tilimsānī's work, a category of legal argument is identified as *al-mutaḍammin li-l-dalīl* (an argument comprising a source of law), by which the author means the consensus of all Muslims and the views of the Companions of the Prophet. Tilimsānī writes:

> That which a legal scholar employs in an argument (*mā yatamassak bihi al-mustadill*) which implies a basis for the legal view (*mutaḍammin li-l-dalīl*) may be of two types: consensus and the view of a Companion of the Prophet. These two imply a [sound] basis for the legal view (*mutaḍamminayn li-l-dalīl*) only because the totality of Muslims (*umma*) and the Companions are prohibited from ruling in a given case without relying on a [sound] basis for it (*dalīl shar'ī*).[1]

For Tilimsānī, the consensus of the Companions or the whole of the Muslim community is an indicator of lost Sunna texts (the Qur'ān's integrity being above question). This raises many issues. Is it required for a consensus that all the members of the community agree on a given view? Does the reported disagreement of one or two members of the community vacate a consensus? Does this consensus have to be expressed verbally by each and every member of the community of the Companions or the entire Muslim community? Or, is it sufficient that some members express a view and others endorse it by silence?[2]

A consensus that is a combination of expressed views and silent endorsement is known to Muslim jurists as tacit consensus (*ijmā' sukūtī*). Tilimsānī gives examples of practical legal questions about which jurists disagree based on their disagreement over the authoritativeness of tacit consensus. For example, 'Umar Ibn al-Khaṭṭāb (d. 644) ruled that if a woman is married to two people and only one of the two marriages has been consummated, the unconsummated marriage must be nullified. This ruling was accepted by the Companions despite the fact that they did not explicitly express their agreement with 'Umar on it; they simply kept silent about it, *ergo*, they endorsed it. Those who do not accept the authoritativeness of this type of consensus are not bound by 'Umar's view, considering it nothing but the view of one individual (and may therefore decide the case differently).[3]

On the authoritativeness of the view of a Companion of the Prophet, Tilimsānī writes:

> The view of a Companion (*qawl al-ṣaḥābī*) is a matter of disagreement: is it authoritative or not? Those who believe that it is authoritative cite as proof for their view the Prophet's statement "my Companions are like guiding stars, in whomsoever you should take guidance, you will be

---

[1] *Miftāḥ*, 164.
[2] *Miftāḥ*, 164–6.
[3] *Miftāḥ*, 165.

> guided." An application of this is as follows. Our fellows [Mālikī jurists] argue that, if a man said to his four wives "all of you are as unlawful to me as my mother" (*antunna ʿalayya kaẓahr ummī*), then the man owes only one expiation [as if he addressed only one wife], based on Ibn ʿUmar's statement (God be pleased with him) 'whoever pronounces the utterance of *ẓihār* [the above statement] with four women owes only one expiation.' Abū Ḥanīfa's view is that 'a Companion's view is authoritative only when it goes against simple rational reasoning (*qiyās*), since only then could one assume that his/her view is not the outcome of the Companion's own reasoning (*raʾy*), and only then should we assume that it ultimately conveys a revelation (*tawqīf*); but if the Companion's view agrees with simple rational reasoning, then it cannot be authoritative, because it might be based on his/her own reasoning (*raʾy*).' An example of a Companion's view diverging from *qiyās* is ʿĀ'isha's view (God be pleased with her) that 'the longest a fetus lives in the womb of its mother is two years,' since this specification cannot be reached based on reasoning. An example of [a view] agreeing with *qiyās* is Ibn ʿAbbās' view that 'two brothers cannot be equated with a group of brothers' [and therefore, Qurʾānic verses addressing inheritance wherein 'brothers' are mentioned as inheritors must be interpreted as addressing cases where the deceased has at least three brothers rather than two.][4]

The Companions can be seen as 1) *confidants of the Prophet and bearers of the Prophet's message* to us (thus purporting to convey textual sources of the law) or 2) *agents who exercise their own reasoning*. The discussion of the Companions' views as sources of law, however, is a venture beyond *known* guidance from God and His Messenger into *possible* guidance from them. This controversial source of the law begins to take us away from hermeneutical processes and farther afield from direct revelation. Juristic consensus takes us yet another step farther.

Juristic Consensus

One of the non-textual sources of the law is juristic consensus, which Isnawī treats after dedicating two chapters to the two textual sources, the Qurʾān and the Sunna. Isnawī writes:

> Consensus is the agreement of qualified jurists (*mujtahidīn*) among the people of the Prophet Muḥammad (peace be on him) on a legal determination (*ḥukm*). And it is authoritative [as a source of law]. In the chapter on

[4] *Miftāḥ*, 166–7.

adjudication (*qaḍā'*) in his book *al-Baḥr* (the Sea), al-Rūyānī (d. 920) related on the authority of some jurists (*ba'ḍihim*) that it [juristic consensus] cannot be authoritative (*ḥujja*) unless the reportedly unanimous view of these jurists is accompanied by the practice corresponding to this view, so that their view can be confirmed. [Concerning the situation in which] some of the jurists expressed their view on a legal matter, and the rest of the jurists were aware of that view and remained silent and did not attack that position, there are different positions (*madhāhib*). *The most sound of these positions, according to the Imām Fakhr al-Dīn [i.e., al-Rāzī (d. 1209)], is that it is neither consensus nor authoritative*, since [a silent jurist] may have decided to suspend his/her judgment on that matter or might have believed that every jurist of sound qualifications (*mujtahid*) is ultimately correct [even if he/she disagrees with other qualified jurists]. Rāzī and Āmidī (d. 1233) said that this was the view of Shāfi'ī (d. 820). In his book *al-Mankhūl* (the Filtered), Ghazālī (d. 1111) said that Shāfi'ī explicitly stated this position among his latter views (*al-jadīd*). In his book *al-Burhān* (the Proof), Juwaynī (d. 1076) said that this was the prima facie position of Shāfi'ī (*ẓāhir madhhab al- Shāfi'ī*). Juwaynī said that one of Shāfi'ī's elegant statements [in this context] was "a silent person cannot be considered/said to have stated anything by his silence" (*lā yunsab ilā sākit qawl*)." This applies to silence that has not been repeated. If the silence is repeated in different circumstances, then it would constitute a consensus that would be authoritative in the view of Shāfi'ī, according to Ibn al-Tilimsānī (d. 1369). Tilimsānī said: thus, Shāfi'ī established the authority of analogy and mono-chain Sunna reports (*al-qiyās wa khabar al-āḥād*) based on that argument [i.e., that the silence of the juristic community indicates the latter's approval of juristic reasoning by analogy and mono-chain Sunna reports, which makes them authoritative], because such silence was repeated on different occasions. Ibn al-Tilimsānī's reporting is correct. The Imām [that is, Fakhr al-Dīn al-Rāzī] was confused in his book *al-Ma'ālim* (Milestones) when he said that that was a contradiction on the part of Shāfi'ī. *The second position is that we know that it is consensus only when the people of the whole generation, who were silent about a certain view, have all died*, since their persistence in their silence until their death makes it unlikely [that it was just a coincidence]. *The third position is that it is not a consensus, but is authoritative*, because it is reasonable to assume an agreement [whether or not it is comprehensive so as to assure a consensus]. Ibn Abī Hurayra (d. 956) said that, if the one whose view was reported was a judge, then [the silence of other jurists] neither constitutes a consensus nor an authoritative position. Otherwise [i.e., if not a judge], it would be [an authoritative consensus]. *Another position reported on the matter is that it would be an authoritative consensus without qualification (muṭlaqan)*. Āmidī chose the third position, and Ibn al-Ḥājib (d. 1249) agreed in his *al-Mukhtaṣar al-Kabīr* (Elaborate Summary). In his *al-Mukhtaṣar al-Ṣaghīr* (Terse Summary), he confined himself to either of two positions: 1) that the situation described above is a consensus or 2) that it was authoritative. Āmidī's postion, which we reported, is specific to the case in which the jurists of the generation (under consideration) have not

> died. After the end of the generation, however, his position is that this would be a consensus. That is what he stated on the question of the end of a generation (*mas'alat inqirāḍ al-ʿaṣr*). Māwardī (d. 1058) and Rūyānī made a distinction between different cases in the chapter on adjudication [in their respective works]. They said that if such agreement occurred in any generation other than that of the Companions, then it would not have any effect or value (*lā athar lah*), while if it was in [the Companions'] generation, then, if it concerned a matter that could not be ameliorated once judged mistakenly (*fī mā yafūt istidrākuh*), such as the shedding of blood or the violation of the sanctity of honor, then it would be a consensus. If it pertained to other matters, such as a question of property, then it would be authoritative [but not necessarily a consensus]. On the question of whether it is a consensus there are two views inferred from Shāfiʿī's language (*wajhān*).[5]

The above quotation touches on many questions related to consensus as a source of law and whether consensus should be limited to the generation of the Companions. Some legal theorists held that a circumstance can occur where one cannot be sure that a consensus has occurred in a previous generation but may consider it easier to determine that some type of agreement among jurists of an earlier generation has occurred, which should be seen as an authoritative source of law. Given the complexity of the subject, the position of a number of legal theorists, including Shāfiʿī, has been misrepresented or in some cases never determined with certainty.

In my view, the most intriguing of all the questions related to consensus is the one discussed above, viz. whether consensus can occur when a jurist or a group of jurists expresses a view on a legal matter and the contemporaries of these jurists remain silent. In the practical section related to his theoretical discussion of whether silence constitutes a position, Isnawī examines the principle of tacit approval in practical legal matters.[6] I pointed to a treatment of this principle in Tilimsānī's discussion of a tacit consensus among the Companions. This principle, which is also to be found in books of legal maxims (*qawāʿid fiqhiyya*), goes as follows: "a silent person cannot be said to have indicated anything by his/her silence" (*lā yunsab ilā sākit qawl*). Since the authoritativeness of tacit consensus is based on the assumption that silence indicates a position on a given issue (as silence was taken by some legal theorists to indicate agreement with the common opinion), this reasoning must be examined

---

[5] *Tamhīd*, 451–3.
[6] *Tamhīd*, 453–6.

in dealing with specific legal cases. For example, people's lack of objection regarding the uprightness (good character) of a witness is sufficient to establish his/her uprightness for the judge (just as the silence of those present before an altar where two people get married can be taken as an indication that they have no objection to the marriage.) Another example is that endorsement of marriage could be indicated by the mere silence of a girl known to be shy (usually jurists assume that a girl who has not married before would be shy to explicitly express her consent to a marriage offer).[7]

In the rest of the chapter, Isnawī deals with the possibility of abrogating a consensus by another, whether disagreement resulting in two opinions gives rise to an implicit consensus limiting valid views to these two positions (and thereby disapproving of any third position), and the question of how much change in a given case originally decided by consensus would render the original (consensus-based) decision inapplicable.[8]

Rational and Amalgamated Sources of the Law

Rational sources of the law include reasoning by analogy, which Tilimsānī considers an amalgamated source of the law that utilizes textual and rational elements. A purely rational source of the law does not include any textual elements. An example of this is the principle that when an act can be considered either permissible or prohibited, and arguments fail to establish either position with certainty, permissibility must be taken as the default position. At any rate, rational and amalgamated sources of the law share the quality of being extra-textual (partially or fully). I will address some of these sources in this section.

Zanjani's work includes three *uṣūl* principles concerning legal analogy.[9] The very first principle presented in the book concerns whether one should assume that the rationale behind God's laws is discernable. This theological/metalegal question is known as the issue of *taḥsīn/taqbīḥ ʿaqlī* (judging actions as good or bad based on the human intellect). The Muʿtazilites are known for advocating that the intellect is capable of realizing the characteristics of a given act that make it good or bad, while

---

[7] *Tamhīd*, 454.
[8] Ibidem, 456–9.
[9] *Takhrīj*, 38–46, 47–9, 19.

other theologians have insisted that this is not always possible and that it is God's law that ultimately informs us of the goodness and badness of an act. Ḥanafī jurists of Māturīdite persuasion, whom Zanjānī refers to as "theologians/legal theorists who follow Abū Ḥanīfa," agreed with the Muʿtazilites that the intellect can discern the rationale of many of God's laws and must therefore be used in issuing legal decisions in cases for which no practical legal determination (*ḥukm*) is known. Shāfiʿī, who rejects legal analogy in some matters, denied the intellect's ability to discern the majority of God's laws and prefers to assign to the intellect a less significant role in issuing practical legal determinations in such cases. Shāfiʿī argues that God's punishment of sinners and infidels [whether this-worldly or in the hereafter] does not benefit anybody, but such punishment is acceptable to all believers. Furthermore, God challenged those who reject the authority of the Qur'ān to author the like of ten or even one of its verses and ordered the angels to tell Him the proper names of things whose names they did not know—all examples of God's burdening His creation with the impossible, which cannot be rationalized according to our unaided intellect. Shāfiʿī concludes that it is far too ambitious to aspire to explaining all of God's laws or even the majority of them by our intellect. The ramifications of this disagreement include Shāfiʿī's insistence that only water is appropriate for removing impurity (e.g., cleaning a shirt to make it appropriate to wear during the prayer), while Ḥanafī jurists, following their teacher, find any ritually pure liquid appropriate for this purpose. Similarly, Ḥanafī jurists accept using wine made from dates to perform ablution while traveling when water is lacking, which Shāfiʿī jurists reject. In both cases, Ḥanafī jurists extend the use of analogy beyond what is acceptable to Shāfiʿī jurists.

The second question related to analogy that Zanjānī addresses is whether, when the rationale behind a given practical legal determination or *ḥukm* is discernable from a given text, that rationale should be limited only to the cases directly addressed in the text. For example, according to Sunna texts, breaking the fast on a Ramaḍān day by deliberate sexual intercourse requires expiation. The question, then, becomes whether the rationale for that expiation should be limited to cases in which fasting is broken by sexual intercourse—which Shāfiʿī jurists hold—or whether it should be extended to all deliberate breaches of fasting, including breaches by eating or drinking. Ḥanafī jurists hold that a rationale can be called a rationale only when it must be extended to encompass cases not mentioned in the texts. Another practical application concerns texts indicating that breaking wind, urination or

excretion breaks one's ablution and makes necessary renewal of ablution prior to performance of the prayers. Ḥanafī jurists conclude that whenever an impure substance comes out of the body (including blood, for example), the ablution has been broken. Shāfiʿī jurists, however, limit the rationale to the cases mentioned in the text.

The third and last direct[10] treatment of legal analogy in Zanjānī's book concerns the question whether a practical legal determination known to be an exception in its class can constitute the basis of legal analogy. For example, jurists have debated whether the ruling (known from a Prophetic report) that male next-of-kin must share the responsibility of paying blood money incurred by their family members—which is an exception to the general principle of limiting criminal responsibility to the criminals themselves—should be extended to all criminal acts against the human body. Shāfiʿī jurists argue that such extension is unacceptable, while Ḥanafī jurists argue that it is.[11] In the treatment of these three questions, one can identify a tendency in Ḥanafī jurisprudence to enlarge the scope of rational reasoning and a tendency in Shāfiʿī law to limit such reasoning in favor of a more strictly textual approach.

As stated earlier, in Tilimsānī's scheme of the sources of the law, amalgamated (i.e., mixed from rational and revelatory elements) sources include analogy, which is discussed with quite some elaboration. In this discussion Tilimsānī deals with the four components of analogy: (1) a case with a known practical legal determination (*aṣl*), 2) the practical legal determination of that case (*ḥukm*), 3) a case with an unknown practical legal determination (*farʿ*), and 4) a rationale shared by both cases (*ʿilla*). Tilimsānī explains the conditions that must be met for the application of a sound and acceptable analogy.[12]

Let us consider the conditions that must apply to the fourth component, the rationale (*ʿilla*) or *ratio legis* as some writers call it. A rationale must be capable of being described with some precision. We know from the Sunna of the Prophet that when Muslims travel, they are allowed to shorten some of their daily prayers. Can "*mashaqqah* (the exertion of significant effort)" be a rationale for shortening the prayers during a trip? The answer is no, considering that people's standards for defining

---

[10] A case that may be seen as an indirect treatment of legal analogy is found on pages 162–7, where the author deals with the question of *mafhūm al-khiṭāb*. This is a hermeneutical principle which Ibn al-Laḥḥām also discusses, as we indicated in Chapter Five.

[11] *Takhrīj*, 183–5.

[12] Ibidem, 130–59.

significant effort are quite different. By contrast, "traveling for a certain distance" is sufficiently measurable and therefore can be a rationale for shortening the prayer. Thus, to infer from the texts that mention the Prophet's shortening of the prayers during traveling that the rationale is the exertion of significant effort would be contrary to this principle.

While legal analogy still carries an aspect of the textual basis of the law, purely rational sources of the law can be found in the discussion of *istiṣḥāb* (assuming default positions). The principle of *istiṣḥāb* appears as the only purely rational source of law in Tilimsānī's work. Tilimsānī initially states that one type of *istiṣḥāb* relies on knowledge of a legal determination (*istiṣḥāb ḥukm sharʿī*), that is, it might be based on a default position implied in a textual source. Later, however, he raises doubt about this possibility, emphasizing that it is rare (*qallamā yatimm*). He writes:

> Be advised that there are two types of *istiṣḥāb*: 1) an *istiṣḥāb* presumption based on sensory knowledge or reason (*istiṣḥāb amr ʿaqlī aw ḥissī*) and 2) an *istiṣḥāb* presumption based on knowledge of a legal determination (*istiṣḥāb ḥukm sharʿī*). This second type of argument is acceptable for us (Mālikīs) and for Shāfiʿī (d. 820), because it establishes the probability (*ghalabat al-ẓann*) that what has been known to be the state of affairs (*status quo*) has not changed, but it is rare that such a claim is not countered by another *istiṣḥāb* or by reasonable proof that the presumed *status quo* has changed. An example of the first case, which is when an *istiṣḥāb* presumption is countered by another, is an argument made by some of our fellow Mālikī jurists that, if merchandise that has been sold is destroyed and disagreement arises between the two parties [to the sale] as to whether the merchandise was destroyed before or after the contract, then to argue that the liability belongs to the buyer is to argue that the merchandise existed before the contract and was free of imperfections [not stated in the contract; otherwise the sale would have been impossible or invalid, whereas its occurrence and validity is acknowledged by both parties]. The merchandise, therefore, should be presumed thus [i.e., existing and free of unstated imperfections] until a point at which one has to assume its destruction has occurred, which is after the contract that made it the property of the buyer; therefore, it was destroyed when it was the property of the buyer (*halakat ʿalā milk al-mushtarī*). Those among our fellow Mālikī jurists who disagree counter that the buyer is free of liability as a presumption [since he does not own the merchandise for certain until it becomes his undisputed property], and this presumption of lack of liability must be assumed to continue to apply (*wajab istiṣḥāb tilka al-barāʾa*), and therefore, there is no liability for the buyer. It is by determining which one of the two *istiṣḥāb* presumptions is stronger that this case would be decided.[13]

---

[13] *Miftāḥ*, 126–7.

There are many *istiṣḥāb*-type presumptions that govern juristic thought. When an argument for a prohibition does not establish that prohibition with certainty, a presumption of permissibility rules as a sound default position. Another is what is known to us as "the presumption of innocence" for non-convicted defendants in criminal cases. The Arabic term *al-aṣl barāʾat al-dhimma* (no liability exists until it can be proven) shows how the same presumption applies in civil cases (such as the one mentioned above) where claims of responsibility or liability are made. Tilimsānī deals with aspects of *istiṣḥāb* and cases where more than one *istiṣḥāb* presumption may contradict one another. Tilimsānī finally discusses the possibility that our certainty about a given legal determination may stand as a source of *istiṣḥāb* until proof is established that that legal determination has changed, stating, as we said, that this is a rare possibility.[14]

Timurtāshī also mentions *istiṣḥāb al-ḥāl* or the presumption of continuity of a judgment that is known for certain until evidence to the contrary is found. One application he mentions is the case where evidence supports that person A owes money to person B and no evidence exists to prove that this money has been paid. Based on the principle of *istiṣḥāb al-ḥāl*, the burden of proof regarding the payment lies on A's shoulders. Ḥanafī jurists debate the validity of this principle, and Timurtāshī mentions nine examples in which he believes it does not apply. One of these (in the above case) is that when A is dead, the required evidence must prove that A had not paid his debt all the way up to his death (and not only up to a certain point before his death after which no proof of payment is available). Another application of this principle, which Ḥanafī jurists debate, is found in the following case. Person A has been missing for some time and has not been declared "dead" by a judge. If one of A's relatives (C) dies and A would have been eligible for inheritance from C if he were available, A may claim his inheritance as long as C's death preceded any judgment of A's presumed death. Timurtāshī argues against the use of *istiṣḥāb al-ḥāl* in this case, saying that such reasoning would be valid with regard to A's retention of money he had already owned before he went missing but not with regard to gaining additional money. Thus, A would in effect be presumed alive with regard to his money and dead with regard to other people's money.[15] With examples like these, Timurtāshī reveals the limitations of reasoning based on *istiṣḥāb al-ḥāl* from his standpoint.

---

[14] *Miftāḥ*, 126–8.
[15] Ibidem, 278.

Utility

Muslim jurists speak of *istiṣlāḥ* or the consideration of *maṣlaḥa* in issuing practical legal rulings. *Maṣlaḥa* is the utility or benefit drawn from an action or a thing. *Istiṣlāḥ* is the principle that *things or acts of utility* are to be judged desirable in the eyes of the law in Islam.

When translated as "the good"—whether of the individual or the public—the term *maṣlaḥa* evokes Aristotelian themes that are not relevant to the Islamic context and tend to disorient rather than guide the reader. On the other hand, translating *maṣlaḥa* as "interest" bring to mind for an Anglophone readership an overly narrow and perhaps too materialistic concept of *what is of use*. The words "benefit" and "utility" could also be seen as inadequate translations of *maṣlaḥa*, but using either of these is much better than speaking of "the good" or "interest." Even more problematic is using the term "utilitarianism" to speak of *istiṣlāḥ* or the consideration of *maṣlaḥa* as a source of law in Islam, since "utilitarianism" is inseparable from debates around the nature of legitimate utility in a sense associated more narrowly with societal well-being, and may be seen as hostile to any notion of natural rights.

Some ethicists speak of "contractualism" and "utilitarianism" as the two basic categories of ethical theory. The starting point for moral inquiry in contractualism is (real or fictional) agreements people make and according to which they act. Here the needs of individuals determine what is morally acceptable or repugnant, and collective utility may be taken into account only in the context of considering the needs of individuals. Utilitarianism, by contrast, is a theory that aggregates welfare, i.e., adds "together in some way the welfare of all individuals" who are part of the society. In this context, there are two types of utilitarianism: direct and indirect. Direct utilitarianism examines which *acts* may be "justified in terms of maximizing welfare," while indirect utilitarianism looks into which *rules* or *practices* would best achieve this objective.[16]

In Islamic law, jurists' emphasis on freedom of contract in matters of property and the like is as strong as their emphasis on the importance of both individual and collective *maṣlaḥa*. However, contracts (whether factual or fictional) govern a very small area of law and morality in Islam. One might therefore be led to conclude that the predominant

---

[16] Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA, 1985), 75.

theory governing legal and moral obligations in the realm of Islamic law and ethics is probably a form of indirect utilitarianism. In addition to the caveats presented above, another reservation, in my view, remains that if utilitarianism must imply any extreme form of consequentialism (the view that the goodness of the good hinges on its consequences rather than any innate quality in it), then speaking of an Islamic utilitarianism is at least based on an awkward proposition, since it would be attempting to ignore the fact that Muslim juristic discourses have applied aspects of a deontological notion of the good.[17]

Utility is a source of law in Islam only in the peculiar sense in which this notion is understood by Muslim jurists. To Muslim jurists, *competing* "utilities" must always be considered before deciding which utility is most relevant or most worthy of trumping others. *Maṣlaḥa* is not confined to worldly benefits, and, on the whole, the notion of *maṣlaḥa* represents a concept of utility unbound by the principles of rule utilitarianism or welfare utilitarianism addressed in Anglo-American legal theory. Rather, utility in this specific sense is *a source of law in cases where the textual sources of the law have not explicitly stated the will of the lawgiver* (hence, *maṣlaḥa mursala*, i.e., not *specifically* approved in texts). The qualification "specifically" is important here, since ordinarily utility must somehow be approved in the language of the lawgiver (God or the Prophet) to qualify as acceptable and operative in deducing legal rulings. When utility is so clearly deducible from the language of a textual source, one need not call the inference a use of reasoning based on utility; rather, it would qualify simply as a use of the textual source.

Isnawī's acceptable extra-textual sources of the law include the principle that "things of utility are presumptively allowed" (*al-aṣl fī al-manāfiʿ al-ibāḥa*).[18] This principle creates a link between *istiṣḥāb* and *istiṣlāḥ*. *Istiṣḥāb* is a logical principle of inference, according to which the jurist decides matters based on available knowledge until such knowledge is reversed or negated. Thus, when the default "ruling" is permissibility, a jurist will judge an act to be "permissible" until proof of its prohibition is available. *Istiṣlāḥ* is the principle of considering things of utility desirable in the eyes of the law. Thus, jurists will rule it permissible for people to consume a newly cultivated type of plant if it appears to be beneficial to

[17] In my view, Muslim jurists employ a notion of the good that is neither purely deontological (the view that the goodness of the good depends on innate qualities in it rather than its bringing about good things in the world) nor purely consequentialist.

[18] *Tamhīd*, 487–9.

the body, but if evidence causes a change in the judgment that this type of plant is beneficial, the jurists will change the ruling of "permission." If harm can be ascribed to a certain act, jurists will consider assigning it the ruling of "reprehensible" or "prohibited."

Custom

When later writings on Islamic legal theory speak of *ʿurf* (custom) as a source of law, they are saying that custom may be a source of law that, in a sense, competes with texts. To be sure, there are cases where one might come to believe that, in the eyes of some Muslim jurists, custom has come to not only compete with but indeed trump textual sources, and I will offer examples of that shortly. Custom can be a source of the law in many ways. For example, when a person makes an oath not to eat meat (and fish does not qualify as meat in his/her customary language use), then his/her eating fish cannot be a violation of their oath. The fact that a person's use of a certain word does not encompass a certain class of things limits that person's liability (based on his/her oath) to what is included in his/her customary use of the word. Thus, the legal ruling would be that this person violated his/her oath, if it were not for his speaking habits or *ʿurf*.

But things may get more complicated: What about when customary use of language involves metaphorical language use, while another (regular = non-metaphorical) use remains in currency (even if the latter is not the first thing that comes to the native speaker's mind)? In this case, the customary use is the more common use, despite the fact that it is a metaphorical one, and the regular, non-metaphorical, use is the less common. Muslim jurists differ on this question. In Ḥanafī law, Dabbūsī informs us, jurists have disagreed whether such common, metaphorical (customary) use trumps the regular uncommon use of a certain expression. Abū Ḥanīfa believes that a regular acceptable (though uncommon) use trumps all metaphorical (albeit common) uses, while Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī hold the opposite view. Here is an application for this theoretical disagreement. If a man swears not to eat wheat, then people are likely to understand that he would include bread made out of wheat among the items he prohibits for himself. But using the word wheat to indicate bread is a metaphorical use that is simply very common. Thus, Abū Ḥanīfa holds that the man does not violate his oath by eating wheat-based bread, while Abū Ḥanīfa's two students

hold that this act would make the man responsible for the appropriate compensation for breaking his oath.[19]

The relationship among custom, common sense, and language use offers an interesting dimension to the discussion of custom as a source of law in any legal system, and more juristic disagreements in Islamic law revolve around *ʿurf* than one might expect. One way of looking at the link between these three is to consider all questions of language use and simple logic as part of the question of custom. From that vantage point, most discussions of legal hermeneutics could be seen as relevant to the discussion of custom as a source of law. But many discussions of how customary use may trump more authentic or original uses will remain relevant to the discussion of custom to some extent. Isnawī, for example, discusses the question whether a man who made an oath not to drink *fuqqāʿ* (a word indicating *nabīdh*[20] in some Arabic dialects) breaks his oath if he drinks *nabīdh*, a question which turns on whether these two drinks are considered the same or not. The author states that considering *fuqqāʿ* a form of *nabīdh* is accepted in correct language use, but *fuqqāʿ* is not usually called *nabīdh*.[21] Controversy arose among Shāfiʿī jurists as to whether regular or customary use of language should prevail in this case, with Ghazālī and Rāzī on the side of customary use and others arguing that customary use cannot be determined conclusively. Many Shāfiʿī jurists vacillate between these two viewpoints, as Isnawī alludes, but the controversy makes clear how jurists of different schools have considered customary use of language at least an important consideration in determining legal rulings based on commitments communicated through language.[22]

Language aside, custom is still part of many aspects of life. The Prophet of Islam established customs regarding measuring certain produce or crops by weight or size for trade purposes, but local custom in many Muslim societies goes against the Prophet's practice. This is an important issue in Islamic law, partly because in Islamic markets usury has been conceptualized in terms of providing additional amounts of certain goods in barter transactions. For example, when a person A exchanges one pound of dates today for one and a half pounds of dates to be delivered a month later, the additional amount of produce (half a pound) is considered a prohibited, usurious reward.

---

[19] *Taʾsīs*, 75.
[20] A prohibited drink in the eyes of Shāfiʿī jurists.
[21] *Tamhīd*, 232.
[22] *Tamhīd*, 230–2.

If the Prophet's practice of selling a certain crop based on its weight or size is not seen as authoritative, then some of these usury principles will collapse or at least will need considerable modification. Yet, Muslim jurists have still disagreed as to whether people's customs in buying and selling trump the Prophet's standards. If a country or town measures by size what the Prophet measured by weight and vice versa, Abū Yūsuf holds that custom here essentially prevails over text. Some jurists hold that that country or town may have to change its customs. According to Dabbūsī, Muḥammad Ibn al-Ḥasan al-Shaybānī holds that the Prophet's standards remain authoritative, and such a town must begin to establish new habits for its trade. Part of this disagreement addresses whether the political authority can establish a custom or a ruling against Prophetic practice, since the laws made by political authorities help establish custom. In such cases, the view of Abū Yūsuf will be more flexible with the political authorities as it is with local customs, whereas that of Muḥammad Ibn al-Ḥasan al-Shaybānī will insist on the authoritativeness of the Prophet's standards.[23]

Even when jurists agree that the Prophet's standard has to be used, interpreting the Prophet's measurements in new (non-Arabian) markets has led to some uncertainty. Ḥanafī and Shāfiʿī jurists who lived in regions as far apart as central Asia and north Africa have disagreed on how to convert the Prophet's Arabian measurements into their local measures that use different units. Dabbūsī details this in one of his principles, which sets forth standards for converting amounts when there is a disagreement between Ḥanafī and Shāfiʿī jurists; however, this disagreement is ultimately reducible to differences between the standards of Egyptian markets and those of Persia and central Asia.[24]

Pre-Muḥammadan Laws

The authoritativeness of pre-Muḥammadan laws as a source of law in Islam is a question of a dual nature: one legal and one theological or historical. Timurtāshī distinguishes between the two when he deals with the principle of whether *sharʿ man qablanā* (the laws of [monotheistic] nations that preceded us [Muslims]) could serve as laws for Muslims. He considers this a question of legal theory inasmuch as it has to do with the

[23] *Taʾsīs*, 77–8.
[24] *Taʾsīs*, 61–2.

authoritativeness of a source of law and offers applications of this principle in practical legal questions. These applications include the ruling that retaliation applies when a male kills a female or a free man a slave, since the Qur'ān states that the laws that God gave to the children of Israel included a principle equating the souls of all humans "*al-nafs bi-l-nafs*" (Q 5: 45). The author distinguishes this question of legal theory and its practical applications from another question that is of purely theological or historical interest, namely, the question whether the Prophet Muḥammad had followed a pre-Muḥammadan monotheistic law before he received his own revelation.[25] Timurtāshī clearly finds this issue of interest, but he does not elaborate on it. He finds it sufficient to mention that some scholars—mainly based on the lack of evidence to the contrary—argued that the Prophet must have been a follower of the laws of the prophet Abraham, while others found no evidence to establish this. Although they do not amount to conclusive evidence, Qur'ānic statements suggesting a strong affinity between the Muḥammadan and Abrahamic paths were cited to support the view of those who regarded *sharʿ man qablanā* (pre-Muḥammadan laws) favorably as a source of Islamic law.

Heirarchy among the Sources Revisited

That textual sources of the law are presumed to enjoy precedence over purely rational sources is accepted by all Muslim jurists. After all, few would have bothered to be contributors to the Islamic legal tradition if the content of the Revelation and the Tradition of the Prophet could be marginalized or considered secondary to purely rational arguments. And since understanding textual sources presupposes the application of "reason" and rational arguments, which means that every textual argument is a double argument (rational-cum-textual), a purely rational argument would have to be considered inferior compared to an argument rooted in textual evidence.

This seems to be a sufficiently straightforward answer to a fairly simple question. But more difficult and nuanced questions cannot be answered in the same straightforward manner. How about a text whose authenticity is in question versus a chiefly rational argument that can claim to be at least compatible with textual evidence? How about when

[25] *Takhrīj*, 251–2.

a rational argument of this type stands in opposition to the view of an authority below the Prophet (a Companion's view)? These are the difficult questions of the hierarchy of the sources of Islamic law. And of these two examples will be offered presently.

One example of the *uṣūl* that address the authoritativeness of the different sources of the law concerns whether a mono-chain Prophetic report (*ḥadīth āḥād*) is a source of law of a higher rank than rational inference (*qiyās*) from more authentic textual sources of the law (Qur'ānic or more authentic Sunna texts). Abū Ḥanīfa and his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī hold Prophetic reports to be superior to this type of *qiyās*, while Mālik holds the opposite view. Thus, the Prophet's statement that "those who eat or drink during a Ramaḍān day while temporarily oblivious to their previous intention to fast have not breached their fasting" would lead Abū Ḥanīfa and his students to make a distinction between conscious and oblivious breaching of the fasting. According to Mālik's *qiyās*, the case of those who eat or drink during a Ramaḍān day while being forgetful of the fact that they were supposed to be fasting is analogous to the case of those who intentionally eat or drink. Abū Ḥanīfa and his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī see this *qiyās* as inferior to the Prophetic text, according to the above principle.[26]

The opinion of later Ḥanafī jurists shifted from that of the three forefathers of the school and came to agree with Mālik's position. Zanjānī reports a disagreement between Shāfiʿī and Ḥanafī jurists, where Shāfiʿī adopts what was purportedly the opinion of Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī and where later Ḥanafī jurists adopt Mālik's view that *qiyās* or sound logical reasoning takes precedence over a mono-chain Prophetic report (*ḥadīth āḥād*). An application of this theoretical principle is as follows. For an animal to be allowable as food, it must have been properly slaughtered. Some butchers find fetuses inside camels and rams that they slaughtered properly according to the requirements of the law. The question is whether the flesh of these fetuses may be eaten. A mono-chain Prophetic report tells us that the Prophet proclaimed that "the slaughtering (*dhakāh*) of the fetus is included in the proper slaughtering (*dhakāh*) of the mother." This is sufficient for Shāfiʿī jurists to decide that eating that fetus is allowable. Ḥanafī jurists disagree. The ground for the prohibition of eating animals

[26] *Ta'sīs*, 47.

that are not properly slaughtered is that the blood of the animals remains inside their bodies after they die. Ḥanafī jurists argue that since an animal whose blood remains in its body after the animal dies is undesirable (*mustakhbath*) as food, sound *qiyās* leads to the conclusion that the fetus in this case is carrion and its eating is prohibited. This reasoning, Ḥanafī jurists argue, is superior to the potentially doubtful Prophetic report Shāfiʿī jurists employ in their argument.[27]

Dabbūsī mentions another similar question regarding the hierarchy between the opinion of a Companion of the Prophet and sound *qiyās*. The disagreement here is reported between Shāfiʿī (d. 820) and Ḥanafī jurists, where Shāfiʿī believes that sound *qiyās* is preferable to the opinion of a Companion and Ḥanafī jurists take the opposite stance. This disagreement results in disagreement in practical legal questions. One of these is the question of whether or not it is allowed for non-Muslims in a Muslim state to trade in wine. According to Ḥanafī jurists, they should be allowed to do so based on the opinion of ʿUmar Ibn al-Khaṭṭāb (d. 644). Applying *qiyās*, which he deems to be a superior source of the law, Shāfiʿī reasons that since Muslim jurists are in agreement that "wine" in itself has no monetary value (until it is made into a usable substance, such as vinegar), a Muslim is not required to provide compensation if he/she wastes the wine of a non-Muslim. Based on this reasoning, the sale of wine is the sale of something that has no monetary value and must therefore be invalid. Therefore, non-Muslims should not be allowed to exchange wine for valuable property.[28]

Conclusion

Extra-textual sources of the law, such as consensus, analogy, and reasoning based on utility or custom afford many opportunities for theoretical discussion among Muslim legal theorists. These theoretical discussions have practical applications, as our sources indicate. Other principles of Islamic legal theory are harder to classify simply in terms of a distinction between "textual" and "extra-textual" sources of the law. The next chapter addresses these 'unclassifiable *uṣūl*.'

---

[27] *Takhrīj*, 363–5.
[28] *Taʾsīs*, 55.

CHAPTER SEVEN

UNCLASSIFIABLE *UṢŪL*

Beyond the *uṣūl* of legal hermeneutics and extra-textual sources of the law (including consensus and analogy as well as *istiṣlāḥ* and *'urf*), categories of *uṣūl* become fuzzier and less definable. Inquiring into the ways in which these difficult-to-classify *uṣūl* have been presented in proto-*uṣūl al-fiqh* or early *uṣūl al-fiqh* works and comparing them to the often more developed formulas they take in later books of *uṣūl al-fiqh* or *qawā'id fiqhiyya* is likely to teach us a great deal about the development of Islamic legal theory. I will use the term non-GLT *uṣūl* or unclassifiable *uṣūl* (in the sense that they are not classifiable within GLT) to refer to a host of theoretical legal principles and apparatuses of legal reasoning that function as *uṣūl* in Muslim legal discourse. This chapter deals with these non-GLT *uṣūl*. Non-GLT *uṣūl* range from abstractions governing a small number of legal cases to theories of broad reach in legal practice. The following illustrations aim at a better understanding of their nature.

Dabbūsī's work is full of non-GLT *uṣūl*, i.e., unclassifiable *uṣūl*. Dabbūsī's non-GLT *uṣūl* do not belong in a legal theory that is concerned with the sources of the law and their interpretation. Rather, they are mostly general principles inferred either from Qur'ānic and Sunna texts or from established opinions based on textual or logical reasoning. *Ta'sīs al-Nazar* includes a spectrum or an array of theoretical legal principles or *uṣūl* that range from legal maxims (*qawā'id fiqhiyya*) to principles of the later legal theory (GLT *uṣūl al-fiqh*) to principles of other types. All of these *uṣūl* are followed by one of the *furū'* or *masā'il* (practical legal issues accompanied by rulings or determinations) that are affected by the principle or *aṣl*. Here are two examples of these *uṣūl*/principles.[1]

The second principle in Dabbūsī's *Ta'sīs* reads: A pilgrim who confuses the order of the duties of pilgrimage is required to offer expiation (*kaffāra*). This principle is a generalization from evidence that the Prophet asked pilgrims who had failed to perform the acts of their pilgrimage in the correct order to make an offering to compensate for their mistakes. These cases do not establish the principle in its general

[1] *Ta'sīs*, 4–6.

form, and there is no Prophetic statement that expiation is expected of all pilgrims who fall into a certain category of mistakes. Abū Ḥanīfa's generalization offers a basis for rulings in cases where people may perform the order of the rituals in a manner other than that reported in the texts. For Abū Ḥanīfa's two students, Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, the Prophet's orders may have been specific to the particular cases in which they were given. This principle is an *aṣl* in the sense of a generalization from cases with a known "ruling" (i.e., based on texts), but it remains a fairly specific principle and limited in its application to the rituals of pilgrimage. This *aṣl* will become the basis of an answer to another practical legal question that falls within a similar category. Dabbūsī provides three examples of the extension of this principle to other cases of confusing the order of the acts of pilgrimage.

Now, compare this principle with the following one. The following principle (number three) in Dabbūsī's work reads: What *can reasonably* be presumed to be the case *should* be presumed to be the case. Applications of this principle span different aspects of the law. An example of these is that a judge should consider 19 year old males and 17 year old females to be adults even if the judge is provided with no apparent (biological) indication of puberty. The likelihood that individuals who have reached this age have become adults is transformed into a legal presumption based on the above principle. (Modern laws apply similar presumptions despite our knowledge that individuals' rates of physical and intellectual growth differ). Another application of this principle is considering a missing person "dead" when it becomes unlikely that he/she could be alive. This is an example of a principle that has a rational rather than a textual basis.

These two principles, taken from the book's opening pages, give an idea of the heterogeneity of the *uṣūl* of which Dabbūsī speaks. The rest of the book contains yet other types of *uṣūl*. One of these *uṣūl* resembles a *farʿ* (legal opinion in a particular case) that happens to have applications in other areas of the law. According to Shāfiʿī, Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, a person who converts from Islam to another religion does not lose his/her property because of his/her conversion unless he/she abandons his/her property and migrates to a non-Muslim country. The application of this *aṣl*/*farʿ* is relevant to such a person's inheritance, contracts and other legally relevant actions that concern his/her property.[2] In this case, the *uṣūl* are in fact *furūʿ* or practical legal determinations that have applications.

[2] Ibidem, 22.

Farʿ (*a practical legal determination*):

A person who converts from Islam to another religion does not lose his/her property because of his/her conversion unless he/she abandons his/her property and migrates to a non-Muslim country

In other practical legal determinations (which would be considered the *furūʿ* here):

Aṣl (*a theoretical legal principle*)
Person A who converts from Islam to another religion does not lose his/her property because of his/her conversion unless he/she abandons his/her property and migrates to a non-Muslim country

↓

Farʿ # 1
Person A is eligible for inheritance from relatives
Farʿ # 2
Violation of person A's property results in compensation

Some of Zanjānī's *uṣūl* are general forms of legal principles similar to those found in Dabbūī's *Taʾsīs al-Naẓar*. One of these can be found in both works.[3] Shāfiʿī believes, Zanjānī tells us, that the prayer of a person is not affected by others who may be praying with him/her in a collective prayer. The prayer leader is performing an act of worship whose validity or lack thereof must not affect the prayers of those who follow him. An application of this *aṣl*, according to Shāfiʿī, is that each worshipper must recite all the necessary recitations and not merely listen to the recitation of the prayer leader. Those who disagree with the principle that a collective prayer is an aggregate of separate prayers argue that a follower need only listen to the leader's recitation.

Another application of the same principle is that the intention of the leader and the followers regarding the type of prayers they are performing may be different, as long as these prayers have the same content. Noontime and afternoon prayers are the same, but they are performed at different times of the day. According to this principle, prayer leader may be performing a delayed noontime prayer, while those praying behind him may be performing an afternoon prayer. The leader may

[3] *Taʾsīs*, 53; *Takhrīj*, 102–7.

even be performing a voluntary prayer and the followers an obligatory one. A third application of the same principle is that, if the prayer of the prayer leader turned out to be invalid for some reason, the prayer of the followers need not be deemed invalid simply because they were following him. Abū Ḥanīfa, by contrast, disagrees with this principle and the practical positions that are based on it.

In the remainder of the chapter, I will offer more examples of non-GLT *uṣūl*. I will attempt to categorize some of these *uṣūl* under a simple scheme of *sources of law* and *interpretation*.

Uṣūl, *Theology, and Political Theory: Two Authorities*

The authority of God in a Muslim society manifests itself through Muslim subjects. Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī argue that, unless following God's laws and applying His commands in a *bona fide* manner absolves those who follow these laws from responsibilities associated with unintended harm, many of God's laws will find no application, since people would refrain from applying them out of fear of liabilities. Abū Ḥanīfa disagrees, since giving human beings license to take matters into their hand whenever they believe to be applying God's law may bring more harm than good. This discussion introduces theological and political elements into the discussion of the principles of legal theory and legal practice. The link between the *uṣūl* and the *furūʿ* here becomes a point of intersection for theology, political theory, legal philosophy, and law.

Dabbūsī attributes the following principle to Abū Ḥanīfa: What is allowed by a Muslim government is equal to what is allowed by the lawgiver (God or His messenger) on the condition that it does not lead to any harm. Against this view, Dabbūsī reports, Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī hold that the authority of political authorities who apply God's law is always equal to that of the lawgiver (God or the Prophet). From this perspective, Abū Ḥanīfa's restriction of political authorities by making them responsible for avoiding harm when they exercise their power is unnecessary. Unintended harm may result from applying a politician's orders, just as it may result from applying divine orders. If the government lights a mosque with a chandelier and this chandelier falls and hurts somebody, no liability results if due caution was taken, according to Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī, since putting the light out was

done in the course of following the recommendation to serve God's houses of worship. Abū Ḥanīfa rejects this opinion and insists that doing no harm is an implicit condition limiting what is allowable or recommended for the lawgiver.[4]

The Jurist's Ḥukm *as a Simulacrum of Divinely-Instituted Norms*

Another legal principle with theological implications concerns whether all jurists who exercise care in their reasoning but disagree in their legal opinions can be correct. Answering this question in the affirmative implies that God may have decided the same matter differently, since jurists are engaged in what Bernard Weiss calls the search for God's law. According to Shāfiʿī, only one jurist can reach the correct ruling in a practical legal question (which is God's ruling). Jurists who do not reach the correct ruling, Shāfiʿī holds, are excused for their failure, because reaching the correct ruling is often difficult. Shāfiʿī argues that we would be attributing contradiction to the lawgiver (God) if we were to say that all jurists make correct decisions despite the fact that they disagree. In matters of religious belief, disagreement always indicates that one party is right and the others wrong (or that all are wrong); Shāfiʿī asks why disagreement in matters of law should be any different, when both belief and law stem ultimately from the same divine source. Shāfiʿī jurists later on rejected this analogy and made a distinction between matters of belief and matters of practice or law. Religious belief deals with *questions of fact*, whereas the objective of religious law is identifying good practice. When people disagree on matters of belief, they are either right or wrong. It is incomprehensible that there could be no God, two gods, and One God at the same time. By contrast, juristic disagreement in practical matters is an indication of the flexibility of the law, where different legal practices may be good for different people. This is also the opinion of Ḥanafī jurists, who argue that the Prophet's Companions always assumed that any opinion based on sound juristic reasoning is, in fact, correct.

Does this disagreement concern only how juristic disagreement is viewed (perhaps) from the perspective of the lawgiver, God Almighty Himself? That would make it a question of only theoretical concern. In

---

[4] *Ta'sīs*, 18–9.

fact, however, this question of *uṣūl al-fiqh*, while metalegal and theological in nature, also has important ramifications in practical legal matters. Zanjānī shows that the disagreement over whether a human's judgment must conform to a divinely-instituted norm finds application in cases when the veil of ignorance about what is correct is removed, that is, when a human being exerts himself/herself and, despite due care, makes a judgment that turns out to be incorrect. To be fully consistent with the principle that "all good reasoning" is correct (especially in cases when no harm has been done to others), one must decide that those who did their best and arrived at an incorrect conclusion must be absolved from any responsibility. If a person who is uncertain about the direction of the prayer decides to pray according to the best of his/her judgment, this person must not redo his/her prayer if he/she later learns the correct direction, as the prayer was performed according to a correct judgment (since all views based on sound reasoning are correct).[5] For those who believe that more than one view can be right, even clear indications that one has made a mistake, as in this example, do not change the fact that a "correct judgment" has been made. This judgment and the practice resulting from it were sufficient, and another attempt is not necessary. For those who do not believe that there is more that one correct answer (like Shāfiʿī), such a person must redo the prayer. For Shāfiʿī', the search for what is right is a duty, and failure to reach it after trying once does not remove from one's shoulders the duty to perform a correct prayer.

Court Decisions

Another interesting aspect of the question of the nature of a practical legal determination in relation to God's ruling concerns court decisions. Shāfiʿī and Ḥanafī jurists disagree, Zanjānī states, on whether a ruling issued by a Muslim judge establishes rights and responsibilities for human subjects by virtue of being a simulacrum of God's judgment (the Shāfiʿī view) or whether it establishes these rights and responsibilities by

[5] Ibidem, 79–80. In the following principle (pages 81–89), the author states that jurists have agreed that there is certainly only one correct judgment in the eyes of God, even in matters of law, but jurists disagree as to which one of the juristic judgments is closer to that divine judgment. He then mentions applications of that discussion in legal matters where jurists have agreed on the difficulty of the question at hand but stated that they opine according to the best of their assessment of the available evidence.

virtue of the fact that a competent Muslim judge issued it based on his/her sincere effort and best assessments (the Ḥanafī view). Ḥanafī jurists say that when a Muslim judge issues a ruling, what he/she made allowable or prohibited has become allowed or prohibited regardless of any "fact of the matter." What the judge decides is thus valid even if the evidence on which the judge relied turns out to be false. This disagreement calls to mind the disagreement between Natural Law philosophers and legal positivists on the nature of the law and its source. Natural Law philosophers distinguish between valid and invalid moral reasoning and require that the law agree with valid legal reasoning, while legal positivists believe that law must only reflect the social realities of the people who are governed by it.[6] In a manner similar to the positivists, Ḥanafī jurists argue that the judge establishes rights and duties through his/her rulings. On the other hand, Shāfiʿī jurists argue that this amounts to saying that the judge creates rights, when he/she is supposed to protect existing rights. A claimant requests that a court protect his/her rights and asks the judge to *recognize* these rights rather than *create* them.

The main ramification of this principle, according to the Shāfiʿī view, is that no one should permit himself/herself to enjoy a right that a judge mistakenly gave to him/her if he/she knows that it is not in fact his/her right. Ḥanafī jurists argue that the very ruling which the judge issued changes the nature of things, since what was prohibited may become allowed based on such a ruling.[7]

Law and Authority

Before concluding this section, I shall provide a comment about authority in Islamic legal theory in the context of the issue of God's rulings and human beings' rulings and in light of the previous discussion. Let me begin with a comparison of the above scheme with one that is familiar to students of Anglo-American political theory. In the Anglo-American context, Noah Feldman says, the "division of the world into differently-constituted temporal and spiritual realms" set the context for considering the issue of religion and politics. Feldman continues:

> Under this division, the temporal power lacked legitimate authority to compel dissenters' conscience in the realm of religion, because no one

[6] *Takhrīj*, 372.
[7] Ibidem, 372–5.

> had alienated to the temporal government their rights in matters of religion. It was wrong, therefore, for any government to impose religion on its citizens or subjects."

We are told about two tendencies that agreed, from different points of view, on the necessity of separating state and religion. Feldman again:

> According to this schematic view, rationalists wanted to separate church and state because religion is bad for the state, while evangelicals wanted to separate church and state because state involvement is bad for religion.[8]

In Islamic legal theory, the struggle took a different form. Muslim jurists had to explain the relationship between God's ruling and that of the jurist or even a layperson applying God's law to himself/herself. In practice, God's law and judgments about the world are constantly negotiated. Not only do jurists speak in God's name; laypeople also do so. Disagreement about practice thus constitutes a theoretical problem that has many implications. On the level of the individual, one may hold one of the two above views (either that reasonable effort to arrive at the correct view is sufficient or that a particular position must be arrived at). When it comes to applications of the law that concern the Muslim community, however, debate over how to reconcile *juristic and political disagreement* was inevitable. To reconcile disagreement in terms that separate religion and politics would not be an acceptable juristic position to a medieval Muslim jurist. Thus, in our six sources, juristic and judicial disagreement must be resolved through a mechanism that accepts (at least theoretically) that political authority and religious interpretation function in the same territory and may contest their jurisdiction. Only modern interpretations of the nature and significance of the Islamic legal tradition will try to follow the lead of Europe and wonder whether the application of a Muslim political and legal structure is a necessary condition for living an Islamic life.

The Jurisdiction of Islamic Law

The following texts address what may be called the personal and territorial jurisdiction of Islamic law, an issue which often includes whether non-Muslim subjects living in a Muslim land and Muslims living in

---

[8] Noah Feldman, "Intellectual Origins of the Establishment Clause," *New York University Law Review*, Vol. 77, May 2002. See especially 349–51.

non-Muslim lands are bound by Islamic law. The first two texts address questions of personal jurisdiction, while the last two address territorial jurisdiction.

Consider the following four texts. First, Dabbūsī:

> For Abū Ḥanīfa, protected people (*ahl al-dhimma*) are allowed to practice what they believe, and for his two students, they are not given a free pass to apply their law (*lā yutrakūn*), and this has applications. One of these [applications] is that, when a *dhimmī* (a protected male) marries a *dhimmiyya* (a protected female) while she is in the middle of the *ʿidda* (a period that must pass after the termination of her previous marriage before she remarries, according to Islamic law), they are *left alone* (*yutrakān*) [i.e., allowed to remain married] in Abū Ḥanīfa's view, while for the two students, these two people must be separated (*yufarraq baynahumā*) [i.e., forced to divorce]. Another one of these [applications] is that, if a *dhimmī* marries a close relative (when this would be incestuous in Islam), they should not be separated [i.e., should be allowed to remain married] unless they both seek a court decision by a Muslim judge, in his view [Abū Ḥanīfa's], while for them [the two students], if only one of them resorts to a Muslim judge, the judge has the authority to separate them [annulling their marriage]. Yet another one of these [applications] is that, if a Magian/Manichean (*majūsī*) married his mother and consummated the marriage and then converted to Islam, and was called *an adulterer* by another person, the latter must be punished for that, since—according to their [the Manichean] religion—they were allowed to do what they did (*kānā yuqarrān ʿalā dhālik*). For the two students, the person who called the man an adulterer should not be punished for what he said. Another [application] is that, if a Manichean marries a female relative (whom he cannot marry under Islamic law), he owes her alimony, because the two [spouses] accept that relationship.[9]

Second, Zanjānī:

> The unbelievers are addressed by the obligation to perform the practices of Islam (*furūʿal-islām*), according to Shāfiʿī (God be pleased with him), and this is also the view of the majority of the Muʿtazilites. He [Shāfiʿī] argued that based on general statements in the Qur'ān, such as His saying (glorified is He) [relating a dialogue among unbelievers and their punishers in Hell]: "They [Hell's guards] said, 'What brought you to Hell (*saqar*)'? They [the unbelievers] replied, 'We have not performed the prayers'" (Q 74: 42-3). This indicates that they are punished for failing to perform the prayers. Also, His saying (glorified is He): "They do not call upon other gods with God, and whoever does that *faces sins*. His punishment on the Day of Resurrection will be multiplied." (Q 25: 68). Also, His saying (glorified is He): "Woe to the unbelievers, who do not pay obligatory

[9] *Taʾsīs*, 13–14.

alms (*zakāh*)" (Q 41: 6-7). Abū Ḥanīfa (God be pleased with him) and the majority of his followers held that the unbelievers are not addressed [by these duties]. They argue that, if the prayer, for example, became obligatory for the unbeliever, it would be obligatory either while he/she is an unbeliever or after. The first possibility is invalid, because the prayer is not meaningful/acceptable from an unbeliever while he/she is an unbeliever. The second possibility is also invalid, because we all [Ḥanafīs as well as Shāfiʿīs] hold that an unbeliever who embraces Islam is not required to perform the prayers he/she did not perform while an unbeliever. Applications branch out of this principle (*yatafarraʿ ʿalā hādhā al-aṣl masāʾil*). One of these is that an apostate (*murtadd*) who embraces Islam must perform the prayers he/she did not perform during his/her days of apostasy from Islam (*ridda*), and the same applies to unfulfilled fasting during the days of apostasy in our view. In this we disagree with him [Abū Ḥanīfa], since he considered the apostate the same as an unbeliever in that he/she is not bound by religious practices.[10]

Third, Dabbūsī again:

For us [Ḥanafī jurists], the world contains two abodes (*dārān*): the abode of Islam and the abode of war (*ḥarb*). For al-Imām al-Shāfiʿī, the world is one continuous terrain (*dār wāḥida*). And there are applications for that [disagreement]. One of these [applications] is that, if one of two spouses immigrates to the abode of Islam, whether as a Muslim or as a protected person (*dhimmī*), while the other spouse remains in the abode of war, then separation between them has occurred, in our view, while for the Imām Abī ʿAbdillāh al-Shāfiʿī, separation does not occur by means of the mere act of immigration (*lā taqaʿ al-furqa bi-nafs al-khurūj*). Another [application] is that, if the enemy appropriated our property and took it to the abode of war, they own it in our view, but in the view of al-Imām al-Shāfiʿī, they do not own it. Another [application] is that, if the people of [the abode of] war (*ahl al-ḥarb*) took our property and took it to the abode of war and then converted to Islam after seizing it, it is their property, while for al-Imām al-Shāfiʿī, they do not own it and must return it to their original owners.[11]

Fourth, Zanjānī once again:

Differences between the two abodes (*ikhtilāf al-dārayn*), i.e., the abode of Islam and the abode of war, do not entail difference in the law (*lā yūjib tabāyun al-aḥkām*) for al-Shāfiʿī (God be pleased with him). He argued that lands, places, and terrains have no impact on the law, since the law is the privilege of God—glorified is He (*al-ḥukm li-llāh taʿālā*), and the call of Islam is addressed generally to the unbelievers, whether they live in their countries or in other countries. Abū Ḥanīfa (may God be pleased with him) held

---

[10] *Takhrīj*, 98–101. See also 327–8.
[11] *Taʾsīs*, 58–9.

> that differences between the abodes entail differences in laws. He argued that moving to different lands, in reality and in legal considerations (*ḥaqīqatan wa ḥukman*), is analogous to death, and death ends ownership, and thus should moving to different lands, too. He [Abū Ḥanīfa] said: this is because ownership is evidenced by control of property (*al-istīlāʾ ʿalā al-mamlūk*), and such control ceases when the land changes both physically and legally (*ḥaqīqatan wa ḥukman*). As for the former, it is by being out of the control of the owner, and as for the latter, it is by the owner's inability to exercise any legal rights relevant to it (*inqiṭāʿ yadih min al-wilāyāt wa-l-taṣarrufāt*). From this principle many applications branch out (*yatafarraʿ ʿalā hadhā al-aṣl masāʾil*). One of these applications is that, if one of two spouses immigrated to us [Muslim lands], whether being a Muslim or a protected person (*dhimmī*), while the other remained in the abode of war, the marriage does not dissolve by virtue of immigration in and of itself. For them [Ḥanafī jurists], it dissolves, because of the difference in the land. Another [application] is that, if a man from the abode of war (*ḥarbī*) embraced Islam and immigrated to us, leaving his property in the abode of war, and Muslims later conquered those lands, then his property cannot be owned [by a conquering Muslim army] in our view. For them [Ḥanafī jurists], it can be owned and counted among the spoils of war. Another [application] is that, whoever embraces Islam while in the abode of war and does not immigrate to the abode of Islam, then his/her life is protected (*maʿṣūm*), and whoever kills this new convert owes blood money and [the possibility of] retaliation, and whoever destroys his/her property owes its value, just as if that had happened in the abode of Islam. Abū Ḥanīfa (God be pleased with him) held that it is prohibited to kill such a person or seize his/her property, but no liability (*ḍamān*) befalls [those who destroy the property], since the sanctity of property is founded on the land [where the law applies], while sanctioning his soul is founded on his/her embracing of Islam.[12]

According to Abū Ḥanīfa, non-Muslims living permanently in Muslim states are not addressed by many aspects of Islamic law, (for example, non-Muslim subjects living in a Muslim state who do not believe that wine drinking is prohibited cannot be punished for drinking it) while his students Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī hold the opposite view. Shāfiʿī's view on this subject would resemble that of the two students more than that of Abū Ḥanīfa's.

On the question of territorial jurisdiction also, two views are expressed. Shāfiʿī believes that Islamic law has jurisdiction in non-Muslim lands since, as he points out, the whole earth is one, *continuous* piece of land, while jurists of the Ḥanafī school make a distinction between lands where Islamic law applies and others where it does not.

---

[12] *Takhrīj*, 277–8.

According to Ḥanafī jurists, for example, dealing in usurious transactions in non-Muslim lands is allowable, as long as these transactions are allowed by the law that governs these lands. Furthermore, crimes such as drinking wine and fornication that may take place outside of "the abode of Islam" are not to be prosecuted in a Muslim state (if those who committed them return to the abode of Islam). On this and similar issues, Shāfiʿī does not share the position of Ḥanafī jurists as he disagreed with them concerning the underlying legal theoretical principle.

Aspects of these discussions are of a semi-theological nature, being concerned with consequences that may befall non-Muslims in the hereafter for their failure to comply with Islamic law. One of the ramifications of whether non-Muslims are responsible for the duties of Islamic law is whether non-Muslims would be punished in the hereafter for their failure to embrace the Islamic faith (which would definitely mean that they failed to fulfill God's commands according to Islamic law) or whether they would be held accountable for each and every failure to meet Islamic legal obligations, even if they did not accept the authority on which these obligations were based. But some of the applications of these principles are practical legal matters that are relevant to this world, the "here" rather than the hereafter. For example, Shāfiʿī held that, when a Muslim converts to another faith and then reverts back to Islam, he/she must be held responsible for the religious duties he/she had missed during his/her period of apostasy. Ḥanafī jurists consider such a person free of this requirement. Another application of this principle, based on the opinions of Ḥanafī jurists, is that non-Muslims own the property that they appropriate from Muslim lands and transfer to their own lands and should not be asked to return such property whether it was taken in war or in peacetime. Shāfiʿīs disagree and hold these non-Muslims responsible for returning the property, since these non-Muslims do not escape the jurisdiction of Islamic law by virtue of being non-Muslims living in non-Muslim lands.[13]

The fact that Muslim jurists were concerned with the rule of Islamic law over non-Muslim subjects and territories clearly signifies their universal outlook, despite their disagreement. A similarly universal outlook on the subject is shared by European jurists in classical, medieval, and modern times. I limit myself here to indicating a principle from the *Digest of Justinian* on the subject for illustration, noting that a full comparison between the attitudes of Muslim jurists on the subject (on the

[13] *Takhrīj*, 98–101.

one hand) and those of humanistic or scholastic European jurists (on the other hand) could make a good subject for a full-length book. The principle I shall indicate is known as the principle of *postliminium*, the principle that "Roman citizens taken as prisoners by an enemy were slaves in the eyes of Roman law also, until they returned to Roman jurisdiction."[14] That is, since Roman law allows enslaving non-Roman citizens at war, Roman citizens enslaved by non-Romans must be seen as slaves in the eyes of Roman law, until their return to lands where Roman law applies. Thus Roman legal reasoning is extended even to cases where its implications would be the enslavement of Roman citizens by non-Romans.

Legal Maxims (Qawāʿid Fiqhiyya)

The following two principles are examples of Dabbūsī's *uṣūl* that are often treated as legal maxims in books of *qawāʿid fiqhiyya*. The first principle in Dabbūsī's work reads as follows: A condition that can influence the status of an obligatory act if the condition occurs at the beginning of the act must equally influence the status of the same act if the condition occurs at the end of the act. Consider the following case: Person A fails to find water to perform ablution and decides to use dry ablution (*tayammum*) to acquire ritual purity and then begins his/her prayers. If A were to find water before he/she began the prayers or shortly thereafter, jurists agree that performing regular ablution (with water) would be obligatory. The question, however, is "should this person interrupt his/her prayer if he/she becomes aware of the availability of water when he/she is almost at the end of the prayers?" For Abū Ḥanīfa, this person should interrupt his/her prayer and start a new prayer after performing appropriate ablution with water, in accordance with the above

---

[14] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), 32. The text of the *Digest* (49.15.5; trans. Alan Watson) goes as follows:

> "*Pomponius*: . . . The right of *postliminium* . . . In war: When those who are our enemies have captured someone on our side and have taken him into their own lines; for if during the same war he returns he has *postliminuim*, that is, all his rights are resorted to him just as if he has not been captured by the enemy. Before he is taken into the enemy lines, he remains a citizen. He is regarded as having returned from the time when he passes into the hands of our allies or begins to be within our own lines."

principle (i.e., a condition that can influence the status of an obligatory act if the condition occurs at the beginning of the act must equally influence the status of the same act if the condition occurs at the end of the act). For jurists who distinguish between the beginning and the end of an act, this person must interrupt his/her prayers only if he/she becomes aware of the availability of water at the beginning of his/her prayers. The basis of this principle is purely rational, and stems from practical concerns rather than hermeneutical theory.[15]

The fourth principle in Dabbūsī's *Ta'sīs* deals with a similar principle: A ruling decided based on conclusive evidence cannot be repealed based on inconclusive evidence to the contrary. In the literature on *qawā'id fiqhiyya* (legal maxims), this principle (*al-yaqīn lā yazūl bil-shakk*) is known to be one of the five major maxims on which the whole of Islamic law is based. In *uṣūl al-fiqh* works, this principle is linked to *istiṣḥāb*, which is considered one of the non-textual sources of the law (see the previous chapter). *Istiṣḥāb* may be seen as a form of reasoning that considers inconclusive evidence inadequate to change a status quo or a default position that was based on conclusive evidence. Its applications include the presumption of innocence in criminal cases, among other applications in Islamic law. This is an *aṣl* that persisted in juristic writing and entered into both *qawā'id fiqhiyya* and *uṣūl al-fiqh*. Applications of this principle (*al-yaqīn lā yazūl bil-shakk*) appear in almost every chapter of *fiqh*, and it is embraced, as Dabbūsī states, by both Abū Ḥanīfa and al-Shāfi'ī, while Abū Yūsuf and Muḥammad Ibn al-Ḥasan al-Shaybānī do not accept it. The following is one of its applications, according to Dabbūsī. A wife asked her husband to divorce her and promised to pay him 1000 dirham in return, and he accepted to divorce her but did not say anything about the money. The question is twofold: "Is the divorce valid?" and "Does she owe him the money?" The answer, based on the principle, is that the divorce is valid and she does not owe him the money. The reasoning here is that her ownership of her money is established with definite knowledge, while her responsibility for the payment is not, since it was not confirmed by him.

Included in Zanjānī's concept of *uṣūl* are other legal maxims that are usually mentioned in books of *qawā'id fiqhiyya*. An example of these is the maxim stating that "transactions that might lead to deception and/or conflict (*gharar*) must be prohibited." Based on this principle, Shāfi'īs hold the following two opinions. The first is that sales of merchandise not

[15] *Ta'sīs*, 3.

inspected by the buyers are invalid. The second is that any party to a contract should be allowed to annul the contract as long as he/she has not ended his/her meeting with the other party (where the contract was concluded).[16] The reasoning and link between the maxim and the applications are clear. If contracts that may include trickery or confusion (*gharar*) or lead to controversy must be prohibited, conditions causing situations where trickery or confusion to arise must also be prevented from occurring. Now, what is the position of Abū Ḥanīfa concerning the general maxim and its applications? While Abū Ḥanīfa does not object to the maxim in general, he finds it sufficient to safeguard against conflicts over sales of un-inspected merchandise by stipulating that the buyer be given the right to annul the sale upon inspecting the merchandise, if he/she chooses to do that. Shāfiʿī, by contrast, would judge the contract invalid regardless of whether the buyer wished to go forward with it. Abū Ḥanīfa also finds it unnecessary to give any party to a contract the right to annul the contract, as long as the meeting in which the contract is negotiated has not ended. According to this view, stipulating that the contract be the outcome of free choice is a sufficient safeguard against potential deception or future conflict.

Definientia

Both Isnawī and Timurtāshī begin their works with a discussion of the juristic implications of the definition of *fiqh*.[17] The very definition of *fiqh*, therefore, becomes an *aṣl* that has ramifications in the arena of practical legal decisions. In this sense, an *aṣl* is a concept, the comprehension of which aids the jurist in devising correct and theoretically-based practical legal decisions. In other words, a conceptualization of the *definiendum* (*fiqh* in this case) through potentially different *definientia* in the minds of different jurists may be a source of disagreement on practical legal questions.

Isnawī defines *fiqh* as "knowledge of practical legal rulings based on specific proofs." He then explains the definition, mentions objections that were raised against it, and discusses responses to these objections. Although Isnawī does not mention the lexical meaning of the term *fiqh* (that is "understanding"), we understand from his discussion that *fiqh* is

[16] Ibidem, 145–7.
[17] *Tamhīd* 50–7 and *Wuṣūl*, 114–23.

both a type of knowledge or science and a faculty or a form of erudition and sophistication that some but not all students of Islamic law acquire. A student who attains this faculty is properly called "*faqīh*."

Isnawī states that the implications of this definition can be seen in questions of law pertaining to endowments, wills, oaths, and vows both conditional and unconditional (among other branches of the law). Isnawī then mentions only two groups of questions whose answers are relevant to two points in the definition. *The first group of questions* concerns the extent to which the term "knowledge" (*'ilm*) here implies certainty and whether *fiqh* is usually based on definite or simply probable knowledge. *The second group of questions* deals with the extent of knowledge (awareness, sophistication) required for someone to be considered a *faqīh* or jurist (pl. *fuqahā'*).

The question of the extent to which *fiqh* rulings are based on definite or simply preponderant knowledge opens the door for interesting discussions. If *fiqh* may be based on indefinite or probable knowledge, then the definition that calls it "knowledge" or *'ilm* (which would imply certainty) is defective. Isnawī counters that the followers of Islam know that they are required to act on their indefinite knowledge of their religious duties, since even the best of jurists can assure nothing but probable knowledge of these duties. This means that Muslim subjects acquire *definite knowledge* with respect to what they *should do* irrespective of the fact that their knowledge of their duties is mediated by probable proofs. Hence, *fiqh* is *'ilm*, because it leads to certainty about one's duties, regardless of how these duties were established. This means that acting upon probability should be accepted as valid and sound behavior for Muslims who follow Islamic law. For example, one might suppose that if a Muslim in a state of ritual purity falls into some water that he/she feels may be ritually impure, he/she is required to wash his/her clothes before entering into a prayer while wearing them. But this conclusion is wrong, as Muslims in this case are required to act only upon definite knowledge of the facts, based on the principle that "certainty cannot be repealed by doubt" (*al-yaqīn lā yazūl bi-l-shakk*). According to this maxim, probable knowledge may be reduced to "doubt"—thus Muslim jurists here equate *zann* (probability) and *shakk* (doubt). (For example, making an ablution before the prayer is not required of a person who doubts whether his/her ritual purity was breached by an act that occurred after a moment at which she/he was certain of having that ritual purity.) This discussion of the definition of *fiqh* as *'ilm* thus carries practical applications.

We note that Isnawī mentions legal questions that may stand in contradiction with one of the implications of his *aṣl*, i.e., the definition of *fiqh*. The definition of *fiqh* which states that *fiqh* is a type of *ʿilm* (knowledge) seems to contradict a principle that discounts all types of indefinite knowledge and finds in the certainty that existed before that indefinite knowledge a stronger indication of what action must be taken. Isnawī's *furūʿ* here, therefore, are ones that show the limitation of his definition of *fiqh* while in conformity with the principle that "certainty cannot be repealed by doubt" (*al-yaqīn lā yazūl bi-l-shakk*).

Isnawī also treats questions relevant to the extent of knowledge (awareness, sophistication) required for a person to be called a *faqīh* or a jurist. One of these is the following. If an endowment is dedicated to the *fuqahāʾ* (jurists), may all students of law take advantage of it? An answer that is consistent with *the correct definition* of *fiqh* would be in the negative. Isnawī discusses several opinions that diverge from this answer by reducing the standards for acquiring *fiqh*, but he is particularly critical of Rāfiʿī's (d. 1266) opinion that includes under the category of *faqīh* any person with even modest knowledge of *fiqh*. He also criticizes Nawawī (d. 1277), who followed this view, and Ibn al-Rifʿa (d. 1311), who cites it without criticism.

Timurtāshī elaborates on the definition of *fiqh*, objections raised against it, and responses to these objections. He produces, for example, more arguments in favor of using the term *ʿilm* in the definition). Timurtāshī's *furūʿ* are taken from Ḥanafī rather than Shāfiʿī law, but are generally similar to those of Isnawī. Timurtāshī offers a discussion of the meaning of *ʿilm* (knowledge) and *ʿālim* (scholar) and applies questions of endowment to the terms *ʿālim* (scholar) and *ʿulamāʾ* (scholars). These applications include dedication of a certain fund for scholars and whether these include philosophers and mystics. These *furūʿ* are not directly linked to the definition of *fiqh*, but their relevance to the general discussion justifies citing them from Timurtāshī's point of view.

Another example of a definition that becomes a legal principle is what Zanjānī mentions on the question of whether both the man and the woman in a marriage bond can be called "married" (Shāfiʿī's position) or whether it is only the woman that can properly be called "married" (Abū Ḥanīfa's position).[18] This apparently hairsplitting, semantic quibble has at least three legal ramifications according to Zanjānī. One of these is that, upon the death of the wife, the husband may—in the

[18] *Takhrīj*, 105–7.

Shāfiʿī school—be permitted to perform the final ablution on her body, while this would be rejected by Abū Ḥanīfa and his followers. Another application, according to Shāfiʿī, is that a man who says "I am divorced from my wife" would thereby effectively divorce her, while Abū Ḥanīfa would reject this on the grounds that whoever cannot be called "married" cannot possibly be considered "divorced."

Independent Reasoning

Timurtāshī's chapter on legal reasoning (*ijtihād*) offers interesting examples of *uṣūl* that are usually mentioned in works of legal maxims or *qawāʿid*. One of these is "*al-ijtihād lā yunqaḍ bi-l-ijtihād*," that is, a legal opinion that is based on reasonable independent reasoning cannot be declared "wrong" and repealed by another opinion.[19] This principle lends support to juristic disagreement and the right to dissent. A jurist can freely issue a legal opinion or court decision, unburdened by the possibility that it might later be repealed by a higher juristic authority (as in an appellate system). Muslim jurists insist that repealing a court decision because it does not match the popular opinion in one's school or *madhhab* is invalid. Therefore, if a Ḥanafī jurist repeals the judgment of a Shāfiʿī jurist for no reason other than the disagreement among the two schools, and the issue is given to a Mālikī jurist to rule on it again, the latter must support the Ḥanafī ruling, in accordance with the above principle (*al-ijtihād lā yunqaḍ bi-l-ijtihād*).

Exceptions, however, do apply to this principle. Some legal opinions and court decisions are seen as clearly crossing the bounds of reason and must therefore be rejected. Timurtāshī provides examples of such views, which simply cannot be deemed in accord with sound Islamic legal reasoning and must be overturned.[20] Validating temporary marriage, a view Shīʿī law adopts, is one example. Sunnī jurists believe that temporary marriage is absolutely unacceptable; it is against the wisdom of marriage and destroys its aims of stability and respect for the family. Similarly, jurists reject the view that delaying the payment of a dowry absolves the husband of the obligation to pay it after the passage of a certain period

---

[19] *Wuṣūl*, 288–90.

[20] These are ultimately cases where Ḥanafī jurists are known to have disagreed with jurists from other schools, such as the Jaʿfarī and Shāfiʿī schools.

of time (*suqūṭ al-ḥaqq bil-taqādum*). This is also a suspect juristic view that may lead to irresponsible behavior and abdication of financial responsibility. Finally, the view that a woman does not have the right to spend her money without her husband's permission is also rejected, as it contradicts the general principle of financial independence in Islamic law.

Between Legal Maxims and Kalām

In their writings on legal maxims (*qawā'id fiqhiyya*), Muslim jurists address the question of whether actions should be judged as having been lawful before the Islamic revelation provided a normative judgment for them. Take act X (eating salmon), known to belong to the class of lawful acts based on a Scriptural or Traditional text. How can we know whether to consider this act as having been good or bad, lawful or unlawful, before the Islamic revelation? A maxim addressing this question may be put in the following terms: Things are allowed until proven otherwise (*al-aṣl fī al-ashyā' al-ibāḥa*). This maxim has a clearly theological/philosophical aspect and is thus one which, creating a bridge between theology and legal maxims, defies simple classification.

Timurtāshī deals with this maxim (things are allowed until proven otherwise (*al-aṣl fī al-ashyā' al-ibāḥa*)) in his book's final chapter, where he introduces broadly related questions. He mentions that Ḥanafī jurists have expressed doubt about the validity of this maxim. These jurists say that we have no indication of how to rule on actions before the Islamic revelation decided them. They argue that we do not even know whether there are rulings for actions if the sources of our law do not offer any help for us to rule on them. The argument they present is that, if there is neither a revelatory source nor a rational source for such a ruling, how can a ruling be issued? The absence of a revelatory source in this case is obvious, but the absence of a rational argument requires explanation. The presumption of all concerned here is that a rational argument that leads us to decide that act X is allowable may be rendered invalid if revelation were to make X prohibited. For a rational argument to make us decide that X must have been allowed before the law, it must also explain why it was not possible that the law could have prohibited X at any point in history. On the other hand, a rational argument that makes us decide that X must be prohibited is susceptible to being repealed by a revelation that makes it allowable. This means that the rational argument can never be conclusive, which makes it inapplicable. Rarely could a rational argument

be made in favor of a certain conclusion or position, which revelation could not have come to repeal. Jurists give the example of inferring the duty of gratitude to God on all humans, which may be seen as a duty based on a rational argument that applied before the revelation.

In addition to the position that restricts the unaided intellect from making judgments about what was right and what was wrong before revelation, there are two other positions on the matter. Shāfiʿī jurists hold that actions must be presumed allowable until the revelation decides otherwise. Their argument is a textual one: In the Qurʾān (2:29), it is stated that God has created all things for use by human beings (*khalaqa lakum mā fī-l-arḍi jamīʿan*). This means that we should assume that we can enjoy whatever benefit these things offer unless we are told that they are prohibited. The other position, held by some Traditionists (*muḥaddithūn*), states that actions must be treated as "prohibited" until we know they are allowed. The argument for this position can ultimately be reduced to an attitude of pious caution derived from some texts in the Qurʾān and the Sunna.

What could be a practical application of this apparently theoretical (and, in the eyes of some, facetious) principle? If this principle addresses only historical rulings that should have applied thousands of years ago, why would Islamic law be affected by it? The answer is that what applied thousands of years ago constitutes a default position for Muslims and their post-revelation law. Therefore, applications of this disagreement can be found in cases where there is doubt as to what the Islamic revelation has decided for Muslims about a certain action, that is, when doubt arises as to what the correct ruling is for a given action. For jurists who believe that actions must be presumed permissible, cases where there is disagreement over whether an act is permissible or prohibited must be decided in favor of permissibility. Thus, actions not known to be permissible or prohibited with certainty remain permissible until compelling proof of their prohibition is produced. For those who believe that actions must be presumed prohibited until the revelation informs us of their permissibility, the believers must refrain from actions whose permissibility has not been established with certainty. Those who believe that there is no evidence either way hold that one's only duty regarding actions such as these is to consider the proper ruling on them unknown. In other words, the question of performing or not performing such acts in fact has no answer.[21]

---

[21] *Wuṣūl*, 319–20.

Conclusion

The richness of the *uṣūl* goes beyond providing a framework for the sources of law and a scheme of legal hermeneutics. The *uṣūl* include theoretical principles stemming from theological and philosophical reflection, which has a practical legal component. The interrelation between legal theory and law as a practical science whose subject is human actions, in fact begins to reveal an interrelation of theology, legal theory, maxims, hermeneutics, and practical legal determinations that classify human actions into lawful and unlawful, desirable and undesirable. The examples offered in this chapter of the interrelation between theoretical legal principles and practical legal determinations complete the picture of a seamless web of ideas whose threads are interlaced. Understanding the interconnection of these theoretical and practical elements can greatly enhance our understanding of Islamic juristic thinking.

CHAPTER EIGHT

THE *FURŪʿ* AND THEIR INTERRELATION WITH THE *UṢŪL*

In their simplest, most common form, the *furūʿ* of the *fiqh* are practical legal decisions describing actions as "prohibited," "reprehensible," "permissible (neutral)," "recommended," or "obligatory." The cases that require these decisions can also be called *furūʿ*. But *fiqh* is not limited to making these practical legal decisions, since it also includes much of what may be properly called legal theory, i.e., much theoretical legal reasoning which jurists may deem appropriate to mention in their summa works of *fiqh* to explain the basis of the practical legal decisions they discuss. Thus, the case for the interrelation of the *furūʿ* and the *uṣūl*, in my view, can be made most clearly by studying summa works of *fiqh*. Works of *takhrīj al-furūʿ ʿalā al-uṣūl* serve as guiding manuals that point to connections between theoretical and practical legal reasoning, of which more elaboration may be found in *fiqh* books.

One must remember that the *furūʿ* theoretically encompass all human actions whether involving rituals or trade, family matters or crime, political arrangements or personal behavior. There are different levels of legal decisions that can be made in practical matters: Some decisions apply in regular situations (e.g., fasting is *obligatory* for the healthy), while others apply only in special circumstances (e.g., fasting is *prohibited* for menstruating women). Some may be given in regular or paradigm-case scenarios and may thus be formulated as general rulings in generic terms (e.g., if the only inheritors of the deceased are his: 1) son, 2) wife, and 3) a paternal male cousin, then the wife collects an eighth of the inheritance and the son the rest). Others may be variations on the paradigm case that include more details (e.g., in the above case of inheritance, if the son has been convicted of killing his father, and if the wife happens to be a paternal cousin of her deceased husband, then the wife collects five twelfths of the inheritance and the male cousin the rest).[1] The first inheritance case is a

[1] The wife would collect her eighth of the inheritance before the cousin's share is determined. Since the remainder of the inheritance (seven eighths) must be divided among those related to the deceased through his male agnates, both the wife and the

"regular" case that applies a minimum number of legal principles, while the second includes a complicating factor. Still, both cases are decided in general terms. By contrast, some very specific cases involve yet further details and more complex considerations of consequence for the final decision, and the resulting rulings therefore apply only to specific individuals. These may be called penumbra cases or gray-area cases. Thus, the generality or specificity of the *furūʿ* belong to a spectrum. The general, generic types of *furūʿ* are to be found in *fiqh* summa works, and the most specific forms of legal decisions are found in sources of detailed legal opinions (*fatwās*).

In the *takhrīj al-furūʿ ʿalā al-uṣūl* literature, the *furūʿ* are mostly generic practical legal determinations made to fit what I called regular or paradigm-case scenarios. The *takhrīj* literature draws our attention to the most basic structural interrelation between theory and practice in the law, but more work is needed to understand the full range of interrelatedness of the *furūʿ* and the *uṣūl*.

In the present study, I speak of structural interrelations of legal theory and practice to indicate two facts. The first, already touched upon in the opening chapters, is that the connection between the *furūʿ* and the *uṣūl* allows for the development of each of them while maintaining the connection between them. Both the *uṣūl* and the *furūʿ* can be developed as valid considerations are discovered that may require modification of a theoretical legal principle or a practical legal decision. In the process of developing legal theory, some theoretical legal principles make philosophical or theological points that do not clearly relate to practical matters. However, unless a breakdown occurs in the system, practical legal decisions must make sense in terms of the principles of theoretical reasoning. The structure of Islamic legal thought is sustained as it maintains interest in both the theoretical and the practical aspects of the law while modifying them.

The second fact concerning a "structural interrelation" of theory and practice in Islamic law is that the connection between the *furūʿ* and the *uṣūl* may be viewed as having a *core* in which paradigm-case scenarios

---

male cousin will have to share the rest with a ratio of 2:1 (male: female). Thus, the wife collects a third of the remainder of seven eighths (= 7/24) in addition to her initial one eighth of the whole, all of which makes ten shares out of twenty four or five twelfths. The male cousin gets two thirds of the remaining seven eighths, which makes seven twelfths.

are prominent. In penumbra cases that have many complicating factors, a larger number of theoretical principles apply. For the sake of consistency, and to guarantee a degree of predictability in the law, Muslim jurists must apply a finite number of theoretical legal principles. To judge whether Muslim jurists succeed or fail in achieving an adequate level of consistency in their legal reasoning, one must be sufficiently well-versed in legal theory to be able to understand the subtle and complex reasoning Muslim jurists apply in their practical legal reasoning. It is not at all surprising that the role of theoretical legal reasoning in Islamic jurists' practical legal determinations in penumbra cases may not be immediately evident to outsiders. It goes without saying that one need not presume any infallibility on the part of Muslim jurists as a group or declare them invulnerable to inconsistency. However, one need not accuse Muslim jurists of inconsistency or separation of theory and practice without adequate research and reflection on both the theoretical and practical elements of their reasoning.

In sum, a structural interrelation of theory and practice can be discerned on a variety of levels, the most basic of which can be seen most clearly when we examine paradigm cases, while more research is needed to understand the more complex reasoning and deliberation among jurists in penumbra cases.

The Scope of the Furūʿ *in the Sources of this Study*

The scope of the *furūʿ* varies in the six works under consideration here. As we have stated repeatedly, all six works speak of the link between principles of legal theory and rulings from the realm of legal practice. Zanjānī's work is the only one organized into chapters based on the *furūʿ* rather than the *uṣūl* it discusses. In each chapter Zanjānī includes only those theoretical legal principles relevant to the *furūʿ* that belong to a specific area of the practical law. Zanjānī deals with *furūʿ* related to ritual purity, prayers, almsgiving, fasting, pilgrimage, sale, usury, pawning, proxy, confession, property appropriation, the renting and leasing of property, the right of preemption of property, slave proxy, vows, marriage, dowry, the jurisdiction of Islamic law, divorce, resumption of marriage after divorce, alimony, crimes against the human body, crimes whose punishments are determined in the revelatory sources of the law, robbery, war, oaths, adjudication, legal testimony, the freeing of slaves, and contracts with slaves resulting in their emancipation.

The above list provides a sense of the breadth of the *furūʿ* which Zanjānī's work discusses and elaborates. The *furūʿ* or practical legal decisions mentioned in the remaining five works are organized according to their relevance to theoretical legal principles. In Tilimsānī's work, a broader variety of practical legal issues is discussed, while in Isnawī's and Timurtāshī's works, the proportion of cases addressing the legal consequences of verbal statements is disproportionately high. Nevertheless, these five works include a broad range of *furūʿ* belonging to a many areas of practical legal decisions.

The reader interested in *furūʿ* will find that all six works include a good variety of *furūʿ* from all the aforementioned areas of the law (rituals, trade, family, political authority, etc). In an ideal situation, a case (C1) is a real-life situation governed by a ruling (R1), which is based on a theoretical principle (P1). But do all the *furūʿ* in the six sources consist of regular practical legal questions? The short answer is no. Isnawī's *Tamhīd* and Timurtāshī's *Wuṣūl* also include hypothetical (practical) cases generated from theoretical and grammatical inquiries. For example, a jurist may ask whether, if case C* arises, a jurist would have to rule R* based on principle P. Principle P has been proven to be theoretically valid (it could be a principle of legal hermeneutics, a definiens, a principle of sound legal inference, etc.), while both case C* and ruling R* have been devised as examples of potential real-life questions that would be governed by principle P. In our examination of the *furūʿ* in our sources, therefore, we are speaking of two kinds of *furūʿ*: real-life cases and hypothetical cases. To illustrate the contrast between these two types of *furūʿ*, I will offer two examples.

An example of a principle of legal theory that governs real-life questions is a principle of legal theory or an *aṣl* (P1) dealing with the definition of the Qurʾān. Principle P1 confines the Qurʾān to a specific Arabic text rather than any rendering or translation of its content. If the definition of the Qurʾān excludes all paraphrasing and translations of the Arabic text, then these translations cannot be called Qurʾān, properly speaking. In Islamic legal theory, a definition of the Qurʾān may be offered simply as a preface to a discussion of the Qurʾān as the first source of law in Islam. For the purpose of the *uṣūl* (legal theory), this determines which text jurists should rely on when they discuss the import of the Qurʾān. But this definition becomes a principle in its own right and capable of applications in the *furūʿ* (legal practice).[2] How does

[2] *Wuṣūl*, 128.

principle P1 function in practice? In other words, is there a real-life case C1 in which ruling R1 may be introduced on the basis of principle P1? The answer is yes. Case C1 goes as follows: Can a non-Arabic-speaking Muslim recite parts of a Persian translation of the Qurʾān in his/her prayers? According to principle P1, the answer is no, since a translation of the Qurʾānic text cannot be called "Qurʾān," and what is required to be recited in the prayer is what is called Qurʾān. Hence, ruling R1: A translation of the Qurʾān does not substitute for the original Arabic text in the performance of the prayers.

C1 is a real-life question rather than a hypothetical case. On the other extreme of the spectrum of possibilities in legal practice one finds a principle P2, which governs a ruling R* in a hypothetical case C*. P2 is a principle of legal hermeneutics addressing whether an expression of *a fraction of something* (a half, a third, a quarter, etc.) must be taken to indicate at least *one full instance of that thing* if a fraction of it does not exist in reality. This principle is useful in interpreting ambiguous or cryptic contract language.[3] Now, in the (hypothetical) practical question C*, a man states that his wife is divorced "half of an instance of divorce" and "a third of an instance of divorce" and "a sixth of an instance of divorce." Although such language sounds quite exotic to the modern ear, it shares much with actual modern contracts in various areas of civil law. According to principle P2 ("an expression of a fraction of something must be taken to indicate at least one full instance of that thing if a fraction of it does not exist in reality"), ruling R2 would be that the man has in fact divorced his wife three times, because each fraction must count for a full instance of divorce (half = 1, a third = 1, and a sixth = 1; hence, 1 + 1 + 1 = 3). One cannot count the half as referring to a half of a divorce D1 and the third as referring to a third of the same divorce D1, since saying *half an instance of divorce* (Arabic *niṣf ñalqa*) and *a third of an instance of divorce* (Arabic *thuluth ṭalqa*) must be taken to indicate two *separate* instances of divorce, D1 and D2.[4] That is, when the indefinite form

---

[3] It is also important to remember that people's way of talking—sometimes unusual or uncommon—have caused them to ask jurisconsults all kinds of strange questions related to divorce and contracts, as those familiar with lengthy summa works of *fiqh* know. For example, jurists have asked [or have been asked?] whether selling an object to somebody's *ʿayn* (eye) may be taken as a metaphorical reference to selling it to the person himself, since the word *ʿayn* is an apposition that expresses emphasis, such as *al-walad ʿaynuh* (the child himself). It may have been experience with actual questions of this nature that led to this juristic habit of inventing similarly strange questions.

[4] *Takhrīj*, 137.

is used (*ṭalāq*), one cannot meaningfully refer to *an instance of divorce* and *an instance of divorce* and be speaking of the same instance; on the other hand, when the definite form is used (*al-ṭalāq*, i.e., *this* divorce), one can repeatedly refer to *a specific instance of divorce* and still be speaking of the same instance. If we believe that "an expression of a fraction of something may be taken to indicate that fraction, even if such a fraction is not intelligible to the linguistic community" (P2-, the antithesis of P2), then the man has divorced his wife only once. That is, based on P2-, one must add up the fractions into a complete one (a half + a third + a sixth = 1).

The fact that hypothetical cases are part of the *furūʿ*, the practical aspect of Islamic legal reasoning, may throw doubt on some of my claims about the interrelation of Islamic theoretical and practical legal thinking. In the next section, I shall offer further discussion of that subject.

Hypothetical Questions and the Interrelation of Legal Theory and Practice

At the dawn of Islamic legal thought, the terms *ara'ayta* (what-if) and *ara'aiytiyyūn* (those interested in what-if questions) conveyed negative connotations. The idea was that the *ara'aiytiyyūn* concerned themselves with imaginary, and often improbable, situations and legal questions. In reality, some *ara'aiytiyyūn* were mature and sophisticated jurists, while others were less so. Over the course of Islamic legal history, Muslim jurists have believed that, while not all forms of *ara'ayta* questions are worthy of consideration, some are of value in developing the juristic craft.

In the *takhrīj al-furūʿ ʿalā al-uṣūl* literature generally, hypothetical questions are rare, and those mentioned in Isnawī's and Timurtāshī's works are not fanciful or unrealistic questions. They are, rather, questions arising from a legal dialectic whereby law as theory and law as practice are juxtaposed with one another in an attempt to maximize their convergence and consistency. This concern for consistency between legal theory and practice goes beyond that of ordinary practicing Muslims who are interested in correcting their practice and beyond the concern of more inquiring Muslims who at most tend to be interested in those aspects of legal theory that relate directly to their practice. That is why at least advanced Muslim jurists and legal theorists have had to be among the *ara'aiytiyyūn* to one degree or another.

The legal dialectic that occupies and engages advanced Muslim jurists consists ultimately in these jurists' attempts to reconcile and transcend

the tensions and contradictions between legal theory and practice. The advanced jurist is aware that the ideals of theory and the demands of real-life practice sometimes pull in different directions, yet these opposing forces may also be seen as converging in the very process whereby the jurist seeks a solution to his/her practical question based on the legal system's theoretical ideals. Law influences society and society influences law in a manner closely reflecting the legal dialectic that jurists utilize to lead the community on a path of constant adaptation and adjustment.

Considering the small number of these hypothetical questions in relation to all practical legal cases treated in these works and in regular books of *fiqh*, it is clear that such hypothetical questions do not constitute a significant proportion of what jurists have elaborated and discussed as examples of legal practice. This point is particularly important for the Western reader, who may be acquainted with how historians such as Schacht have occasionally generalized from exceptions like these to make a case for essentially wrong conclusions. The very mention of hypothetical questions in books of law should not be taken as an indication of an absence of real-life questions that fit the theoretical framework created by legal theory. Such a hasty conclusion would do injustice to our understanding of the totality of the Islamic juristic corpus, and in this case, the totality of the materials in the *takhrīj al-furūʿ* works.

The need to apply juristic minds to hypothetical questions is acknowledged by all practitioners of law under any legal system. For legal theory to govern *all real* legal practice, it must govern *all possible* practical legal questions. Hence, the existence of hypothetical questions does not in itself suggest a disconnect between legal theory and legal practice. If any thing, it bolsters the claim of the efficacy of legal theory in a given legal system. This clearly flies in the face of the position of some early Muslims who rejected in principle any involvement in considering hypothetical questions based on the dogma that one should confine oneself to questions offered by the Creator (in the world of real events).

However, hypothetical cases can create their own world of *ideas* or idealism, in the general sense of beginning one's inquiries with ideas rather than practical considerations. Idealist tendencies that are rigid and uninterested in any practical point of view have a limited value in everyday life. Yet emphasizing the point of view of idealism need not be seen as inevitably harmful to practical needs. In fact, stating an idealist position in clear terms unmitigated by practical considerations is necessary for a full comprehension of that idealist point of view.

Let us take an idealist point of view on the use of language, for example, that presupposes that the speech of a community that speaks the language of the divine revelation should (ideally) be intelligible in terms of the grammar used in that revelation (the Qurʾān). If the law addresses practical questions arising from utterances and other statements made by this community of speakers (and initiating legally binding commitments), then this idealist point of view should refer to the grammatical principles used in the Qurʾān to interpret these statements. Now, inasmuch as the community considers itself to be an Arabic-speaking community, this idealist viewpoint will apply to it. That is also to say, that the degree to which this ideal may be deemed irrelevant is proportionate to the divergence between the actual habits of speech and writing of this community and the language of the Qurʾān.

Isnawī's juristic writing in general, and his *Kawkab*[5] and *Tamhīd* in particular, betray an idealist tendency manifested in the ambition to apply the rules of interpretation of the language of God to the language of His human subjects. Isnawī's concern for legal hermeneutics—otherwise naturally directed to interpreting the divine language in revelation—is directed mainly at the pronouncements of those addressed by the law.[6] For example, if a man says to his wife (*in dakhalti al-dār anti ṭāliq*; in English this may sound like "if you enter this house; indeed you are divorced," i.e., without a link between the conditional clause and the sentence that follows, thus raising doubt about this link), then the woman is divorced unconditionally, because his utterance failed to create the appropriate connection between the condition and its result (in Arabic, it should have been *in dakhalti al-dār faʾanti ṭāliq* "if you enter this house, *then* you are divorced," with a *fāʾ* linking the two parts of the conditional sentence).[7]

To be sure, Isnawī does not intend to say that people should be taken to account for statements they make without understanding their meaning. His intention is to state the general rules that apply in Islamic courts and before jurisconsults who provide legal opinions from the standpoint of Islamic law. His position addresses the fact that, in many cases, people

---

[5] Isnawī's book is titled *Al-Kawkab al-Durrī fīmā yatakharraj ʿalā al-uṣūl al-Naḥwiyya min al-Furūʿ al-Fiqhiyya* or *al-Kawākib al-Durriyyah fī Tanzīl al-Furūʿ al-Fiqhiyya ʿalā al-Qawāʿid al-Naḥwiyya*. It was published under the former name by Dr. Mḥammad Ḥasan ʿAwwād (Amman, Jordan, 1985). It is organized based on grammatical inquiries, which are followed by legal questions of relevance.

[6] Examples of these, as we noted, are found in nearly all of the six works we are studying (including Tilimsānī's *Miftāḥ*: e.g., 71–2).

[7] *Wuṣūl*, 147; *Tamhīd*, 151.

would be willing to claim that they *did not know what they meant* in order to escape the consequences of their utterances. There is an interesting disagreement among jurists as to whether such claims should be believed or not. In the above case, for example, failing to pronounce this *fāʾ* could occur when a person interrupts himself to begin a new sentence, but it could also occur when a person fails to follow the correct grammatical rule in this case. Does this question, then, hinge on the intention of the speaker? Some jurists believe that intentions must be investigated only when a valid claim of ambiguity can be made. Ibn al-Qayyim[8] dedicates a good part of one of his voluminous books to counter Isnawī's position on this issue with commonsense reasoning, maintaining that it is people's habits of speech and intentions that count in determining their legal commitments rather than grammar. The argument against Ibn al-Qayyim's view is that people's habits of speech can be hard to discern, and intentions are definitely inaccessible.

Isnawī reminds us that not all of the principles of interpretation that apply to the divine language are pertinent in matters concerning human language. The author points out that when a word has a lexical, a customary, and a legal meaning (each distinct from the other), jurists disagree about which meaning must enjoy priority over the other. When the text is from the Qurʾān or Sunna, our presumption must be that the legal meaning enjoys priority over the customary, and the customary over the lexical. This cannot be our presumption about people's language. Isnawī states that when an utterance involves everyday language, only customary and lexical meanings are considered.[9] (Incidentally, the same presumption was stated six hundred years later by Earl Crawford in his book on the canons of statutory construction in American law.[10])

The links between grammatical principles and legal opinions invited disagreement as early as the second century of the Hijra. In the book of *aymān* (oaths) in his *al-Ǧāmiʿ al-Kabīr*, Muḥammad Ibn al-Ḥasan al-Shaybānī (d. 805) discussed and demonstrated how resolution of many question of law is contingent on understanding grammatical and other linguistic principles. Shaybānī's position had its critics, who may have (like some observers today) thought it far fetched to think of the process of lawmaking as an outcome of semantic quibbles. Zamakhsharī, who had the intuition of a jurist and perhaps the bias of a linguist and

---

[8] Ibn al-Qayyim, *Iʿlām al-Muwaqqiʿīn*, (Beirut, 1988), III, 110–229.

[9] *Tamhīd*, 228–36.

[10] Earl T. Crawford, *The Construction of Statutes* (Saint Louis, 1940), 319–22.

rhetorician, dismissed Shaybānī's critics and accused them of lack of erudition, since they could not appreciate the interrelation between the linguistic sciences and the religious sciences.[11] As we discussed earlier, the connection between the linguistic and legal sciences is multifaceted, and the impact of the interpretation of texts on legal opinions is only one aspect of this connection. This is, in essence, the message of Isnawī's *Kawkab* and *Tamhīd*.

Although the notion that people's speech could give rise to these types of legal questions and discussions may seem a stretch to readers from some cultures, the conflict among regular, customary, and legal uses of a word that Isnawī faces is real. One such question was addressed to Isnawī by a man from Yemen who was soliciting a juristic opinion, which shows that it was both a real-life question and one that was viewed as relevant in Isnawī's time (not merely harking back to grammatical quibbles of an earlier age). We discussed this case in Chapter Six: whether a man who makes an oath not to drink *fuqqāʿ* breaks his oath if he drinks *nabīdh* (a question which turns on whether these two drinks are the same or not). Isnawī states that considering the *fuqqāʿ* a form of *nabīdh* is accepted in correct language use, but *fuqqāʿ* is not usually called *nabīdh*.[12]

To a lawyer, the value of Isnawī's *Kawkab* and *Tamhīd* must clear. Even if these two books seem to be directing a great attention to everyday speech in a way that most modern lawyers would find hard to relate to, all lawyers recognize that the interpretation of (often written) legally binding agreements and other legally relevant statements is always of concern to the lawyer and the judge.

Final Remarks on the Multidimensional Connections Between Legal Theory and Legal Practice

The complexity of the ways in which theoretical and practical legal thought can interrelate derives from their complex nature. Change is a fact of life, both the life of social practices and the life of ideas or theoretical conceptions. To capture the relationship between legal theory

---

[11] Zamakhsharī (ed. Imīl Badīʿ Yaʿqūb), *Al-Mufaṣṣal fī Ṣināʿat al-Iʿrāb* (Beirut, 1999), 31.

[12] *Tamhīd*, 232. Isnawī believes that reference to people's intention to interpret their utterances is allowed only when there is ambiguity in their speech. Thus, for Isnawī, determining common use is essential for deciding whether an intention must be considered to determine what the person meant.

and legal practice in a changing world, one must bear in mind the image of two mechanisms that are capable of generating their own movement to a certain degree but are still tied to one another. Neither mechanism would be what it is if it pursued a path separate from the other. As their entwinement persists, their constant movement effects change in each of them.

Imagine a ship that is in the process of being renovated piecemeal; only parts of it are changed at a time. If the renovation of parts of the ship continues for a while, the ship will become a "different" ship in due time. But is it really a new ship? Assuming the ship becomes different if very little or none of its original structure persists after the changes, one could ask about the moment at which the ship becomes a "different" one. This is an ancient paradox. In our discussion of the development of law and legal theory in Islam, things are a little more complicated. What we have here are two ships sailing in tandem one with the other, with renovation applied to both of them at the same time. If one of the ships stops, the other will stop, too, and that is why the two vehicles must be renovated simultaneously (as they sail in the same road and are exposed to the same conditions). A valid question is: *Do the two vehicles become different vehicles over time? And, if yes, when does this happen?*

When one observes what change does to the mechanism of theory, one notices that some forms of theoretical legal reasoning are generated amidst theoretical legal discussions that may have limited practical value. However, it is quite common for such forms of legal reasoning to remain in the realm of theory until an able juristic mind finds applications for them in the world of practical legal dilemmas. To continue the metaphor of the two vehicles, a piece of one vehicle which seemed to perform no function at a given time and might have been tossed away may be rediscovered and restored at a later moment and integrated into the vehicle of which it is part. The confidence with which legal theorists devise principles of legal theory with no immediate applications has led their critics to accuse them of undue idealism and lack of attention to practice. However, jurists' theoretical mindedness can be overstated, and a more nuanced view highlighting the interrelation of legal theory and practice provides an important complement to some of the previous scholarship in the field (see my critique of Schacht and Calder in Chapter Two).

Legal practices also change. Certain practices wither into the realm of *past practice* or the history of legal practice, which one may equate with theory in the sense that these practices survive in the minds of jurists

living in contexts where no immediate applications can be attached to them, yet they remain part of the tradition and may be revived at a later stage. The particular social conditions that previously made these legal practices relevant to people's lives may be revived. The principles to which obsolete legal practices relate may appear theoretical, but once these practices are revived, their theoretical underpinning resurfaces as a form of practical reasoning. One requires ample data from historical sources to be able to decide whether a given question of legal practice was purely hypothetical or more of a rare real-life question (see the above example of the Yemeni questioner on the oath case).

In the discussions of the *uṣūl* and the *furūʿ* in the *takhrīj* works, we noticed that more than one theoretical principle may affect a single practical legal decision, and a group of practical legal decisions may be affected by one and the same principle of legal theory. For one principle of legal theory to be relevant to more than one practical legal decision is natural, since theoretical legal principles are meant to govern multiple cases; it is simply part of the design of legal theoretical principles to apply in different practical cases. In fact, some legal theoretical principles may be considered arch-principles under which other principles are subsumed. An arch principle AP may be an abstraction from a host of other legal principles (P1, P2, etc.), which govern practical legal cases (C1, C2, C3, C4, etc.). For example, a principle of legal hermeneutics about understanding concepts (AP) may apply to different texts in which concepts require definitions; these definitions function as theoretical principles (P1, P2) governing multiple practical cases (C1, C2, C3, C4). Arch-principle of legal hermeneutics AP states that terms that have a literal and a technical meaning should be interpreted according to their technical meaning (absent clues necessitating the opposite). According to AP, P1 offers a technical definition of *ribā* (literally = increase; technically = usury) as any exchange including a possible or actual increase (interest) in an exchanged item. P1 also requires jurists to ignore a term's literal use when interpreting Scriptural language. Cases C1, C2, etc., are examples of exchanges that may include usurious agreements that must be governed by P1. AP could also govern P2, which is a definition of *zakāh* (lexically = purity; technically = almsgiving). Cases C5, C6 could be governed by P2 and ultimately by the same AP.

Cases such as C1, C5, etc., may also be an occasion for citing and discussing more than one theoretical legal principle. For example, the discussion of whether witnesses to a marriage contract should be upright

(of good character) hinges on Qurʾānic and Prophetic texts. Qurʾānic texts addressing this subject do not include this stipulation. Some of the relevant Prophetic reports mention it while others do not. The Prophet is reported to have said: 1) "Marriage is not deemed valid without a male guardian, a dowry, and two witnesses" and 2) "Marriage is not valid without a male guardian, a dowry, and two *upright* witnesses." In this context there are two relevant principles or *uṣūl*, one hermeneutical and another related to abrogation. The first states that "When two texts use one term (one qualified and the other unqualified) in the context of a single issue and a single practical legal determination or ruling (prohibition, permission, obligation, etc.) that are tied to this term in both texts, then the qualification in the one text must apply to the other." The second principle, according Abū Ḥanīfa, is that a Prophetic text including information not available in the Qurʾānic text addressing the same issue must meet the standard of multiple reporting (*tawātur*) required for a Qurʾānic text; otherwise, such a report cannot abrogate the Qurʾānic text. Based on the first principle, Shāfiʿī jurists argue that uprightness is a requirement in witnesses to a marriage contract and that marriages with witnesses who do not satisfy that requirement are invalid. Based on the second principle, Abū Ḥanīfa argues that the addition of "uprightness" in some of the Prophet's statements must be rejected, since it contradicts the Qurʾān, which does not mention uprightness as a condition for witnesses to marriage. Here different jurists did not appeal to principles that are mutually exclusive; they simply employed different principles. Shāfiʿī jurists appeal to the first principle and reject the second, while Abū Ḥanīfa does the opposite.[13]

To arrive at a desired practical legal ruling or *farʿ*, jurists often need to refer to more than one principle of legal theory. Note the position of Ḥanafī jurists in the following example. In a Prophetic report on the

---

[13] Sometimes a legal decision is mentioned in the context of two principles that have a more tenuous relationship to it. For example, Shāfiʿī jurists hold that marriage contracts can be concluded in a valid manner only if one of the words indicating "marriage" (*inkāḥ* or *tazwīj*) is used, whereas Abū Ḥanīfa and his followers accept the validity of the contract if other words are used that are not obviously incompatible with the nature of the contract (such as dedication or *hiba*). Zanjānī mentions the Shāfiʿī view in the context of two different principles. The first is that "married" is a proper description of the husband in a marriage relationship, which is rejected by Ḥanafī jurists who believe that "married" is a proper description of the wife rather than the husband. The second is the principle that the purpose of marriage is allowing the married couple lawful sexual pleasure.
Takhrīj, 106 and 194.

authority of Anas Ibn Mālik, the Prophet says that turning wine into vinegar is not permissible. For Ḥanafī jurists, the permissibility (or prohibition) of turning wine into vinegar is a *farʿ* that may be decided based on the following two *uṣūl* or principles:

1) A change in the circumstances in which a legal ruling was given entails the abrogation of that ruling.
2) Reasoning by analogy has the power to abrogate texts.

Ḥanafī jurists argue that this prohibition was meant to curtail new Muslims' attachment to wine by prohibiting them from using wine to make vinegar. In support of this view, Ḥanafī jurists state, for example, that the Prophet ordered Muslims to break their wine glasses as a way of declaring their dissociation from the act of wine drinking, and jurists agree that someone who quits drinking wine today is not required to break his/her wine glasses or vow not to use them to drink other liquids. In reference to the second principle, Ḥanafī jurists argue that the prohibition against turning wine into vinegar ceases to apply, just as the requirement to break one's wine glasses no longer pertains. This is an abrogation of texts by analogy. All jurists agree that there is no need to break wine glasses and that the past instruction to do so has no application today. By the same token, the religious instruction to avoid turning wine into vinegar does not apply today. Analogy here overrules the Prophet's prohibition against turning wine into vinegar.[14]

Mālikī jurists disagree with both of the above principles and argue that the prohibition against turning wine into vinegar continues to be valid despite the change in circumstances. A Mālikī jurist may worry about the implications of the Ḥanafīs' reasoning here. Jurists agree that a religious instruction to break wine glasses as an indication of repentance and a strong statement about giving up wine ceases to apply. To take this reasoning to its logical limits, one would argue that another religious instruction (not to use wine to make vinegar) ceases to apply once it is agreed that people no longer have any attachment to wine. This reasoning can be seen as putting religious commands in danger. Could one argue, by extension, that the very prohibition against wine is no longer meaningful? Could one say, for example, that if wine vinegar is allowed (despite the text), wine itself may also be allowed by analogy?

[14] *Miftāḥ*, 114–5.

Conclusion

The *uṣūl* and the *furūʿ* maintain a complex relationship whereby jurists move from the realm of theoretical reasoning to the realm of practice in order to solve real-life questions and satisfy their concern for consistency. The interrelation of theoretical legal principles and practical legal decisions does not take the form of a one-to-one correspondence between a single theoretical principle and a single practical decision. The interrelation of theory and practice is maintained for the structure of the legal system to persist, while allowing for the explanation of different perspectives and the exercise of reasoned dissent.

CONCLUSION

This study has attempted to contribute to the discussion on the interrelation of law and legal theory in Islamic legal and intellectual history. The study highlights six works of *takhrīj al-furūʿ ʿalā al-uṣūl*, juristic works that serve as a point of convergence for theoretical and practical legal reasoning. A satisfactory answer to the question of the extent to which Islamic legal theory and legal practice are interwoven and interdependent is likely to be nuanced and forbiddingly complex. *Simplex sigillum veri* (simplicity is the seal of the truth) does not always hold, and certainly does not hold in this case. Sources of social and legal history, among other sources, must be consulted to complete the picture, but the six sources I have introduced will, I hope, remain an important point of reference for the discussion. These six works have something to tell us about the process of legal reasoning that simultaneously involves the realms of theory and the realms of practice and explains their basic structural interrelationship.

Relying on these six works of *takhrīj al-furūʿ ʿalā al-uṣūl*, I presented four broad umbrellas for theoretical legal reasoning in Islam. First is the classification of the legal rulings that govern human actions, which (rulings) are presented as the "fruit" of Islamic legal thinking, accompanied by a delineation of the notion of responsibility before the law and impediments to human agency that reduce this responsibility or eliminate it (Chapter Four). Second are the textual sources of the law coupled with a theory of legal hermeneutics that allow Muslim jurists to draw on the content of the Qur'ān and the Sunna to devise practical legal rulings in specific circumstances (Chapter Five). Third are what I called extra-textual sources of the law, including juristic consensus, utility, and custom—which all aid the jurist to rule in cases where the textual sources lack a clear answer to the questions at hand (Chapter Six). Fourth and finally comes a group of heterogeneous theoretical principles dealing with definitions of concepts, basic theoretical issues such as the personal and territorial jurisdiction of Islamic law, and theological, meta-legal, and legal maxims (Chapter Seven).

Thus one can conclude that the scope of the *uṣūl* in the six *takhrīj al-furūʿ ʿalā al-uṣūl* works presented here is much broader than in scholastic definitions

of *uṣūl al-fiqh*. In the *takhrīj* works, the *uṣūl* consist of a wide range of theoretical legal principles: some relate to the interpretation of the sources of the law and some to legal rulings as the fruit of legal reasoning, as I noted, but many are various forms of legal maxims not clearly related to these two. Some of the *uṣūl* belong in a grand-legal-theory structure where principles concern the sources of the law (textual or non-textual); others are simple inferences from specific texts of the Qurʾān or the Sunna of the Prophet which were used to answer a group of questions of the law rather than address a specific case; and yet others are abstractions from legal opinions of earlier generations, which opinions had either a textual or a rational basis.

Theoretical legal reasoning as distilled from the works of *takhrīj al-furūʿ ʿalā al-uṣūl* show that the scope of the *uṣūl* has also been different in the writings of different jurists. The *uṣūl* of grand-legal-theory *uṣūl al-fiqh* is simply a well-developed form of legal theory, but does not encompass all of Islamic legal theory. Studying the interrelation between GLT *uṣūl al-fiqh* and legal practice must always be supplemented by the study of the interrelatedness of other aspects of Islamic legal theory and legal practice.

My work suggests that the best sense that a historian of Islamic law can make of works of *takhrīj al-furūʿ ʿalā al-uṣūl* such as those presented here is that these works highlight Muslim jurists' understanding of the natural connection between law and legal theory. *Takhrīj al-furūʿ ʿalā al-uṣūl* works provide sufficient evidence of the interrelation of the *uṣūl* in regular books of *uṣūl al-fiqh* and the *furūʿ* in summa works of *fiqh* or *furūʿ*. The material included in my sources, despite their eclectic nature, is bound to draw our attention to underlying (and sometimes explicit) assumptions about the teleological interrelation between theoretical and practical legal thought.

The works of *takhrīj al-furūʿ ʿalā al-uṣūl* portray Islamic legal theory as the outcome of a process of negotiating a general program of theological and moral objectives and the imperatives of the mundane life of individuals in society. These works include examples of how practical legal determinations or rulings have been the outcome of theoretical assumptions regarding language use and logical reasoning. The practical application of these linguistic and logical assumptions, and the fact that these assumptions represented integral elements of the worldview of the medieval jurisconsults and were generally adopted in the lives of their practicing Muslim contemporaries—all suggest that their *theoretical* (in the sense of impractical) character should not be overstated.

A legal dialectic in which the jurist moves back and forth between *uṣūl* and *furūʿ* is essential to the Islamic juristic endeavor. It is in the

adjustment of theory to fit practice and the reconsideration of practice in light of theory that a jurist carries out his/her task. The value of the juristic endeavor for Muslim society would be thrown into question had that endeavor consisted, as some modern historians have suggested, in a mere game of trickery and stratagem. Moreover, a quite impoverished reading of myriad legal texts in *fiqh* books would have to be offered to support an insistence on the notion that legal theory and legal practice were isolated from each other. Such an approach would prevent us from understanding these *fiqh* books deeply and appreciating their complexity.

The notion that the *uṣūl* mediate between theology and law is explicitly expressed in two of the sources of this study,[1] but the story these works tell is more complex. Generation of the *uṣūl* from the *furūʿ* and vice versa seems to have been regarded by jurists as a natural and repeatable process, since an *aṣl* may be an abstraction from a group of legal opinions (*furūʿ*) and a *farʿ* may be a hypothetical question based on a theoretical legal principle or an *aṣl*. Dabbūsī's *Taīsīs al-Nazar* attempts to articulate some of the *uṣūl* that governed legal reasoning in the production of the *furūʿ* or existing legal opinions, but a fairly heterogeneous group of *uṣūl* is also mentioned—some drawn by direct inference from texts, and some drawn from rational assumptions or notions of what is just and appropriate. In Isnawī's *Tamhīd* and Timurtāshī's *Wuṣūl*, the task seems to be to collect existing, interdependent *uṣūl* and *furūʿ* and to generate the *furūʿ* not found in regular works of *fiqh* from the *uṣūl* that are often known to be studied in *uṣūl al-fiqh*. Zanjānī's *Takhrīj*, Tilimsānī's *Miftāḥ*, and Ibn al-Laḥḥām's *Qawāʿid* mainly address the *uṣūl* and *furūʿ* found in the already existing books of *uṣūl* and *furūʿ*.

While the works of *takhrīj al-furūʿ alā al-uṣūl* that I introduced here present a clear "common message," each work also reflects the peculiarities of its author's juristic personality, the stage of development of juristic thought in his era, and the academic culture in which the work was written. I dedicated the third chapter of this study to a description of these works and included their authors' statement of purpose when this was available. I attempted to achieve a balance between emphasizing the uniformity of these sources and the uniqueness of each.

The traditional Muslim introduction to *uṣūl al-fiqh* (the ten points of departure) teaches that the *uṣūl* and the *furūʿ* are teleologically interdependent. This

[1] Isnawī's *Tamhīd* and Ibn al-Laḥḥām's *Qawāʿid*.

view finds both support and challenges in the juristic literature of different eras and schools of law. The traditional introduction to *uṣūl al-fiqh* also teaches that the evolution of the *uṣūl* and the *furūʿ* has occurred as two aspects of a single process. This should not be taken to suggest a matrix of theoretical legal principles and practical legal rulings of perfect ratios and interconnections. Such view would be as problematic as the view that the *furūʿ* had an *ad hoc* existence long before *uṣūl al-fiqh*, that *uṣūl al-fiqh* was the product of a much later stage in Islamic legal thought, and that legal theory had only a tenuous link to everyday law.

Efforts to produce analyses of the links between specific legal ideas and their milieus are greatly needed. Whether they focus on the power of the human intellect to generate novel ideas to address social, political, or economic needs or show its ability to apply itself to Scriptural exegesis for similar reasons, such analyses can contribute tremendously to our understanding of the Islamic tradition as religious and intellectual history. Such work will show how each stage of Islamic legal thought has reflected its temporal context and the ways in which interpretation of the Qur'ān and Sunna has linked texts and reality.

EPILOGUE

Just as there are mainstream and non-mainstream ideas and behavior in the present, there are mainstream and non-mainstream traditions, depending on the audience and context. The preceding essay was an exercise in writing non-mainstream history, since Islamic intellectual history is not part of mainstream history in Anglophone societies. Difficulties and caveats are thus a necessary part of the process. My work is ultimately an attempt at translating texts and ideas that do not constitute part of the intellectual makeup of the English-speaking world. The sources of this study have been written in Arabic and describe a legal order that bears little similarity to those of most modern societies, especially those of the West. None of the authors of these sources can aspire to the relevance of any Western writer to today's Western audience, even if the latter's era is much more distant than the medieval world from which my authors come.[1]

My subject has been the relationship between legal theory and practice, which may be different in different legal systems. In many legal systems, the notion of legal theory and legal practice as two sides of the same coin may not be present. Vico, for example, argues that legal theory was relegated to the realm of philosophy by the Greeks and thus taken far afield from legal practice, while the Romans regarded legal theory and legal practice as naturally linked.[2] Hence, what would appear highly counterintuitive to jurists of one legal tradition may be regarded by jurists of another tradition simply as an appropriate description of how things work.

To the mind of a modern Muslim jurist, legal theory and legal practice should not and need not be separated. *Why should one develop a legal theory that does not serve legal practice?*, the modern Muslim jurist would ask,

---

[1] There is no reason this should be otherwise; the above is simply a statement of a fact. No medieval Muslim jurist, even *Averroes* (d. 1198), can be considered one of the fathers of western thought. Compare Virgil (d. 19 BC) who was dubbed *the father of the west* by Theodore Haeker in his 1931 book *Virgil. Vater des Abendlands*.

[2] Vico (ed. Leon Pompa), *The First New Science* (Cambridge, 2002), xx.

and then assert: *Juristic minds in modern Islam should be applied to the serious issue of how much transformation both legal theory and legal practice must undergo in order for the Islamic legal system to flourish once again*. This is the most meaningful task for Muslim jurists at this point in history, this view emphasizes. In a context in which Muslim students of law are concerned primarily with the renewal and revitalization of Islamic law as a legal system governing everyday life, the luxury of developing legal theory in an overly esoteric and impractical direction is not easily justified.

In pre-modern times, by contrast, the luxury of developing legal theory beyond the needs of legal practice in Muslim legal discourse may at times have been possible. Muslim jurists' emphasis on the interrelation of law and legal theory in Islamic legal practice has varied over time. Some medieval Muslim jurists (Ibn al-Ḥājib comes to mind) took joy in extending the limits of legal theory beyond the boundaries and imperatives of legal practice. In response, others (such as Shāṭibī) insisted on enhancing the relationship between the theoretical principles of legal reasoning and the immediate needs of legal practice.

While it is clear that to insist on the extreme position of denying any divergence between legal theory and legal practice in Islam is unnecessary, an emphasis on a dichotomy between the two is equally problematic, especially when one speaks of a dichotomy between an "idealistic" theory and a "pragmatic" practice.

A full account of how Islamic legal theory and legal practice may have converged or diverged historically is, in many ways, not possible at this point, due to many scholars' confusion of the structural interrelation of theory and practice in Islamic law, on the one hand, with the complex historical analysis of the actual consistency of the legal system at different points in time, on the other. Questions concerning how theoretical legal principles and practical legal rulings can be identified and how consistency between the two can be measured further add to the complexity of the endeavor. Scholarly efforts at clarifying the methods and criteria used to examine the nature of legal theory and practice have thus far been disappointing. My work suggests that we should begin with clarifying our basic notions of legal theory, legal practice, the interrelation between the two, and the consistency of theory with practice in specific contexts.

The *uṣūl* and *furūʿ* of which Muslim jurists speak are not fixed or fixable entities. These two concepts lie at the center of juristic discussions among Muslim lawyers and constitute the very material with which juristic studies are concerned, and the elasticity of these concepts is a reflection of the development of the two fields of Islamic law and legal

theory over the course of history. The development of these concepts and their interrelation (and the interrelation of the realities to which they refer) is the story of Islamic jurisprudence itself. Therefore, the notion of structural interrelations must not be taken so far as to create another ahistorical view of the nature and development of these two fields.

Just as similarity and dissimilarity represent inevitable categories for studying the Islamic juristic culture, *continuity* and *change* constitute essential trends underlying the varied manifestations of Islamic law over the centuries, including the late medieval and early modern eras from which my sources sprang. This story of continuity and change is naturally complex. The evolution of juristic thought has been influenced by social realities as well as by academic cultures represented by schools of thought and intellectual trends. Attempts at socio-legal analysis of juristic materials based on speculations from inadequate and often quite ambiguous data in historical and biographical sources are not sufficient to tell the story of the evolution of Islamic law and legal theory. Crucial elements of this story must be told through careful textual analysis informed by an understanding of the gradual accumulation of intellectual inquiry and rival trends in juristic thinking.

One final word about studying Islamic law as "intellectual history" or as "a legal system" is in order. I believe that Islamic law can be studied as a legal system and as an intellectual field of inquiry, and isolating the scholarly discourses that address these two aspects may be desirable in some situations. However, combining the two discourses may be justifiable and even preferable in many contexts. Islamic law has applied in the lives of the followers of Islam both *within* and *without* a political structure, and Islamic juristic writings, by and large, are relevant to the application of Islamic law and the development of Islamic legal thought. In this study, I have chosen to do two things at once: 1) to address a feature of the Islamic legal system, viz. structural interrelations of theory and practice and 2) to introduce a group of works of jurisprudence (*takhrīj al-furūʿ ʿalā uṣūl*) as intellectual historical events. The first aspect of my work makes *theory* central, and the second makes *history* central. Thus, I have attempted to combine my interests in theory and history, and I hope to have been neither a historian who despises theory nor a lover of theory who finds historical details an unnecessary burden on the mind.

This study has attempted to offer a reading of six sources of Sunnī law and jurisprudence that provide scholars with both questions and answers in the area of Islamic legal history. It is hoped that, with more works like

this one, our understanding of the nature and evolution of Islamic law and legal theory over its long journey of fourteen centuries and across the vast regions of the Islamic world may be improved. Perhaps some time in the near future a good textbook on Islamic law and legal theory can be produced, one that goes beyond the conviction that skepticism about all assertions of medieval historians of Islam is the most valuable contribution of modern scholarship on Islam. This is naturally linked with the more ambitious hope that modern academe will someday prove to be a place where both those trained in traditional methods of Islamic legal scholarship and those with modern perspectives can engage in fruitful discussions. At that point, the contribution of modern academies to the study of Islamic intellectual history will be recognized by good scholars of different stripes and tendencies all over the world.

SELECTED BIBLIOGRAPHY

Primary Sources

Ibn al-Akfānī (d. 1348) (ed. ʿAbd al-Laṭīf al-ʿAbd), *Irshād al-Qāṣid ilā Asnā al-Maqāṣid* (Cairo, 1978).

Bayḍāwī (d. 1286), *Minhāj al-Wuṣūl Ilā al-Uṣūl* (published with Tāj al-Dīn al-Subkī's *al-Ibhāj fī Sharḥ al-Minhāj*) (Beirut, 1984).

Bayjūrī (d. 1860), *Ḥāshiyat al-Imām al-Al-Bayjūrī ʿalā Jawharat al-Tawḥīd* (Cairo, 2002): A commentary on the text of *Jawharat al-Tawḥīd* by Ibrāhīm al-Laqqānī (d. 1631).

Dabbūsī (d. 1032), *Taʾsīs al-Naẓar* (Cairo, n. d.).

[Shams al-Dīn] al-Iṣbahānī (d. 1349) (ed. Muḥammad M. Baqā), *Bayān al-Mukhtaṣar Sharḥ Mukhtaṣar Ibn al-Ḥājib* (d. 1249) (Jiddah, 1986).

Fārābī (d. 950) (ed. ʿUthmān Yaḥyā), *Iḥṣāʾ al-ʿUlūm* (Cairo, 1968).

Ghazālī (d. 1111), *al-Mustaṣfā* (Beirut, 1980).

Isnawī (d. 1370), *al-Tamhīd fī Takhrīj al-Furūʿ ʿalā al-Uṣūl* (Beirut, 1987).

Ibn Khallikān (d. 1282) (ed. Iḥsān ʿAbbās), *Wafayāt al-Aʿyān wa Anbāʾ Abnāʾ al-Zamān* (Beirut, 1994).

Khārazmī (d. 997), *Mafātīḥ al-ʿUlūm* (Cairo, 1924).

Ibn al-Laḥḥām (d. 1402), *al-Qawāʿid wa-l-Fawāʾid al-Uṣūliyya wa mā yataʿallaq bihā min al-Aḥkām al-Sharʿiyya* (Beirut, 1998).

ʿAbd al-Ḥayy al-Laknawī (d. 1304) (ed. Aḥmad al-Zughbī) *al-Fawāʾid al-Bahiyya fī Tarājim al-Ḥanafiyya* (Beirut, 1998).

Maqrīzī (d. 1442) (ed. Maḥmūd al-Jalīlī), *Durar al-ʿUqūd al-Farīda fī Tarājim al-Aʿyān al-Mufīda* (Beirut, 2002).

Ibn Nujaym (d. 1573) (ed. Muḥammad Muṭīʿ al-Ḥāfiẓ), *al-Ashbāh wa-l-Naẓāʾir* (Beirut, 1999).

Qarāfī (d. 1285) (ed. Muḥammad Ḥajjī), *al-Dhakhīra* (Beirut, 1994).

Ibn Quṭlūbughā (d. 1475) (ed. Muḥammad Khayr R. Yūsuf), *Tāj al-Tarājim* (Damascus, 1992).

Samarqandī (d. 1144) (ed. ʿAbd al-Malik al-Saʿdī), *Mīzān al-Wuṣūl fī Natāʾij al-ʿUqūl fī Uṣūl al-Fiqh* (Baghdad, 1987).

Shāṭibī (d. 1388)), *al-Muwāfaqāt* (Cairo, 1956).

[ʿAlī Ibn ʿAbd al-Kāfī] al-Subkī and his son Tāj al-Dīn al-Subkī (d. 1354 & 1369), *al-Ibhāj fī Sharḥ al-Minhāj* (Beirut, 1984).

Ibn Khaldūn (d. 1406) (ed. Darwīsh al-Juwaydī), *al-Muqaddima* (Beirut, 1995).

[Saʿd al-Dīn Masʿūd Ibn ʿUmar] al-Taftazānī (d. 1392), *Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ limatn al-Tanqīḥ fī Uṣūl al-Fiqh*, a commentary on *al-Tanqīḥ*, a text in Ḥanafī legal theory written by Ṣadr al-Sharīʿa ʿUbayd-llāh Ibn Masʿūd al-Maḥbūbī (d. 1345) (Cairo, n. d.).

———, (ed. Claude Salāma) *Sharḥ al-ʿAqāʾid al-Nasafiyya fī Uṣūl al-Dīn wa-l-Kalām* (Damascus, 1974).
Al-Shahīd al-Thānī (d. 1559) (ed. Maktab al-Iʿlām al-Islāmī in *Qumm*), *Tamhīd al-Qawāʿid* (Qumm, 1996).
Tilimsānī (d. 1369), *Miftāḥ al-Wuṣūl ilā Bināʾ al-Furūʿ ʿalā al-Uṣūl* (Cairo, 1996).
Timurtāshī (d. after 1599), *al-Wuṣūl ilā Qawāʿid al-Uṣūl* (Beirut, 2000).
Ibn Abī al-Wafāʾ [al-Qurashī] (d. 1373) (ed. ʿAbd al-Fattāḥ al-Ḥilw), *al-Jawāhir al-Muḍiyya fī Ṭabaqāt al-Ḥanafiyya* (Cairo, 1993).
Zanjānī (d. 1258), *Takhrīj al-Furūʿ ʿalā al-Uṣūl* (Beirut, 1987).
Zarkashī (d. 1392) (ed. Muḥammad Tāmir), *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Beirut, 2000).
———, *al-Manthūr fī al-Qawāʿid al-Fiqhiyya* (Beirut, 2000).

Secondary Literature

Roswitha Alpers-Gölz, *Der Begriff* σκοπός *in der Stoa und seine Vorgeschichte* (New York, 1976).
Aristotle (trans. J. L. Ackrill), *Categories* and *De Interpretatione* (Oxford, 1963).
——— (tr. Terence Irwin), *Nicomachean Ethics* (Indianapolis, 1985).
Marc Bloch, *Apologie pour l'histoire ou métier d'historien* (Paris, 1974).
Norman Calder "Al-Nawawī Typology of Muftīs and its Significance for a General Theory of Islamic Law" in *Islamic Law and Society* 3.2 June 1996, 158-61.
———, "Law": Seyyed Hossein Nasr and Oliver Leaman (eds.), *History of Islamic Philosophy* (London, 1996).
N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago, 1969).
Earl T. Crawford, *The Construction of Statutes* (Saint Louis, 1940).
F. Reed Dickerson, *The Fundamentals of Legal Drafting* (Boston-Toronto, 1965).
Elmer A. Driedger, *Construction of Statutes* (Toronto, 1983).
Ronald Dworkin (ed.), *The Philosophy of Law* (Cambridge, 1977).
Mohammed Fadel, "Istiḥsān is Nine-Tenth of the Law: the Puzzling Relationship of Uṣūl to Furūʿ in Mālikī Madhhab": Bernard Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden, 2002), 161–176.
Robert Gleave, *Inevitable Doubt: Two Theories of Shīʿī Jurisprudence* (Leiden, 2000).
Paul Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge, 2000).
[Muḥammad Ibn al-Ḥasan] al-Ḥajawī al-Thaʿālibī (d. 1955), *al-Fikr al-Sāmī fī Tārīkh al-Fiqh al-Islāmī* (Cairo, 1977).
Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge, 1997).
———, "Uṣūl al-Fiqh: Beyond Tradition": *Journal of Islamic Studies* 3.2 July 1992; *A History of Islamic Legal Theories* (Cambridge, 1997), 162–206.
Alī Ḥasab-Allah, *Uṣūl al-Tashrīʿ al-Islāmī* (Cairo, 1973).
Wolfhart Heinrichs, "Structuring the Law: Remarks on the Furūq Literature": Ian Richard Netton (ed.), *Studies in Honor of Clifford Edmund Bosworth* (Leiden, 2000).

Wolfhart Heinrichs, "Qawāʿid as a Genre of Legal Literature": Bernard Weiss (ed.), *Studies in Islamic Legal Theory* (Leiden, 2002), 365–84.
Aḥmad Ibrahīm (d. 1945), *Tārīkh al-Tashrīʿ al-Islāmī* (Cairo, 2001).
Sherman Jackson, *Islamic Law and the State* (Leiden: Brill, 1996).
Muṣṭafā Saʿīd al-Khinn, *Athar al-Qawāʿid al-Uṣūliyya fī Ikhtilāf al-Fuqahā* (Beirut, 1971).
Muḥammad al-Khuḍarī (d. 1927), *Tārīkh al-Tashrīʿ al-Islāmī* (Cairo, 1954).
Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: ihre Entwiklung in Mekka bis zur Mitte des 2. /8. Jahrhunderts* (Stuttgart: Deutsche Morgenländische Gesellschaft, 1991).
Joseph Schacht, *On the Origins of Muḥammadan Jurisprudence* (London, 1952).
Alī al-Nadwī , *al-Qawāʿid al-Fiqhiyya* (Beirut, 1988).
Richard Posner, *Frontiers of Legal Theory* (Cambridge MA: Harvard, 2001).
Jaʿfar al-Subḥānī, *Mawsūʿat Ṭabaqāt al-Fuqahā'* (Beirut, 1999).
Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge 1979).
[ʿAbd al-ʿAẓīm] Sharaf al-Dīn, *Tārīkh al-Tashrīʿ al-Islāmī* (Cairo, 1972).
Bernard Weiss, "Law in Islam and in the West" in: *Wael Hallaq and Donald Little (eds.), Islamic Studies Presented to Charles J. Adams* (Leiden: Brill, 1991).
Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA, 1985).

INDEX

Note: Ibn, Abū, Abī & al- are ignored in the alphabetical ordering of names (e.g. both Ibn Abī Laylā (d. 765) and Ibn al-Laḥḥām (d. 1402) appear among entries beginning with the letter L).

STUDIES IN ISLAMIC LAW AND SOCIETY

Edited by

RUUD PETERS and BERNARD WEISS

1. Jackson, S.A. *Islamic Law and the State*. The Constitutional Jurisprudence of Shihāb al-Dạn al-Qarāfạ. 1996. ISBN 90 04 10458 5

2. Saeed, A. *Islamic Banking and Interest*. A Study of the Prohibition of Riba and its Contemporary Interpretation. 1996. ISBN 90 04 10565 4

3. Shaham, R. *Family and the Courts in Modern Egypt*. A Study Based on Decisions by the Sharạğa Courts 1990-1955. 1997. ISBN 90 04 10742 8

4. Melchert, C. *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* 1997. ISBN 90 04 10952 8

5. Khalilieh, H.S. *Islamic Maritime Law*. An Introduction. 1998. ISBN 90 04 10955 2

6. Hoexter, M. *Endowments, Rulers and Community*. Waqf al Ḥaramayn in Ottoman Algiers. 1998. ISBN 90 04 10964 1

7. Johansen, B. *Contingency in a Sacred Law*. Legal and Ethical Norms in the Muslim *Fiqh*. 1999. ISBN 90 04 10603 0

8. Vogel, F. *Islamic Law in the Modern World*. The Legal System of Saudi Arabia. ISBN 90 04 11062 3

9. Gerber, H. *Islamic Law and Culture 1600-1840*. 1999. ISBN 90 04 11939 3

10. Müller, C. *Gerichtspraxis im Stadtstaat Córdoba*. Zum Recht der Gesellschaft in einer mālikitisch-islamischen Rechtstradition des 5./11. Jahrhunderts. 1999. ISBN 90 04 11354 1

11. Leeuwen, R. van. *Waqfs and Urban Structures*. The Case of Ottoman Damascus. 1999. ISBN 90 04 112995

12. Gleave, R. *Inevitable Doubt*. Two Theories of Shīʿī Jurisprudence. 2000. ISBN 90 04 115951

13. Donaldson, W.J. *Sharecropping in the Yemen*. A study in Islamic Theory, Custom and Pragmatism. 2000. ISBN 90 04 11490 4

14. Brockopp, J.E. *Early Mālikī Law*. Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence. 2000. ISBN 90 04 11628 1

15. Weiss, B.G. (ed.) *Studies in Islamic Legal Theory*. 2001. ISBN 90 04 12066 1

16. Layish, A. and G.R. Warburg. *The Reinstatement of Islamic Law in Sudan under Numayrī*. An Evaluation of a Legal Experiment in the Light of Its Historical Context, Methodology, and Repercussions. 2002. ISBN 90 04 12104 8

17. Ergene, B.A. *Local Court, Provincial Society and Justice in the Ottoman Empire*. Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652-1744). 2003. ISBN 90 04 12609 0

18. Hennigan, P.C. *The Birth of a Legal Institution*. The Formation of the Waqf in Third-Century A.H. Ḥanafī. Legal Discourse. 2004. ISBN 90 04 13029 2

19. Lombardi, C.B. *State Law as Islamic Law in Modern Egypt*. The Incorporation of the *Sharīʿa* into Egyptian Constitutional Law. 2006. ISBN 90 04 13594 4

20. Yanagihashi, H. *A History of the Early Islamic Law of Property*. Reconstructing the Legal Development, 7th–9th Centuries. 2004. ISBN 90 04 13849 8

21. Van den Boogert, M.H. *The Capitulations and the Ottoman Legal System*. Qadis, Consuls and *Berats* in the 18th Century. 2005. ISBN 90 04 14035 2

22. Masud, M.Kh., R. Peters and D.S. Powers (eds.) *Dispensing Justice in Islam*. Qadis and their Judgments. 2006. ISBN 90 04 14067 0

23. Maghen, Z. *Virtues of the Flesh – Passion and Purity in Early Islamic Jurisprudence*. 2005. ISBN 90 04 14070 0

24. Layish, A. Sharīʿa *and Custom in Libyan Tribal Society*. An Annotated Translation of Decisions from the *Sharīʿa* Courts of Adjābiya and Kufra. 2005. ISBN 90 04 14082 4

25. Powers, P. *Intent in Islamic Law*. Motive and Meaning in Medieval Sunnī *Fiqh*. 2006. ISBN 90 04 14592 3

26. Jaques, R.K. *Authority, Conflict, and the Transmission of Diversity in Medieval Islamic Law*. 2006. ISBN 90 04 14745 4

27. Ahmad, A.A. *Structural Interrelations of Theory and Practice in Islamic Law*. 2006. ISBN 90 04 15031 5