FOUR SCHOLARS ON THE AUTHORITATIVENESS OF SUNNĪ JURIDICAL *QIYĀS*

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To Amila Buturovic, a dear friend

ABSTRACT

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The present thesis examines the question of the authoritative basis of Sunnī *qiyās* as it was systematically treated for the first time by Muḥammad b. Idrīs al-Shāfiʿī (d.204), and later by the three prominent Shāfiʿīte Ashʿarite jurists-theologians, Abū Ḥāmid al-Ghazzālī (d.505), Fakhr al-Dīn al-Rāzī (d.606) and Sayf al-Dīn al-Āmidī (d.631). The textual arguments advanced by these jurists in support of *qiyās* are analyzed in light of the epistemological criteria which these jurists adopted. The thesis also examines how al-Ghazzālī, al-Āmidī, and al-Rāzī responded to the major arguments against *qiyās*, which were adduced mainly after al-Shāfiʿī, and how they rationalized *qiyās* from the standpoint of theology and epistemology.

The following salient points emerge in this exposition: Whereas these jurists insisted upon the textual basis of the authoritativeness of *qiyās*, they adopted different arguments for its justification. Moreover, unlike al-Shāfiʿī and al-Ghazzālī, both al-Rāzī and al-Āmidī did not consider the evidence about *qiyās* to be conclusive, nor did they deem it necessary to be so. Secondly, the thesis argues that in defining and justifying the individual methods of applying *qiyās*, the jurists were guided not only by theoretical and methodological considerations, but also by the need to systematize and rationalize the modes of inference underlying the body of legal doctrines already established by the earlier jurists. The role theology occupied in the discussion of the validity of *qiyās* in the writings of these jurists is also closely examined in this thesis.

RESUME

Auteur : Nissreen Haram

Titre: Quatre savants et l'autorité du *qiyās* juridique sunnī.

Département: Institut des Etudes Islamiques

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La présente thèse se propose d'examiner la base de l'authorité du *qiyās* sunnī tel qu'interprété pour la première fois par Muḥammad b. Idrīs al-Shāfiᶜī (m. 204), et plus tard par les trois fameux juristes-théologiens shāfiᶜîtes ashᶜarites, Abū Ḥāmid al-Ghazzālī (m. 505), Fakhr al-Dīn al-Rāzī (m.606) et Sayf al-Dīn al-Āmidī (m. 631). L'argumentation textuelle favorable au *qiyās* avancée par ces trois juristes, est analysée sur une base épistémologique telle qu'adoptée par ces derniers. L'étude montre également comment al-Ghazzālī, al-Āmidī, and al-Rāzī repondent aux arguments s'opposant au *qiyâs*, arguments qui firent surtout loi après la mort d' al-Shāfiᶜī, et comment d'un point de vue théologique et épistémologique, ils le rationnalisent.

Les points qui suivent sont également développés : alors que les juristes insistent sur la base textuelle de l'autorité du *qiyās*, ils adoptent des arguments différents pour en justifier l'usage. Par ailleurs, à la difference d'al-Shâfiᶜî et d'al-Ghazzālī, al-Rāzī et al-Āmidī ne considèrent le *qiyās* ni concluant, ni digne de l'être. De plus, la thèse discute le fait qu'en définissant et en justifiant les méthodes individuelles d'application du *qiyās*, les juristes ne sont pas uniquement guidés par des considérations théologiques et méthodiques, mais aussi guidés par le besoin de systematiser et de rationaliser les modes de déductions, mettant en apparence un corpus de doctrines légales établies par les tous premiers juristes. Le rôle que la théologie joue dans le débat portant sur la validité du *qiyās* dans les écrits de ces juristes est également étroitement étudié.

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LW/lrem
17.11.64

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TRANSLITERATION TABLE

Consonants: ء initial: unexpressed ء medial and final: '

	Arabic	Persian	Turkish	Urdu
ب	b	b	b	b
پ		p	p	p
ت	t	t	t	t
ٹ				t̲
ث	th	s̲	s̲	s̲
ج	j	j	c	j
چ		ch	ç	ch
ح	ḥ	ḥ	ḥ	ḥ
خ	kh	kh	h̲	k̲h̲
د	d	d	d	d
ڈ				d̲
ذ	dh	z̲	z̲	z̲
ر	r	r	r	r
ڑ				r̲
ز	z	z	z	z
ژ		zh	zh	zh
س	s	s	s	s
ش	sh	sh	ş	sh

	Arabic	Persian	Turkish	Urdu
ص	ṣ	ṣ	ṣ	ṣ
ض	ḍ	ẓ	ẓ	ẓ
ط	ṭ	ṭ	ṭ	ṭ
ظ	ẓ	ẓ	ẓ	ẓ
ع	'	'	'	'
غ	gh	gh	ğ	g̲h̲
ف	f	f	f	f
ق	q	q	ḳ	q
ك	k	k	k	k
گ		g	g	g
ڭ			ñ	
ل	l	l	l	l
م	m	m	m	m
ن	n	n	n	n
ں				ṇ
ه	h	h	h	h
و	w	v	v	v
ي	y	y	y	y

Vowels, diphthongs, etc. (For Ottoman Turkish vowels etc. see separate memorandum.)

short: َ a; ِ i; ُ u.

long: ا ā; و ū, and in Persian and Urdu also rendered ō; ي ī, and in Urdu also rendered by ē; ے (in Urdu) ē.

alif maqṣūrah: ى á.

diphthongs: يَ ay; وَ aw.

long with tashdīd: ـيّ īya; ـوّ ūwa.

tā' marbūṭah: ة ah; in iḍāfah: at.

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INTRODUCTION

In recognition of the fundamental role played by consensus (*ijmāʿ*) in classical Sunnī legal theory and of the centrality that the question of the basis of its authoritativeness occupied in Muslim jurisprudential discourse, modern western scholars have undertaken several studies which examine in considerable detail how Muslim jurists attempted to establish the validity of *ijmāʿ*. On the other hand, no serious attempt has yet been made to study in some detail how mainstream Sunnī jurists affirmed the validity of *qiyās* and how they defended it against the objections of its numerous opponents. This is the case in spite of the longstanding awareness by modern scholars of the scale and significance of the controversy which surrounded *qiyās* in medieval Muslim intellectual circles, and of the major role that *qiyās* played in Sunnī legal construction. Mainstream Sunnī jurists accepted *qiyās* as a fourth source of law, next to the Qurʾān, the Sunna of the Prophet and *ijmāʿ*, adopting it as the main method by means of which they extended the law to newly arising situations. Imām al-Ḥaramyn al-Juwaynī declares that nine-tenths of the Sharīʿa is the product of *raʾy* and *qiyās*.[1] In keeping with their adherence to the principle of the primacy of revelation, Sunnī legal theorists recognized the need to establish that the authoritativeness of *qiyās* rested on the strength of the Qurʾān and the Sunna. Failing to base the validity of *qiyās* in the textual sources implied that the *qiyāsists* took into their hands the task of legislation -- a task which Muslims unanimously considered to be the exclusive prerogative of God. This also implied that a sizable portion of the rules of conduct governing the lives of Muslims was devoid of divine sanction. It is therefore not surprising that the question of the authoritativeness of *qiyās* consituted a main concern of Sunnī legal theorists and was treated at length in all major works of *uṣūl al-fiqh*. Moreover, there seems to be a need in current scholarship for undertaking an investigation of how mainstream Sunnī jurists attempted through the ages to establish the validity of *qiyās*.

The present thesis makes a preliminary attempt towards addressing this need, by examining how the question of the authoritativeness of *qiyās* was treated by four prominent legal theorists, namely, Muḥammad b. Idrīs al-Shāfiʿī (d.204), Abū Ḥāmid al-Ghazzālī (d.505), Fakhr al-Dīn al-Rāzī (d.606) and Sayf al-Dīn al-Āmidī (d.631). Beginning with al-Shāfiʿī, we shall see how this issue was treated in a systematic manner for the first time in Muslim legal history. Al-Shāfiʿī's justification of *qiyās* will be analyzed in the overall context of his legal theory, and in light of the background in early Muslim jurisprudence against which this theory was formulated. Then, taking al-Shāfiʿī as a comparative point of reference, we will turn to examine how the question of the validity of *qiyās* came to be treated at the time when Sunnī legal theory was well into full maturity, and by three prominent legal theorists who belonged to what was then the dominant school of theology in Islam. The theological persuasion of the jurists whom we have selected is especially relevant, as we shall see, to what may be characterized as the "rationalization" of *qiyās*.

In their justification of *qiyās*, Sunnī jurists primarily attempted to produce the evidence about the textual basis of this legal method. No amount of rationalization of *qiyās* or refutation of the counter claims of its opponents substituted for this prerequisite of validity. Thus, the main aim of this thesis is to analyze the textual arguments adduced in support of *qiyās* and to assess such arguments critically, although this will be done in light of the same epistemological premises adopted by each of the jurists discussed. The first and third chapters of this thesis will mainly treat this aspect of the jurists' justification of *qiyās*. It must be noted here that the arguments which are adduced by al-Ghazzālī, al-Rāzī and al-Āmidī are clearly not originally theirs. In fact, most of the textual evidence about *qiyās* seems to have proliferated in the first century after al-Shāfiʿī and in response to the intensification in the campaign against *raʾy* and *qiyās* which was waged mainly --as we are told-- by the Ẓāhirites, the Shīʿites and some of the early Muʿtazilites. This does not mean that

the later jurists simply restated the earlier arguments. Rather, they constantly revised, redeployed and further explicated the available evidence in a continuous effort to assert the validity of *qiyās*. By undertaking a chronological study of the question of authoritativeness of *ijmāᶜ*, Wael Hallaq has detected a gradual and significant pattern of development in the textual arguments which Sunnī jurists through the centuries have adduced in support of this source of law, highlighting as a result the dynamic and evolutionary dimension of Sunnī legal theory.[2] Ideally, in my view, the question of the authoritativeness of *qiyās* is best studied from this chronological perspective. For practical considerations, however, it was not possible to undertake such a task in this thesis. Instead, this thesis aims primarily to present a relatively detailed exposition of the arguments that each of the three jurists advocated without attempting to determine precisely the actual contribution of these jurists to the earlier accomplishments in the justification of *qiyās*. Nor will a definite statement be made here about the final development in the textual jusitification of *qiyās* in Sunnī legal theory.

For the jurists after al-Shāfiᶜī, the attempt to establish the textual basis of *qiyās* represented only a part of their effort to provide a comprehensive justification for this source of law, and to respond to the objections of its opponents. In addition to challenging the claim about the textual foundation of *qiyās*, some anti-*qiyāsists* also maintained that *qiyās* is an arbitrary method of inference whose usage renders the law subject to the whims of individual jurists. With an eye to this aspect of the campaign against *qiyās*-- which seems to have been waged more effectively and sytematically after al-Shāfiᶜī-- we shall examine in the second chapter how al-Ghazzālī, al-Rāzī and al-Āmidī attempted to rationalize *qiyās* in general, and the individual modes of inference commonly employed in its application in particular. These attempts are found mainly in their respective discussion of the methods for educing the legal case (*ᶜilla*), which, as the jurists themselves proclaimed, constituted the central pillar (*rukn*) of

qiyās. The jurists themselves, however, did not discuss the different methods of educing the cause (*masālik al-ʿilla*) under the section treating the validity of *qiyās.* Nonetheless, this thesis argues that the lengthy discussions of the epistemology of the cause-- as they were presented in *Uṣūl al-fiqh* works which have been studied here-- did not serve a methodological function only. They were also intended to rationalize the body of legal doctrine derived by *qiyās*, and as such constituted an implicit aspect of the justification of *qiyās.* It must be noted here that the subject of the methodology of the cause is a vast one, and abounds with technical complexities and controversial matters. In order to appreciate this fact, one only needs to examine al-Ghazzālī's voluminous work *Shifāʾ al-ghalīl*, which was dedicated in its entirety to the discussions of *taʿlīl*. This thesis makes a preliminary attempt to analyze certain aspects of the jurists' treatment of the methodology and only in so far as this represented their attempt to rationalize and justify *qiyās.*

The second chapter will also examine the jurists' explicit responses to what they considered to be the major arguments against *qiyās*. It should be made clear from the outset that one cannot obtain an accurate picture of the various positions of the *anti-qiyāsists* from the treatises authored by *qiyāsists*. To begin with, the jurists often give conflicting attributions of the individual arguments against *qiyās*. Furthermore, these arguments often seem to be presented out of their original context, as they are set in a strictly logical (and theological) scheme of systematization which is centered around the hypothetical question of the rational admissibility of the authoritativeness of *qiyās.* This thesis does not attempt to verify the claims the jurists have attributed to their opponents nor to determine whether the jurists succeeded in responding to the actual objections of the different anti-*qiyāsists.* Instead, it only examines how, through their response to the non-textual arguments against *qiyās,* the jurists were able to rationalize certain problematic aspects of this source of law, while insisting that the basis of its validity is revelation. Finally, the second chapter

will also examine how the jurists attempted to accommodate the theoretical presumptions entailed in the application of *qiyās* with the tenets of Ashʿarite theology, and the role that theology played in their evaluation of the arguments for and against *qiyās*.

ENDNOTES

[1] See Imām al-Ḥaramayn al-Juwaynī, ***al-Burhān fī uṣūl al-fiqh*** , ed. ᶜAbd al-ᶜAẓīm Dīb (2nd ed.; Cairo: Dār al-anṣār, 1400/1980), Vol.II, p.768.

[2] See Wael Hallaq, "On the Authoritativeness of Sunni Consensus," ***International Jounral of Middle East Studies,*** 18 (1986), pp. 427-54.

CHAPTER I

EARLY DEVELOPMENTS IN JURISPRUDENCE AND AL-SHĀFIʿĪ'S JUSTIFICATION OF *QIYĀS*

Islamic law employed reasoning from its very beginnings. The first *qāḍīs* relied considerably on their opinion and discretion in passing judgments. Moreover, reasoning constituted an integral element in the large-scale task of revising and Islamicizing the popular and public practices of the Umayyads, which was undertaken by the pious specialists of what Joseph Schacht called the " ancient schools of law ". It was also the means by which the law was continuously elaborated from set authoritative precedents. Finally, reasoning was used independently when the Qurʾān was deemed to be silent about a given situation, or when the strict implications of the Qurʾān were overlooked for practical considerations. In such cases, judgments were based upon individual discretion, which was usually guided by considerations of equity and public interest.[1] In the early period, the word *raʾy* was used to designate any opinion that was considered sound, whether based entirely on the individual discretion of the jurist or inspired by an effort at consistency and guided by a textual parallel.[2]

In early Islamic jurisprudence, the use of reasoning was an inevitable postulate which did not warrant any theoretical justification. Modern research has amply demonstrated that early Islamic law did not possess the massive body of Prophetic traditions that later, together with the Qurʾān, came to constitute its material foundation. In view of the modest size of the Qurʾānic legislation, the process of " Islamicizing " the law entailed a great deal of human deliberations. Individual opinion was involved in any attempt to determine, beyond the most simple and basic level, the applicability and implications of the Qurʾānic injunctions to new situations.[3]

It seems that in the beginning, the need for justifying the validity of this kind of judgments was subdued by the recognized merit of the primary intent of Islamicizing the law. Nor was there a compelling need for the jurists to account for their frequent reliance upon individual discretion. It would be difficult to explain this phenomenon, only if it were deemed that the task of the Muslim jurists remained strictly theoretical and revisory. In fact, however, the lawyers of the ancient schools gradually acquired the status of advisers to their communities on an increasingly wider range of legal matters. In view of the breadth and practical demands of this task, the early jurists must have felt confidently entitled-- particularly in cases where the Qur'ān was deemed to be silent-- to provide advise solely on the basis of sound individual judgments.[4]

In each of the local schools of law, it was the opinion of the majority, that is the average opinion of recognized scholars, that counted. This opinion went under the guise of an " anonymous consensus " , determining the doctrine of the school. In the course of time, this doctrine became the Sunna or " living tradition ". [5] Until a relatively late period, the consensus of the school remained anonymous and was considered to provide a sufficient sanction for doctrine. However, as Joseph Schacht argues, " the idea of continuity inherent in the concept of the Sunna, the idealized practice, together with the need to create some kind of theoretical justification for what so far has been instinctive reliance on the opinion of the majority, led to the living tradition being projected backwards and into its being ascribed to some of the great figures of the past." [6] Gradually, this process culminated in the attribution of doctrine to the highest human authority, the Prophet himself. Thus, the schools now claimed for their doctrines the status of the Sunna of the Prophet, yet without attempting to document this claim by formal traditions. This retrospective justification reflected the recognition, in principle, of the absolute authority of the Prophet. However, in practice, *ra'y* continued to play a major role in the constant creation and revision of

the doctrine while the consensus remained the actual determinative of the legal doctrine and hence of the Sunna of the Prophet.

This state of affairs came under question with the growing influence of the " traditionist movement ". Like the ancient schools of law, the tradionists sought the authority of the Prophet as a basis of their legal doctrine. However, the distinctive feature of their thesis was that the Sunna of the Prophet could only be established by formal traditions (*ḥadīth*) and that these traditions superseded the " living tradition ".[7] Already before al-Shāfiʿī, the logic of the traditionist thesis, if not its actual implementation, was beginning to win some grounds in Muslim Jurisprudence.

Although the ancient schools did not consistently determine or modify their doctrine in light of circulating traditions, they did not hesitate to use available traditions in order to sanction their legal doctrines and practices.[8] Furthermore, they adduced traditions as legal evidence in their polemical exchanges with the other schools.[9] In the domain of reasoning, the impact of traditionism was reflected in an increasing move away from independent reasoning, and towards inferences guided by analogues in the textual sources. The ancient schools, particularly the Iraqis, employed *qiyās* considerably. Moreover, in principle, they recognized its superiority over independent reasoning, as well as its subordinate status in relation to binding precedents *(khabar lāzim).*[10] The fact that the term *istiḥsān* came to signify a breach of *qiyās* for reasons of public interest reflected the concession that *qiyās* normally took precedence over independent reasoning because of its association with the authoritative sources.[11] Yet, the ancient schools of law retained a considerable amount of freedom to judge matters independently of the textual sources: not only did they depart from *qiyās* for considerations of equity and utility, but also, they often rejected traditions, particularly those which were not widely accepted and transmitted, in favor of independent reasoning and of inferences that ensured consistency.[12] Thus, although before al-Shāfiʿī the ancient schools had acknowledged in principle the paramount authority of

the Qur'ān and the Sunna of the Prophet, their legal practice was still dominated by an informal, though uneasy, eclecticism. Personal discretion and regard for circumstances and consistency played a major role in the formation of the doctrines of each school, while the consensus of the local scholars was the instrument by which these doctrines were ultimately sanctioned and synthesized. As we have mentioned before, this consensus was majoritarian. Within each school disagreement *(ikhtilāf)* was reprehended and irregular opinions which threatened the unanimity of doctrine were disparaged.[13]

It is against this state of affairs that al-Shāfiʿī advanced his thoroughgoing critique and proposed an alternative legal theory, which was to define the course of classical Sunnī jurisprudence. As Joseph Schacht tells us, al-Shāfiʿī's most dramatic break with the ancient schools of law was his insistence upon the overriding authority of the Prophetic traditions as opposed to the living tradition which was the outcome of the consensus of the scholars. In al-Shāfiʿī's legal scheme, this consensus was deprived altogether of its role as the ultimate determinant of law. Al-Shāfiʿī considered only the consensus of the entire community to be authoritative, acknowledging, however, that in its nature, this kind of consensus was practically applicable only in the realm of the fundaments of faith and not in details of the law.[14] Al-Shāfiʿī accepted *qiyās*, but relegated it strictly to the status of a supplement to be used only in the cases of necessity and in the proven absence of explicit Qur'ānic texts or traditions. Finally, he rejected unqualifiedly independent reasoning, which he called *istiḥsān.*

Al-Shāfiʿī does not postulate his doctrines about tradition, *ijmāʿ*, *qiyās*, and *istiḥsān*, but ties them articulately and systematically to the central principle of his theory, namely, the principle of the absolute authoritativeness of revelation. By its own testimony, the Qur'ān stands as the comprehensive and the only reliable source of guidance and explication *(bayān).* In *al-Risāla* and in the parts of *Kitāb al-Umm* which deal with legal theory, al-Shāfiʿī introduces his discussion, by citing numerous

Qur'ānic verses which attest to this theme.[15] However, the explicatory character of the Qur'ān does not reside solely in its positive laws, but also in the fact that it contains guidance to the other principles of the law, namely the Sunna of the Prophet, *ijmāᶜ*, and *qiyās.* " For every eventuality that befalls the people of God's religion, the Book of God provides guidance regarding it, either by texts or by way of indicating the general principles *(jumlatan).* "[16] In an unmistakable address to the ancient schools of law, al-Shāfiᶜī asserts that the authoritativeness of traditions is not self-constituted but derives from the authority of the Qur'ān, in which obedience to the Prophet is repeatedly commanded.[17] It is the Sunna, and therefore ultimately the Qur'ān, which attests to the validity of the *ijmāᶜ* (of the community).[18] Moreover, it is the Qur'ān which indicates the authoritativeness of *qiyās* as well as the invalidity of *istiḥsān.* Al-Shāfiᶜī identifies *qiyās* with *ijtihād.*

Setting the fundamental epistemological principle of Sunnī legal theory, al-Shāfiᶜī asserts that, in the domain of law, only well authenticated traditions and unequivocal Qur'ānic texts yield certain knowledge, that is knowledge that encompasses both surface appearance and underlying reality *(ᶜilm iḥāṭa fī al-ẓāhir wa al-bāṭin).*[19] The truth about matters which are not stated by explicit texts constitutes the unseen *(ghayb).* [20] Since *qiyāsī* judgments do not fall within the explicit bounds of their textual bases, they cannot be ascertained and constitute truth based upon apparent indicants only *(ḥaqq fī al-ẓāhir).* [21] Therefore, al-Shāfiᶜī is compelled, by the premises of his own theory, to account for the authoritativeness of such partial human judgments: in a legal scheme that claims revelation to be the exclusive authority and comprehensive source of guidance, the authoritativeness of human judgment cannot be self-constituted. The device of the dialogue with a hypothetical interlocutor is employed to emphasize this awareness:

> [Interlocutor]: You maintain that the cases about which there are neither texts in the Qur'ān or the Sunna, nor a consensus among the people,

> should be adjudicated by *qiyās*. Do you consider that the judgments derived by *qiyās* are authorized by God *(a yuqālu li hādhā qubila ʿan Allāhi)*? If it is asserted that the general principle *(jumlatuhu)* [by which these judgments are derived] is authorized by God, then I ask you: what is this general principle? If it is said that it is the principle of exercising *ijtihād* on the basis of the Book and the Sunna, we ask: is there evidence *(dalīl)* in the Book about this?[22]

However, al-Shāfiʿī's thesis was primarily addressed to the ancient schools of law which employed *qiyās* as well as *istiḥsān*. Judging from the relative emphasis and repetitions of certain discussions, it can be safely inferred that what al-Shāfiʿī found to be the difficult and more controversial assertion is not that *qiyās* is valid, but that it is the only valid *ijtihād*. All the arguments that al-Shāfiʿī adduces in support of *qiyās* serve simultaneously the function of showing the invalidity of *istiḥsān*. They answer the dual question, put aptly in the mouth of an interlocutor:

> I ask you two things: first, cite a proof that you are entitled to use *qiyās*. Second, since *qiyās*, unlike the transmitted report, does not provide conclusive knowledge *(laysa bi iḥāṭatin ka al-khabari)*, and constitutes only *ijtihād*, then on what basis do you restrict *ijithād* exclusively to *qiyās*? [23]

Addressing this dual concern, al-Shāfiʿī mainly cites Qurʾānic verse 2: 150 in conjunction with verse 6: 97:[24]

> ...and wheresoever thou comest turn thy face toward the direction *(shaṭr)* of the inviolable Place of Worship and wheresoever ye may be turn your face towards it....[25]
>
> ...and He it is who appointed for you the stars that He may guide you in the darknesses of the land and the sea.

The verses cited above, al-Shāfiʿī explains, establish conclusively that Muslims are commanded to pray in the direction *(shaṭr)* of the Holy Mosque (hereafter *qibla)*, " wheresoever " they may be. When the *qibla* is out of sight, it is not possible to locate its direction with certainty *(bi iḥāṭa)*. Yet, neither the obligation to pray nor of directing oneself towards the *qibla* is suspended.[26] Therefore, this indicates conclusively two things: first, that in this case it is obligatory to seek the direction of the *qibla* by *ijtihād*, [27] and second, that when the *qibla* is out of sight, the obligation

(al-taklīf) entailed is not to locate its direction correctly, but only to attempt to find its direction by means of *ijtihād*. By doing so, a jurist can be certain about having fulfilled his obligation towards God even if he fails to find the exact direction of the *qibla*.[28] However, verse 6:97 specifies that the proper *ijtihād* consists of attempting to locate the *qibla* with the help of the signs *(al-ʿalāmāt)* which God has intently erected in nature for guidance. Thus, *ijtihād* is valid only if it is guided by concrete and divinely designated indicants. When the *qibla* is out of sight, it is neither permitted nor is it considered *ijtihād* at all to pray arbitrarily in any direction.[29]

In the example of the *qibla*, al-Shāfiʿī sees a powerful textual paradigm which provides an instructive parallel with the case of *qiyās*. In this paradigm, the obligation to seek the *qibla* in prayers corresponds to the obligation of seeking to know the divine prescriptions for every eventuality which are reposited exclusively in the texts of revelation. When there are binding texts about legal cases it is obligatory to follow them strictly, just as it is obligatory to pray in the exact direction of a visible *qibla*. The cases about which there are no explicit texts, al-Shāfiʿī maintains, are analogous to the *qibla* when it is out of sight; although it is not possible to know the truth with certainty, a scholar must seek to find the judgments of these matters by means of *ijtihād* and by utilizing the textual indicants, which are signs that God intently provided for our guidance. In such cases, the jurist is only obliged to follow the truth as it appears to him on the basis of his own *ijtihād (kullifa fī al-ḥukmi al-ijtihāda fī al-ẓāhiri dūna al-mughayyabi)*.[30] By doing so, he can be certain about having fulfilled his obligation towards God, even if he may not have found the actual divine judgment about the eventuality. Although the judgments of *qiyās* are probable, al-Shāfiʿī wants to say, the validity of *qiyās* is conclusively established.[31] Al-Shāfiʿī corroborates his argument by citing a *ḥadīth* which confirms the validity of *ijtihād*. When a judge rules on the basis of *ijtihād*, he is rewarded twofold if he arrives at the correct judgment and once if he is at error.[32] This indicates that by exercising *ijtihād*, a jurist is right (*ʿalà*

ṣawābin) for having fulfilled his primary obligations. Otherwise, if *ijtihād* were invalid, the jurist would not be rewarded for being entirely at error. The other reward is, as it were, a bonus point, but the *mujtahid* is not expected to find the correct ruling *(lam yukallaf ṣawāba al-ʿayni)*.[33] However, the paradigm of the *qibla* proves that *qiyās* is the only valid *ijtihād*. To judge matters independently of the textual indicants is as good as praying arbitrarily in any direction without even attempting to seek the *qibla* by *ijtihād*. Clearly, al-Shāfiʿī finds the parallelism between the two cases very compelling:

> There can be no *ijtihād* without a definite object which can be pursued either by means of indicants which lead to this object, or on the basis of resemblance to an established object. Therefore, this makes it clear that it is not permitted for anyone to judge matters according to *istiḥsān*, if *istiḥsān* does not accord with the established precedent. The meanings of the Qurʾān and the Sunna are objects that a jurist should pursue by *ijtihād*, just as the one who is remote from the *qibla* ought to seek it by *qiyās*. Therefore, nobody is entitled to judge matters except on the basis of *ijtihād*, which is the pursuit of truth in the manner described.[34]

Since revelation is the only valid source of juristic knowledge, the aim of the juristic endeavor is to seek the dictates of revelation about every eventuality. Therefore:

> A scholar is not entitled to judge any matter except on the basis of knowledge, and knowledge can be obtained only from the binding report *(al-khabar al-lāzim)* and from *qiyās* on the basis of indicants about the truth. This is so, because a scholar should always either adhere to the report or seek the report by means of *qiyās*, just as he should face the *qibla* when it is visible, and seek to find its direction by means of *ijtihād* on the basis of signs and indicants.[35]

It may have already become clear, that, inspite of its textual semblance, al-Shāfiʿī's argument accommodates an independent rational thread. What I mean by this is that although al-Shāfiʿī insisted that it was the textual paradigm of the *qibla* which provided the evidence about the validity of *qiyās*, the evidence afforded by this paradigm was in fact superfluous. Al-Shāfiʿī has reasoned that the validity of *ijtihād*, when the *qibla* is remote, follows necessarily from the fact that it is always obligatory

to seek the *qibla* in prayers. Furthermore, he postulated that since it is not possible to locate the *qibla* with certainty when it isout of sight, the obligation in this case cannot possibly entail the same responsibility as when the *qibla* is visible.[36] Similarly, he argued that the validity of *qiyās* when there are no explicit texts follows necessarily from the conclusively established obligation of seeking the judgments of revelation about every eventuality. (This latter is the fundamental premise of al-Shāfiʿī's legal theory). The reasoning underlying al-Shāfiʿī's justification of *qiyās* is made explicit in a telling, yet unique paragraph in *al-Umm:*

> God has provided the Book with an explication for everything. But, explication has different aspects.God has prescribed certain obligations [textually], while others He revealed only in summary *(jumlatan)* and commanded that they be sought by means of *ijtihād.* Furthermore, God guided man to the proper ways of seeking what He has commanded them to seek, by means of signs which he has created in them *(bi ʿalāmātin khalaqahā fī ʿibādihi).* Therefore, when God commands us to pursue something, this indicates two things (God knows best): first, that the object pursued has to be sought by what directs one to it and not arbitrarily, and second, that God has only made it incumbent to attempt to attain that object by means of *ijtihād*.[37]

Al-Shāfiʿī, however, does not consider this statement to be sufficient for establishing the authoritativeness of *qiyās,* but supports it with the paradigm of the *qibla* as an illustrative proof text (even though he employs the same reasoning in the justification of *ijtihād* about the *qibla*). Thus, it is clear that al-Shāfiʿī considers any rational argument, regardless of its strength, to be inadequate for establishing a source of law. As we shall see in the next chapter, our three Ashʿarite jurists advance elaborate arguments against the various rational justifications put forth by fellow advocates of *qiyās.*

In addition to the verse of the *qibla,* al-Shāfiʿī also cites verse 5: 98:

> O ye who believe! Kill no wild game while ye are on pilgrimage. Whoso of you killeth it of set purpose he shall pay its forfeit in the equivalent *(mithl)* of that which he killed in the domestic animals, the judge to be two men among you known for justice *(ʿadl),* the (forfeit) to be brought as an offering to the Kaʿbah, or for expiation....

In this case, he explains, the law demands compensation in kind for the animals slaughtered unlawfully on Holy days. Yet, it does not specify the equivalences between game and domestic animals. Therefore, this entails the obligation to exercise *ijtihād* in order to determine the proper compensation. However, the word *mithl* indicates that the correct *ijtihād* in this case consists of looking for material similarities between animals, and not of determining the compensation arbitrarily. Similarly, the law obliges us to accept the testimony of individuals whom we judge on the basis of outward appearance to be just, even though they may inwardly be unjust.[38] Nevertheless, the assessment of probity cannot be entirely subjective and has to be guided by material indications about the individual's piety and probity.[39] Like the example of the *qibla*, the examples of the *mithl* and *ʿadl* demonstrate that the law tolerates *ijtihād* when certainty is not attainable, but specifies that *ijtihād* cannot be arbitrary and should be guided by material indicants. The three textual examples constitute proof about the validity of *qiyās* because they provide guidance to the correct way of fulfilling established obligations. Al-Shāfiʿī states this explicitly:

> This section [in which the examples are discussed] encompasses the meaning of *qiyās* since we have discussed here the evidence about the correct way of arriving at the *qibla*, *ʿadl*, and *mithl*. *Qiyās* is that which is sought by means of indicants to be in agreement with the set precedents from the Book and the Sunna, because the Book and the Sunna constitute signs to the truth, and this latter truth ought to be sought just as it is obligatory to seek the *qibla*, *ʿadl*, and *mithl*.[40]

It must be noted that al-Shāfiʿī does not take account and perhaps was not yet aware of an important juridical doctrine which was advocated by extreme traditionists and cited by later jurists as an argument against *qiyās*. Some traditionists upheld that the cases which were not explicitly addressed by the texts were known to retain their original status prior to revelation, that is, the status of being devoid of legal qualifications *(istimrār al-barāʾa al-aṣliyya)*.[41] They considered revelation to be complete only in the sense that everything of legal relevance that was meant to be

communicated was found in the explicit texts. When no such texts were found, any legal judgment was to be suspended.[42] Therefore, they argued that the analogy between *qiyās* and *ijtihād* about the *qibla* did not hold: the resort to *qiyās* in the absence of explicit texts, unlike the resort to *ijtihād* about the direction of the *qibla*, was not dictated by necessity. It was mainly by taking account of the doctrine regarding the continuation of the original presumption that the later *qiyāsists* rejected the justification of *qiyās* on grounds of rational necessity.[43]

Since the judgments of *qiyās* are not conclusive, and entail an element of personal opinion, al-Shāfiʿī acknowledges, they may precipitate disagreement *(ikhtilāf)*. However, in matters which are not decided by conclusive texts, disagreement is valid. This follows necessarily from the conclusively established validity of *ijtihād*. In the absence of texts, each jurist is only responsible to follow the truth as it appears to him. Thus, when two jurists arrive at different judgments, each is obliged to follow his own *ijtihād*. They may both fail to arrive at the correct judgment, which is the unique and objective divine truth regarding the legal situation. Yet, they are both primarily right for having fulfilled their obligation to exercise *ijtihād*.[44] Once again the paradigm of the *qibla* provides the matching parallel. When the *qibla* is out of sight, each person can pray towards what best appears to him to be the correct direction. Another example is found in the event that two judges with different knowledge may differ in their assessment of the probity of the same individual, one accepting his testimony while the other rejecting it.[45] In addition to the argument above, al-Shāfiʿī quotes verse 98: 4: " Those who have been given the Book were not divided except after they were vouchsafed a clear proof ", and 3: 105 : " Be not like those who were divided and were at variance after they were granted clear proofs ". These verses indicate that *ikhtilāf* is reprehended only in the presence of conclusive texts. Otherwise, the tolerance of *ikhtilāf* is concomitant with the validity of *ijtihād*.

Later *qiyāsists* consider al-Shāfiʿī's argument inadequate for establishing the authoritativeness of *qiyās*. For instance the Muʿtazilite jurist ʿAbd al-Jabbār (d.415) concedes to the anti-*qiyāsists* that the argument of the *qibla* is invalid as it falls into circularity: it involves *qiyās* in the justification of *qiyās*.[46] The fact that the law authorizes the probable judgments in the particular case of the *qibla* and in other similar cases does not imply the authorization of all kinds of probable judgments.[47] In the next chapter, we shall see what evidentiary role the jurists assign to the textual examples such as that of the *qibla* in their justification of *qiyās*.

Al-Shāfiʿī himself acknowledges that the fact that the law permits *ijtihād* in the case of the *qibla*, *ʿadl* and *mithl*, does not constitute explicit evidence about the validity of *qiyās*. In the beginning of *al-Risāla* in what seems to be an unambiguous reference to *qiyās*, al-Shāfiʿī explains that he has cited the examples of the *qibla*, *ʿadl* and *mithl* in the hope that they would indicate other matters which are governed by the same meaning *(an tadulla ʿalà mā warāʾihā mimmā fī mithli maʿnāhā)*.[48] Furthermore, al-Shāfiʿī is aware that speaking of the *maʿnà* of the texts carries one from their custody to the realm of *qiyās*.[49] Thus, as it appears, al-Shāfiʿī's argument for the justification of *qiyās*, if treated as a textual argument and without regard to its underlying rational structure, falls within what al-Shāfiʿī himself would characterize as *qiyās* and is in fact circular. Moreover, since this argument is based on *qiyas* and not on an explicit textual statement, it is only probable and not conclusive. Al-Shāfiʿī does not take account of this and asserts, as we have seen, that the validity of *ijtihād*, whether it is applied to determine the direction of the *qibla* or to provide judgments for new eventualities, is a matter that is known conclusively *(bi iḥāṭa)*. Later jurists who uphold that the validity of *qiyās* is conclusively established, attempt to strengthen their evidence in support of this claim, taking into account the objections of the anti-*qiyāsists* as well as the rigorous and well-defined epistemological criteria of classical Sunnī legal theory.

In addition to the Qur'ānic evidence about *qiyās*, al-Shāfiʿī was aware of the famous tradition according to which the Prophet is said to have approved of his governor's decision to rely upon *ijtihād* in order to adjudicate cases which are not addressed by the explicit texts in the Qur'ān or the Sunna. However, he mentions this tradition only once in his discussion of *qiyās* and does not seem to assign to it the evidentiary value it acquires in the arguments of later jurists.[50] It is possible to explain why al-Shāfiʿī would disregard such a tradition in favor of the Qur'ānic verses discussed above, which are less explicit in providing sanction for *ijtihād* in a specifically judicial context. As has been shown, al-Shāfiʿī's argument was primarily addressed to the ancient schools of law, who did not oppose *ijtihād* to *qiyās*. On its own, this tradition provides an explicit textual sanction for *ijtihād*, but does not specify the proper kind of *ijtihād*, leaving room for debate about the validity of *istiḥsān*.[51] For later jurists who employ this tradition in the justification of *qiyās*, the difficulty did not lie in having to establish that *ijtihād* excludes independent reasoning *(al-raʾy al-mursal)*. In the discourse of later times this could be presupposed. Rather, what the *qiyāsists* had difficultly asserting, against the counter claims of their opponents, is that *ijtihād* in this tradition meant *qiyās* and was not confined strictly to the interpretive activities of a jurist.

More notably, al-Shāfiʿī rejects the claim that *ijmāʿ* provided the evidence about the validity of *qiyās*. In a lengthy discussion with an interlocutor, al-Shāfiʿī argues that the claim of an *ijmāʿ* among the successors--and presumably the companions-- about the validity of *qiyās*, is not sufficiently substantiated, and that *ijmāʿ* therefore does not provide the evidence about the authoritativeness of *qiyās*. As we shall see in the last chapter of this thesis, our three Ashʿarite jurists considered that the *ijmāʿ* of the companions provided the strongest evidence about *qiyās* and adduced lengthy arguments to verify the existence of such an *ijmāʿ*. For later comparative

reference, it would be useful to cite al-Shāfiʿī's dialogue with his interlocutor about this issue:

> Al-Shāfiʿī: " You claim an *ijmāʿ* among them [the successors] regarding the validity of *qiyās,* although you acknowledge that you cannot verify that they conferred in the same place. Instead you base your argument upon individual narratives which are transmitted about them. You infer that they employed *qiyās,* because you have found that they passed judgments about matters regarding which you are unable to find Qurʾānic texts or traditions. Thus, you assert that *qiyās* is the firm knowledge which is unanimously endorsed by the scholars *(ahl al-ʿilm)* to be the truth. "
>
> Interlocutor: " Yes I have said so. "
>
> Al-Shāfiʿī: " But it is possible that they have judged matters on the basis of texts of the Qurʾān and the Sunna of which you are not aware or which they failed to mention or transmit. It is also possible that they have judged these matters according to *raʾy* and not *qiyās.* "
>
> The interlocutor: " Although this is possible, I do not suppose that they could have known of a tradition without transmitting it, or that they may have judged matters other than on the basis of *qiyās.* "
>
> Al-Shāfiʿī: " Do you assert this on the basis of sayings attributed to them and which indicate that they considered *qiyās* to be binding, or are you only postulating on the basis of your own surmise *(ẓann)* [52] that *qiyās* ought to be binding upon them. Perhaps they did not accord to *qiyās* the same value you ascribe to it, [... the interlocutor approves al-Shāfiʿī's analysis]... thus, what you adduce as proof *(ḥujja)* about their practice of *qiyās* is only your erroneous impression. "
>
> The interlocutor: " If this is so, then by what authority do you judge matters on the basis of *qiyās* to the exclusion of other [methods of reasoning]. "
>
> Al-Shāfiʿī: " On the basis of another method *(min ghayri ṭarīqin)* than that which you have adopted and which I have discussed elsewhere." [53]

It may be important to note that al-Shāfiʿī does not adduce this argument in the context of his discussion of *qiyās,* but rather in relation to his criticism of the doctrine of *ijmāʿ* in the ancient schools of law. He considers this as one example of the unsubstantiated claims of *ijmāʿ* put by the schools.

Qiyās, al-Shāfiʿī explains, involves the application of a ruling to cases which are not explicitly addressesd by the texts but which are understood to fall within the *maʿnà* of a textual ruling. [54] In this context, *maʿnà* denotes the reason or purpose for which the ruling is established. In practice, however, al-Shāfiʿī applies the term to the idea or principle underlying the ruling, or even any property which is deemed to be essential to the ruling. Perhaps, of the different terms used by later jurists to designate the middle term in the *qiyāsī* inference, the one that would correspond best to al-Shāfiʿī's application of *maʿnà* is al-Ghazzālī's term the " nexus " (*al-manāṭ*). The presumption underlying the application of *qiyās* is that rulings are established for intelligible reasons, and that the cases which have relevant similarity with respect to that reason , and hence fall under the same *maʿnà*, are subject to the same ruling.

Unlike later jurists, al-Shāfiʿī prescribes only very general rules for the application of *qiyās*. In order to be entitled to practice *qiyās*, he explains, a jurist should have thorough knowledge of the rulings in the Qurʾān and the Sunna, as well as the ability to comprehend the ideas (*ʿaql al-maʿānī*) underlying rulings and to discern between relevant and irrelevant similarities. Furthermore, he should be sincere and exhaustive in his efforts and able to assess and know the merits of the judgments he rejects over the ones which he accepts.[55] More specifically, in his definition of *qiyās*, al-Shāfiʿī explains that the evidence as to what constitutes *maʿnà*, may be found in the ruling itself or in other rulings. In practice, what this means as we shall see from the examples below, is that al-Shāfiʿī sometimes adduces systematic reasoning and textual evidence in support of the validity of individual inferences. Often, however, he only states his inference without further explanation. We shall see, how later jurists who accept al-Shāfiʿī's legal doctrines, attempt to rationalize some of his inferences, in the context of their justification of the individual methods of identifying the legal cause.

Qiyāsī inferences vary in strength and clarity. In some cases, the general meaning of the original ruling is clear and the new case falls clearly under this meaning, *fī maʿnà al-aṣl*. Under this category, al-Shāfiʿī places the *a fortiori* argument in its two forms, *a minore ad maiorem* and *a maiore ad minorem*, which he considers as the strongest kind of *qiyās*. For example, from the statement establishing that God has made it unlawful to think of other believers in any way contrary to the good which they manifest, it is concluded that it is all the more unlawful to tell untruths about fellow believers. Similarly, since God has made lawful for Muslims the life-blood and property of combatant unbelievers, it is concluded that whatever is taken of their bodies, which is less than their life-blood and of their properties except the whole of it is all the more lawful.[56] However, al-Shāfiʿī relates, some jurists consider that the judgments based on the *a fortiori* inferences are textually stipulated and not derived by qiyās *(huwa bi ʿaynihi lā qiyāsun ʿalà ghayrihi)*. [57] Such judgments are clearly encompassed in the meaning of the text *(maʿnà mā aḥalla Allāhu wa ḥarrama)* and fall under the clear general intention of revelation *(dākhilun fī jumlatihi)*. [58] Likewise they do not consider as *qiyās* when the new case is conclusively considered to be equivalent in meaning *(fī maʿnà)* to the textual prohibition.[59] They reserve the term *qiyās* to cases in which the new case resembles the original parallel, but is not subsumed under it, that is to say, to cases in which there is uncertainty either with regard to the identification of the *maʿnà* and/or the validity of the subsumption.[60] However, others consider as *qiyās* every judgment that goes beyond the explicit bounds of the texts and is only the equivalent of a textual ruling. [61]

We will discuss here two examples to illustrate how al-Shāfiʿī applied *qiyās* and attempted to justify his individual inferences against other possible interpretations:

The following tradition from the Prophet regarding usury states:

> Do not sell gold for gold or paper[currency] for paper, or wheat for wheat, or barley for barley or salt for salt except like for like, equal

> amount for equal amount, hand by hand. But you can sell gold for paper and paper for gold, barley for wheat and wheat for barley and salt for dates and dates for salt as long as they are exchanged hand for hand [immediate delivery]. [62]

Al-Shāfiʿī argues that the prohibiton should be extended beyond the specific commodities mentioned in this tradition, all of which have the feature of being edible and exchangeable by measure *(kayl)* to any edible and potable commodity, regardless of whether they are sold by weight *(wazn)* or measure. This is so because they are all similar *(mujtamiʿat al-maʿānī)* in being nutriments *(qūt)* or staples *(ghidhāʾ)* (the properties which al-Shāfiʿī deems to be relevant to the ruling in the case of the edible commodities). Thus it is neither permitted to exchange different quantities of the same edible products at the same time (e.g. a measure of salt for two measures of salt), nor to barter them on credit (e.g, one measure of wheat for future delivery of wheat or for any amount of oil). However, it cannot be said that the ruling of the edible commodities which are sold by weight is inferred by analogy from the prohibition of gold or paper (which are also sold by weight and hence serve as a more appropriate basis for analogy).[63] This is so, because although it is not permitted to trade gold for paper money (or silver) on credit, Muslims are agreed about the validity of making cash payments of gold, (or silver), or paper money for a future delivery of any commodity. Therefore, it has to be inferred that in the case of gold and silver, usury is prohibited for a meaning that is unique to these metals and which is not present in other commodities.[64] We shall see how later jurists rationalize al-Shāfiʿī's inference in this case in terms of the method of *al-sabr wa al-taqsīm* (and sometimes the method of *shabah*).

In another example, al-Shāfiʿī relates that it is the widely accepted doctrine that the weregeld of a slave is his market price, and not a fixed amount as the weregeld of a a freeman. For some jurists, this was sufficient to establish that the slave is to be treated as property with regards to torts. Thus, they hold that the compensation due for

damages inflicted upon a slave should be the estimated loss in his market price, as in the case of any other beast or property. They also hold that when a slave is injured deliberately, his offender is not subject to retaliation *(qawad)* but only to paying compensation for the damages. Al-Shāfiᶜī, on the other hand, holds the opposite position. He advocates that the damages for wounds should be a fixed proportion to the weregeld as in the case of humans, and that the culprit in any deliberate offense upon a slave is subject to the punishment of retaliation. Although the slave resembles property in that his weregeld is his price, al-Shāfiᶜī maintains, he resembles humans in many more respects: if a slave is killed deliberately, the culprit is subject to retaliation, if accidentally to the payment of weregeld and the emancipation of a slave. Moreover, the offender's agnate kinsmen *(al-ᶜāqila)* are made responsible for the weregeld of a slave who is killed accidentally, although they are not made to pay the compensations for accidental damages on property. Furthermore, unlike beasts, the slave is subject to religious prescriptions. Since the slave resembles the human in five respects and the beast in one only *(yujāmiᶜu al-ḥurra fī khamsati maᶜānin wa yufāriquhu fī wāḥidin)*, it is more appropriate to infer the laws of tort for slaves by analogy with those of humans.[65]

This last example is particularly important and helps to clarify one aspect of al-Shāfiᶜī's treatment of *qiyās* which has been misinterpreted by both later jurists and some modern scholars. As we have seen, al-Shāfiᶜī defined *qiyās* as a procedure that involves the assimilation between the judgment of cases which are deemed to be similar in their *maᶜnà*. [66] However, in an earlier reference to *qiyās* in *al-Risāla*, al-Shāfiᶜī explains that the conformity with set precedents *(muwāfaqat al-khabar al-mutaqaddim)* by means of *qiyās* can be accomplished in one of two ways (*min wajhayn*): when a new case is found to be similar in meaning *(mā fī mithli dhālika al-maᶜnà)* to a textual parallel, it should acquire the ruling of this parallel. However, when a new case resembles *(yushbih)* more than one precedent, it should be assimilated to the precedent

to which it bears the closest resemblance *(awlà al-ashyā' i shabahan)*. This is similar, al-Shāfiʿī adds, to the procedure entailed in the assessment of compensations for slaughtered game.[67] This has lead some scholars to the conclusion that al-Shāfiʿī recognized two kinds of *qiyāsī* inferences, the first based on " essential principles " and reasons (the presumed meaning of *maʿnà)*, and the second based upon material resemblance *(shabah)*.[68] Others, have also claimed that al-Shāfiʿī identified the so called " *qiyās al-shabah* " with the procedure entailed in the assessment of *mithl*.[69]

It seems to me that such interpretations do not represent al-Shāfiʿī's thought correctly. Admittedly, taken in isolation, the above excerpt of al-Shāfiʿī's treatment of *qiyās* in *al-Risāla* can be misleading, especially if it is interpreted in light of the later developments in the concepts and the terminology of the theory of *qiyās*. (It is very easy to see in this classification the correspondence between the two major kinds of *qiyās* in classical legal theory, namely, *qiyās al-shabah* and *qiyās al-ʿilla)*. However, when this excerpt is assessed in light of other evidence in *al-Risāla* and in *al-Umm*, it becomes clear that al-Shāfiʿī did not conceive of an essential distinction between two kinds of *qiyās* with respect to the basis of the assimilation (mere material similarity or a well defined *ratio*) [70] The distinction he draws between the two ways of applying *qiyās* is clearly intended to emphasize the following principle: when there is more than one competing precedent *(aṣl)*, the jurist is not at liberty to select the *aṣl* to which the case is to be assimilated randomly, [71] but should weigh the evidence in favor of either choice. It is quite evident, that this principle is inspired, or at least particularly pertinent to the controversy among jurists regarding the laws of torts in the case of slaves. As we have seen, al-Shāfiʿī defends his doctrine of torts by arguing that the number of precedents which indicate that the slave is treated like a human, outnumber the single precedent that treats the slave as a beast or property (in that his weregeld is his price). Thus, in some cases the proper *qiyās* does not only consist of assimilating the case to a precedent which has the same *maʿnà*, but also of correctly

choosing among the possible precedents to which a new case may be assimilated. Although *ikhtilāf* is tolerated in *qiyās*, a jurist who has the preponderance of evidence in favor of his doctrine-- as al-Shāfiʿī does in the case of the laws of torts-- proves the validity of his doctrine against that of his opponents.[72] In other words, although all *qiyāsī* judgments are probable, it can be proven sometimes that one probable judgment is better than another. In this regard, it becomes clear that the relevance of the example of game ω the application of *qiyās* is not to illustrate the qualitative nature of the basis of the assimilation. Rather, this example serves as a proof text (where the paradigm of the *qibla* fails) to the necessity of assessing relative resemblance when more than one possible parallel presents itself for assimilation.[73]

Moreover, to say that al-Shāfiʿī articulates a defined concept of *shabah* as opposed to *maʿnà*, presupposes that he had a well defined concept of *maʿnà*. In fact, however, from the numerous examples in *al-Risālah* by which al-Shāfiʿī illustrates his application of *qiyās*, it becomes clear that what he considers as *maʿnà* only sometimes coincides with what can be characterized as the motive or reason behind the ruling.[74] In the second chapter, we shall how later jurists classify some of arguments that al-Shāfiʿī associates with *maʿnà*, under what they consider as *qiyās-al-shabah*, which in turn is defined in relation to a well-defined concept of rational pertinence *(munāsaba)*. An important note must be made here which will highlight the relevance of some of our discussion in the next chapter. Throughout his discussion of *qiyās*, al-Shāfiʿī takes for granted that judgments of *qiyās*, generally speaking, are not arbitrary. Although not conclusive, such judgments are reasonably justified by the " apparent " indicants and in this respect constitute *ḥaqq fī al-ẓāhir*. Undoubtedly, al-Shāfiʿī was aware of some staunch anti-rationalist opposition to *raʾy*. But it seems that at his time such opposition had not yet become significant and systematic so as to warrant being seriously addressed in the justification of *qiyās*. Thus, al-Shāfiʿī justifies *qiyās* solely by adducing textual evidence about its validity. For later jurists

however, the task of justifying *qiyās* did not consist of establishing its textual basis only. In addition, and undoubtedly prompted by the more systematic attacks upon *qiyās*, the jurists adduced elaborate rationalizations of *qiyās* and of the modes of inference commonly employed in its application.

Sunnī Islam eventually embraced al-Shāfiʿī's theory of juridical inference. The rejection of independent reasoning which was considered by the dominant schools of law at al-Shāfiʿī's time to be controversial and restrictive, became axiomatic to classical Sunnī jurisprudence. However, after al-Shāfiʿī the argument for the validity of *qiyās* came under severe challenge by an outspoken and diverse groups of opponents. In response to this challenge, Sunnī jurists continuously attempted to upgrade the strength of the textual arguments which they adduced in support of *qiyās* in light of the increasingly more rigorous and well defined epistemological criteria of their legal theory. Furthermore, they sought to affirm the reasonable character of this source of law against the various counter claims of its opponents. Taking al-Shāfiʿī as a comparative point of reference, the next two chapters will examine different aspects of the justification of *qiyās* as undertaken by our three Ashʿarite Shāfiʿite jurists, Abū Ḥāmid al-Ghazzālī (d. 555), Fakhr al-Dīn al-Rāzī (d.606) and Sayf al-Dīn al-Āmidī (d. 631).

Endnotes

[1] The thesis adopts Joseph Schacht's argument that Islamic law started towards the end of the Umayyad period, through the concerted attempt of pious specialists to revise existing practices in light of Islamic norms. For further account see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (3rd Ed.; Oxford: Clarendon Press, 1959), part III, Chap. I; for a detailed discussion of the character of reasoning in early Islamic law see the same work, Part I, Chap. 9. Our argument below is largely based on the results of Schacht's studies about the early developments in Islamic Jurisprudence.

[2] See Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p. 37; see also *Origins*, pp. 98-9.

[3] For a brief and useful discussion of the character of Qurʾānic legislation, see N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), Chapter I.

[4] See Zafar Ishaq Ansari, " An Early Discussion on Islamic Jurisprudence: Some Notes on *al-Radd ʿalā Siyar al-Awzāʿī*, " in *Islamic Perspectives: Studies in Honour of Sayyid Abul Aʿlā Mawdūdī*, ed. Khurshid Ahmad & Zafar Ishaq Ansari (Jeddah: Saudi Publishing House, 1977), p. 153; Schacht, *Introduction*, p. 37.

[5] This is of course Joseph Schacht's expression; For a detailed discussion of the ' living tradition' and the relationship between Sunna and consensus in the ancient schools of law, see Schacht, *Origins*, Chap. 7-8; for a less detailed and technical, but very lucid treatment of this subject see Fazlur Rahman, *Islamic Methodology of History* (Karachi: Central Institute of Islamic Research, 1965), pp. 18-24.

[6] Schacht, *Introduction*, p. 31.

[7] See Schacht, *Origins*, pp. 128f., 253ff.

[8] Already before al-Shāfiʿī, some jurists such as Shaybānī, whose theory anticipates al-Shāfiʿī's, occasionally changed their doctrine on account of traditions, see ibid., p. 34.

[9] On the role of traditions in polemics see ibid., pp. 22-3, 27, 35, 152ff; see also Ansari, " An Early Discussion, " pp. 154-5.

[10] Apparently, the opposition *Khabar lāzim/qiyās* was first employed by Shaybānī, See Zafar Ishaq Ansari, " Islamic Juristic Terminology before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa, " *Arabica*, 19 (1972), p. 34; see also Schacht, *Origins*, pp. 27, 110, 136.

[11] See ibid., p. 90; this is applicable to the Medinese as well as the Iraqis see ibid., pp. 111, 117-8; see also Ansari, " Islamic Juristic Terminology, " pp. 36-8.

[12] See Schacht, *Origins*, pp. 23, 30.

[13] Ibid., p. 95.

[14] Schacht, however, observes that al-Shāfiʿī's doctrine about consensus shows continuous development and had retained at its earlier stages some aspects of the ancient doctrine of consensus, see ibid., pp. 88ff.

[15] In support of his assertion about the all comprehensiveness of revelation, al-Shāfiʿī cites mainly verse 16: 89: " And We reveal the Book unto thee as an explication for everything *(tibyānan li kulli shayʾin)*, " and also V: III: " This day I have perfected your religion for you and completed My favor unto you and have chosen for you Islam as a religion, " see Muḥammad b. Idrīs al-Shāfiʿī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Maṭbaʿat Muṣṭafà al-Bābī al-Ḥalabī, 1940), p. 20; see also *Kitāb al-umm*, edited by Muḥammad Zuhrī al-Najjār (Cairo: Maktabat al-kulliyyāt al-azhariyya, 1961), Vol. VII, p. 294; regarding the exclusive authority of revelation al-Shāfiʿī states: "God made known to all people by means of his Book that the only valid knowledge is that which He has taught them. Then he bestowed upon them knowledge and commanded them to adhere exclusively to it *(bi al-iqtiṣāri ʿalayhi)* and to rely upon none other than what He has taught them, " al-Shāfiʿī supports this with several pages of evidence from Qurʾān and tradition, see *al-Umm*, Vol. VII, p. 294ff; for George Makdisi it is through such statements about the exclusive and all-comprehensive authority of reason that the " traditionalist, anti-rationalist dimension of al-Shāfiʿī's Risāla comes into focus, " see his " The Juridical Theology of Shāfiʿī, " *Studia Islamica*, 59 (1984), p. 41; Makdisi considers that the anti-rationalist theological dimension of al-Shāfiʿī's legal science has been overlooked by Schacht and Goldziher in favor of its legal dimension. He suggests that " ...by raising the Prophet's Sunna to the level of the Koran, and by restricting the use of analogical reasoning within definite limits, Shāfiʿī's purpose was to create for traditionalism a science which could be used as an antidote to kalam..., " ibid., p. 12, for similar reflections upon the anti-Muʿtazilite aspect of *al-Risāla*, see Norman Calder, " Ikhtilāf and Ijmāʿ in Shāfiʿī's *Risāla*, " *Studia Islamica*, 58 (1983), p. 70. This thesis attempts to highlight the traditionalist epistemological structure of al-Shāfiʿī's theory. But it is beyond its scope to analyze the actual motives and intents behind al-Shāfiʿī's traditionalism.

[16] Al-Shāfiʿī, *al-Umm*, Vol. VII, p. 298; cf., *al-Risāla*, p. 21.

[17] " *Fa man qabila ʿan rasūli Allāhi fa bi farḍi Allāhi qabila*, " al-Shāfiʿī, *al-Risāla*, p. 22, cf. pp. 32-3 ; *al-Umm*, Vol. VII, p. 299.

[18] Al-Shāfiʿī, *al-Umm*, Vol. VII, p. 299.

[19] Al-Shāfiʿī, *al-Risāla*, p. 478; al-Shāfiʿī considers that some Qurʾānic verses are capable of various interpretations *[yaḥtamilu al-taʾwīl]* such verses are inconclusive and *ikhtilāf* about their meaning is admissible, ibid., p. 560. Regarding traditions, al-Shāfiʿī considered that only traditions transmitted from generality to generality--what later jurists call *mutawātir*- - produce certain knowledge; al-Shāfiʿī acknowledges that solitary reports *(khabaral-khāṣṣa)* constitute truth based upon apparent indicants *(ḥaqq fī al-ẓāhir)*, for a discussion of the epistemological typology of *al-Risāla*, see Calder, " Ikhtilāf. " Classical Sunnī legal theory adopts this dichotomous typology of certain and probable knowledge under the different terminology *(qaṭʿ/ẓann)*.

[20] Al-Shāfiʿī, *al-Risāla*, p. 479.

[21] Ibid., pp. 477, 479.

[22] Al-Shāfiʿī, *al-Umm*, Vol. VII, p. 299, cf. p. 276 ; see also al-Shāfiʿī, *al-Risāla*, pp. 477-78, 481.

[23] Al-Shāfiʿī, *al-Umm*, Vol. VII, p. 277.

[24] Al-Shāfiʿī's discussion of the textual evidence about *qiyās* in *al-Risāla* is sketchy, repetitive, and unorganized. However, its overall import is identical to the discussion in *Kitāb al-Umm*. The following exposition of al-Shāfiʿī's textual justification of *qiyās* is based on the reconstruction of his arguments in both works.

[25] *" Wa min ḥaythu kharajta fa wallī wajhaka shaṭra al-masjidi al-ḥarāmi wa ḥaythu mā kuntum fawallū wujūhakum shaṭrahu."*

[26] Al-Shāfiʿī, *al-Risāla*, p. 489.

[27] Al-Shāfiʿī seems to suggest that this is indicated by the very language of the verse. Thus, after citing attestations of poetry to explain the meaning of the term *(shaṭr)* he explains: " The [use of the] term " direction " means that if the object [the Sacred Mosque] is seen, then [the prayer] in that direction is determined [by sight]; but if [the Mosque] is out of sight, the direction is determined by *ijtihād* (personal reasoning)- that is all that one is required to do, " al-Shāfiʿī, *Islamic Jurisprudence: Shāfiʿī's Risāla*, Trans. Majid Khadduri (Baltimore: The John Hopkins Press, 1981), p. 77; similarly in *al-Umm* he explains: " It is only comanded that one ought to orient oneself towards the Holy Mosque, and orienting oneself *(al-tawajjuh)* is attempting *(al-taʾkhkhī)* to locate [the direction of the Mosque] by *ijtihād*, without necessarily finding that direction with certainty *(iḥāṭa)*, *al-Umm*, Vol. VII, p. 277, 299; however, elsewhere al-Shāfiʿī argues that the validity of *ijtihād* about the direction of a distant *qibla* is inferred from the general obligation of praying in its direction, because the best that one can do when the *qibla* is out of sight is to seek it by *ijtihād* (presumably, God does not expect from us to do what is beyond our means), *al-Risāla*, pp. 487-9, cf.480-1, 502-3. Al-Shāfiʿī clearly prefers the first argument since it allows him to ground the validity of *ijtihād* exclusively in the texts, and not in rational inference which, in the first place, he was trying to avoid. Yet, he seems to be aware that it is rather far-fetched to assert that the alone the language of the verse 2:150 indicates a sanction for *ijtihād*. It is interesting to note that according to Sayf al-Dīn al-Āmidī, some extreme traditionist who have interpreted the above verse literally asserted that when the *qibla* is out of sight, it is necessary to perform the prayers four times , once in each direction, to insure that the obligation of praying in the correct direction is fulfilled, *al-Iḥkām fī uṣūl al-aḥkām* (Cairo: Maṭbaʿat al-maʿārif, 1914), Vol. IV, p. 36.

[28] Al-Shāfiʿī explains this well in *Kitāb al-umm* where he states: " The one who locates the exact direction of the *qibla* by sight *(muʿāyanatan)*, and the one who is distant from the *qibla*, yet seeks to find its direction [by *ijtihād*] are both accepting *(qābilīn)* from God the obligation of directing themselves [towards the *qibla* in prayers]. The first locates the house with certainty and the other seeks its direction by means of indications *(bi dalāla)*. The latter can be certain about the validity of the general obligations which he is fulfilling *(ʿalà iḥāṭatin min ṣawābi jumlati mā kullifa)*," *al-Umm*, Vol. VII, p. 299, see also *al-Risāla*, pp. 480-1, 497-99.

[29] *"Wa lam yajᶜal lahum idhā ghāba ᶜanhum ᶜaynu al-masjidi al-ḥarāmi an yuṣallū ḥaythu shāᶜū,"* ***al-Risāla***, p. 24, see also p. 503; cf., ***al-Umm***, pp. 299-300.

[30] Al-Shāfiᶜī, ***al-Risāla***, p. 497.

[31] *"Fa kāna fī al-naṣṣi muᵓaddiyan mā umira bihi naṣṣan wa fī al-qiyāsī muᵓaddiyan mā umira bihi ijtihādan wa kāna muṭīᶜan li Allāhi fī al-amrayni,"* al-Shāfiᶜī, ***al-Umm***, Vol. VII, p. 300; cf. ***al-Risāla***, p. 498.

[32] *"Idhā ḥakama al-mujtahidu fa ijtahada fa aṣāba fa lahu ajrān wa idhā ḥakama fa ijtahada fa akhṭaᵓa fa lahu ajrun,"* ibid., p. 302; also cited in ***al-Risāla***, p. 494.

[33] Al-Shāfiᶜī, ***al-Risāla***, pp. 494ff.

[34] Ibid., p. 504.

[35] Ibid., p. 508.

[36] *"Alladhī kullifnā bihi fī ṭalabi al-ᶜayni al-mughayyabi ghayru alladhī kullifnā bihi fī ṭalabi al-ᶜayni al-shāhidi,"* al-Shāfiᶜī, ***al-Risāla***, p. 481.

[37] Al-Shāfiᶜī, ***al-Umm***, Vol. VII, p. 277.

[38] Ibid., p. 277; ***al-Risāla***, pp. 38, 342f.

[39] Al-Shāfiᶜī, ***al-Umm***, Vol. VII, pp. 277-8, 299-300.

[40] Al-Shāfiᶜī, ***al-Risāla***, p. 25.

[41] See chapter II, p. 54 of this thesis for a fuller discussion of the argument against *qiyās* based upon this doctrine.

[42] In the paradigm of the *qibla*, this would correspond to the option of suspending prayers when the *qibla* is out of sight, which al-Shāfiᶜī considers and dismisses quickly as inadmissible. But it is not clear whether al-Shāfiᶜī was intentionally alluding to the invalidity of the doctrine of ***al-barāᵓa al-aṣliyya***.

[43] See 2nd chapter pp. 50-1.

[44] Al-Shāfiᶜī, ***al-Umm***, Vol. VII, p. 302.

[45] Al-Shāfiᶜī, ***al-Risāla***, pp. 489-90, 494, 97; ***al-Umm***, p. 302.

[46] Commenting on the invalidity of the argument of the *qibla*, the Muᶜtazilite jurist ᶜAbd al-Jabbār says: *"fa alladhī yubayyinu buᶜda al-iᶜtimādi ᶜalà hādhā al-dalīli mā badaᵓnā bi dhikrihi min annahu ithbātun li al-qiyāsī al-sharᶜī bi qiyāsin mithlihi, wa mithlu hādhā la yaṣuḥḥu fī al-sharᶜiyyāti,"* al-Qāḍī ᶜAbd al-Jabbār, ***al-Mughnī fī abwāb al-tawḥīd wa al-ᶜadl***, ed. Amīn al-Khūlī (Cairo: al-Dār al-Miṣriyya li al-taᵓlīf wa al-tarjama, n.d), Vol. XVII, p. 304.

[47] Al-Āmidī, ***al-Iḥkām***, Vol. IV, p. 36.

[48] Al-Shāfiʿī, *al-Risāla*, p. 25, see also, pp. 39-40, 498.

[49] *"Mā ʿadā al-naṣṣa min al-kitābi aw al-sunnati fa kāna fī maʿnāhu fa huwa qiyāsun,"* al-Shāfiʿī, *al-Risāla*, p. 516.

[50] Al-Shāfiʿī, *al-Umm*, Vol. VII, p. 300; see Schacht's discussion of the origin and authenticity of this tradition, *Origins*, pp. 105-6.

[51] See for example al-Shāfiʿī's rational argumentation about the meaning of *ijtihād*, in *al-Umm*, Vol. VII, p. 301, cf. p. 299.

[52] Al-Shāfiʿī uses the term *ẓann* in the derogatory sense of conjectural and baseless opinion, while later jurist use this term for sound probable judgment.

[53] My translation slightly modifies the text to reduce redundancy, see al-Shāfiʿī, *al-Umm*, Vol. VII, p. 282.

[54] For later reference al-Shāfiʿī's description of the procedure entailed in *qiyās* is cited in full: " For every ruling that is laid down by God or the Prophet, there may be indication *(dalāla)* in itself or in other rulings that it is established for a certain meaning *(maʿnan min al-maʿānī)*. If a new case *(nāzila)* arises which is not addressed by the texts, it should be judged according to the precedent which is similar in meaning *(fī maʿnāhā)*," *al-Risāla*, p. 512.

[55] Ibid., pp. 510-11.

[56] Ibid., pp. 513-5.

[57] Ibid., p. 516.

[58] Al-Shāfiʿī uses *maʿnà* in this context, in the sense that later jurists apply the term *mafhūm al-muwāfaqa* or *dalālat al-naṣṣ*, see Wael Hallaq, "Non-Analogical Arguments in Sunnī Juridical *Qiyās*," *Arabica*, (forthcoming), pp. 6f.

[59] Of course every *qiyās* involves the assimilation of a new case to a parallel which is deemed to be encompassed in its meaning. However, it is clear that al-Shāfiʿī has in mind all the cases in which the similarity between the *aṣl* and the *farʿ* is so predominant that the *farʿ* falls unambiguously under the implied, though uninferred, meaning of the text. Such cases are distinguished from the judgment based on *a fortiori* correspondence in that the meaning of the original ruling is very conspicuous, but is not necessarily suggested through the medium of the language, for possible examples see chapter II, p. 27.

[60] *"Wa yamtaniʿu an yusammà al-qiyāsu illā mā kāna yaḥtamilu an yushabbaha bi mā iḥtumila an yakūna fīhi shabahun min maʿnayayni mukhtalifayni, fa ṣarafahu ʿalà an yaqīsahu ʿalà aḥadihimā dūna al-ākhari,"* ibid., p. 516; al-Shāfiʿī carefully takes account in wording this definition of the two possible sources of uncertainty in the standard procedure of *qiyās*, namely, the identification of the *maʿnà*, and the choice of the *aṣl* to which the new case may be assimilated. The standard *qiyāsī* procedure has an inherent element of uncertainty, because the generalization of a ruling beyond its

textual context cannot be conclusively asserted: regardless of the strength of the evidence attesting to the generalization, there is always the possibility that the ruling is intended to be exclusively applicable to its particular context. Furthermore in some cases a jurist may have to choose between the several competing precedents to which the new case may be assimilated, for al-Shāfiʿī's treatment of this possibility see below, p. 17. It is interesting to compare al-Shāfiʿī's wording with the definitions of *ẓann* which are adduced by later jurists. For example, according to al-Āmidī *ẓann* is: *" ʿibāra ʿan tarjīḥi aḥadi al-iḥtimālayni fī al-nafsi ʿalà al-ākhari min ghayri qaṭʿin, " al-Iḥkām*, Vol. I, p. 15; for al-Rāzī, *" taghlībun li aḥadi mujawwazayni ẓāhiray al-tajwīzi, " al-Maḥṣūl fī ʿilm uṣūl al-fiqh*, ed. Ṭāha Jābir Fayyāḍ al-ʿUlwānī (Riyadh: Maṭbaʿat jāmiʿat al-Imām Muḥammad bin Saʿūd al-islāmiyya, 1979), Vol. I, i, p. 102.

[61] Al-Shāfiʿī, *al-Risāla*, p. 516.

[62] *Al-Umm*, Vol. VII, p. 76; a shorter variant of traditions is cited in *al-Risāla*, p. 52.

[63] This is stated in response to the question raised by the opponent: *" a fa yuḥtamalu mā bīʿa mawzūnan an yuqāsa ʿalà al-wazni min al-dhahabi wa al-waraqi, fayakūnu al-waznu bi al-wazni awlà bi an yuqāsa min al-wazni bi al-kayli?"* al-Shāfiʿī, *al-Risāla*, p. 525.

[64] Al-Shāfiʿī, *al-Umm*, Vol. VIII, pp. 76ff; see also *al-Risāla*, p. 523ff; later Shāfiʿīte jurists argue that the cause of prohibition of usury in gold and silver is their unique property of being precious metals *(al-jawhariyya al-thamīna)*. They cite this as the standard example of an intransitive legal cause *(al-ʿilla al-qāṣira)*, a cause regarding the validity of which there was much controversy among the *qiyāsists*, see for example al-Āmidī, *al-Iḥkām*, Vol. III, p. 311.

[65] Al-Shāfiʿī, *al-Risāla*, p. 537ff; *al-Umm*, Vol. VII, p. 303; the argument is based upon similar sections in the two works.

[66] See definition in note 53 above.

[67] Al-Shāfiʿī, *al-Risālah*, p. 40, see also p. 479.

[68] See Nabil Shehaby, " *ʿIlla* and *Qiyās* in Early Islamic Legal Theory, " *Journal of the American Oriental Society*, Vol. 102 (1982), p. 33; Aron Zysow, " The Economy of Uncertainty: An introduction to the Typology of Sunnī Legal Theory, " Ph.D. Dissertation (Harvard University, 1984), p. 331f; Calder, " Ikhtilāf, " p. 63, see my discussion of *qiyās al-shabah* in chapter II.

[69] See for example Shehaby, " *ʿIlla* and *Qiyās*, " p. 33; Calder, " Ikhtilāf," p. 63; Zysow, " Economy, " pp. 331f.; see also discussion of *qiyās al-shabah* in the second chapter.

[70] The second kind of *qiyās* mentioned above, is described elsewhere without excluding the term *maʿnà*: *" fa in kānat [al-nāzila] tushbihu aḥada al-aṣlayni fī maʿnan wa al-ākhara fī ithnayni ṣurifat ilā alladhī ashbahathu fī al-ithnayni dūna alladhī ashbahathu fī wāḥidi, "* al-Shāfiʿī, *al-Umm*, Vol. VII, p. 303; furthermore, al-Shāfiʿī does not use the term *shabah* in the technical sense it later acquires, and in opposition

to *maʿnà*. For him, every *qiyās* involves an assimilation *(tashbīh)* between cases that are similar in relevant respects, and thus fall under the same idea *(maʿnà)*, see definition of *qiyās*, note 53. Thus, al-Shāfiʿī expains, that a jurist is entitled to apply *qiyās* only if he is able to discern between similar things *(yufarriqu bayna al-mushtabahi)*, *al-Risāla*, p. 50; he should have the knowledge of the reports as well as the intellectual ability to extend their rulings by analogy: *(ʿālimun bi al-akhbāri ʿāqilun li al-tashbīhi ʿalayhā)*, ibid., p. 501.

[71] To be sure al-Shāfiʿī does not apply the term *aṣl* here properly, since an *aṣl* in the convention of the jurists is a textual ruling. Stricty speaking, being property or human does not constitute an *aṣl*. It is the textual laws regarding humans and property that are the respective *uṣūl*. Thus what is actually at hand here is not a new case (the slave) which has two competing textual precedents (human or property). Rather, what al-Shāfiʿī should have said, is that the textual cases *(uṣūl)*, which attest in their meanings that the slave should be treated as a freeman with regard to torts outnumber those *uṣūl* which indicate that the slave is to be treated as property.

[72] This is asserted in response to a question raised by the interlocutor with regard to whether it is possible, when there is disagreement about the results of *qiyās*, for any jurist to prove the superiority of his own opinion *(an yuqīma aḥaduhumā ʿalà ṣāḥibihi ḥujjatan fī baʿḍi mā ikhtalafā fīhi)*, *al-Umm*, Vol. VII, p. 303; cf., *al-Risāla*, p. 479.

[73] See al-Shāfiʿī's discussion of this aspect of the paradigm of *mithl*, in *al-Risāla*, pp. 39, 490-92.

[74] See ibid., pp. 512 ff.

CHAPTER II

THE RATIONALIZATION OF *QIYĀS*

Apart from attempting to establish the textual foundation of *qiyās*, jurists after al-Shāfiᶜī sought to rationalize this source of law. Thus, they affirmed the rational character of *qiyās* by analyzing its logical basis and by defining and defending the validity of the modes of inference commonly employed in its application. This pertained in particular to the central element in the *qiyāsī* procedure, namely, the identification of the relevant property on the basis of which the ruling is extended beyond its textual context. By defending the validity of the accepted methods of identifying the cause, the jurists were affirming that, although admittedly inconclusive, the judgments of *qiyās* are not entirely subjective. They are probable since they are justified by the apparent textual evidence. This assertion was clearly prompted by the numerous charges of arbitrariness laid against *qiyās* by its outspoken opponents. Moreover, although the jurists acknowledged that reason could not establish the authoritativeness of *qiyās*, they argued--against the supposed counter claims of their opponents-- that the incidence of the authoritativeness of *qiyās* was rationally and theologically admissible. For the Ashᶜarite jurists, there was the additional necessity of accounting for the phenomena of legal causality and rationality in law, which the application of *qiyās* presupposed. These aspects of the endeavour to provide theoretical justification for *qiyās*, as treated by our three jurists, will be the subject of investigation in this chapter.

The three jurists defined *qiyās* as the procedure involving the transfer of the judgment for a known case to a new case which is not expressly regulated, when the two cases have a common property *(amr jāmiᶜ)* that is relevant to the ruling.[1] Al-Ghazzālī commends this definition for including the two main kinds of *qiyās*, causal analogy *(qiyās al-ᶜilla)* and analogy of resemblance *(qiyās al-shabah)*; this defintion

uses the term *jāmiᶜ* as opposed to *ᶜilla* to designate the middle term in the inference.[2] In most cases, al-Ghazzālī reserves the term *ᶜilla* for the *ratio* of the *aṣl*.[3] Al-Rāzī and al-Āmidī also recognize the distinction between *qiyās al-shabah* and *qiyās al-ᶜilla*. Unlike al-Ghazzālī, however, they apply the term *ᶜilla* to any property that is deemed pertinent to the ruling, and that is consequently used as the middle term in the analogical inference.[4] Therefore, they define *qiyās* as the procedure involving the assimilation between the ruling of a new case and a textual precedent when both rulings are deemed to have the same *ᶜ illa*.[5] Al-Ghazzālī considers this defintion to be applicable to causal analogy only.[6]

On the practical level, the jurists discuss many theological issues pertaining to *qiyās*, as well as, the authoritativeness of this source of law mainly in terms of the model procedure of causal analogy. This procedure involves the identification of the *ratio* of the original ruling, and the subsequent application of the ruling wherever this same *ratio* prevails. The standard example cited by the jurists is the extension of the prohibition of date-wine, *khamr*, to grape-wine (*nabīdh*) because it is deemed that the protection of rational behavior from the effects of intoxication is the cause of prohibition.[7]

Qiyās, al-Ghazzālī maintains, is only one of the three methods by which it is possible to assimilate cases which are not addressed explicitly in the texts to those which are explicitly regulated *(ilḥāq al-maskūt bi al-manṭūq)*.[8] In the first and strongest of these methods, the *a fortiori* argument, it can be ascertained that the ruling of the textual case is even more applicable to the assimilated case *(al-maskūt ᶜanhu awlà bi al-ḥukmi min al-manṭūqi bihi)*.[9] For example, from the Qurʾānic injunction prohibiting saying " fie " to one's parents, it is conclusively inferred that hitting one's parents is also prohibited. Al-Ghazzālī and al-Āmidī aknowledge that this inference is not typical of *qiyās*. In the procedure recognized as *qiyās* by all jurists, it is not necessary that the ruling of the *aṣl* be more applicable in the *farᶜ*. However, regardless of whether the

prohibition of hitting one's parents is considered to be a derivative of *qiyās* or of the linguistic implication of the texts, the jurists are in agreement about its conclusiveness. Hence, the authoritativeness of this kind of judgments is self constituted.[10]

In the second method, the ruling is generalized from one case to another because it is ascertained that the differences between the two cases is irrelevant to the ruling. However, no attempt is made to locate the precise cause of the original ruling. For example, the laws governing the manumission of male slaves are extended to female slaves because it is known that the difference in sex is irrelevant to the rulings of manumission.[11] Similarly, from the specific tradition according to which the Prophet enjoins a bedouin to pay expiation for having had sexual intercourse at daytime in Ramadan, the ruling is generalized to all capable Muslims regardless of their ethnic origin. The jurists consider such legal inferences to be subsumptive rather than analogical. In the cases above, the ruling of the *aṣl* is known to be equally applicable in the *farᶜ* and the *farᶜ* is understood to be encompassed in the " meaning " of the textual case. If they are to be considered as *qiyās,* such inferences are to be referred to as *qiyās fī maᶜnà al-aṣl.* [12]

In the standard *qiyāsī* procedure, the ruling of the new case is strongly suggested by the textual precedent, but is not considered in any way to be implied by or subsumed under it. Therefore, it is not possible to affirm with certainty the application of the ruling of the *aṣl* in the *farᶜ.* [13] However, al-Rāzī maintains that the *qiyāsī* inference is potentially demonstrative since its epistemological strength is solely dependent on the strength of its two premises. When a property which is known to be the cause of the *aṣl* exists unobstructed in the *farᶜ,* it can be ascertained that the ruling of the *aṣl* prevails in the *farᶜ.* [14] This is a universal rule of deduction that is equally applicable to both the rational sciences *(al-ᶜaqliyyāt)* and the law.[15] Similarly, al-Ghazzālī maintains that the element of probability *(mawāḍiᶜ al-iḥtimāl)* inherent in *qiyās* is a consequence of the possibility of the existence of error in the identification of

the cause of the *aṣl* and the verification of the actual existence of this cause in the *farᶜ*. [16]

However, the jurists also maintain that when the cause of a ruling is known conclusively, the extension of this this ruling to other instances of the cause does not constitute *qiyās*, but rather a form of deduction from a general textual norm. For example, once it is ascertained that the intoxicating property of *khamr* is the cause of prohibition, it is immediately deduced that grape-wine and, for that matter, all intoxicants are similarly prohibited. The prohibition of grape-wine is considered to be as textually stipulated as the prohibition of date-wine.[17] Extending the prohibition of *khamr* to grape-wine can be considered to be *qiyās*, only if it is strongly supposed, and not ascertained, that the property of intoxication is the cause of prohibition. According to al-Ghazzālī , the *raison d' être* of *qiyās* pertains to the fact that the laws are stated in individual cases and cannot be generalized beyond their particular contexts with certainty . However, when the general applicability of a ruling is established by the texts, as it would be the case if the cause of a ruling is explicitly stated, there would be no need for *qiyās*. [18]

The process of identification and extraction of the cause from its textual context occupied a central place in the theory of *qiyās* was recognized to contain numerous methodological difficulties. However, for the Ashᶜarite jurists these difficulties were compounded by theological considerations: to speak of legal causes is to imply an explanation for the incidence of the laws beyond their being the expression of the divine command. This could conflict with the cardinal Ashᶜarite ethical principle, namely, that the exclusive source of all deontic rules and ethical values is the divine volition. Thus, the jurists take painstaking efforts to eliminate the implications of efficient causality from their discussion of the *ᶜilla*.

The three jurists , therefore, agree that the legal cause does not necessitate its rulings and is only a cause by virtue of God making it. Prior to the revelation, as the

jurists assert, there were no legal rulings *(lā ḥukma qabla wurūdi al-sharᶜi)*, although the " causes " of these rulings existed.[19] It was the prohibition of wine itself that rendered intoxication to become the cause of prohibition, and not vice versa. The property of intoxication does not necessitate the ruling of prohibition, and nor does fornication *(zinā)* necessitate the application of *ḥadd*. These properties have become causes because God has chosen to take them into consideration *(iᶜtibār)* in establishing their respective rulings.[20] For every ruling that is derived by *qiyās* and not by the text, there correspond two other rulings: first, the ruling of the *aṣl* which discloses the legal cause, and second, God's ruling prior to that which has made that cause a cause.[21]

Although all three jurists were in agreement that laws are contingent and that legal causes do not necessitate their own rulings, they each offered a different explanation for the meaning of the legal cause (what al-Rāzī refers to as *tafsīr al-ᶜilla)*.[22] Insofar as its relationship to divine volition is concerned, the legal cause is defined by al-Āmidī, as the motive *(bāᶜith)* for which the law is established.[23] God's laws, al-Āmidī maintains, are not established arbitrarily. They are purposeful and are aimed at promoting the welfare of mankind.[24] However, this is an observed fact which is the outcome of God's volition and is not dictated by rational necessity as the Muᶜtazilites might claim.[25] The rationality of the law is strictly *a posteriori*. Although the revealed law can be rationalized, the rationality of the law itself is not dictated by any necessity. Al-Āmidī believes that the element of volition in his account enables him to speak of the reasons and motives behind the law while at the same time dissociating himself from the Muᶜtazilite position with respect to objective ethical rationality.

Al-Rāzī, on the other hand, avoids speaking about the motives (to which he refers as *al-dāᶜī* or *gharaḍ)* behind God's laws since such discourse suggests unacceptable theological implication. Attributing rational motives to the Divine laws, and for that matter to any Divine action, implies that God established the law for

external reasons, the consideration of which determined the specificity of His choice.[25] Thus, al-Rāzī rejects the explanation of the cause as a motive and considers it to be as unacceptable of a claim as the one stating that legal causes are necessitating *(mūjib)*, which he attributes to the Muʿtazilites. [26] Instead, al-Rāzī maintains that the legal cause is a sign which serves only an epistemological function (*muʿarrif*), namely, the function of identifying the cases in which the ruling may be duplicated.[27]

Similarly, in *al-Mustaṣfā*, al-Ghazzālī also avoids explaining the legal cause as a motive or reason.[28] He maintains that the cause is only a sign(*ʿalāma, imāra*) which God attached *(anāṭa)* to the ruling in order to indicate the instances of its recurrence.[29] In reference to the Qurʾānic injunction: " Perform prayers at the time of the sunset" *(aqim al-ṣalāta li dulūki al-shamsi)*, [30] al-Ghazzālī points our that the sunset is a cause since it signals the recurrence of the obligation to perform prayers. Some jurists object that the setting of the sun cannot be considered a cause of the ruling in the same way that intoxication is the cause of prohibition in *khamr*. Al-Ghazzālī takes this opportunity to reaffirm what one may call the " occasionalist " relationship between the legal cause and the ruling. Legal causes are designated by God in order to remind humans about their legal obligations, exactly in the same manner that the sunset is to signal the recurrence of the obligation of prayer. The feature of rational pertinence *(munāsaba)* between the *ʿilla* and the ruling has but an epistemological value and is devoid of any causal import.[31] As it shall be seen, in the context of his discussion of the method of *al-munāsaba*, al-Rāzī advances a more elaborate occasionalist account of legal rationality with the intention of accomodating the epistemology of the cause with Ashʿarite theology.

Notwithstanding their theological reservations about explaining the legal cause as a motive, both al-Rāzī and al-Ghazzālī make repeated references to the benefit, *(maṣlaḥa)*, and the wisdom *(ḥikma)* of the law. Furthermore, al-Ghazzālī acknowledges that the strongest feature by which the *ʿilla* may be identified, when it is not explicitly

stated, is its pertinence *(munāsaba)* to the perceived benefit of the ruling.[32] Like al-Āmidī, al-Ghāzzālī and al-Rāzī both maintain that each law is established to promote a particular human benefit which constitutes its actual purpose, even though this benefit may not always be intelligible and apparent.[33] As al-Rāzī explains a property may be considered *ʿilla*, only if it has some relevant association with the underlying *ḥikma* of the ruling. It is this *ḥikma* which is the efficient *(muʾaththir)* and actual cause of the ruling.[34]

THE EPISTEMOLOGY OF THE CAUSE

We now turn to see how the jurists defined and justified their different methods for the identification of the cause *(masālik al-ʿilla)*. As mentioned earlier, the discussion of the epistemology of the cause does not, strictly speaking, pertain to the subject of the authoritativeness of *qiyās*, as this subject was defined by the jurists themselves. With regards to the question of validity, the jurists treated *qiyās* as a general form of procedure, without emphasis on the various methods of its application.[35] Moreover, in their discussion of the different methods of educing the cause, the jurists presupposed the validity of *qiyās (ṣiḥḥat aṣl al-qiyās)*.[36] The arguments in support of the individual methods of educing the cause were addressed not only to anti-*qiyāsists*, but also to fellow *qiyāsists* who held different positions.[37] However, the effort to define and justify the individual methods of educing the legal cause was to a large extent stimulated by the need to affirm, that *qiyāsī* inferences were reasonable and had valid objective grounds, and not merely arbitrary and entirely subjective, as the opponents claimed. It is in this respect, that the treatment of the methodology of the legal cause is viewed in our discussion as part of the jurists' effort to assert the validity of *qiyās*.

The three jurists acknowledge the non-existence of a specific text treating the authoritative methods of *qiyās*. What establishes the validity of any individual method, is the evidence that it produces probable knowledge and hence qualifies for the general

sanction of *ẓann* provided by the master rule of *qiyās*.[38] The problem in this criterion lies in defining objectively the limits of what constitutes valid *ẓann*. As we have discussed in the preceding chapter, al-Shāfiʿī asserted that the judgments of *qiyās* constituted truth on the basis of apparent indicants: *ḥaqq fī al-ẓāhir*. Although inconclusive, *qiyāsī* judgments are justified by the apparent textual evidence. Our three jurists, particularly al-Ghazzālī, appeal to this notion of probability (as knowledge based upon the apparent evidence) in rationalizing the individual methods of educing the legal cause.

The jurists clearly favored the *ʿilla* when it was identified by virtue of its manifest rational pertinence to the ruling. This preference, as we have seen, was stated explictly. Moreover, it is implict in the fact that the jurists assessed the strength of the other methods of identifying the cause according to their relative proximity to the method of *munāsaba* . In practice, what the jurists accepted as *ʿilla* did not uniformly conform to the criterion of being the intent behind the ruling, that is the *ratio legis*. Al-Ghazzālī acknowledges that in many cases where the *ʿilla* is explicitly stipulated, *ʿilla* does not represent the reason for which the law is established. Nevertheless, once the construction of the language of the Qurʾān, the traditions, or the results of consensus indicate that a ruling is associated with a certain property, this property qualifies for the status of a cause regardless of whether its pertinence to the ruling is apparent or not. For example, if the law states: " whoever touches a wall, a peace of cloth, or a stone, should perform ablution" , one is to understand that this contact is a cause for performing ablution even though the pertinence *(munāsaba)* of the causal association in this case is not apparent. In such cases, al-Ghazzālī explains, that the property which is associated with the ruling is a cause only in the sense that it is known to have been considered *(muʿtabar)* in establishing the ruling. It need not be the *ratio*. [39] When the *ʿilla* is explicitly stated, it is said to have the property of efficiency *(taʾthīr)*, that is, the power to produce the ruling.

For al-Āmidī and al-Rāzī, the *ʿilla*, in principle, stands for the wisdom *(ḥikma)* behind the ruling.[40] However, both jurists maintain that in practice and for the purposes of extending the original ruling by *qiyās*, the *ʿilla* need only be an apparent characteristic *(waṣf)* that is thought to encompass this *ḥikma*. In fact, al-Āmidī claims the existence of a consensus to the effect that the actual *ḥikma* may be utilized for extending the ruling only if this *ḥikma* is specific and apparent.[41] Otherwise, it is sufficient to consider as *ʿilla* the feature of the *aṣl* that is thought to be the " nexus " of the ruling and which is presumed to encompasses its wisdom.[42] The duty of the jurist is not to investigate the ultimate purpose of the law but to discover a principle by which the rulings can be extended.

The jurists concede that this approach to the extraction of the *ʿilla* is dictated by practical necessity. In many instances the actual wisdom behind the ruling is difficult to identify and its extraction constitutes a real hardship *(ḥaraj)*. Furthermore, because the actual *ʿilla* in such cases is broad and abstract, it is difficult to verify its existence in the *farʿ* and to insure that the ruling is correctly extended by *qiyās*.[43] However, in addition to its practical and regulatory function, the above discussed principle exemplifies what has already been noted by some scholars. The function of legal theory was not only to define theoretically acceptable methodologies for deriving legal doctrine, but also to rationalize the pre-established and accepted body of doctrines.[44] The process of systematizing and classifying the modes of juridical reasoning which the jurists subsumed under *qiyās* went hand in hand with the process of rationalizing the body of legal doctrine which had already been developed in the earlier period of Islamic law. If the jurists were to apply strictly the condition that the *ʿilla* ought to be the actual *ratio legis*, much of the body of legal doctrine that had already formulated would have fallen out of the bounds of validity.

THE METHOD OF PERTINENCE: *AL-MUNĀSABA*

The jurists prescribe three methods for educing the legal cause. It is only in the the method of *munāsaba*, to which references have already been made in our discussion, that the educed *ʿilla* may be described as the *ratio legis*. The *ʿilla* in this case is identified with the divine intent behind the ruling.[45] However, the principle that laws have intelligible purposes is not used to define the consistent method of educing the legal cause. Rather, this principle is cited in order to justify the validity of basing an analogy on the motives of the law when the motives are apparent. The inference applied in the method of pertinence is of the following order: when a rule is considered to lead to a benefit *(maṣlaḥa)*, the promotion of that benefit, or equivelantly the property that encompasses that benefit, is understood to be the cause of the ruling. For example, it is understood that the benefit of the rule punishing the drinking of wine is the protection of rational behavior. Therefore, this benefit itself, or the intoxicating property of wine, is considered to be the cause.

The jurists distinguish three categories of pertinent causes, with respect to the strength of the evidence attesting that the perceived benefit is actually the factor taken into consideration *(muʿtabar)* in the formulation of the ruling. When the purpose of the ruling is stated textually, the *ʿilla* is considered to be an explicit cause possessesing the characteristic of pertinence *(munāsibmuʾaththir)*. For example, it is explicitly stated in the Qurʾān that the purpose of prohibiting wine is the protection of rational behavior. Since the rationale of prohibition in this case is intelligible, the cause of the ruling can be characterized as pertinent. However, what confirms the validity of the cause is primarily its explicit statement, that is , the property of efficiency *(taʾthīr)*.[46]

A *ʿilla* is called pertinent and suitable when the specific benefit with which it is identified is not stated explicitly. Yet, there is a textual indication that the genus of this particular benefit is taken into consideration in establishing the genus of the ruling at hand. An example of this, is the ruling according to which Muslim women are not

expected to compensate for the prayers omitted during their menstrual cycle, even though they are obliged to compensate for ommitted fastings. This law, the jurists argue, has the benefit of mitigating the excessive hardship *(ḥaraj)* entailed in the compensation of recurrent prayers. Elsewhere, it is indicated explicitly that the law takes into consideration the mitigation of hardship in the reduction of religious duties *(li jinsi al-mashaqqati taʾthīrun fī al-takhfīfi).*[47] Such textual evidence corroborates the inference that the purpose of the above law is the mitigation of the hardship entailed in compensating accumulated prayers. In this case, the jurists maintain, the purpose and *ʿilla* of the law is partly, but not entirely, identified by reason. According to al-Ghazzālī, the majority of *qiyāsists* acccepted the validity of educing the *ʿilla* by such means. This kind of inference qualifies for the status of *ẓann*, since it is produced by strongl suggestive textual indicants.[48]

The method of pertinence is held to be most controversial when the purpose of the law is educed by reason without corroboration from other textual evidence. This would be the case if it were inferred that the intoxicating property is the cause of prohibition in *khamr*, without any textual evidence attesting that the protection of rational behavior is a benefit that the law aims to promote.[49] Another example is provided by the Prophetic tradition which states that a murderer is debarred from the inheritance of his own victim. According to the jurists, the purpose of this ruling is the creation of a disincentive against criminal acts which would otherwise accrue benefit to the person committing them.[50] The fact that the law is understood to serve this particular benefit produces probable knowledge that this benefit is the purpose and cause of this law. When a cause is identified by this kind of evidence it is considered to be pertinent but unfamiliar *(al-munāsib al-gharīb).*

According to al-Ghazzālī, this last method is opposed on the grounds that it is not sufficient to produce probable knowledge, *ẓann*, and creates only false illusion *(wahm)* about the legal cause.[51] This is particularly the case, when the *ʿilla* is interpreted

not as a causal motive but as a sign which serves the function of identifying the ruling.[52] For example, without a concrete textual indicant establishing intoxication to be the cause behind the prohibition of khamr, the latter supposition would be entirely unjustified. It may be that *khamr*, like pork, carrion, blood and wild beasts, was prohibited arbitrarily and for pure obedience *(taḥakkum wa ta'abbud)*. Yet, the accidental occurrence of the seemingly pertinent property of intoxication created the illusion that this property was the cause of prohibition. It is also possible that the ruling may have been established for a purpose different from that which is actually apparent to the intellect.[53] Given the above possibilities, the fact that a law encompasses a certain benefit does not provide sufficient evidence that this particular benefit is its purpose and cause. According to the opponents, this faulty reasoning is attributable to the human proclivity to seek causes for all judgments and to interpret the ignorance about the existence of other causes as evidence of their non-existence.[54]

Ẓann, al-Ghazzālī explains in response to the above objection, differs from *wahm* in that the following way: *wahm* involves an arbitrary choice, whereas *ẓann* constitutes a probable judgment which is justified by the apparent indicants.[55] What justifies educing the legal cause by the method of *munāsaba* is our knowledge about the character of Islamic revelation. The observed custom of the law *('ādat al-shar')*, al-Ghazzālī explains, is that the rulings are established in order to promote human welfare and not merely for instituting obedience.[56] Therefore, when a ruling is deemed to serve a particular benefit, it is not unreasonable to assume that this benefit is its purpose. To illustrate the reasonable character of this inference, the jurists cite an analogue from daily life. When a king is seen giving money to a pauper, it is justified to infer that this act of giving is motivated by the pauper's poverty. Admittedly, the act of giving may have been prompted by another cause, such as the pauper being a jurist or the king's relative. However, unless this cause becomes apparent, the possibility of its existence does not undermine the soundness of the former inference.[57] Similarly, any given law

may have been established for a reason other than the one suggested by the apparent indicants. Nevertheless, it remains reasonable to identify the cause of ruling with its apparent benefit. Al-Ghazzālī argues that such inferences can be validly characterized as *ẓann, since* by definition, *ẓann,* is non other than the knowledge based upon the apparent evidence.[58] Furthermore, a jurist is only responsible to follow the probable judgments dictated by such evidence. This is well attested by the textual evidence establishing the validity of *qiyās.* [59]

The validity of educing the *ʿilla* by the method of *munāsaba,* rests on the presumption that the laws are established for the purpose of promoting man's welfare under divine guidance. However, as it has been mentioned earlier, al-Rāzī explicitly rejects attributing rational motives for God's laws. It is in his discussion of the method of *munāsaba* that al-Rāzī attempts to account for the seeming contradiction between his legal epistemology and his theology. Thus, he offers two arguments in justification of this method. The first argument, he explains, is to be utilized by the jurists who attribute motives and causes for God's laws and who would therefore define *al-munāsib* as " the aspect of the ruling which is conducive to the maintenance and promotion of human welfare." [60] There is another justification which al-Rāzī endorses on theological grounds, since it dispenses with the need of presuming that God acts or establishes the laws for purposes.[61] To this end al-Rāzī utilizes the theological concept of custom which was developed by Muslim theologians long before him in order to account for the phenomenon of causality and to defend the validity of inductive inferences. By utilizing the concept of custom to offer an occasionalist account for legal rationality and epistemology, al-Rāzī seems to show a great deal of originality.[62]

It is not rationally necessary, al-Rāzī explains, that the planets should rotate in their orbits and that the sun should rise daily. But since it has been God's custom to sustain the periodic occurrence of such events, it is justified to suppose that they will continue to occur in the future. Similarly, since it is the customary state of things that

eating results in satiety, that clouds bring rainfall and burning occurs upon contact with fire, it is justified to be almost certain that these natural patterns will take place in the future *(lā jurma ḥaṣala ẓannun yuqāribu al-yaqīna bi istimrārihā ʿalà minhājihā).* [63] The continual repetition of certain events in the past imperatively produces the probable knowledge that such events will recur in the future. It is on the basis of the validity of inductive reasoning that al-Rāzī seeks to justify the rational interpretation of the law.

Upon the observation of revealed laws of the past, it is found that the rulings are inseparably associated with human welfare. It is therefore reasonable, thanks to the validity of inductive reasoning, to associate laws with human welfare without implying that there is an essential relationship between them.[64] The rationality of the law and the fact that it is observed to promote human welfare, al-Rāzī wants to say, is just another divine custom. With this explanation for the nature of legal causes, the definition of the *ʿilla,* when it is educed by the method of *munāsaba,* becomes " the characteristic which is compatible with the ruling according to the customary rational standards " *(innahu al-mulāʾimu li afʿāli al-ʿuqalāʿi fī al-ʿādāti).* [64] With this account, al-Rāzī defends the epistemological validity of associating rulings with human welfare, without having to speak about the motives and purposes of the law. It must be noted once again that apart from this explanation, al-Rāzī makes repeated reference in *al-Maḥṣūl* to the benefits *(maṣāliḥ)* and purposes of the law.[65]

ANALOGY OF RESEMBLANCE: *QIYĀS AL-SHABAH*

Al-Āmidī and al-Ghazzālī cite and reject several definitions of *qiyāsal-shabah* all of which clearly represent different interpretations of al-Shāfiʿī's treatment of the kind of *qiyās* in which the assimilated case has several competing precedents Thus, they reject the identification of *qiyāsal-shabah* with the reasoning involved in the assessment of the equivalence *(mithl)* between domestic animals and game. What is involved in the assessment of compensations, they explain, is not analogy at all, but the

excercise of discretion in applying an obligation which is textually stipulated *(taḥqīq al-ḥukm al-wājib).*[66] Al-Ghazzālī calls this procedure *taḥqīq al-manāṭ*-- a procedure under which he includes also the *ijithād* about the direction of *qibla*, and the assessment of probity *ʿadl* (both of which al-Shāfiʿī associated with *qiyās).*[67]

For others, what distinguished *qiyās al-shabah* from causal analogy was that in the former the new case could be assimilated to one of several competing textual precedents *(taraddada fīhi al-farʿu bayna aṣlayni)*, hence the appelation which al-Rāzī attributes to al-Shāfiʿī: *qiyās ghalabat al-ashbāh* .[68] As an example, the jurists cite the controversial case of the compensations due for the damages inflicted upon a slave. This explanation of *qiyās al-shabah* also clearly stems from al-Shāfiʿī's discussion of the two methods of applying *qiyās*, which was treated at length in the preceding chapter. Once again, it is to be emphasized that al-Shāfiʿī did not have a distinct concept of *shabah* as opposed to *maʿnà*, although his writings lent themselves easily to such an interpretation by later jurists. In any case, al-Āmidī and al-Ghazzālī reject the identification of this kind of reasoning with *qiyās al-shabah.* What is involved in this case, they maintain, is *qiyās al-ʿilla* in which the *farʿ* (the slave) accomodates two conflicting nexuses *(manāṭayn).* Whereas the slave as property induces the ruling of having the compensation for damages inflicted upon him assessed at market value, as a human being, however, his compensations are to be set at a fixed value *(muqaddar).* The judgments of such cases are to be determined by giving preponderance *(tarjīḥ)* to one causal analogy over another and not merely by material comparison *(mushābaha).*[69]

The jurists define the concept of *shabah* in relation to the distinct concept of *munāsaba* of which al-Shāfiʿī was not yet aware. In *qiyās al-shabah*, the middle term *(al-jāmiʿ* according to al-Ghazzālī, *ʿilla* according to al-Āmidī and al-Rāzī) is a property that is deemed to be relevant to the ruling.[70] However, the exact pertinence of this property to the ruling is not readily intelligible *(mā yūhimu al-munāsabata min ghayri iṭṭilāʿin ʿalayhā).*[71] Thus, although in *qiyās al-shabah* the benefit of the

ruling is not apparent, the property that is taken as its cause is somehow felt to encompass that benefit, and to be a valid basis for extending the ruling.[72] The majority of the judgments derived by jurists, al-Ghazzālī asserts, are based upon this kind of *qiyās*. In most cases it is very difficult to establish the efficiency *(ta'thīr)* of causes by text or by consensus, or to identify the *'illa* by virtue of its strongest characterestic, namely, the feature of *munāsaba*.[73]

For al-Āmidī and al-Rāzī, what distinguishes the *'illa* in the case of *shabah* from other irrelvant properties *(waṣf ṭardī)*[74] is the fact that the property identified as the *'illa* has elsewhere been taken into consideration *(mu'tabar)* in establishing other rulings.[75] Al-Āmidī provides the following example: it is known that cleansing by water is required for ablution, circumambulation around the Holy Mosque, and touching the Qur'ān. The fact that water is considered *(mu'tabar)* in all these cases suggests strongly that it is relevant to inducing the judgment of purity *(ṭahāra)*, although the basis of this relevance may not be intelligible.[76] Al-Āmidī and al-Rāzī acknowledge the relative epistemic weakness of *qiyās al-shabah*. Nevertheless, they assert that it produces probable knowledge about the cause. On the spectrum of analogies, and with regard to the strength of the method used for the identification of the *'illa*, *qiyās al-shabah* falls in between *qiyās al-munāsaba* and *qiyās al-ṭard*. In the latter, the characteristic which is chosen as a *'illa* is definitely known not to be relevant to the ruling *(al-ṭardī majzūm bi nafī munāsabatihi)*,[77] although, this characterestic is found to be co-existent with the ruling. Such is the case in the faulty reasoning that it is invalid to use some liquids, such as vinegar, to perform ritual ablutions, because such liquids, like lard and unlike water, cannot have bridges constructed over them![78] In *qiyās al-shabah* the pertinence *(munāsaba)* of the property which is taken as the *'illa* to the ruling is not identified. However, it is strongly felt that this property is relevant to the ruling and encompasses its benefit. When a jurist surveys the properties of a ruling whose *ratio* is not apparent, he can safely disregard all the properties that are known to

be irrelevant. Furthermore, he can justifiably infer that amongst all the remaining properties, the property which is also found to have been considered in other similar rulings, most likely encompasses the cause.[79] Since this method yields probable judgments about the *ʿilla*, its authoritativeness is subsumed under the textually established authoritativeness of *ẓann*.

Al-Ghazzālī discusses *qiyās al-shabah* at length and dedicates to it a sizable portion of his large work *Shifāʾ al-ghalīl*. As he himself acknowledges, it is impossible to offer a detailed and exhaustive classification of the arguments which are accepted as valid forms of *qiyās al-shabah*. Two examples are chosen to be discussed here in order to provide some idea of al-Ghazzālī's conception of *shabah*. Like many of the examples about *qiyās al-shabah* which al-Ghazzālī discusses in *al-Mustaṣfā* and *Shifāʾ al-ghalīl*, the two chosen here pertain to legal arguments which were familiar to al-Shāfiʿī. The first of the two examples pertains to the law of torts. It is established that the compensation *(badal)* for any major offense upon a human being, whether this offense leads to the loss of life (hence *badal* is *diyya)* or limb, is to be imposed upon the agnate kinsmen *(al-ʿāqila)*. On the other hand, the compensation for property damages or the payment of expiation *(kaffāra)* is imposed solely upon the culprit. Al-Ghazzālī explains that the *munāsaba* of the first ruling is not intelligible, since according to accepted rational standards, it is more appropriate that the culprit alone be responsible for his own crime. Nevertheless, it is understood that the ruling of imposing the compensation upon the *ʿāqila* is attached *(manūṭan)* to the fact that the crime is an offense upon a human being and not property. Thus, it is inferred by *qiyās al-shabah* that the indemnities for smaller offenses of this kind *(qalīl arsh al-jināya)* are also to be imposed upon the *ʿāqila*. The opponents object that the compensation must be imposed upon the clan only when it is a large and burdensome amount (thus the opponent is suggesting a more specific *ʿilla)*. Al-Ghazzālī refutes this claim by showing that the ruling above remains applicable even when the compensation is distributed among the

clans of the accomplices in a crime, thus reducing the respective shares of each clan, or when the compensation is of small value as in the weregeld of an embryo or a low priced slave.[80]

Al-Ghazzālī also considers the inference on the basis of which the prohibition of usury in wheat is extended to other commodities to be a form of *qiyās al-shabah.* The pertinence *(munāsaba)* of the prohibition of usury in wheat, he explains, is not intelligible. Yet, it is felt strongly that the benefit of the ruling is related to the protection of sustenance *(qawām al-nafs).* Hence, of all the properties of wheat, its edibility *(ṭa'm)* or the fact that it constitutes a staple nutriment *(qūt)* are the most relevant to the prohibition. This is unlike, for example, the fact that wheat is sold by measure *(kayl).* Accordingly, the prohibition is extended to other commodities which are either edible (such as salt) or constitute nutriments (dates, rice, etc.)[81]

The opponents object that *qiyās al-shabah* is arbitrary and insist that, only those properties whose pertinence to the ruling is manifest and well attested to, qualify for the status of the cause. Otherwise, they contend, every property can be claimed in some unknown way to encompass a benefit, since there is no objective demaraction between *shabah* and *ṭard.* [82] Al-Ghazzālī acknowledges that it is impossible to offer an abstract and exhaustive typology of the features that indicate whether a property which is not directly pertinent to the ruling *(ghayr munāsib)* is *ṭardī* or *shabahī*. [83] This can only be determined contextually. The difference between the two kinds of properties *(shabah* and *ṭard)* does not lie in the essence *(fī dhātihi)* of either one of them. Nevertheless, in the case of *qiyās al-shabah,* as in every other kind of *qiyās,* a solitary scholar is entitled to follow the dictates of his probable judgment, if this judgment represents his best efforts and the result of his exhaustive probing and selection *(sabr ḥāṣir)* between the possible candidates for the cause.[84] Admittedly, since the determination of *'illa* by *shabah* involves an element of discretion, it is not possible for a jurist to produce decisive evidence to his opponents about the validity of a judgment based upon *qiyās*

al-shabah.[85] (The most that he can do is describe the reasoning that lead to his opinion). For this reason, al-Ghazzālī recommends, jurists should not be subjected to the requirement *(al-muṭalaba)* of adducing positive proof in support of their probable judgments *(iqāmat al-dalīli ᶜalà kawnihi mughalliban ᶜalà al-ẓanni)*, especially so, when these judgments are based on a method whose general validity is accepted. Such demands impose undue hardships upon jurists and supress reasoning and investigation.[86] Instead, it should be the convention *(iṣṭilāḥ)* of dialectical debates *(jadal)* to have the opponents *(al-khaṣm)* only responsible for challenging or disproving unacceptable legal judgments. This arrangement would leave room for sound, probable judgments, while insuring that opinions which are based upon *ṭard* do not infiltrate the law, since such opinion can readily be subjected to refutation *(naqḍ)* and objection *(muᶜāraḍa)*.[87] Without such an arrangement, al-Ghazzālī points out, jurists would not only have to set aside *qiyās al-shabah*, but also every *qiyās* in which the identification of the *ᶜilla* involves an element of individual discretion, such as *qiyās al-munāsaba* and *qiyās al-shabah*. In turn, this would mean that the application of *qiyās* would have to be restricted to cases in which the *ᶜilla* is identified by the text, *ijmāᶜ (al-muʾaththir)*, or by conclusive and exhaustive probing *(al-sabr al-qāṭiᶜ)*.[88]

THE METHOD OF PROBING AND SUCCESSIVE ELLIMINATION: *AL-SABR WA AL-TAQSĪM*

As we have seen, the jurists defend the validity of *qiyās al-shabah* by arguing that the middle terms on the basis of which this form of *qiyāsī* inferences are based exhibits some relevance to the ruling. However, when the method of *al-sabr wa al-taqsīm* is applied independently, the extracted *ᶜilla* need not have a manifest relationship of substance to the ruling. According to al-Rāzī, the method of *al-sabr wa al-taqsīm* was imported to law from theology.[89] In this method the *ᶜilla* is identified by probing and successively eliminating all but one of the apparent properties of the ruling

that are marshalled as rival candidates for the status of the cause. We have already seen that this procedure is presupposed in the extraction of any *ʿilla*. As Aron Zysow observes regarding the independence of this method:

> The process of identifying the cause was always one of choosing the best among the set of available alternatives...Hence it could be argued that the method of determining the cause was not *al-sabr wa al-taqsīm* but rather that *al-sabr wa al-taqsīm* was presupposed for the application of the other methods.[90]

Al-Ghazzālī, al-Rāzī and al-Āmidī, however, insist that *al-sabr wa al-taqsīm* can be applied as an independent method. These jurists argue that, the fact that a property of a ruling is the residual of a process of elimination from among several candidates for the status of the cause, constitutes strong probable evidence that this property is the cause. A candidate property can be safely eliminated if the presumption about its causality is disproved *(ifsād)*. This can done by showing, for example, that such a property exists in some instances without inducing the ruling (*naqḍ*), or that the ruling at hand continues to exist in the absence of this same property (*ʿadam al-taʾthīr*). However, the fact that a property does not have a manifest pertinence to the ruling *(ʿadam al-munāsaba)*, the jurists assert, is not a valid basis for the elimination of this property. Resort to *al-sabr wa al-taqsīm*, as an independent method presupposes that the benefit of the ruling is not apparent and that none of its properties has the feature of pertinence. [91]

The validity of applying the method of *al-sabr wa al-taqsīm* in individual cases rests upon establishing two things: first, that the ruling at hand has a cause, and secondly, that this cause coincides with one of the rival, individual *(mufrad)* and apparent *(ẓāhira)* properties that are nominated as candidates.[92] As al-Rāzī explains in law, as in theology, the form of analytical reasoning involved in *al-sabr wa al-taqsīm* leads to certainty when the following conditions are fulfilled: on the one hand, the enumeration of the possible causes has to be exhaustive, and their division mutually

exclusive, and on the other hand, the evidence about the validity of the individual eliminations has to be conclusive . Al-Ghazzālī admits that while such conditions are attainable in theology, they are rare in law.[93] The inclusion of the cause among the enumerated candidates can be ascertained, al-Rāzī explains, only if these candidates are established conclusively by a clear text or by an *ijmāᶜ*. For example, there is a consensus among jurists that the cause of guardianship over young girls is either minority or virginity. The former possibility is rejected on the grounds of a tradition which stipulates that divorced young girls who are underage are responsible for themselves. Therefore, it is concluded that of the two candidates, virginity and not minority is the actual cause of the ruling. [94] An inference based upon *al-sabr wa al-taqsīm* is less certain and more problematic to justify when the jurist has to rely entirely on his own probing in enumerating the possible candidates for the cause. Al-Rāzī aptly labels this procedure as " dispersed division " *(al-taqsīm al-muntashir).* [95] For example, there is no text or *ijmāᶜ* establishing which properties are relevant to the prohibition of usury in wheat. Nevertheless, the jurists , on the basis of their own individual probing, may nominate the feature of edibility *(ṭaᶜm)* salability and measurability as possible candidates for the status of the cause.[96]

What is needed to provide a universal justification for the method of *al-sabr wa al-taqsīm* is the evidence in support of the two presumptions which underly its application. These are: first, that each rulings has a cause, and secondly, that this cause is actually manifested in one of the apparent properties of the ruling , thus being amenable to the intellect. The first presumption, al-Āmidī argues, is validated by the observed character of Islamic revelation. The existence of a ruling without a cause is an observed rarity in law *(al-khuluww ᶜanhā ᶜalà khilāfī al-ghālibi al-maʾlūfi min sharᶜi al-aḥkāmi).*[97] With regards to this explanation, one may raise the following question: if none of the apparent properties of a ruling is understood on its own merits to be a cause, why is it then valid to consider that the *ᶜilla* must be identical to one of these

properties ? The cause of a ruling has to be encompassed in one of the apparent properties, al-Āmidī argues, because a law without a manifest cause *(ʿilla ẓāhira)* and an intelligible meaning *(maʿnà maʿqūl)* is an observed rarity .[98] However, as we have seen, the *raison d''être* ş of *al-sabr wa al-taqsīm* when it is applied as an independent method is to provide a formal procedure to identify the *ʿilla* when the *ratio* of the law in a given case is not apparent. Thus, al-Āmidī's response seems to contradict the presumptions underlying the application of this method. On the other hand, al-Ghazzālī's justification of the method of *sabr wa al-taqsīm* provides a more carefully formulated response to this question and one that is in line with the formal aspect of this procedure. In the example of usury in wheat, and for that matter in all rulings, al-Ghazzālī maintains, there must be a conspicuous sign *(ʿalāma)* that distinguishes the general applicability of the ruling from the specificity of its locus *(taḍbuṭu majrà al-ḥukmi ʿan mawqiʿihi).* [99] The nexus of the ruling in this case is evidently more general than the particular characterestic of wheat *(aʿammu min ismi al-burri),* because the prohibition of usury does not disappear when wheat is reduced to bread or any other of its derivatives. [100] This being the case, a jurist can attain probable knowledge about the cause by exhausting his efforts in probing all the apparent candidates.[101]

A final note should be made before we terminate our discussion of this last method. As al-Ghazzālī seems to concede in *al-Mankhūl,* and as it is evident from al-Rāzī's treatment, the jurists do not prescribe the method of *al-sabr wa al-taqsīm* as a general procedure that can be defended universally and without reference to the specific examples which it is intended to label.[102] In this sense. the adoption of this method in law, once again represents a process of rationalizing the existing legal arguments. The examples which are used in illustrating the method of *sabr wa al-taqsīm* predate the coinage of the technical name and concept for this method. In this respect, it seems that this method is advanced to justify the several cases in the body of legal doctrine where the *ʿilla* does not fall in either one of the two other forms of *qiyās* mentioned above.[103]

As has been mentioned earlier, al-Ghazzālī and al-Rāzī both consider that the *qiyāsī* inference is potentially demonstrative. Thus, they maintained that if it is ascertained that a ruling is established for a certain cause, it can be confirmed that this same ruling prevails in all proven instances of that cause. However, the jurists also maintain that it is very difficult to identify the cause of a ruling with certainty. This is the case even when the *ʿilla* is explicitly stated! For example, our three jurists assert that the textual statement, " wine is prohibited because of its intoxication *(ḥurrimat al-khamru li-iskārihā)* does not conclusively indicate the prohibition of all intoxicants. The grammatical construction of this injunction, they explain, does not establish unequivocally that intoxication, as a universal property *(ʿumūm al-iskār)*, is the cause of prohibition in *khamr*. It is possible that the cause of prohibition is the kind of intoxication peculiar to *khamr (khuṣūṣ iskār al-khamr)* .[104] Only a clear and unequivocal textual statement, such as *" ʿIllatu taḥrīmi al-khamri al-iskāru"*, establishes conclusively that intoxication in general is a cause of prohibition. [105] However, in this case the prohibition of *nabīdh*, and for that matter of all intoxicants, would be inferred by deduction *(istidlāl)* from a universal textual norm, and not by *qiyās*. [106] Al-Rāzī acknowledges that the former statement *" ḥurrimat al-khamru li iskārihā"* produces the probable knowledge that all intoxicants are prohibited, and that the consumption of intoxicating drinks may entail other worldly harm. However, he maintains, it is not permissible to extend the ruling of prohibition beyond *khamr* without the master textual rule establishing that it is obligatory to act so as to avert supposed harm. It is the existence of such a master rule that provides the evidence about the authoritativeness of *qiyās*. [107] How the jurists proved the existence of such a master rule will be the subject of discussion in the rest of this thesis.

REASON AND THE AUTHORITATIVENESS OF *QIYĀS*

Following what seems to have become the standard approach to the subject in Sunnī works of *uṣūl al-fiqh*, al-Ghazzālī, al-Rāzī, and al-Āmidī commence their discussion of the authoritativeness of *qiyās* with assessing the admissibility of the obligation of following the dictates of *qiyās* *(jawāz al-taᶜabbud bi al-qiyās)*.[108] Like the majority of *qiyāsists*, our three jurists also consider that reason neither precludes nor necessitates the authoritativenness of *qiyās*., but only indicates that the occurence of this authoritativeness *(wuqūᶜ al-taᶜabbudi bihi)* is a possible event.[109] On the one hand, the jurists oppose this to the position of some anti-*qiyāsists* who held it to be impossible that God should oblige humans to follow the dictates of *qiyās* *(inna l-ᶜaqla yuḥīlu wurūda al-taᶜabbudi bi al-qiyāsi)*. On the other hand, they maintain that some anti-*qiyāsists* accepted the possibility of this obligation, but rejected *qiyās* on textual grounds. Finally, according to al-Āmidī and al-Ghazzālī, a minority of *qiyāsists*, among whom al-Āmidī mentions the Muᶜtazilite jurist Abū Ḥusayn al-Baṣrī, argued that reason necessitated the occurence of the authoritativeness of *qiyās* *(al-ᶜaqlu mūjibun li wurūdi al-taᶜabbudi bi al-qiyāsī)*.[110]

It is necessary to note that the jurists' classification of the different positions about *qiyās* is neither exhaustive nor does it correctly characterize all the rational arguments which were advanced against *qiyās*. The jurists consider every non-textual argument against the validity of *qiyās* to be an argument against the rational possibility of its authoritativeness. This latter group of arguments, however, logically and in actuality, constitutes only a subgroup of the former arguments. To maintain that reason precludes the authoritativeness of *qiyās* is to put forth the highly controversial and vulnerable claim-- especially when such a claim is viewed from the standpoint of Ashᶜarite theology-- that it is impossible for God to enjoin upon us the obligation of following the probable judgments of *qiyās*. As we shall see, only some of the arguments against *qiyās* are tantamount to such an assertion.[111] The majority of the

arguments against *qiyās* are not antithetical to the claim of the rational admissiblity of the authoritativeness of *qiyās*. Rather, they are antithetical to the more straightforward claim of the actual validity of *qiyās*. Such arguments presuppose that *qiyās* has no foundation in the textual sources, and proceed from this to challenge the validity of theoretical presumptions which underly the application of this source of law.[112] It is beyond the scope and aim of this thesis to verify the claims and arguments attributed to the anti-*qiyāsists*. Our main concern is to see how the jurists represented and addressed such arguments within their scheme of systematization, in a way that enabled them to rationalize *qiyās*, while acknowledging that the basis of its authority is relvelation.

Moreover, al-Ghazzālī and al-Āmidī consider that every rational argument about *qiyās* is an argument about the necessity of its incidence *(wuqūᶜ)*. This is also incorrect especially with regard to the rational argument advanced by Abū al-Ḥusayn al-Baṣrī. Al-Baṣrī himself is aware of the distinction between, on the one hand, the claim that reason provides evidence about the authoritativeness of *qiyās (yadullu ᶜalà al-taᶜabbudi)*, and on the other hand, the claim that reason necessitates this authoritativeness *(yūjibu al-taᶜabbuda)*. Like all other *qiyāsists*, al-Baṣrī primarily asserts that the authoritativeness of *qiyās* is an event that is rationally admissible *(inna al-ᶜaqla lā yuqabbiḥu al-taᶜabbuda bi al-qiyāsi al-sharᶜī)*,[113] although, he states his position in characteristically Muᶜtazilite ethical terms. Furthermore, he argues expressly against the claim put forth by some *qiyāsists*, and which is that *qiyās* is a necessary and indispensible legal institution.[114] Nonetheless, al-Baṣrī also maintains that reason provides evidence about the actual occurence of the authoritativeness of *qiyāsī* judgments.[115]

The three jurists insist that reason cannot establish the authoritativeness of *qiyās*. Al-Ghazzālī even places the jurists who base the validity of *qiyās* upon rational evidence at par with the deniers of *qiyās*.[116] However, although the jurists do

not claim that reason indicates the authoritativeness of *qiyās*, they are able in the context of their discussion of the rational arguments about *qiyās* to defend the rational character of this source of law and to account for its problematic aspects.

For the three Ashᶜarite jurists, the criteria of rational admissibility of any obligation were purely logical. It is admissible to have God enjoin upon us any obligation whose fulfillment does not entail an impossibility. An example of an inadmissible obligations, is the obligation of performing two contradictory actions simultaneously *(istiḥālat al-taklīfi bi al-mustaḥīli li dhātihi ka al-jamᶜi bayna al-ḍiddayni wa naḥwahu)*.[117] Short of such impossible tasks, the occurence of any other kind of obligation is an admissible event. This jurists deliberately omit any ethical consideration from the crieria for the admissibility of an obligation. Ethical considerations, the jurists repeatedly assert, have absolutely no bearing upon the assessment of the rational possibility of an obligation. God is neither rationally nor even morally bound to act or establish his laws in a way that promotes or maximizes human welfare or averts their harm. The fact that an obligation is thought to be devoid of any wise purpose or to entail a harm or an undue burden does not constitute a conclusive proof against the possibility of its incidence.[118] Nor does the fact that an obligation is considered to be necessary to promote our benefit constitute a proof about the necessity of this obligation. As shall be seen, it is mainly such theological considerations that render the rational arguments ineffective in establishing or precluding the authoritativeness of *qiyās*.

Inspite of such minimal criteria for assessing the possibility of legal obligations, al-Āmidī and al-Rāzī both advance positive arguments to support their claim about the rational possibility of the authoritativeness of *qiyās*. What is implicit in such arguments is an attempt to emphasize the reasonable nature of the obligation to follow the dictates of *qiyās*. All reasonable people, al-Āmidī explains, would find it acceptable if God were to tell us, for example, that a judge is forbidden to rule when he

is angry, and then command us explicitly to extend the prohibition to all situations such as hunger, exhaustion or thirst which may prevent good judgment. Similarly, God could prohibit the drinking of date-wine, ***khamr***, and then request that the prohibition be extended to all intoxicants, if it is strongly deemed that the intoxicating property of ***khamr*** is the cause of prohibition.[119] Had the fulfillment of such an obligation been rationally impossible, it would not be deemed " good " to have such an obligation enjoined by revelation *(law kāna dhālika mumtani^{c} an ^{c}aqlan lamā ḥasuna wurūdu al-shar^{c}ī bi dhālika).* [120]

Moreover, the obligation to follow the judgments produced by *qiyās* is compatible with our rational capacities. Any rational person is able to infer hidden implications *(al-madlūlāt al-ghā$^{\prime}$iba)* from apparent indicants *(al-imārāt al-ḥāḍira)* through proper investigation and reasoning.[121] One is able to infer from seeing thick clouds that it is about to rain, and to predict that a cracked and slanted wall is about to fall. The same kind of reasoning can be applied in legal matters. When one considers a certain principle *(ma^{c}nà)* to be the underlying motive *(dā^{c}ī)* of a legal ruling, one is lead to the supposition that this ruling prevails in all instances were the same motive or characteristic for which it is thought to be established recurs.[122] As put by al-Rāzī , the supposition of parity between the original and new case with respect to the cause necessarily produces strong probable knowledge *(wajaba an yaḥṣala ẓannun)* to the effect that the ruling of the *aṣl* prevails in the *far^{c}*.[123] This knowledge, together with the knowledge that following God's laws averts harm while neglecting them incurs benefit, leads to supposition that following the dictates of *qiyās* averts harm and entails benefit. Since *qiyās* produces probable knowledge about other worldly harm, the obligation to follow the dictates of *qiyāsī* judgments is rationally admissible *(inna al-qiyāsa yufīdu ẓanna al-ḍarari fa wajaba jawāzu al-^{c}amali bihi).* [124] However, the jurists emphasize, that the fact that *qiyās* produces probable knowledge about other worldly harm does not alone prove the authoritativeness of *qiyās.* In addition to this, what is

needed to ascertain the authoritativeness of *qiyās* .is evidence to the effect that it is obligatory to act so as to avert supposed harm *(wujūb al-iḥtirāzi min al-ḍarari al-maẓnūni).*[125]

For Abū Ḥusayn al-Baṣrī, such an evidence is conclusively furnished by reason. Reason necessitates the " badness " (and therefore prohibition in the Muʿtazilite eithical-legal scheme) of anything which is strongly supposed to encompass an indication of harm. The judgments of *qiyās* are authoritative since they constitute probable indicants about prohibition and otherworldy harm.[126] Al-Baṣrī acknowledges that his opponents are entitled to the question: " How can one affirm conclusively the prohibition of what is only known to be harmful by means of fallible probable indicants?" [127] In response, he restates that it is rationally obligatory to choose the course of action which is supposed to avert harm. [128] In daily matters, reason indicates that it is obligatory to move away from beneath a cracked and slanted wall even though ones safety may actually be in having stayed and harm in having moved away.[129] Probable judgments are equally binding in religious matters as they are in daily matters.

Among the three jurists, only al-Āmidī cites and criticizes al-Baṣrī's argument. However, his refutation is based upon Ashʿarite theological and ethical principles to which, it seems that al-Ghazzālī and al-Rāzī would readily subscribe. Al-Āmidī rejects al-Baṣrī's argument on the grounds that nothing is rationally obligatory, a principle which he summarizes in the maxim " *al-ʿaql lā yūjib* ". [130] Since acts derive their obligatoriness exclusively from God's command, it is not possible to ascertain the obligatoriness of any action except by way of revelation.[131]What is obligatory is entirely contingent upon the volition of God and is, therefore, rationaly unpredictable. Al-Āmidī does not deny that reason dictates that one should act so as to avoid a supposed harm. However, this does not prove that this course of action is obligatory, in the strict Ashʿarite meaning of obligatoriness. Since there is no necessary

correspondence between the dictates of reason and the volition of God, the judgments of reason have no epistemic value in determining legal obligations. Following the dictates of *ẓann* is another obligation whose confirmation pends evidence from revelation. [132]

The only universal statement that can be made regarding the authoritativeness of probable judgments in law is the following: it is rationally admissible that God may oblige us to follow the dictates of any kind of *ẓann.*[133] However, there is no master rule that authorizes all kinds of probable judgments in law.[134] The jurists are aware that any such universal claim can be refuted *(manqūḍ)* by the numerous cases in which the law forbids following probable judgments even when certainty is unattainable. As the opponents point, a judge is forbidden from accepting the testimony of a single witness, of slaves or of numerous women, although it is possible that such a testimony produces a probable judgment.[135] It is also forbidden to eat any amount of meat if a small portion of it is believed to be carrion.[136] More relevant to the case of *qiyās,* it is forbidden to follow the judgments indicated by independent considerations of welfare *(al-maṣāliḥ al-mursala),* even if such considerations produce probable knowledge about the prevalence of a legal ruling.[137] Al-Āmidī grants the opponents the validity of such examples. However, he maintains that they are not pertinent to his own argument, since he is not claiming a universal rule of reason in favor of the authoritativeness of all kinds of *ẓann.* Instead, he is only claiming that the authoritativeness of any kind of probable judgments is rationally admissible.[138] The final validation of a specific kind of *ẓann* is contingent upon confirmation from revelation. Conversely, the prohibition of probable judgments in the cases cited above is not dictated by rational necessity and does not prove the invalidity of all kinds of *ẓann.* Any such claim is refuted by the fact that the law accepts exercising *ijtihād* about the direction of the *qibla,* basing judgments upon the testimony of witnesses, and following the dictates of probable texts *(al-nuṣūṣ al-ẓanniyya)* and of solitary reports *(khabar al-āḥad).*[139] Therefore, al-

Āmidī maintains, the cases in which *ẓann* is prohibited, are contingent incidents of revelation.[140] Similarly, the authoritativeness of *ẓann* in the case of *qiyās* is not dictated by rational necessity, but by virtue of its occurrence in revelation.[141]

The jurists also reject the justification of *qiyās* on the basis of the claim that *qiyās* is an indispensible legal institution. Some advocates of *qiyās* argue that God could not have foregone this legal institution. Since there are infinite number of legal cases, it is not possible to have the entire law stipulated by means of explicit texts. Therefore, *qiyās* is an inevitable supplement to the textual sources. Al-Āmidī and al-Ghazzālī respond to such an argument by defending the feasibility of having a comprehensive revelation. The law comprises finite classes of legal cases, which include all the particular situations. Thus, it could have been possible to state the law textually, by means of universal statements that regulate every class of legal rulings. For example, instead of stating the prohibition of *khamr* only, God could have explicity stated the prohibition of all intoxicating drinks. In this case, what would be needed to extend the ruling to particular cases *(al-juzʾiyyāt al-dākhilat taḥta al-ajnāsi al-kulliyyati*) is not *qiyās* but deductive reasoning and *ijtihād* about the applicability of the texts *(taḥqīq al-manāṭ).* Thus, it cannot be *a priori* claimed that *qiyās* is authoritative.[142] Moreover, al-Āmidī comments, the argument about the institutional necessity of *qiyās* is based upon the false theological supposition that God is morally bound to maximize human welfare by providing rulings for every legal case *(taʿmīm al-ḥukm fī kulli ṣūratin).*[143]

However, even if the question of feasibility is set aside, al-Āmidī maintains, the fact that the law is not comprehensive but only regulates particular cases does not prove the authoritativeness of *qiyās.* If there were no textual evidence about the authoritativeness of *qiyās,* it would have to be presumed that law was meant to be limited to the particular cases which are addressed explicitly, while the rest of the cases retain their status prior to revelation. This is the status of being devoid of positive legal

qualifications.[144] The assumption that it is obligatory to provide positive judgments for every legal situation, upon which the claim of the institutional necessity of *qiyās* is based, al-Āmidī argues, leads to inadmissible juridical conclusions. If this assumption were true, it would be necessary to consider the probable judgments which are based on independent considerations of welfare *(al-maṣāliḥ al-mursala al-khāliyya ʿan al-iʿtibār)* to be also authoritative.[145] The four sources of law, including *qiyās*, al-Āmidī explains, do not provide judgments for every legal situation (pace al-Shāfiʿī's doctrine of all-comprehensiveness of the four sources of law). The authoritativeness of *qiyās* does not derive from any rational necessity, but from the evidence of revelation.[146]

The jurists cite the rational arguments against *qiyās* in the form of objections *(muʿāraḍāt)* and refutations *(nuqūḍ)*-- in most cases anonymous-- to the claim of the rational admissibility of the authoritativeness of *qiyās*. Al-Rāzī classifies these arguments into several categories. In a separate group, he places the argument commonly attributed in the sources to the early Muʿtazilite al-Naẓẓām (d. circa. 220). This argument is singled out for being a rejection of *qiyās* unique to the character of Islamic revelation. Those who rejected *qiyās* on more universal grounds are classified into three groups: the first, argued against the admissibility of *ẓann* in law generally and not only in the case of *qiyās*, while the second group accepted *ẓann* only in the case of necessity and when certainty was not attainable. Thus, they rejected *qiyās* because its practice was not dictated by necessity. Finally, the third group denied that *qiyās* produced probable knowledge, let alone certainty.[147] They challenged the validity of the two major theoretical presumptions underlying *qiyās*, which are first, that laws have causes and second, that these causes are accessible to the intellect.[148] The manner in which the jurists treated this aspect of the anti-*qiyās* campaign has already been dealt with in part in this discussion. As it has been seen earlier, the arguments in the justification of the different methods of educing the legal cause constitute an implicit response to certain aspets of the anti-*qiyās* opposition.

Furthermore, although the accounts of legal causality and rationality that the jurists advanced were partly motivated by Ashʿarite theological concerns, they can also be viewed to be preemptive of the anti-*qiyāsist* critique of legal causality.

Some anti-*qiyāsists* argued that it is inadmissible that God should oblige men to follow their probable and fallible judgments in matters pertaining to the other worldly welfare. There is no benefit in any obligation that forces humans to indulge in ignorance and to judge matters arbitrarily, without the ability to ascertain whether they are abiding by the Divine law or its very contrary.[149] It is inadmissible that God should inform us about his laws by an inadequate and fallible tools of inference. Only certainty is tolerated in religion.[150]

Al-Ghazzālī and al-Āmidī begin their response to this argument by rejecting its theological premise, namely, that God is obliged to promote and maximize human welfare *(wujūb riʿāyati al-ṣalāḥ wa al-aṣlaḥ).*[151] Even if the obligation of following the dictates of *qiyās* were proven to be harmful and unjust, this would not preclude its occurence *(wuqūʿ).* Apart this necessary tribute to theology, the jurists turn to address the genuine difficulties in accommodating the phenomenon of error and uncertainty in religion, in much the same manner as al-Shāfiʿī did before. In the case of *qiyās,* as in all cases of *ijtihād,* a jurist is only obliged to exercise the best of his intellectual efforts to arrive at a legal judgment. By doing so, he fulfills the primary obligation of *ijtihād,* even if he fails to discover the correct judgments of the case in question. Since the scholar is exonerated from any responsibility for the error which he may commit in exercising *ijtihād,* the obligation of following the dictates of probable judgments does not entail any injustice. In support of their arguments, the jurists adduce the tradition: every scholar is right *(kull mujtahid muṣīb),* which conforms to al-Shāfiʿī's thought, yet of which, as we have seen, al-Shāfiʿī was unaware.[152]

Furthermore, the jurists maintain that the claim of the absolute inadmissibility of *ẓann* in law, is flagrantly refuted *(manqūḍ)* by emperical evidence from revelation.

The law authorizes solitary reports, accepts passing judgments on the basis of probable testimony of witnesses, and enjoins *ijtihād* about the direction of the *qibla* and the assessment of compensations.[153] Unlike al-Shāfiʿī, later jurists do not utilize such examples to establish the authoritativeness of *qiyās*, but only cite them in order to refute the claim that the authoritativeness of probable judgments in law is rationally inadmissible.

The anti-*qiyāsists* seem to have taken account of the empirical weakness in their universal claim about the inadmissibility of *ẓann* in law. Thus, while insisting upon the inadmissibility of the authoritativeness of *qiyās*, they also attempt to rationalize the other instances in law in which *ẓann* is authorized. One such argument which al-Rāzī attributes to the Ẓāhirites is based on the premise that God is morally bound to reveal the law by the best possible means of explication *(bayān)*. God could have informed Muslims about the rulings derived by *qiyās*, by means of texts which state the universal legal principles under which such rulings are subsumed *(al-tanṣiṣ ʿalà aḥkāmi al-qawāʿidi al-kulliyyati)*.[154] That He did not do so, and that He stated instead the rulings of particular cases only, means that He intended the law to be confined strictly to the stipulated cases. To say otherwise, would imply that God did not reveal the law by the clearest possible means of explication, which is inadmissible.[155] Al-Ghazzālī and al-Āmidī cite an argument against the admissibility of *qiyās* of a similar import. The anti-*qiyāsists* argue that it is not possible that the Prophet would forbid usury only in the six stipulated commodities, if he had actually intended the universal prohibition of all the other commodities, which the jurists regulate by *qiyās*. Such indirectness and unclarity of speech is incompatible with the Prophet's eloquence.[156] The law permits recourse to probable judgments, in determining the direction of the *qibla*, and assessing compensations, only because it is impossible to regulate the rulings of such cases by a universal text. Probable judgments in this case constitute the best available means of explication.[157]

The *qiyāsists* provide ample response to this argument. The claim that God is obliged to reveal the law by the clearest means of explication, they maintain, is easily refuted on empirical grounds. If such a claim were valid, the Qur'ān would not have contained equivocal verses.[158] By the same token, the entire law would have been revealed by conclusive *mutawātir* reports instead of having a considerable portion of it based on individual reports.[159] Indeed, God would have had to create for humans the necessary knowledge *(al-ʿilm al-ḍarūrī)* about the law. [160] The fact that *qiyās* is a form of explication *(bayān)* is sufficient to render the authoritativeness of *qiyās* admissible, even though *qiyāsī* judgments are admittedly of a lesser clarity than other possible and conclusive means of explications *(al-bayān al-qaṭīʿ).* [161]

Moreover, there may be spiritual and social benefits to having people research the law by *qiyās* and *ijtihād* which outweigh the advantages of clear explication. When a jurist researches the law faithfully, he obtains the other worldy reward appointed for self-exertion and deliberation in religious matters. Furthermore, when men participate in formulating the law, they are more eager to abide by the dictates of their deliberation. The element of deliberation helps in keeping the law flexible, vital and pertinent *(tabqà al-sharīʿatu mustamirratan ghaḍḍatan ṭariyyatan).* [162]

In another objection, the anti-*qiyāsists* appeal to a juridical principle accepted by the Sunnī jurists. The cases which are not addressed by revelation, they assert, can be safely presumed to retain the original status prior to revelation, that is, the status of being devoid of legal qualifications.[163] Thus, they maintain, it is not admissible to repeal the original presumptions of non-prohibition *(al-nafī al-aṣlī)* in favor of the judgments of *qiyās,* since certainty is not to be overruled by probable judgment.[164]

Al-Āmidī and al-Rāzī treat this argument as if it were set against the rational admissibility of *qiyās.*[165] Once again in refutation of their opponents claim, they point out to the numerous cases in which the law authorizes probable judgments. Furthermore, although the individual *qiyāsī* judgments are probable, al-Ghazzālī

explains, the validity of the authoritativeness of such judgments is conclusively indicated by revelation. It is only because of this fact basis that the jurists repeal the original presumption with the probable judgments of *qiyās.* [166]

The specific technical criticism of the individual features of this composite source of law are arguments of a later period in the controversy about *qiyās.* An early argument which is associated with the Muᶜtazilite al-Naẓẓām represents a less technical and anatomized, yet fuller, attack on the crux of the analogical procedure entailed in *qiyās.* The procedure of *qiyās,* al-Naẓẓām is said to have argued, rests on the rule of reason which dictates assimilating the judgments of similar cases, and differentiating between distinct ones.[167] Therefore, the claim about the validity of *qiyās* presupposes that the rationality of the individual laws is accessible to human reason and that the divine law is rationally structured. However al-Naẓẓām denies the validity of both of these claims in the case of Islamic revelation. In Islamic revelation, al-Naẓẓām is said to have conteded, the rationale rulings is inaccessible to reason. For example, it is not intelligible why the law prescribes soil for the performance of ablution, or why particular days of the year and not others are deemed sacred.[168] Furthermore, the law is characterized by inconsistencies that contradict the rules of analogy. The law distinguishes between the waiting period *(ᶜidda)* of a divorced woman and a widow, athough the supposed rationale of instituting a waiting period, the test for pregnancy, is the same in both cases. It forbids one from glancing at the face of an old free woman, yet permits gazing at the face of an attractive young female slave. On the other hand, the law also assimilates between the ruling of different cases. Thus, it designates capital punishment as common penalty for homicide, adultery, unbelief and neglect of prayer. The character of Islamic revelation precludes the extension of the law by analogical inference.[169]

Al-Āmidī responds to al-Naẓẓām by rejecting the claim about the irrationality of the examples provided. Al-Naẓẓām has failed to see the true relevance of the law

and the real rational basis for the distinction or assimilation which it makes in the rulings of the cases cited.[170] On the other hand, al-Rāzī and al-Ghazzālī acknowledge that the revelation contains a number of rulings whose *ratio* is not intelligible and which may have been established arbitrarily or for the purpose of instituting obedience *(taḥakkum wa taʿabbud).*[171] Precisely because of this recognition, al-Ghazzālī explains, the jurists restrict greatly the application of *qiyās* in the area of rituals *(al-ʿibādāt),* while permitting its applications in laws regulating practical affairs. In the latter domain, it is known by abundance of circumstantial evidence that laws are established for intelligible reasons and are based upon considerations of worldly welfare.[172] The examples cited by al-Naẓẓām, al-Rāzī asserts, are rare exceptions in the law. Their existence is not sufficient to undermine the epistemological strength of *qiyāsī* judgements, just as the validity of our inductive association of clouds with rainfall, is not challenged by the rare cases when clouds do not bring forth rainfall.[173]

The opponents raise another challenge to the validity of *qiyāsī* inferences which is based on the critique of the character of legal cause. The legal cause, they assert, does not necessitate its ruling. The determinant of the textual ruling is not the so called cause, but the divine command. Furthermore, legal causes cannot be considered as real causes since they are seperable from their rulings; prior to revelation there were no legal rulings inspite of the existence of their causes. This is in contrast to rational causes *(al-ʿilal al-ʿaqliyya)* which cannot be seperated from their rulings *(yastaḥīl infikākuhā ʿan aḥkāmihā).* The following example is standardly cited; since mobility *(al-ḥaraka)* is the cause *(maʿnà)* of a thing being in motion, wherever the *maʿnà* of motion exists, the judgment of movement is confirmed. Thus, while causal analogy is valid and reliable in theology, it is inapplicable in law, because of the difference in the nature of causes in both domains. Since the legal causes does not produce its ruling in the first place, it is completely ineffective outside its textual context, hence the invalidity of legal *qiyās.*[174]

Al-Āmidī and al-Ghazzālī do recognize the distinction between legal and theological causes. However, they maintain that this has no bearing upon their assertion about the admissibility of *qiyās*, since they do not ground the validity of *qiyās* in the character of the legal cause. Instead, they claim that the legal cause is only an indicant *(imāra)* or sign *(ʿalāma)* and that it is admissible that God could enjoin upon us to follow the judgments indicated by such signs.[175]

As we have seen, in their treatment of the rational objections to *qiyās*, the jurists repeatedly assert that the authoritativeness of *qiyās* is neither self-constituted nor established by reason. Reason only indicates the admissibility of the authoritativeness of *qiyās*. The actual validity of *qiyās* derives from its sanction by revelation, and in this respect the judgments of *qiyās* established by divine designation *(ḥukm bi al-tawqīfī al-maḥḍi)*.[176] That they are extracted by a delegated human authority should not obscure this fact. Whether the jurists were able to support their claim about the textual foundation of *qiyās* will be our concern in the next chapter.

Endnotes

[1] *"Al-qiyāsu ḥamlu maᶜlūmin ᶜalà maᶜlūmin fī ithbāti ḥukmin lahumā, aw nafyihi ᶜanhumā bi amrin jāmiᶜ in baynahumā.. "* Al-Āmidī and al-Rāzī criticize some aspects of this definition but consider that it provides adequate description for the procedure entailed in *qiyās;* see Fakhr al-Dīn al-Rāzī, *Al-Maḥṣūl fī ᶜilm al-uṣūl,* ed., Ṭāha Jāber Fayyāḍ al-ᶜUlwānī (Saudi Arabia: Maṭbaᶜat jamīᶜat al-imām Muḥammad bin Saᶜūd al-islāmiyya, 1980), Vol. II, part.ii, pp. 9ff; Sayf al-Dīn al-Āmidī, *Al-Iḥkām fī uṣūl al-aḥkām* (Cairo: Maṭbaᶜat al-maᶜārif, 1914), Vol. III, pp. 266ff; Abū Ḥāmid al-Ghazzālī, *Al-Mustaṣfà min ᶜilm al-uṣūl* (Baghdad: Maṭbaᶜat maktabat al-Muthannà, 1970), Vol. II, pp. 228-9; see also *Shifāᵓ al-ghalīl fī bayān al-shabah wa al-mukhīl wa masālik al-taᶜlīl,* ed., Ḥamd ᶜUbaid al-Kubaisi (Baghdad: al-Irshad Press, 1971), p. 19.

[2] Al-Ghazzālī, *Shifāᵓ,* p. 19.

[3] Ibid., p. 19; this is made clear in the distinction al-Ghazzālī draws between *qiyās al-ᶜilla* and *qiyās al-shabah:" maᶜnà al-tashbīhi al-jamᶜu bayna al-farᶜi wa al-aṣli bi waṣfin maᶜ al-iᶜtirāfi bi anna dhālika al-waṣfi laysa ᶜillatan li al-ḥukmi bi khilāfi qiyāsī al-ᶜillati fa innahu jamᶜun bimā huwa ᶜillatun li al-ḥukmi,"* al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 311; the middle term is a *ᶜilla,* al-Ghazzālī explains, when its pertinence *(munāsaba)* to the benefit behind the ruling is intelligible, p. 310; however, al-Ghazzālī is inconsistent since he applies the term *ᶜilla* in several cases to the middle term in the analogical inference, even when it does not represent the actual *ratio,* see *Shifāᵓ,* pp. 454-6; see our discussion of the epistemology of the cause below.

[4] Al-Āmidī and al-Rāzī do not oppose *qiyās al-ᶜilla* to *qiyās al-shabah.* Instead they consider every *qiyās* to be centered around the determination of the *ᶜilla,* but that the *ᶜilla* may be discovered by different means, such as *al-shabah, al-munāsaba, al-sabr,* see al-Āmidī, *al-Iḥkām,* Vol. IV, p. 5; al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, p. 191; see the discussion of the epistemology of the cause below.

[5] *"Ithbātu mithli ḥukmi maᶜlūmin li maᶜlūmin ākharin li ajli ishtibāhihimā fī ᶜillati al-ḥukmi ᶜinda al-muthbiti,"* al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, p. 17; for a similar definitions see al-Āmidī, *al-Iḥkām,* Vol. III, p. 273.

[6] Al-Ghazzālī, *Shifāᵓ,* p. 19.

[7] See al-Ghazzālī, *al-Mustaṣfà,* Vol. II, pp. 287-8; al-Āmidī, *al-Iḥkām,* Vol. IV, p. 2.

[8] Al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 281.

[9] Ibid., p. 281.

[10] Al-Āmidī, *al-Iḥkām,* Vol. IV, p. 2; al-Ghazzālī, *al-Mustaṣfà,* p. 281; elsewhere in *al-Mustaṣfà,* however, al-Ghazzālī argues that the *a fortiori* inference involves *qiyās* and is not only linguistic, see Wael Hallaq, " Non-Analogical Arguments in Sunnī Juridical Qiyās," *Arabica* (Forthcoming), pp. 8-10. It seems that in his treatment of the

authoritativeness of *qiyās*, al-Ghazzālī is more concerned with identifying the standard *qiyāsī* procedure than with characterizing the *a fortiori* argument. Al-Rāzī also subsumes the *a fortiori* inference under *qiyās*. However, he considers this kind of *qiyās* to be conclusive since both the *ʿilla* of the *aṣl* as well as the existence of the *ʿilla* in the *farʿ* are known with certainty, see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 170, 172-3.

[11] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 283-4.

[12] Ibid., p. 283; see also al-Āmidī, *al-Iḥkām*, Vol. IV, p. 2; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 174. Al-Ghazzālī also refers to this procedure as the redaction or abstraction of the nexus: *tanqīḥ al-manāṭ* or *tajrīd al-manāṭ*, *al-Mustaṣfà*, Vol. II, pp. 230, 285

[13] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 2; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 283.

[14] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 29.

[15] *"Fa inna idhā raʾaynā al-ḥukma ḥāṣilan fī ṣūratin muʿayyanatin, thumma qāmat al-dalālatu ʿalà inna al-muʾaththira fī dhālika al-ḥukmi huwa al-waṣfu al-fulāniyyu, thumma qāmat al-dalālatu ʿalà inna al-waṣfa ḥāṣilun fī hādhihi al-ṣūrati al-thāniyati, lazima al-qaṭʿu bi ḥuṣūli al-ḥukmi fī al-ṣūrati al-thāniyati,"* Ibid. pp. 451-2, see also pp. 28-9.

[16] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 278-9.

[17] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 168, also pp. 22-3; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 81; al-Ghazzālī, *al-Mustaṣfà*, pp. 274, 276.

[18] *"Inna al-qiyāsa innamā yutaṣawwaru li khuṣūṣi al-naṣṣi bi baʿḍi majārī al-ḥukmi wa kullu ḥukmin quddira khuṣūṣuhu fa taʿmīmuhu mumkinun fa law ʿamma lam yabqà li al-qiyāsī majālun,"* al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 238. Thus, the jurists were aware that the inherent probability in legal analogy is not due to its logical structure but rather to the uncertainty in its premises and that, as put by a modern scholar, " analogical inference goes back to syllogism and has no special logical structure of its own," J. Horowitz, *Law and Logic: A critical Account of Legal Argument* (Wien: New York, 1972), as cited by Hallaq, " Non-Analogical Arguments," p. 29. For al-Ghazzālī's treatment of the logical features of analogy, see this article especially pp. 16-20.

[19] Al-Āmidī, *al-Iḥkām*, Vol. I, p. 182; al-Ghazzālī, *al-Mustaṣfà*, Vol. I, p. 63.

[20] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 280, also p. 238; al-Āmidī, *al-Iḥkām*, Vol. III, p. 355, also Vol. IV, pp. 25-6.

[21] Al-Āmidī, *al-Iḥkām*, Vol. I, p. 181-3; al-Rāzī, *al-Maḥṣūl*, Vol. I, i, p. 139; al-Ghazzālī, *al-Mustaṣfà*, Vol. I, p. 93-4, *Shifāʾ*, p. 145.

[22] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 179.

[23] Al-Āmidī, *al-Iḥkām*, Vol. III, pp. 289, 346, also Vol. IV, p. 26.

[24] Ibid., pp. 411.

[25] "*...bi ḥukmi al-ittifāqi wa al-wuqūᶜi min ghayri wujūbin,*" ibid., p. 411.

[26] Al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, pp. 184-9. The representation of the Muᶜtazilite view about the nature of the legal cause in the Ashᶜarite sources is, as it seems to me, imprecise and unreliable. Both prominent Muᶜtazilite jurists-theologians, al-Qāḍī ᶜAbd al-Jabbār, and Abū Ḥusayn al-Baṣrī distinguish between legal and theological causes, and affirm that legal causes do not necessitate their rulings, see al-Qāḍī ᶜAbd al-Jabbār, *al-Mughnī fī abwāb al-tawḥīd wa al-ᶜadl,* ed. Ibrāhīm Madkūr (Cairo: al-Dār al-Miṣriyya li al-taᵓlīf wa al-tarjama, n.d.), Vol. XVII, pp. 278, 282, 286ff; Abū Ḥusayn al-Baṣrī, *al-Muᶜtamad fī uṣūl al-fiqh,* ed. Muhammad Hamidullah, Ahmad Bekir and Hasan Hanafi (Damas: Institut Français, 1965), Vol. II, pp. 701, 714-5; see also Robert Brunschvig, " Rationalité et tradition dans l'analogie juridico-religieuse chez le muᶜtazilite ᶜAbd al-Ǧabbār," *Arabica,* 19 (1972), especially, pp. 218-9; R.M. Frank, " Several Fundamental Assumptions of the Baṣra School of the Muᶜtazila," *Studia Islamica,* 33 (1971), especially, p. 15, line 13ff. It seems that the jurists confused between the Muᶜtazilite doctrine of the existence of universal ethical values and the doctrine of the necessitating character of the causes of particular legal rulings.

[27] Al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, p. 190.

[28] Al-Ghazzālī is aware of the theological problems inherent to attributing a motive to God's laws, and indicates this by acknowledging that the opponents could raise the following objection against speaking of th motives *(bāᶜith)* of the law: "*wa qawlukum ithbātu al-ḥukmi ᶜalà wifqihi talbīsun idh maᶜnāhu innahu taqāḍà al-ḥukma bi-munāsabatin wa baᶜatha al-sharᶜa ᶜalà al-ḥukmi fa ajāba bāᶜithahu wa inbaᶜatha ᶜalà wifqi baᶜthihi wa hādhā taḥakkumun,*" *al-Mustaṣfà,* Vol. II, p. 299.

[29] Ibid., pp. 237-8. In *Shifāᵓ*, however, al-Ghazzālī accounts for the rationality of the law, and the fact that the laws are observed to serve human benefits, in the same manner adopted by al-Āmidī, see *Shifāᵓ*, pp. 162, 204, 145.

[30] Qurᵓān 17:78.

[31] Al-Ghazzālī, *Shifāᵓ*, 145.

[32] "*Al-ᶜillatu al-jāmiᶜatu in kānat muᵓathiratan aw munāsibatan ᶜurifat bi ashrāfi ṣifātihā wa aqwāhā wa huwa al-taᶜthīru wa al-munāsabatu dūna al-akhaṣṣi wa al-aᶜami alladhī huwa al-iṭṭirādu wa al-mushābahatu,*" al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 310

[33] See ibid,. p. 310; al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, pp. 202, 302.

[34] "*Inna al-waṣfa lā yuᵓathhthiru fi al-ḥukmi illā li ishtimālihi ᶜalà jalbi nafᶜin aw dafᶜi maḍarratin, fa kawnuhu ᶜillatan muᶜallalun bi hādhihi al-ḥikmati,*" al-Rāzī, *al-Maḥṣūl,* Vol. II, ii p. 397, also p. 387.

[35] Al-Āmidī, *al-Iḥkām,* Vol. IV, p. 27.

[36] Al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 279.

[37] See for example Aron Zysow's discussion of the controversy between the Ḥanafite and Shāfiʿite jurists about their respective doctrines of " appropriateness" *(munāsaba)* and " effectiveness" *(taʿthīr)*, " The Economy of Certainty: An introduction to the Typology of Islamic Legal Theory, " PhD Dissertation (Harvard University, 1984), pp. 335-64.

[38] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 282; al-Ghazzālī, *Shifāʾ*, 194-5; al-Āmidī, *al-Iḥkām*, Vol. III, pp. 413, 428.

[39] " *Inna mā ẓahara taʾthīruhu bi iḍāfati al-ḥukmi ilayhi fa huwa ʿillatun nāsaba aw lam yunāsib*, " *al-Mustaṣfà*, Vol. II, pp. 294-5, also 291; see also ibid., pp. 291-2, 294-5, *Shifāʾ*, 147-48; for similar statements by other jurists see al-Āmidī, *al-Iḥkām*, Vol. III, p. 378-80; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 200.

[40] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 289; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 397.

[41] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 291.

[42] "*Fa innā naktafī bi maʿrifati al-ḍābiṭi wa maʿrifati aṣli iḥtimāli al-ḥikmati lā ghayra*, " Ibid. p. 294; see also al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 395.

[43] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 290-5; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 394-8.

[44] See Wael Hallaq, " Considerations on the Function and Character of Sunni legal Theory, " *Journal of the American Oriental Society* , 104 (1984), pp. 679-89.

[45] The jurists provide different definitions of *al-munāsib*. According to al-Āmidī, it is: *waṣfun ẓāhirun munḍabiṭun yalzamu min tartībi al-ḥukmi ʿalà wifqihi huṣūlu mā yaṣluḥu an yakūna maqṣūdan min sharʿi dhālika al-ḥukmi*", *al-Iḥkām*, Vol. III, 388-9, for al-Ghazzālī: *mā huwa ʿalà minhāji al-maṣāliḥi bi ḥaythu idhā uḍīfa ilayhi al-ḥukmu intadhama*, " *al-Mustaṣfà*, Vol. II, p. 297, al-Rāzī, *huwa alladhī yufḍī ilà mā yuwāfiqu al-insāna taḥṣīlan wa ibqāʾan*, " *al-Maḥṣūl*, Vol. II, ii, p. 218. As Aron Zysow observes, " although in keeping with their interest in the cause, the Muslim jurists refer to the appropriateness of the cause to the qualification, more properly what is appropriate is the regulation of the cause in the light of a particular purpose, " Zysow, " Economy , " p. 339.

[46] Al-Ghazzālī, *Shifāʾ*, p. 145, also *al-Mustaṣfà*, Vol. II, 297; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 226; al-Āmidī, *al-Iḥkām*, Vol. III, p. 407.

[47] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 297; similar examples cited by al-Āmidī, *al-Iḥkām*, Vol. III, p. 408-09; Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 227.

[48] See al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 303.

[49] Ibid., p. 298; al-Āmidī, *al-Iḥkām*, Vol. III, p. 407; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 232.

[50] See al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 298.

[51] Ibid., p. 301. According to al-Ghazzālī, this objection is raised not only by the anti-*qiyāsīsts* but also by the Ḥanafites who insisted upon the exclusive validity of their doctrine of effectiveness *(taʾthīr)*. According to this doctrine, the *ʿilla* cannot be established by rational means. It has to be related directly or indirectly to causes which are textually validated. According to al-Ghazzālī, a leading Ḥanafite jurist, Abū Zayd al-Dabbūsī (d. 430), argued that without textual evidence attesting to the validity of the cause, the determination of the *ʿilla* would be based merely on the subjective whims of the heart and the mind *(innahu yarjaʿu ilà qubūli al-qalbi wa ṭumaʿnīnati al-nafsi)*, *Shifāʾ*, p. 146; see also *al-Mustaṣfà*, Vol. II, p. 299. For a discussion of the doctrine of effectiveness as an 'implied critique' of the method of *munāsaba*, see Zysow, "Economy," pp. 347-64. However, as Zysow observes, the Ḥanafite doctrine of effectiveness represents itself an attempt to answer one of the cardinal arguments of the anti-analogists. Some anti-analogists argued that since the rationality of the Divine law does not conform to human rationality, it is not possible to grasp legal causes by reason. Thus, it is not possible to practice *qiyās*, see ibid., pp. 363-4. Al-Ghazzālī considers the argument attributed to al-Naẓẓām (see below, p.)to be essentially a critique of the method of *munāsaba*, *Shifāʾ*, pp. 288ff.

[52] See al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 299.

[53] Ibid., see also, *Shifāʾ*, p. 200.

[54] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 300.

[55] *"Inna al-wahma ʿibāratun ʿan mayli al-nafsi min ghayri sababin murajjiḥin wa al-ẓanna ʿibāratun ʿan al-mayli bi al-sababi,"* ibid., p. 302.

[56] Ibid., p. 304.

[57] *"Lā nunkiru annahu yajūzu an yakūna lahu gharaḍun siwà dhālika, lākinnahu tajwīzun marjūḥun lā yaqḍaḥu fī dhālika al-ẓanni al-ghālibi,"* al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 245; see for similar statements al-Ghazzālī, al-Mustaṣfà, 303-4; al-Āmidī, *al-Iḥkām*, Vol. III, pp. 407-8.

[58] *"Ghalabatu al-ẓanni fī kulli mawḍiʿin tastanidu ʿilà mithli hādhā al-wahmi wa taʿtamidu intifāʾa al-ẓuhūri fī maʿnn ākharin law ẓahara la baṭulat ghalabatu al-ẓanni wa law futiḥa hādhā al-bābu lam yastaqim qiyāsun,"* al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 301.

[59] Ibid., pp. 304-5.

[60] *"Innahu alladhī yufḍī ilà mā yuwāfiqu al-insāna taḥṣīlan wa ibqāʾan [huwa] qawlu man yuʿallilu aḥkāma Allāhi ta ʿālà bi al-ḥikami wa al-maṣāliḥi,"* al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 218-9.

[61] *"Al-wajhu al-thānī an nusallima anna afʿāla Allāhi ta ʿālà wa aḥkāmihi yamtaniʿu an takūna muʿallalatan bi al-dawāʿi wa al-aghrāḍi, wa maʿ hādhā fa naddaʿī inna al-munāsabata tufīdu ẓanna al-ʿilliyyati"*, ibid., p. 246.

[62] The concept of custom of social and historical custom is utilized in the justification of the authoritativenss of consensus, see Wael Hallaq, " On the authoritativeness of Sunni Consensus," *International Journal of Middle East Studies* 18 (1986), pp. 437ff.

[63] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 247.

[64] Ibid., p. 219.

[65] See Endnotes 34, 35 above.

[66] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 425; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 323.

[67] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 230-1. The procedure identified with *qiyās* involves the extraction and determination of the `nexus': *takhrīj al-manāṭ*, see ibid., p. 233.

[68] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 424; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 323; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 279.

[69] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 242; see al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 323-4.

[70] As we have explained before, al-Āmidī and al-Rāzī refer to *qiyās al-shabah* as the *qiyās* in which the *ʿilla* is determined by the method of *shabah*. In this case, they use the term *ʿilla* in the sense of the middle term in the analogical inference and not the *ratio*. They oppose *qiyās al-shabah* to *qiyās al-munāsaba*, and consider these two to be subsumed under *qiyās al-ʿilla*. For al-Ghazzālī, since middle term in *qiyās al-shabah* is not pertinent *(munāsib)* to the ruling, it does not constitute a *ʿilla*. Thus he opposes *qiyās al-shabah* to *qiyās al-ʿilla*, see *al-Mustaṣfà*, p. 311.

[71] This is al-Āmidī's definition which also summarizes what is stated by the other two jurists, *al-Iḥkām*, Vol. III, p. 425; See al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, 279.

[72] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 310.

[73] Ibid., p. 312; al-Ghazzālī spends a considerable section of *Shifāʾ* arguing that the early scholars, such as al-Shāfiʿī and Abū Ḥanīfa, frequently based their opinions upon *qiyās al-shabah*, without recourse to investigating the actual *ratios* of the law.

[74] As al-Ghazzālī explains a property is characterized by *ṭard* when the ruling is found to exist whenever this property exists: *maʿnà al-ṭard al-salāma ʿan al-naqḍ*. In this respect, *ṭard* is a prerequisite for every *ʿilla*. A property cannot be a *ʿilla* if it is proven to exists without bringing about its ruling, see *al-Mustaṣfà*, Vol. II, p. 310. In this context, however, what the jurists mean by *waṣf ṭardī* is a property which is found to exist with the ruling but which has no relationship of substance to it, see ibid., pp. , 306-7.

[75] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 426; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 278-9.

[76] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 427.

[77] Ibid., p. 428; see also al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 277-8; al-Ghazzālī, *al-Mustaṣfā*, Vol. II, p. 311.

[78] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 426; see also al-Ghazzālī, *al-Mustaṣfā*, Vol. II, p. 311.

[79] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 278-80; al-Āmidī, *al-Iḥkām*, Vol. III, pp. 427-8.

[80] Al-Ghazzālī, *al-Mustaṣfā*, Vol. II , p. 313, *Shifā'*, pp. 329, 350; Al-Shāfi'ī cites a similar example in his discussion of the application of *qiyās*, see Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1940), pp. 537ff.

[81] Al-Ghazzālī, *al-Mustaṣfā*, Vol. III, p. 313; in *Shifā'*, al-Ghazzālī discusses at length the difference of opinions between Mālik, Abū Ḥanīfa and al-Shāfi'ī, regarding the cause of prohibition of usury in the six commodities mentioned in the tradition , see *Shifā'*, pp. 332-47. However regardless of the disagreement between these jurists, al-Ghazzālī maintain, they all accepted causes which are not pertinent *(lā tunāsib)*, and based their opinions upon *qiyās al-shabah*.

[82] Ibid., pp. 369, 370.

[83] See al-Ghazzālī, *al-Mustaṣfā*, p. 321; *Shifā'*, p. 319.

[84] Al-Ghazzālī, *Shifā'*, pp. 319-27, see also *al-Mustaṣfā*, Vol. II, p. 312.

[85] *"Ammā al-munāẓiru fa lā yumkinuhu iqāmata al-dalīli 'alayhi 'alà al-khaṣmi al-munkiri,"* ibid. p. 315.

[86] Ibid., p. 316.

[87] Ibid., p. 316; this is where the methods to test the *'illa* come into play, for a discussion of these methods see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 321-78.

[88] Ibid., pp. 318-317.

[89] Al-Ghazzālī, *al-Mankhūl min 'ilm al-uṣūl*, ed. Muḥammad Ḥasan Hītū (n.p. , n.d.) p. 350; see also al-Rāzī, *al-Maḥṣūl*, p. 299.

[90] Zysow, " Economy , " p. 367; see for example al-Rāzī's and al-Āmidī's general justification of *shabah* and the examples mentioned in al-Ghazzālī's discussion of this method of identifying the *'illa*.

[91] Al-Ghazzālī, *al-Mustaṣfā*, Vol. II, pp. 295-6; al-Rāzī, *al-Maḥṣūl*, Vol. II, pp. 299-304; al-Āmidī, *al-Iḥkām*, Vol. III, pp. 380-7.

[92] Such qualifications take into considerations the possibility that the cause may be composed *(murakkab)* of more than one of the properties which are selected as candidates, or that it is a part of but not completely identical with one of the enumerated properties, see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 301.

[93] Al-Ghazzālī, *al-Mankhul*, p. 351.

[94] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 300.

[95] Ibid., p. 300.

[96] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 296; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 300. Al-Ghazzālī discussses this example both in connection with *shabah* as well as *sabr*.

[97] Al-Āmidī, *al-Iḥkām*, Vol. III, p. 380.

[98] Ibid., pp. 380-81.

[99] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 296.

[100] Ibid., p. 296. When asked about the benefit of having wheat prohibited because of the property of being measurable or edible, al-Ghazzālī and al-Āmidī each offer a different response. It is not necessary, al-Ghazzālī explains, that the benefit of the ruling be apparent to mankind, see *al-Mustaṣfà*, Vol. II, p. 237. Al-Āmidī, on the contrary dodges the answer. He insists that there must be an apparent benefit but that it is the duty of the specialist in positive law *(furūᶜ)* and not the *uṣūlist* to identify it, see *al-Iḥkām*, Vol. IV, pp. 15, 27.

[101] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 296; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 302-3.

[102] Al-Ghazzālī is by far less enthusiastic about this method in *al-Mankhūl* then he is in *al-Mustaṣfà*. In the former work, he acknowledges that the method of *al-sabr wa al-taqsīm* can be applied independently only in very specific circumstances. One of the difficulties in applying this method lies in determining the line of division between the properties, which are listed as candidates for the cause. Could not the cause be composite of two properties? It is only in the specific case of usury in wheat that the lines of division are indicated by *ijmāᶜ*. But this example, al-Ghazzālī admits, is an exception *(illā anna hādhihi al-ṣūrata lā yufraḍu wuqūᶜuhā li nudūrihā, wa masᵓalatu al-ribā mimmā ajmaᶜū ᶜalà taᶜlīlihā)*, see *al-Mankhūl*, pp. 350-1. Al-Rāzī also responds to such objections about the method of *sabr wa al-taqsim* by referring to specific features of the example of usury in wheat and the " supposed " consensus regarding it, al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 302-4.

[103] This is not to deny that once these methods were defined and accepted they were used to expand the body of legal doctrine. Our comment is only concerned with the origin and not the actual subsequent function and practicability of such methods. See for example Aron Zysow's interpretation of the function of formal methods of educing the cause which were imported from theology and to which al-sabr wa al-taqsīm belonged: " The paradox is that these methods were not looked to in the mistaken belief that epistemologically the law could meet the standards of theology. Instead, they were introduced because their proponents despaired of finding a genuine legal rationality. The formal methods had the advantage of being readily applicable and publicly verifiable," " The Economyy, " p. 365.

[104] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 74; see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 164-5; al-Ghazzālī, *al-Mustaṣfà*, pp. 272-3.

[105] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 77.

[106] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 81; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 168.

[107] *"...Al-dalīl ᶜalà wujūbi al-iḥtirāzi min al-ḍarari al-maẓnūni...huwa al-dalīlu ᶜalà kawni al-qiyāsī ḥujjatan,"* al-Rāzī, *al-Maḥṣūl*, p. 176.

[108] See for instance sections on *qiyās* in the following works: ᶜAbd al-Jabbār, *al-Mughnī*; Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, ed., ᶜAbd al-ᶜAẓīm Dīb, (2nd ed.; Cairo: Dār al-anṣār, 1400/1980), Vol. II; Abū Isḥāq al-Shīrāzī, *Al-Tabṣira fī uṣūl al-fiqh*, ed. Muḥammad Ḥasan Ḥītū (Damascus: Dār al-fikr, 1983); al-Baṣrī, *al-Muᶜtamad*, Vol. II; ᶜAbd al-ᶜAzīz al-Bukhārī, *Kashf al-asrār al-uṣūl al-Pazdawī* (Astāna: Maktabat al-Ṣanāyiᶜ, 1307/1889), Vol. III. A distinct treatment of the subject is to be found in Abū Bakr Muḥammad al-Sarakhsī, *Uṣūl al-Sarakshī*, ed., Abū al-Wafā' al-Afghānī (Haidarabad: Dār al-kitāb al-ᶜarabī, 1327), Vol. II., pp. 118ff.

[109] As put by al-Ghazzālī: *"Lā ḥukma li al-ᶜaqlī fīhi bi iḥālatin wa lā ījābin wa lākinnahu fī miẓannati al-jawāzi,"* *al-Mustaṣfà*, Vol. II, p. 234; see also al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 6-7; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 31.

[110] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 6; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 234. Al-Rāzī, however, understands al-Baṣrī's position correctly see *al-Maḥṣūl*, Vol. II, ii, p. 31.

[111] Moreover, the three jurists give conflicting accounts of the different positions in the controversy about *qiyās*. Al-Ghazzālī and al-Āmidī, attribute to al-Naẓẓām and to the Shīᶜite jurists the claim of the rational inadmissibility of the authoritativeness of *qiyās*, while they claim that the Ẓāhirites accepted the rational admissibility of this source of law, but rejected *qiyās* on textual grounds, *al-Mustaṣfà*, Vol. II, p. 234, *al-Iḥkām*, Vol. IV, p. 5. Al-Rāzī, on the other hand, claims that it is the Ẓāhirites who rejected the rational admissibility of *qiyās*, *al-Maḥṣūl*, Vol. II, ii, p. 33, he also does not consider that the argument which al-Āmidī and al-Ghazzālī attribute to the Shīᶜites constitutes a rejection of the rational admissibility of *qiyās*, ibid., pp. 148-9.

[112] Many of the arguments against *qiyās* which are cited by the three jurists are advanced in one of the earliest extant anti-*qiyāsist* works by the Ismāᶜilite judge al-Qāḍī al-Nuᶜmān (d. 351), *Ihtilāf uṣūl al-madhāhib*, ed. Muṣṭafà Ghālib (Beirut: Dār al-Andalus, 1973). In the section treating *qiyās* of this work, al-Nuᶜmān refutes the textual arguments advanced by the jurists and cites his own textual refutations of *qiyās*. In addition he cites numerous methodological and theoretical arguments against this source of law. However, al-Nuᶜmān does not at any point raise the hypothetical question about the rational admissibility of the authoritativeness of *qiyās*. His argument are antithetical to the claim that *qiyās* constitutes a valid source of law and not the claim that *qiyās* could possibly constitute a source of law, see ibid., pp. 155-84.

[113] Al-Baṣrī, *al-Muᶜtamad*, Vol. II, p. 705.

[114] Ibid., pp. 742-4.

[115] Ibid., p. 725.

[116] *"Fa firaqu al-mubṭilatu lahu thalāthatun: al-muḥīlu lahu ᶜaqlan wa al-mūjibu lahu ᶜaqlan wa al-ḥāẓiru lahu sharᶜan"*, al-Ghazzālī, *al-Mustaṣfā*, Vol. II, pp. 234-5; both al-Ghazzālī and al-Āmidī cite and criticize the rational arguments about *qiyās* in the section entitled "the affirmation of *qiyās* against its deniers: *ithbāt al-qiyās ᶜalà munkirīh*", see ibid., p. 234; *al-Iḥkām*, Vol. IV, p. 6.

[117] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 192. Al-Āmidī approves this opinion and claims that al-Ghazzālī also was inclined to adopt it. On the other hand, al-Rāzī holds that *al-taklīf bi al-muḥāl* is both possible and has occurred in actuality, al-Rāzī, *al-Maḥṣūl*, Vol. I, ii, pp. 363-99. In fact, al-Rāzī concedes to his opponents that the logical implications of the Ashᶜarite predestinarian theology is that all obligations are *taklīf bimā lā yuṭāq*, ibid., p. 377, see also Vol. II, ii, p. 270.

[118] *"Wa muḥālun an yuqāla innahu mumtaniᶜun li al-mafsadati aw li munāqaḍati al-ḥikmati fa inna bināᵓa al-umūri ᶜalà dhālika fi ḥaqqi Allāhi ta ᶜālà muḥālun idh lā yuqabbahu minhu shayᵓun wa lā yajibu ᶜalayhi al-aṣlaḥu,"* al-Ghazzālī, *al-Mustaṣfā*, Vol. I, p. 87.

[119] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 6.

[120] In wording this statment, al-Āmidī carefully avoids any Muᶜtazilite association. The implication of his statment is that God could enjoin upon us something which is rationally impossible, but that we would consider this to be incompatible with our accepted rational standards. Al-Baṣrī would say the converse: had this been bad, it would have been impossible to have it occur in revelation: *"law kāna hādhā wajhan bi qubḥi al-taklīfi lamā warada bihi al-taᶜabbudu al-ᶜaqliyyu wa al-samᶜiyyu,"* *al-Muᶜtamad*, Vol. II, p. 728.

[121] Al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 6-7.

[122] Ibid., p. 6.

[123] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 139.

[124] Ibid., p. 138.

[125] Ibid, p. 167.

[126] *"Al-ᶜaqlu yaqtaḍī qubḥa mā ẓananna fīhi imārata al-maḍarrati, wa imāratu al-taḥrīmi hiya imāratu al-maḍarrati,"* al-Baṣrī, *al-Muᶜtamad*, Vol. II, p. 725.

[127] Ibid., p. 725.

[128] Ibid., p. 725.

[129] It is interesting to see how another Muᶜtazilite jurist, al-Qāḍī ᶜAbd al-Jabbār responds to a similar objection. When one is confronted with a lion, ᶜAbd al-Jabbār

explains, one knows conclusively that it is necessary to flee, although the presence of the lion is only a sign *(imāra)* and not a definite proof *(dalīl)* of danger. ᶜAbd al-Jabbār adduces this argument to demonstrate that it is possible to arrive at conclusive knowledge on the basis of probable indicants. Notably, however, he states clearly that this argument is applicable to the probable judgments of *qiyās*, only after the validity of *qiyās* has been established by way of tradition *(samᶜ)*, see *al-Mughnī*, Vol. XVII, pp. 293-94.

[130] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 30.

[131] All Ashᶜarite *uṣūl al-fiqh* works address themselves in the introductory chapters to the refutation of the Muᶜtazilite doctrine about the existence of objective ethical values, see al-Ghazzālī, *al-Mustaṣfà*, Vol. I, pp. 61-4; al-Āmidī, *al-Iḥkām*, Vol. I, pp. 113ff; al-Rāzī, *al-Maḥṣūl*, Vol. I, i, pp. 183ff; for a the treatment of this issue by another prominent Ashᶜarite theologian, see George Hourani, " Two Theories of Value in Medieval Islam," *Muslim World*, 50 (1960), pp. 269-78, and " Juwaynī's Criticism of Muᶜtazilite Ethics," *Muslim World*, 65 (1975), pp. 161-74.

[132] Al-Āmidī, *al-Iḥkām*, Vol. I, p. 125, also Vol. IV, p. 30; See al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 167.

[133] *" Al-ᶜaqlu yujawwizu wurūda al-taᶜabbudi bi kulli mā huwa mughallibun ᶜalà al-ẓanni"*, al-Āmidī, al-Iḥkām, Vol. III, p. 18.

[134] On several occasions, al-Āmidī cites the maxim: " probable judgments are authoritatiive in law *(al-ẓann wājib al-ittibāᶜ fī al-sharᶜ)*, regarding which he claims a consensus among the companions. However, al-Āmidī does not use this rule to provide a sanction for all kinds of *ẓann*, and cites it only in support of the authoritativeness of *qiyās*, see ibid., pp. 412-3.

[135] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 7; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 141.

[136] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 7; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 238.

[137] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 8; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 141.

[138] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 18.

[139] Ibid., p. 24.

[140] *" Innahu lammā warada al-taᶜabbudu min al-sharᶜi bi imtināᶜi al-ᶜamali bihi, kāna dhālika li māniᶜi al-sharᶜi lā li ᶜadami al-jawāzi al-ᶜaqlī,"* al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 18, 27; see also al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 157, 163.

[141] The same kind of objection against the rational admissibility of *qiyās* receives a different response in *al-Muᶜtamad*, because of the difference in al-Baṣrī's theoretical strategy. In keeping with his rational justification of the authoritativeness of *ẓann*, al-Baṣrī cannot easily explain why the probable legal judgments which are not supported by a specific textual precedent (such as *al-maṣāliḥ al-mursala)* are not authoritative. Unlike al-Āmidī, al-Baṣrī is unable to account for the invalidity of such judgments on

empirical grounds only. Instead, he had to argue, that such judgments are invalid because they are arbitrary and do not qualify as *ẓann*, see *al-Muʿtamad*, Vol. II, p. 717.

[142] Al-Āmidī, *al-Iḥkām*, Vo.IV, pp. 17, 26; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 240.

[143] Al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 17, 30.

[144] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 37; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 340; see below endnote 166.

[145] Al-Āmidī, *al-Iḥkām*, Vol. II, p. 37.

[146] This echoes what is put succinctly by the Ḥanafīte jurist al-Sarakhsī: " *al-qiyāsu ḥujjatun aṣliyyatun ghayru ḍarūriyyatin*", *Uṣūl al-Sarakhsī*, Vol. II, p. 119.

[147] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 32-4.

[148] Ibid., p. 155.

[149] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 235;

[150] Ibid., p. 235; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 13.

[151] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 24; see also al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 235.

[152] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 20; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 236, 239.

[153] Examples selected from the three authors, see al-Āmidī, *al-Iḥkām*, Vol. IV, p. 24; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 236; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 163.

[154] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 156.

[155] " *Inna al-iktifāʾa bi l-qiyāsī iqtiṣārun ʿalà adwani al-bayānayni maʿ al-qudrati ʿalà aʿlāhumā, wa dhālika ghayru jāʾizin,*" ibid.; for similar objections see al-Āmidī, *al-Iḥkām*, Vol. IV, p. 8; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 235-6.

[156] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 13; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 265.

[157] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 156-7.

[158] Al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 21, 17; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 265.

[159] However, it seems that some anti-*qiyāsīsts* attempted to rationalize the authoritativeness of *ẓann* in the case of the solitary reports, while insisting upon the inadmissiblity of *ẓann* in the case of *qiyās*, see Sarakhsī, *Uṣūl al-Sarakhsī*, Vol. II, p. 121. It seems also that in order to account for the inconsistency in their attitude about *ẓann*, some anti-*qiyāsīsts* rejected the solitary reports, while others asserted that such reports yield certainty, see Aron Zysow, " The Economy, " pp. 306-7, also p. 312. None of the three jurists take account of this argument and cite the opponents

unqualified acceptance of the authoritativeness of *khabar al-āḥad*, as the main example on the basis of which they refute the claim about the inadmissibility of *ẓann* in law.

[160] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 17; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 235-7.

[161] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 17.

[162] Ibid., p. 21; see also al-Ghazzālī, *Al-Mustaṣfà*, Vol. II, pp. 235-6.

[163] What al-Āmidī and Rāzī refer to as *al-barā'a al-aṣliyya*, al-Ghazzālī calls *al-nafī al-aṣlī*. The principle underlying this doctrine is explained succinctly by al-Ghazzālī: *" intifā'u al-aḥkāmi ma'lūmun bi dalīli al-'aqli qabla wurūdi al-sam'i wa naḥnu 'alà istiṣḥābi dhālika ilà an yarida al-sam'u,"* *al-Mustaṣfà*, Vol. I, p. 218.

[164] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 13; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 153; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 263.

[165] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 163; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 23.

[166] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 264.

[167] *"Inna al-'aqla yaqtaḍī al-taswīyata bayna al-mutamāthilati fī aḥkāmihā wa al-ikhtilāfa bayna al-mukhtalifāti fī aḥkāmihā,"* al-Āmidī, *al-Iḥkām*, Vol. IV, p. 9.

[168] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 150.

[169] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 264; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 9; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 150-1.

[170] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 18.

[171] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 264.

[172] Ibid., p. 264.

[173] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 160.

[174] For the different arguments pertaining to the character of the legal cause, see al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 12, 13, 14, 16; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 237, 266. Most of the arguments cited by the al-Āmidī and al-Ghazzālī are known to al-Qāḍī al-Nu'mān in *Ikhtilāf*, pp. 169-71.

[175] Al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 25-6, 24, 21; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 237-8.

[176] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 238; for similar statements see al-Āmidī, *al-Iḥkām*, Vol. IV, p. 25; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 158.

CHAPTER III

THE TEXTUAL BASIS OF *QIYĀS*

As we have seen in the preceding chapter, al-Ghazzāly, al-Rāzī and al-Āmidī argue that reason cannot establish the authoritativeness of *qiyās:* the standard *qiyāsī* inference yields probable judgments, *ẓann,* and the authoritativeness of *ẓann,* is not self-constituted. Nor can the authoritativeness of *qiyās* be affirmed on grounds of rational necessity since *qiyās* is a dispensable legal institution. The jurists also reject the textual argument in support of *qiyās* which was advanced by al-Shāfiᶜī: the fact the law tolerates one type of *ẓann,* such as that involved in the determination of the direction of the *qibla,* does not imply a sanction for every kind of *ẓann.* What is needed instead is textual evidence which validates the specific kind of *ẓann* produced by *qiyās.* As we shall see, al-Ghazzālī insists that, in this matter, only conclusive evidence is admissible. Unlike what one might expect, al-Āmidī and al-Rāzī accept probable evidence and hold that the available evidence in favor of the authoritativeness of *qiyās* is in fact only probable. The meaning and implication of each of al-Āmidī's and al-Rāzī's positions will be assessed critically in the light of the epistemological scheme of their respective theories towards the end of our discussion.

In their attempt to establish the authoritativeness of *qiyās,* the jurists relied mainly upon the evidence from *ijmāᶜ.* Al-Ghazzālī in fact held that it was only *ijmāᶜ* that provided the proof about the authoritativeness of *qiyās.* On the other hand, al-Āmidī and al-Rāzī adduced in addition arguments from the Qurʾān and the Sunna, but also maintained that *ijmāᶜ* constituted the strongest evidence in this matter. According to al-Āmidī and al-Ghazzālī, the consensus of the qualified scholars *(ahl al-ḥall wa al-ᶜaqd)* of any age,

constituted conclusive legal evidence *(ḥujja qaṭᶜiyya)* that was irrevocably binding upon all Muslims. Al-Rāzī, however, considered that the evidence supporting the authoritativeness of consensus was only probable and that consensus, therefore, produced probable knowledge only.[1] It must be noted that the position of al-Āmidī and al-Ghazzālī was significantly different from that of al-Shāfiᶜī. The latter considered that consensus yielded certainty only when it represented the agreement of the entire community on matters based on the Qurᵓān and on the Sunna which was transmitted " from generality to generality ". However, the consensus of the scholars did not lead to certainty and was not authoritative.[2]

In their presentation of the argument from *ijmāᶜ*, the jurists start with the unqualified claim that the Companions agreed unanimously about the validity of *qiyās*. Expectedly, they are unable to produce detailed evidence attesting that every single Companion either practiced *qiyās* or expressly sanctioned it. Instead, they concede that only some of the Companions are known, by way of tradition, to have done so. However, those Companions who are not themselves known to have practiced *qiyās*, expressed no objections against it. Thus, what is at hand is a tacit consensus *(ijmāᶜ sukūtī)*. How each of the jurists assessed and defended the value of this type of evidence will be discussed later in this chapter. First, I shall examine how they attempted to substantiate the claim that some of the Companions indeed practiced *qiyās* without having been met with any opposition.

The jurists cite numerous traditions which indicate in different ways that the Companions adjudicated newly arising cases on the basis of textual analogues. As al-Rāzī observes, the letter of the Caliph ᶜUmar to his governor Abū Musà al-Ashᶜarī is unique among such traditions in making explicit reference to *qiyās*.[3] According to this letter, the Caliph ᶜUmar instructed his governor:

> Understand and know in your heart what is neither in the Book nor in the Sunnah. Know the likenesses and the similarities. Then, employ *qiyās* in matters by means of that which is most similar to the truth and the ones closest to God.[4]

Apart from al-Rāzī's brief comment, the jurists do not seem to place any more emphasis on this letter than on other traditions which are less explicit in their mention of *qiyās*. Al-Āmidī and al-Ghazzālī cite this tradition without singling it out for any discussion.

In another distinctive group of traditions the Companions mention that they have judged matters on the basis of *qiyās*. In one tradition, the Caliph ʿUmar, after being advised of a tradition about the so-called case of the "embryo," says: "Have I not known of this [tradition], I would have judged this matter on the basis of my opinion."[5] In another tradition, ʿAlī b. Abī Ṭālib mentions that both ʿUmar b. al-Khaṭṭāb and himself held the opinion *(raʾy)* that a slave-woman who mothered her owner's child could not be sold but that he (ʿAlī) later changed his opinion about this.[6] The jurists also cite the tradition according to which Abū Bakr professes an opinion regarding the meaning of the Qurʾānic term *al-kalāla*, accepting to take responsibility for any error in his interpretation.[7]

Such traditions indicate that the Companions practiced *qiyās*, al-Rāzī argues, because *raʾy* is synonymous with *qiyās*. In standard Arabic, *raʾy* is put in opposition *(muqābala)* to *naṣṣ*. This is indicated by the commonly raised question: *a qulta hādhā bi raʾyika am bi naṣṣin?*. Thus, *raʾy* does not designate judgments which are based directly upon texts *(naṣṣ)* regardless of whether these texts are clear or unclear.[8] The opponents rightly object to the demarcation al-Rāzī draws between text and opinion, and to his exclusive identification of *raʿy* with *qiyās*. The term *naṣṣ*, they contend, is applied to texts whose legal import is apparent and conclusive.[9] In many cases, however, the meaning of a text is unclear and cannot be conclusively determined. Although based upon a linguistic inference *(istidlāl lafẓī)*, the judgments derived from such texts may aptly be termed *raʾy* because of the element of opinion entailed in their derivation. This is attested

by the tradition about Abū Bakr's interpretation of *al-kalāla* which is cited by al-Rāzī himself. In this tradition *ra'y* clearly does not denote *qiyās*, since Abū Bakr was only professing his opinion about the meaning of the unclear term *kalāla*.[10] Notably, neither al-Rāzī nor his opponents consider the possibility that *ra'y* could mean independent reasoning or personal discretion. The opponents claim that the Companions confined their opinion to the interpretation of the meaning and legal import of texts, while al-Rāzī claims that their mention of *ra'y* indicates clearly that they went beyond the texts and judged cases according to *qiyās*.

In response to the objections mentioned above, al-Rāzī qualifies his claim about the synonymity between *ra'y* and *qiyās*. He concedes that *ra'y* did not mean *qiyās* in its original usage but has acquired this specific meaning in the convention of legal language.[11] Furthermore, he points out, the opponents claim that the traditions according to which the Companions condemn *ra'y* constitute evidence against *qiyās*. Therefore, the opponents themselves also understand *ra'y* as *qiyās*.

Al-Rāzī's argument seems to be forced and unjustified. It is rather curious that he should put forth an argument that is refuted by the very same traditions which he adduces in support of it. (It seem highly unlikely that al-Rāzī was unaware that *ra'y* in the tradition about *al-kalāla* refers to opinion regarding the meaning of a word). Moreover, it is difficult to see the theoretical need behind al-Rāzī's insistence on the absolute synonymity between *ra'y* and *qiyās*. Al-Rāzī could have dispensed with this argument, since he does not rely on the *ra'y* category of traditions alone, but also adduces other traditions which are more explicit in order to establish the Companions ' practice of *qiyās*.

Al-Ghazzālī and al-Āmidī, on the other hand, acknowledge that the term *ra'y* is more general than *qiyās* and that its specific meaning is to be determined contextually.[12] Thus, al-Ghazzālī states that the traditions about *ra'y* do not alone prove that the

Companions practiced *qiyās*. What such traditions establish is that the Companions did not base all their judgments upon conclusive textual evidence, but also excercised *ijtihād* and tolerated opinion in legal matter, when certainty was not attainable.[13] However, al-Ghazzālī maintains, this does not imply that the Companions resorted to *qiyās*. It is possible that their *ijtihād* was restricted to the determination of the meaning of the texts and of the application of the texts in particular situations *(ijtihād fī mafhūmi al-alfāẓi wa taḥqīqi al-manāṭi)*.[14] Yet, there are traditions which specifically indicate that the Companions went beyond the interpretation and application of texts and extended the law by *qiyās* to cases which cannot in any way be considered textually stipulated.[15]

Al-Āmidī and al-Ghazzālī cite numerous traditions according to which the Companions state explicitly the reasoning underlying their judgments. For example:

> ᶜAlī b. Abī Ṭālib advised the Caliph ᶜUmar that capital punishment should be applied to all accomplices in a murder crime, in the same manner that the punishment of cutting hands is applied to all accomplices in theft.[16]

> ᶜAlī inferred a punishment for the wine drinker on the basis of the following analogy from the case of the falsifier of testimony: when someone drinks he becomes intoxicated, irrational and commits slander. Therefore, he merits the punishment of a slanderer.[17]

> ᶜUmar is said to have condemned a certain Muslim who traded wines. He mentioned a tradition according to which the Prophet is said to have condemned the Jews for trading lard which is forbidden in their religious law. By analogy from this tradition, ᶜUmar infers that the prohibition of drinking wine implies the prohibition of trading it.[18]

The jurists do not discuss these traditions individually, considering them to be self-evident in indicating that the Companions employed *qiyās*.[19] With regard to authenticity, al-Ghazzālī acknowledges that these traditions are not transmitted by *tawātur* and are only solitary. However, he maintains, they are so widely accepted by the community that doubt about their authenticity is inadmissible.[20] Al-Āmidī, on the other hand, does not raise the question of authenticity at all. As for al-Rāzī, he first argues in favor of the

authenticity of this and other traditions about *qiyās.* Thus, he asserts that one must be able to verify the authenticity of at least some of these traditions since it is not possible, in view of their large number, that they all be false.[21] Moreover, it is only necessary to prove that one of these traditions is authentic to establish the validity of *qiyās.* Al-Rāzī, however, does not consider it necessary for the traditions about *qiyās* to be *mutawātir,* since he does not require certaitnty to establish the validity of *qiyās.* The solitary reports yield strong *ẓann* about the existence of an *ijmāᶜ* about *qiyās* which is in turn sufficient, he asserts, to establish the authoritativeness of *qiyās.* [22]

Nevertheless, it is the concern for certainty and reliability which seems to explain why the jurists attempted to interpret prominent events in Islamic history in favor of *qiyās.* This is particularly the case with al-Ghazzālī. For example, he argues that Abū Bakr's decision to designate ᶜUmar as successor by testament *(al-ᶜahd)* was based upon and sanctioned by *qiyās:* Abū Bakr was not appointed by text *(naṣṣ)* but rather by a covenant of allegiance granted to him by the community *(ᶜaqd al-bayᶜa).* The Companions inferred that since there is no text indicating specifically how the Caliph is to be elected, it is equally valid to appoint him either by the designation of the imam or by the covenant of the community.[23]

Another prominent event in Islamic history, namely the Caliph Abū Bakr's decision to wage war against the tribes which discontinued paying alms tax *(zakāt)* after the Prophet's death, is also said to be partly based upon *qiyās.* ᶜUmar b. al-Khaṭṭāb initially objected to Abū Bakr's decision on the grounds that the Prophet pledged to safeguard the tribes which had professed Islam. Abū Bakr argued that this pledge was conditioned by certain obligations, one of which was the payment of alms-tax. One of the reneging tribes argued that Abū Bakr is not entitled to claim their alms money, since this money was due to the Prophet only in exchange for his religious leadership and the assuagement he

bestowed upon them in prayer.[24] Al-Ghazzālī explains that this petition constituted an appeal to an anti-*qiyāsist* principle similar to that upheld by the Ẓāhirites *(dalīl aṣḥābi al-ẓāhiri fī ittibāᶜi al-naṣṣi)* ; those tribes wanted to claim that a ruling is relevant and applicable only to the very specific locus for which it was originally formulated *(awjabū takhṣīṣa al-ḥukmi bi maḥalli al-naṣṣi).* Abū Bakr's response in turn involved an appeal to *qiyās* as he argued in favor of extending the ruling beyond its specific context to all other instances where its supposed rationale prevailed. On this basis, Abū Bakr argued that since the Prophet took the money not for his own use but for the purposes of distributing it among the poor, the obligation (judgment) of paying alms tax persisted after the Prophet's death.[25] By extending the obligation of *zakāt* to all instances of its original cause, Abū Bakr has, in effect, employed *qiyās.*

The jurists also argue that the Companions ' practice of *qiyās* is evidenced by the nature of their disagreement in several famous controversies. One such case, regards the legal import of a man's statement to his wife: " You are forbidden unto me " *(antī ᶜalayya ḥarām).* One Companion held that this statement is equivalent *(fī ḥukm)* to a statement of a triple divorce, another a single divorce, while for others it was either an oath *(yamīn)* or *ẓihār* , [26] the revocation of which entails a heavier expiation than that of an oath.[27] The jurists argue that each one of the Companions arrived at his opinion by assimilating the statement of *taḥrīm* to what he deemed to be its closest textual analogues. It must be so since there are no texts which stipulate the legal effect of the utterance of *taḥrīm* when it is addressed to one's wife.[28] Moreover, the Companions could not have formulated their opinion arbitrarily and without any textual basis. It is also clear that the Companions did not choose to suspend legal judgment or to presume the unobstructed continuation of the marital bond *(istimrār al-ḥill : al-barāᵓa al-aṣliyya).*[29] Instead, they each attached a distinct positive qualification to this controverted case.[30] The jurists conclude that since

the Companions neither based their judgments directly upon the texts nor formulated them arbitrarily, they must have employed *qiyās*.

The opponents challenge the claim about the analogical basis of the Companions' opinions in the case cited above. They suggest instead that the Companions may have based their opinion upon texts that they failed to disclose or that are no longer extant. In their response to this objection, al-Āmidī and al-Rāzī utilize the concept of custom (*ʿāda*). It is the observed custom of contenders in legal debates to reveal the texts upon which their opinions are based. The dynamics of legal debate insure that any available text which can serve as evidence in a controverted legal matters be publicly disclosed.[31] This custom is particularly applicable when there is a conclusive text about the case in question. It is inconceivable that any of the Companions could have known of a conclusive text without disclosing it and reproaching those who diverged from its dictates. The fact that the Companions tolerated *ikhtilāf* certifies that they knew of no conclusive texts about the case in question.[32] Furthermore, al-Āmidī and al-Rāzī maintain, had any such texts been adduced, they would have necessarily been transmitted down, by token of the custom insuring the transmissio of important texts. It is inconceivable for a large group of people to collude upon concealing, or even to neglect the transmission of, texts about important controversial legal matters. Since no such texts are known, it is evidenced that they never existed and were never adduced.[33]

The opponents object: if the Companions in the cited instances indeed employed *qiyās*, they would have disclosed the legal causes on which they based their rulings and these causes would then have been transmitted down. This would be necessary by token of the same customs of debate and transmission upheld by jurists. The fact that we know of no such causes implies that they were never adduced. The opponents insist that in the example mentioned above each of the Companions based his judgment, if not on

conclusive texts, then on an *ijtihād* in the interpretation of the hidden meanings and implications of texts.[34]

The custom governing the disclosure of texts in legal debates, al-Rāzī and al-Āmidī respond, does not apply to the disclosure of legal causes. It is not necessary for a jurist, in order to convince his opponent, to state the reasoning underlying his own decisions explicitly. Often, this reasoning may be clearly reflected in the decision itself. In illustration, the jurists cite the following example: it is known that kings either kill the spies they capture, thus setting an example for others, or befriend them in order to benefit from the information they carry. Therefore, it is possible to infer the rationale behind a king's decision concerning a spy, without it being mentioned explicitly. Similarly, a jurist need not disclose the reasoning underlying his own judgment when the texts from which the judgment is derived is widely known. However, when the controverted opinion is based directly upon an unknown text, this text has to be disclosed so as to convince one's opponents, since the existence of a such text cannot be independently inferred by the mind.[35]

In the example of *taḥrīm*, the jurists explain, it is possible to infer the textual cause behind each Companions' opinion. Those who considered the utterance of *taḥrīm* to be equivalent to a triple divorce must have reasoned that any declaration of absolute prohibition *(muṭlaq al-taḥrīm)* produced the legal effect of a complete prohibition. On the other hand, others must have reasoned that the statement of *taḥrīm* is similar to a single divorce in being the minimal utterance needed to bring any *taḥrīm* into effect *(aqallu mā yathbutu maʿahu al-taḥrīmu)*.[36] Neither of these inferences, al-Rāzī explains, can be construed as linguistic. Such inferences constitute *qiyās* because it is conclusively known that the utterance of *taḥrīm* is not identical to an explicit statement of divorce *(min ṣarāʾiḥi al-ṭalāqi)*. Furthermore, there was clearly no consensus among the Companions that this

is an indirect statement of divorce *(mā ajmaʿū ʿalà annahu min kināyāti al-ṭalāqi).*[37] Finally, those who considered this utterance to be equivalent to a *yamīn* or *ẓihār* took into account the fact that this utterance of *taḥrīm* also is neither an explicit *(ṣarīḥ)* nor indirect *(kināya)* statement of divorce.[38]

The opponents concede that some of the Companions practiced *qiyās.* However, they proceed to argue that this practice was opposed by others. In support of this, they cite a number of traditions according to which the Companions condemned *raʾy* and *qiyās.* For example:

> ʿUmar said: " Beware of the people of *raʾy;* they are the enemies of religion who were weary of memorizing traditions, so they relied upon *raʾy* and mislead themselves and other. "[39]

> Ibn Masʿūd said: " If you use *qiyās* in religion you will permit what God prohibited and prohibit what He permitted." He also cautioned: " Your readers and the good one among you will disappear, and those after you will take for their leaders ignorant men who use analogy to judge new cases on the basis of precedents. "[40]

> Umar wrote to his governor Shuraih: " Judge on the basis of the Sunna of the Prophet, and if you encounter what is not covered by the Sunna, refer to the consensus of the scholars. If you don't find an answer there than withhold your judgement. "[41]

Al-Ghazzālī first questions the authenticity of these traditions. He maintains that they are all solitary reports with incomplete chains of transmission *(isnāds)* or unreliable transmitters.[42] In contrast, the traditions supporting *qiyās* are either transmitted by *tawātur* or are sound *(ṣaḥīḥ)* and well authenticated solitary traditions. Furthermore, al-Āmidī and al-Ghazzālī observe, the traditions against *qiyās* are attributed to the very same Companions about whom there are authentic traditions which certify their approval of *qiyās.* This goes to confirm that the traditions against *raʾy* are not authentic. Nevertheless, the jurists maintain, even if one were to accept both kinds of traditions about *qiyās,* one would have to harmonize between such a conflicting evidence *(al-jamʿ bayna*

al-adilla).[43] The reports about the Companions ' rejection of *qiyās* must be understood in a qualified sense and in light of the established knowledge about their legal practices. Understandably, the jurists argue, the Companions must have rejected *qiyās* when it is applied in the presence of clear texts or in matters in which only certainty is tolerated. They must have also opposed its practice by those who were not qualified for it.[44] Finally, the Companions ' opposition to *raʾy* can be construed to be directed against arbitrary judgments which are based upon individual preference and have no textual support.

The opponents concede that *qiyās* was not explicitly opposed by any of the Companions . This, however, does not prove the existence of an *ijmāᶜ* concerning the validity of *qiyās.* The silence *(sukūt)* of the Companions who did not employ *qiyās* does not imply their consent *(riḍā).* It is possible that these Companions disapproved of *qiyās,* but concealed their objection out of fear. To prove this possibility, the opponents cite a tradition according to which the Companion Ibn ᶜAbbās held an opinion different from Umar's regarding the distribution of inheritance in the case of *ᶜawl,* yet revealed this opinion only after ᶜUmar's death. In explanation, Ibn ᶜAbbās admitted that he had been afraid to confront ᶜUmar with his disagreement.[45] Moreover, the opponents continue, the Companions may have withheld their opposition in a spirit of accommodation and reconciliation *(al-muṣālaḥa wa al-mujāmala),* with the intention of curbing dispute and civil strife.[46] It is also possible that some of the Companions were unable to determine whether the practice of *qiyās* was right or wrong, and thus, suspended their judgments about it its validity.[47] Since silence is not a conclusive evidence of consent, it cannot be claimed on the basis of the available traditions that the Companions were unanimously agreed about the validity of *qiyās.*[48]

It must be noted that the objections cited above pertain to the verification of consensus in general. In fact, in their treatment of *ijmāᶜ,* the jurists themselves discuss

the extent to which the absence of explicit objection can be considered indicative of consent, and assess the epistemological value of what al-Āmidī calls a tacit consensus *(ijmāᶜ sukūtī)*. Therefore, we will first examine how the jurists evaluated the *ijmāᶜ sukūtī*, in order to determine whether they were consistent with the premises of their own legal theory in claiming an *ijmāᶜ* in favor of the authoritativeness of *qiyās*.

According to the three jurists, the fact that a widely known judgment meets no verbal endorsement or objection from qualified scholars does not necessarily indicate a unanimous approval of that judgment. Apart from consent, the jurists list several possible reasons for silence, two of which are identical to the ones cited by the opponents in their objection to *qiyās*. Thus, they acknowledge that a Companion may withhold his objection for reasons of fear and caution. In fact, they cite the same tradition about Ibn ᶜAbbās to illustrate this possibility. They also maintain that a jurist may have abstained from commenting on a stated opinion either because he has not deliberated on the legal issue, or had done so but failed to arrive at a judgment.[49] In either case, this would not mean that he approved of that opinion. Thus, al-Āmidī, al-Rāzī and al-Ghazzālī conclude that a consensus can be verified only be means of a census of explicitly stated opinions. This is also in compliance with the maxim, which al-Rāzī attributes to al-Shāfiᶜī that states: " *lā yunsabu ilà sākitin qawlun*." [50]

Although the silence does not mean approval, for al-Āmidī, it suggests approval strongly. Thus al-Āmidī considered that a tacit consensus constitutes strong probable evidence *(ḥujja mughalliba ᶜalà al-ẓann)*.[51] On the other hand, al-Rāzī denied any evidentiary value for a tacit consensus *(lā yadullu ᶜalà al-riḍā lā qaṭᶜan wa lā ẓāhiran)*. [52] Al-Ghazzālī held that the approval can be inferred from silence only with a supportive contextual evidence *(qarāᵓin al-aḥwāl)*.[53] Otherwise, he too denied any evidentiary value for *ijmāᶜ sukūtī*.

Regarding the authoritativeness of *qiyās*, al-Āmidī acknowledges, there is only a tacit consensus. Thus, he admits that the question of the authoritativeness of *qiyās* is not settled conclusively *(al-mas'ala ẓanniyya ghayr qaṭ'iyya).*[54] Al-Rāzī and al-Ghazzālī, however, seem to make an exception in their evaluation of *ijmā' sukūtī* in the case of *qiyās.* In response to the objections against *qiyās* mentioned above, al-Rāzī simply appeals to the probity and fortitude of the Companions. In view of their character, he asserts, it is highly improbable that the Companions would conceal their opposition for reasons of fear.[55] It is also well attested, he adds, that the Companions confronted each other with their disagreement in numerous cases (e.g. *mas'alat al-ḥarām).*[56] In all this, there is a clear and unjustified contradiction between al-Rāzī's position about *ijmā' sukūtī* and his evaluation of this kind of evidence in the case of *qiyās.* Al-Rāzī seems to fail to explain why the character of the Companions and the evidence about their *ikhtilāf* should be more relevant to evaluating *ijmā' sukūtī* in the case of *qiyās* than in other cases. Like some jurists before him, al-Rāzī could have pointed out those features of *qiyās* which would make the silence regarding it more indicative of approval.[57] However, he fails to do so, treating the objections about the major aspect of the argument about *ijmā'* with disappointing brevity.

Al-Ghazzālī insists that the absence of explicit objections against *qiyās* constitutes conclusive evidence about the existence of the *ijmā'* about it. Like al-Rāzī, al-Ghazzālī rejects the suggestion that the Companions could have concealed their objection against *qiyās* out of fear; it is well attested, he argues, that the Companions were willing to confront one another with their opinions without affecting agreement. Had any kind of disagreement existed, al-Ghazzālī asserts, it would have been openly stated. Yet, as we have seen, he rejects this same reasoning in his criticism of *ijmā' sukūtī.* Like al-Rāzī, al-Ghazzālī fails to justify the exception he makes in the case of *qiyās.*

Moreover, al-Ghazzālī does not admit to the possibility that the Companions concealed their objections to *qiyās* so as to avert dispute and strife. There is abundant evidence, he maintains, that the Companions were ready to excommunicate and accuse of heresy and sin *(taʾthīm wa tafsīq)* those who were conclusively known to hold false beliefs *(man ʿurifa bi qāṭiʿin fasādu madhhabihim).*[58] Thus, the Companions could not have known of a conclusive evidence against the validity of *qiyās.* Al-Ghazzālī is entitled to this conclusion not only because of the empirical evidence he cites, but also because of his theory of *ijmāʿ.* To have the Companions accommodate, either by way of practice or by abstaining from objection, what is conclusively prohibited, means that they were all agreed upon an error, which is inadmissible. It must be noted that the argument above only proves that the Companions did not know of any conclusive evidence against the authoritativeness of *qiyās.* However, it does not prove that the Companions knew of conclusive evidence about its authoritativeness. It remains possible, the opponents contend, that the Companions considered the question of the authoritativeness of *qiyās* to be open for *ijtihād.* Thus, those who abstained from objecting to *qiyās* may have been unable to decide about it validity due to the obscurity of the evidence *(li khafāʾ al-dalīl).* Al-Ghazzālī rejects this possibility. He postulates that employing *qiyās* without a specific permission from revelation is wrong, since it entails ascribing to oneself the prerogative of legislation *(kullu man qāsa bi ghayri idhnin fa qad sharraʿa).* Therefore, the Companions must have had conclusive evidence about the authoritativeness of *qiyās.* Had they not known that *qiyās* was permitted by revelation, they would have necessarily considered *qiyās* to be invalid and would have objected to its practice. To say otherwise would imply that the Companions were agreed upon an error. [59]

By postulating that the practice of *qiyās* without an evidence from revelation is wrong, al-Ghazzālī is able to prove the existence of a consensus about *qiyās,* inspite of

his position about the tacit consensus. However, this postulation conflicts with other aspects of his theory of *ijmāᶜ*. For al-Ghazzālī, *ijmāᶜ* constitutes a legal proof, even when it is not grounded on a textual evidence. whatever the community agrees upon, regardless of the basis of the decision *(al-mustanad)*, is right. Al-Ghazzālī in fact restates this view just a few pages after the previous argument, when asked to account for the basis of the Companions ' practice of *qiyās*. Even if the Companions had decided to dispense with *qiyās* and chose instead to rely on independent *raᵓy*, he asserts in response, *raᵓy* would be valid and binding upon all Muslims to follow.[60] Al-Ghazzālī therefore seems to depart from this aspect of his theory of consensus in order to confirm the existence of the consensus in favor of the authoritativeness of *qiyās*.

As we saw in the preceding chapter, al-Shāfiᶜī himself argued that the claim about the existence of an *ijmāᶜ* among the Companions about the validity of *qiyās* cannot be substantiated. In fact, it may have been noticed that the objections which al-Shāfiᶜī raised against this claim are very similar (though less elaborate) to the objections later raised by the anti-*qiyāsists*. Our three jurists do not take account of the position of the eponym of their school about this matter. In fact, it is very possible that they were not aware of his position about this matter. Al-Shāfiᶜī does not state the argument about *ijmāᶜ* in *al-Risāla*, nor even in the section of *Kitāb al-umm* which treats the authoritativeness of *qiyās*. Instead he states this argument in *al-Umm* in connection with his critique of the theory and application of the doctrine of consensus in the ancient schools of law. In any case, by rejecting the argument about the *qibla* and adopting the argument of *ijmāᶜ*, the jurists establish the foundation of *qiyās* on grounds entirely different from those proposed by al-Shāfiᶜī.

In addition to *ijmāᶜ*, al-Rāzī and al-Āmidī also adduce in support of the authoritativeness of *qiyās* arguments from the Qurᵓān and the Sunna. The validity of *qiyās*

is indicated by verse 59: 2: " Reflect Ye who have insights " *(iʿtabirū yā ʾūlī al-abṣāri).* The evidential value of the verse is in the key term *iʿtabiru. Al-iʿtibār,* they explain, is making the transition *(al-intiqāl, mujāwaza)* from one thing to another. This is applicable to *qiyās,* because *qiyās* involves making a transition from the ruling of one case to another.[61] This is also attested by a tradition according to which the Companion Ibn ʿAbbās states that he " transferred " the ruling regarding the recompensation for fingers to the teeth:*aʿtabiru ḥukmahā bi al-aṣābiʿi.*. Thus, he held that the teeth like fingers were all to be recompensed by an equal amount.[62]

This explanation is followed by a long chain of objections. These are presented in a dialectical format which the jurists generally use to summarize objections against their claims. In this particular case, the opponents raise a point against the interpretation of the verse, grant this point and move on to another. This series of objections culminates with the conclusion that the verse cannot be considered conclusive and as such, it fails to provide the necessary evidence needed to validate a source of law. A conclusive verse is one about whose interpretation there can be no admissible disagreement.

As one would expect, the jurists' restrictive interpretation of the term *iʿtibār* is questioned. The opponents want to understand it as a command to " take heed " *(ittiʿāẓ),* especially given the context of the verse (Muslims are commanded to take heed from the example set before their eyes about the predicament of others). Moreover, the opponents maintain, even if the term is understood restrictively to mean *qiyās, qiyās* itself is a common term which applies to reasoning in theology *(al-qiyās al-ʿaqlī)* and analogical reasoning in law in both cases when the *ʿilla* is explicit or educed. However, the verse does not have a general formulation *(ṣīghat ʿumūm)* and thus cannot be taken as an obligation to follow all kinds of *qiyās.* Instead, it has an unrestricted *(muṭlaq)* formulation. But it is the accepted exegetical rule that an unrestricted expression has to be

interpreted consistently in one sense only. The opponents are willing to consider that *iʿtibār* here designates *qiyās* in the rational sciences or the legal *qiyās* in cases where the *ʿilla* is explicitly stated. They leave the jurists with the need to produce evidence about *qiyās* when the *ʿilla* is educed.[63]

The jurists grant their opponents that *iʿtibār* is synonymous with *ittiʿāẓ*. However, they explain, this synonymity derives from the fact that both *iʿtibār* and *ittiʿāẓ* involve the transition from one thing to another, which is precisely why *iʿtibār* is also held to be applicable to *qiyās*. In *qiyās*, as in *ittiʿāẓ*, one gains knowledge by relating different things and applying the judgment of one situation to another.[64] Al-Āmidī is willing to acknowledge that the formulation of the verse is not general. However, if the word *iʿtibār* is considered qualified and has to be interpreted restrictively, he maintains, priority ought to be given to the legalistic interpretation. The command for *iʿtibār* ought to be understood as a command to follow *qiyās* when the *ʿilla* is either explicitly stated or educed. This is so because God predominantly addresses us about legal matters. But, when the *ʿilla* is explicitly stated no *intiqāl* is involved since all the cases to which the ruling applies are established textually. Therefore, the verse under discussion has to be interpreted as a command to employ *qiyās* where the *ʿilla* is not explicitly stated.[65] This lengthy argument notwithstanding, the jurists concede that the meaning of the verse cannot be determined conclusively and that the verse provides a probable evidence only about *qiyās*. Once again they restate here that the question of the authoritativeness of *qiyās* is only probable.[66]

Al-Āmidī and al-Rāzī then turn to evidence from the Sunna. The first group of traditions they cite are variants of the theme of the dialogue between the Prophet and his emissaries/judges about the proper means of adjudication. The famous tradition of Muʿādh b. Jabal, which as we have seen, was already known to al-Shāfiʿī, is singled out for

discussion. According to this tradition, the Prophet is said to have approved the decision of Muᶜādh, his emissary to Yemen, to rely upon *ijtihād al-raᵓy*, if he fails to find solutions for certain legal cases either in the Qurᵓān or the Sunna.[67] What Muᶜādh and the Prophet understood by *ijtihād al-raᵓy* here, the jurists assert, is none other than *qiyās*. It is certainly not the independent reasoning *(al-raᵓy al-mursal)* because independent reasoning, al-Āmidī postulates, is legally invalid *(ghayr muᶜtabar)*.[68]

The opponents criticize this tradition. They point out that it has a broken chain of transmission *(mursal)*. Thus, according to al-Shāfiᶜī himself this kind of traditions does not have any evidentiary value *(laysa bi ḥujjatin)*. Furthermore this tradition is a solitary report *(khabar al-wāḥid)*. Although solitary reports are accepted as proof in the domain of actions *(aᶜmāl)*, they are rejected, according to Abū Ḥanīfa, in matters which have a wide application *(fīmā taᶜummu bihi al-balwà)*. Thus there is a consensus among the Ḥanafites and the Shāfiᶜites that this kind of traditions does not constitute valid evidence.[69]

The opponents then turn to question the jurists' restrictive interpretation of the meaning of these traditions. *Qiyās* is only one of the procedures subsumed under *ijtihād*. Muᶜādh could have meant by *ijtihād al-raᵓy* those interpretive procedures that are applied in order to determine the meaning and the legal import of unclear texts *(khafī al-nuṣūṣ)*. Moreover, even if taken as the synonym of *qiyās*, the term *ijtihād*, as it occurs in the tradition, is used in an unrestricted sense. The opponents are willing to concede that the tradition constitutes evidence about the validity of *qiyās* in the specific cases when the *ᶜilla* is explicitly stated.[70]

Al-Āmidī and al-Rāzī insist that the tradition constitutes a valid proof. Irrespective of its formal characteristics of this tradition, its soundness is attested by the fact that it has been unanimously accepted by the community *(talaqqathu al-ummatu bi al-qabūli)*.[71] Nevertheless, the two jurists acknowledge that, as a solitary report, the tradition of

Mu^{c}ādh constitutes a probable evidence only. Once again they restate that the evidence about the authoritativeness of *qiyās* is only probable, and not conclusive.[72]

Regarding the interpretation of the *ḥadīth*, the jurists argue that Mu^{c}ādh and the Prophet could not have understood *ijtihād al-ra'y* to be the interpretation of unclear verses. Mu^{c}ādh, they point out, informed the Prophet that he would rule according to *ijtihād al-ra'y* only after having exhausted his search for a judgment in the Qur'ān and the Sunna. Therefore, *ijtihād al-ra'y* in this context is identical to *qiyās*, since it refers to the exercise of judgments about cases which are not textually stipulated.[73]

The jurists cite another group of traditions according to which the Prophet uses *qiyās* in answer to certain legal questions posed to him. In one such tradition, for example, a women inquires whether she is permitted to substitute for her ill father in performing the obligation of pilgrimage. In response, the Prophet draws an analogy from daily matters: since she is permitted to pay on behalf of her father his debts to other people, it is even more apt that she should pay her father's debt's towards God.[74] Such traditions are indicative of the authoritativeness of *qiyās*, al-Rāzī explains, since the prophet clearly presupposes in his response the argumentative validity of *qiyās*. In a similar way Muslims adduce Qur'ānic verses in their arguments, only because they presume that the authoritativeness of the Qur'ān is accepted by their opponents.[75]

Al-Āmidī acknowledges that this and other similar traditions are mostly solitary *(āḥād)*. However, although the specific wording of such traditions differ, they are all variants of the same theme *(min al-akhbāri al-mukhtalifi lafẓuhā al-muttaḥidi ma^{c}nāhā)*. Thus, although individually each one of these traditions is a solitary report *(āḥāduhā āḥādan)*, they are collectively equivelant to a single *mutawātir* tradition *(jumlatuhā manzilatu al-tawāturi)*. One would have expected al-Āmidī here to elaborate and utilize this as conclusive evidence about the validity of *qiyās*. This is especially so since he

utilizes the concept of *tawāturma'nawī* in arguing that the evidence provided by the numerous individual traditions about the authoritativeness of *ijmā'* is conclusive. [76] But al-Āmidī does not do so. Instead, he continues to recognize that the evidence from traditions about *qiyās* is only probable. In summary, al-Āmidī and al-Rāzī consider that neither *ijmā'* nor the Qur 'ān or the Sunna provide conclusive evidence about the validity of *qiyās*. Thus for both jurists the authoritativeness of *qiyās* is a matter that is only probably indicated, but not settled conclusively.

As we have seen, al-Ghazzālī insisted that the existence of *ijmā'* among the Companions about the validity of *qiyās* was conclusively established and that the authoritativeness of *qiyās* was indeed a matter that did not admit of any doubt. Unlike al-Āmidī and al-Rāzī , however, he maintained that neither the Qur'ān nor the Sunna provided the evidence needed to establish the authoritativeness of *qiyās*. The Qur'ānic verses adduced by jurists in support of *qiyās*, do not on their own, and in dissociation from other corroborative evidence, constitute explicit and unequivocal texts about *qiyās*.[77] As for the traditions adduced in suport of *qiyās*, they are solitary reports whose authenticity cannot be ascertained. Moreover, although al-Ghazzālī argues that the authoritativeness of the tradition of Mu'ādh is beyond doubt, he does not consider this tradition to be a specific and unequivocal text about *qiyās*.

On the other hand, al-Ghazzālī does not entirely discount the value of these traditions and Qur'ānic verses, but uses them as evidence to corroborate his argument from *ijmā'*. As we have seen, al-Ghazzālī argued that the Companions could not have practiced *qiyās* without a conclusive permission from revelation. Thus, when asked to account for the basis (*al-mustanad*) of the Companions ' practice of *qiyās* , he proposes the following theory: The Companions must have known of countless indications and statements from the Prophet in favor of *qiyās*, which in conjunction with other pieces of

circumstantial evidence *(qarā'in aḥwāl)* created in the Companions necessary knowledge *('ilm ḍarūri)* about the authoritativeness of *qiyās*. However, the early Muslims took the validity of *qiyās* for granted to such an extent that they neglected to transmit most of the evidence about it, especially where such evidence consisted of circumstantial indicants that are difficult to describe and transmit (*ya'suru waṣfahā wa naqlahā*). Whatever they have transmitted was handed down via solitary channels only. Consequently, the evidence from traditions does not provide the conclusive evidence needed to establish the authoritativeness of *qiyās*. Nonetheless, al-Ghazzālī suggests that the solitary traditions about *qiyās* are the remnants of the numerous and abundant indicants that at one point made the Companions feel certain about the authoritativeness of *qiyās*. For later scholars, however, the only evidence about *qiyās* is provided by the *ijmā'* of the Companions about its practice. This *ijmā'* in turn is conclusively established, having been transmitted by *tawātur*. [78]

If al-Rāzī and al-Āmidī considered the evidence in favor of *qiyās* to be only probable, then in what sense did they consider *qiyās* to be authoritative? In al-Āmidī's case, the answer is to be found in his treatment of the authoritativeness of the solitary report. After assessing the evidence from reason and tradition about this matter, he concludes that the question of the authoritativeness of solitary report remains inconclusive. Thus, he maintains, everybody is entitled to follow what he believes to be the truth regarding it.[79] Al-Āmidī would follow the judgments of *qiyās* but would not claim that those who reject *qiyās* are entirely in error. Al-Rāzī's position about this matter, although not explicitly stated, can be inferred from his treatment of *ijmā'*. He argues that since the evidence about the authoritativeness of *ijmā'* is not conclusive, departing from the dictates of *ijmā'* does not amount to unbelief *(jāḥidu al-ḥukmi al-mujma'i 'alayhi lā yukaffaru)*.[80] In this respect, al-Rāzī considers that the rejection of *qiyās* is tolerated in religion. The

position of al-Rāzī and al-Āmidī is to be contrasted with that of al-Ghazzālī, who maintains that the rejection of *qiyās* is no less intolerable than the rejection of any of the fundamental principles of religion, such as the affirmation of Prophecy and *tawḥīd*.[81] Al-Rāzī and al-Āmidī would not consider *qiyās* to be an *aṣl*, if what is meant by *aṣl* is a fundamental and conclusively established religious principle, the rejection of which constitutes disbelief.

Some questions remain to be asked regarding al-Āmidī's and al-Rāzī's position. By what authority are the jurists who find the evidence about the authoritativeness of *qiyās* to be probable, obliged, or even entitled, to follow the dictates of *qiyās*? Can a jurist guarantee that, by accepting the authoritativeness of *qiyās* on the basis of the probable textual evidence, he is not committing a grave error? Are Muslims entitled to derive the norms governing their conduct by means of a method whose validity cannot be conclusively confirmed? What if, contrary to the *ẓann* of the jurist, God considers *qiyās* to be an invalid method of inference?

I do not find in *al-Iḥkām* an explicit answer to the questions above. For example, al-Āmidī, as we have mentioned before, considered that the evidence about the authoritativeness of the solitary report to be probable only. Regarding this, he cites the objection of the opponents that such evidence is not sufficient to establish a source of law (*aṣl min uṣūl al-fiqh*), since a source of law can only be validated by conclusive means (*al-ṭuruq al-yaqīniyya*). Al-Āmidī 's response does not address the actual objection which this question raises and which pertains to the evidence needed to validate a source of law. Instead, he responds by conceding that the question of the authoritativeness of the solitary reports is not conclusively settled.[82]

On the other hand, there is abundant evidence in *al-Maḥṣūl* that leads one to an unexpected answer to the question regarding the authoritativeness of the probable

evidence in support of *qiyās*. Al-Rāzī considered that the obligation to follow probable judgments in law is independently indicated by reason. Elsewhere in *al-Maḥṣūl*, he explains that both reason and tradition establish the authoritativeness of probable judgments *(al-rājiḥu fī al-ẓanni wājibun al-ᶜamalu bihi bi al-naṣṣi wa al-maᶜqūli)*. In support of this, he cites the tradition according to which the Prophet states: " I judge matters on the basis of appearances " *(anā aqḍī bi al-ẓāhiri)*.[83] Furthermore, he asserts that it is an axiom of reason that when confronted with the choice between two contradictory and thus mutually exclusive courses of action one follows the course in the favor of which the evidence is preponderant *(rājiḥ)*.[84] Al-Rāzī employs the principle of the authoritativeness of *ẓann* on several important occasions and in supporting the major tenets of his legal theory. As we have mentioned before, al-Rāzī considered the evidence in favor of the authoritativeness of *ijmāᶜ* to be only probable. Yet, he argued that this evidence was sufficient to establish the authoritativeness of *ijmāᶜ*, since it is obligatory to act so as to avert any supposed harm *(li anna dafᶜa al-ḍarari al-maẓnūni wājibun)*.[85] (Al-Rāzī adopts al-Baṣrī's description of legal judgments as indicants of other worldly harm). He also offers the same reason in support of the authoritativeness of an *ijmāᶜ* which is reported by solitary channels: since this kind of *ijmāᶜ* also produces probable knowledge about other worldly harm, it is obligatory to follow its dictates.[86] Al-Rāzī also adduces a rational argument in support of the authoritativeness of the individual report.[87]

However, what we have just mentioned seems to contradict with al-Rāzī's treatment of the authoritativeness of *qiyās*. As we have seen in the previous chapter, although al-Rāzī argued that *qiyās* produced probable judgments about other worldly harm *(al-qiyās yufīdu ẓanna al-ḍarari)*, he did not conclude from this that it is obligatory to follow *qiyās (wujūb al-ᶜamal bihi)*. He maintained instead that this only indicates the rational admissibility of the authoritativeness of *qiyās*.[88] Al-Rāzī takes a similar position in his

treatment of the " explicit cause ". There, he acknowledges that the statement " *ḥurrimat al-khamru li iskārihā* " produces the strong inference that wine also is prohibited. However, he maintains that this is not sufficient to establish the prohibition of wine and that what is needed in addition is evidence that it is obligatory to follow the dictates of probable indicants about other worldly harm *(al-dalīl al-dāll ʿalà wujūbi al-iḥtirāzi min al-ḍarari al-maẓnūni).*[89] Thus, in his discussion of *qiyās,* al-Rāzī does not consider the authoritativeness of probable judgments in law be self-evident or rationally indicated. For this seeming inconsistency between al-Rāzī's treatment of the authoritativeness of *ẓann* in the case of *qiyās* and in the rest of his legal theory, I am unable to find an explanation, on the basis of my knowledge of *al-Maḥṣūl.* Further study of this work could help in this respect.

By accepting that the evidence about the authoritativeness of *qiyās* is only probable, al-Āmidī and al-Rāzī make a significant departure from what seems to have been the position of the majority of the jurists who preceded them. As we have seen, al-Ghazzālī insisted that the authoritativeness of *qiyās* was conclusively established and that *qiyās* constituted a fundamental principle of religion. The same position regarding the conclusiveness of the evidence about the validity of *qiyās* is upheld by other major jurists, such as al-Qāḍī ʿAbd al-Jabbār,[90] Abū Ḥusayn al-Baṣrī,[91] Abū Isḥāq al-Shīrāzī (d. 467),[92] and al-Ghazzālī's own teacher Imām al-Ḥaramayn al-Juwaynī (d. 478).[93] Al-Āmidī's and al-Rāzī's willingness to depart from the claims which were generally upheld by the jurists preceding them, if the results of their own investigation so dictates, is not unique to the case of *qiyās*. As we have already mentioned, al-Āmidī argued that the evidence about the authoritativeness of the solitarty reports was only probable and not conclusive, as the earlier jurists had claimed. On the other hand, al-Rāzī maintained that the evidence about the validity of the solitary reports was conclusive, but the evidence

about the validity of *ijmāᶜ* was only probable. This " flexibility " on the part of these two jurists may in part be due to the fact that al-Āmidī and al-Rāzī, unlike the jurists who preceded them, did not seem to consider it crucial for the evidence about the validity of a source of law to be conclusive. Instead, they held that strong probable evidence sufficed even for establishing a source of law. However, it may also be that the jurists did not conceive of their task as merely one of providing *ex post facto* justification for generally accepted principles, but also of assessing prior claims in the light of the evidence available to them. This revisory aspect of al-Āmidī's and al-Rāzī's approch to issues of jursiprudence merits further investigation.

ENDNOTES

[1] Fakhr al-Din al-Rāzī , *al-Maḥṣūl fī ʿilm uṣūl al-fiqh*, ed. Ṭāha Jābir Fayyāḍ al-ʿUlwānī (Riyādh: Maṭbaʿat jāmiʿat al-Imam Muḥammad bin Saʿūd al-islāmiyya, 1979-1981), Vol. II, part.ii, pp. 126-8. Al-Rāzī states this very clearly: "*Inna adillata aṣli al-ijmāʿi laysat mufīdatan li al-ʿilmi, fa mā tafarraʿa ʿalayhā awlà an la yufīda al-ʿilma, bal ghāyatuhu al-ẓannu wa munkiru al-maẓnūni lā yukaffaru* ," ibid., p. 298, see also p. 214.

[2] See Wael Hallaq, " On the Authoritativeness of Sunni Consensus , " *International Journal of Middle East Studies*, 18 (1986), p. 431.

[3] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 122.

[4] See Ibid., p. 122; see similar excerpts of this letter in al-Āmidī, *al-Iḥkām fī uṣūl al-ahkām* (Cairo: Maṭbaʿat al-maʿārif, 1914), Vol. IV, p. 57; al-Ghazzālī, *al-Mustaṣfà min ʿilm al-uṣūl* (2nd ed.; Baghdad: Maṭbaʿat maktabat al-Muthannà, 1970), Vol. II, p. 244, for a discussion of the content and the authenticity of this letter, see D.S. Margoliouth, " Omar's letter to the Kadi, " *Journal of the Royal Asiatic Society*, (1910), pp. 307-26.

[5] " *Qāla ʿUmar lammā samiʿa al-ḥadītha fī al-janīni: ' lawlā hādhā la qaḍainā fīhi bi raʾyinā ' "* al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 234.

[6] " *Qāla ʿAlī raḍiya Allāhu ʿanhu: ` Ijtamaʿa raʾyī wa raʾyu ʿUmara fī ummi al-waladi an lā tubāʿa wa raʾytu al-āna bayʿahunna, '"* ibid., p. 244.

[7] " *Fa min dhālika qawlu Abī Bakrin lammā suʾila ʿan al-kalālati: ` Aqūlu fīhā bi raʾyī fa in yakun ṣawāban fa min Allāh wa raṣūlihi wa ʾin yakun khaṭa ʾan fa minnī wa min al-shaiṭāni wa Allāhu wa raṣūluhu minhu barīʾāni : al-kalālatu ma ʿādā al-wālida wa al-walada,'"* ibid., p. 234. The Traditions mentioned above are also cited by al-Rāzī and al-Āmidī, see *al-Maḥṣūl*, Vol. II, ii, pp. 84-5, *al-Iḥkām*, Vol. IV, pp. 53-5.

[8] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 85.

[9] " *Inna al-naṣṣa huwa al-lafẓu al-dāllu ʿalà al-ḥukmi dalālatan ẓāhiratan jaliyyatan,* "ibid., p. 103.

[10] Ibid., p. 103.

[11] Ibid., p. 134.

[12] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 65.

[13] Al-Ghazzālī's presents his evidence about *qiyās* in the context of a more general argument which is directed not only to the anti-*qiyāsists*, but also to all those who denied a role for *raʾy* and *ijtihād* in law. The title of the section in which such arguments are adduced

states; *"fī al-raddi ᶜalà man ḥasama sabīla al-ijtihādi bi al-ẓanni wa lam yujawwiz al-ḥukma fī al-sharᶜi illā bi dalīlin qāṭiᶜin ka al-naṣṣi wa mā yajrī majrāhu fa ammā al-ḥukma bi al-raᵓyi wa al-qiyāsi fa manaᶜūhu wa zaᶜamū annahu lā dalīla ᶜalayhi, " al-Mustaṣfà,* Vol. II, p. 241. Thus, al-Ghazzālī considers the traditions, which are not directly and specifically pertinent to *qiyās,* as evidence that the Companions practiced *ijtihād* and tolerated opinion in law when conclusive texts were not available, and thus excercised *ijtihād,* see ibid., p. 245.

[14] Ibid., p. 251.

[15] *" Bāna ᶜalà al-qaṭᶜi anna ijtihāda al-ṣaḥābati lam yakun maqṣūran ᶜalà mā dhakarūhu bal jāwazū dhālika ilà al-qiyāsi wa al-tashbīhi wa ḥakamū bi aḥkāmin lā yumkinu taṣḥīḥu dhālika illā bi al-qiyāsi wa taᶜlīli al-naṣṣi wa tanqīḥi manāṭi al-ḥukmi, "* ibid., p. 251.

[16] Al-Āmidī, *al-Iḥkām,* Vol. IV, p. 55; see also al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 244.

[17] *" Innahu idhā shariba sakira, wa idhā sakira hadhà wa idhā hadhà iftarà fa ḥuddūhu ḥadda al-muftarīna, "* al-Āmidī, *al-Iḥkām,* Vol. IV, p. 55; al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 244.

[18] *" Inna raṣūla Allāhi ṣallà Allāhu ᶜalayhi wa sallama qāla: 'Laᶜana Allāhu al-yahūda, ḥurrimat ᶜalayhim al-shuḥūma, fa jamalūhā wa bāᶜūhā wa akalū athmānahā. 'Qāsa [ᶜUmar] al-Khamra ᶜalà al-shaḥmi, wa inna taḥrīmahā taḥrīmun li thamanihā, "* al-Āmidī, *al-Iḥkām,* Vol. IV, p. 54.

[19] Al-Ghazzālī, however, seems to be aware of the objections which are raised against the validity of ᶜAlī's reasoning in the tradition about the penalty of wine drinking, and on the basis of which some anti-*qiyāsists* were lead to question the authenticity of this tradition: how could ᶜAlī extend the penalty of slander to the wine drinker, when it cannot be said that every wine drinker necessarily commits slander. See Karmen Talbot, " Arguments Against Sunnī Legal Methodology: Ibn Ḥazm and his Ibṭāl al-Qiyās, " M.A. Thesis (McGill University, 1987), p. 21-2. ᶜAlī's reasoning, al-Ghazzālī argues, is not alien to the law. There are numerous instances where the probability of the occurrence of an event induces the same judgment as the actual event *(inna al-sharᶜa qad yunzilu miẓannata al-shayᵓi manzilatahu).* The law for example imposes ablution after sleeps, only because it is possible, although by no means necessary that sleep would induce ritual impurity, see *al-Mustaṣfà,* Vol. II, p. 244.

[20] Ibid., p. 248.

[21] Al-Rāzī, *al-Maḥṣūl,* Vol. II, i, p. 120.

[22] Ibid., p. 121.

[23] See al-Ghazzālī, *al-Mustaṣfà,* Vol. II, p. 234; al-Āmidī, *al-Iḥkām,* Vol. IV, p. 53; al-Rāzī, *al-Maḥṣūl,* Vol. II, ii, p. 120.

[24] In reference to verse IX: 103: " Take alms of their wealth, wherewith thou mayst purify them and mayst make them grow, and pray for them. Lo! thy prayer is an assuagement for them .. " .

[25] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 242; also cited briefly in al-Āmidī, *al-Iḥkām*, Vol. IV, p. 53.

[26] Ẓihār: Pre-Islamic form of divorce consisting in the words of repudiation: You are to me like my mother's back.

[27] Al-Āmidī, *al-Iḥkām*, p. 78.

[28] The opponents cite verse 65: 1: " O Prophet! Why bannest thou that which Allāh has made lawful for the *(limā tuḥarrimu mā aḥalla Allāhu laka)*. They claim that this verse provides the ruling for the utterance of *taḥrīm*. In response, al-Ghazzālī argues that the verse is explicitly applicable to the statement of *taḥrīm* when it is addressed to one's slave-girl *(mamlūka)*. This verse reprimands the Prophet for having declared his slave-girl Māria unlawful unto him. If the Companions used this verse at all they would have applied *qiyās* nonetheless, by extending the ruling of *taḥrīm* from a slave-girl to that of the wife, see *al-Mustaṣfà*, Vol. II, p. 252; cf. al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 97-8, 129-30.

[29] Al-Ghazzālī, *al-Mustasfà*, Vol. II, p. 251.

[30] Ibid., p. 252; see also al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 81; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 31.

[31] Al-Rāzī, *al-Maḥṣūl*, Vol. II, p. 63; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 75.

[32] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 245; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 137.

[33] See al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 56-7; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 82-3.

[34] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 94; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 58.

[35] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 63; al-Rāzī, *al-Maḥṣūl*, Vol. II, p. 126.

[36] See al-Āmidī, *al-Iḥkām*, Vol. IV, p. 64; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 128-9.

[37] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 131.

[38] Ibid., p. 128, for a similar argument see al-Āmidī, *al-Iḥkām*, Vol. IV, p. 64.

[39] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 247; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 59; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 105.

[40] Al-Āmidī, *al-Iḥkām*, Vol. II, p. 60; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 247; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 107 (al-Rāzī attributes this tradition to Ibn ᶜAbbās).

[41] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 59.

[42] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 248.

[43] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 65; al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 248.

[44] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, pp. 248-9; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 65-6.

[45] *ᶜAwl*: pertains to the situation where the fixed proportions of the Qurᵓānic heirs *(dhawū al-farāᵓiḍ)* add up to more than unity. see tradition in al-Rāzī, *al-Maḥṣūl*, Vol. II, i, p. 217; al-Āmidī, *al-Iḥkām*, Vol. III, p. 62; al-Ghazzālī, *al-Maḥṣūl*, Vol. I, p. 192

[46] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 252.

[47] *"Mā ẓahara lahum kawnu al-qiyāsi ḥaqqan wa lā bāṭilan: fa kāna farḍuhum al-sukūta,"* al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 115.

[48] A similar argument is attributed to al-Naẓẓām who is said to have claimed that only a minority of the Companions exercised reasoning in law. Within this minority were those who had the greatest influence and authority in the community, such as the first four Caliphs. Others were therefore in no position to state their objection to *qiyās*, and instead practiced caution *(taqiyya)*, see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 111-2.

[49] Al-Āmidī, *al-Iḥkām*, Vol. I, p. 361.

[50] Al-Ghazzālī, *al-Mustaṣfà*, Vol. I, p. 191; al-Rāzī, *al-Maḥṣūl*, Vol. I, i, p. 220;

[51] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 57.

[52] Al-Rāzī, *al-Maḥṣūl*, Vol. II, i, p. 220.

[53] Al-Ghazzālī, *al-Mustaṣfà*, Vol. I, p. 191.

[54] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 69.

[55] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 134.

[56] Ibid., p. 86.

[57] See for example Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, ed. ᶜAbd al-ᶜAẓīm Dīb (2nd ed., Cairo: Dār al-anṣār, 1400/1980), Vol. II, p. 772.

[58] Al-Ghazzālī, *al-Mustaṣfà*, Vol. II, p. 249.

[59] Ibid., p. 249.

[60] Ibid., p. 253.

[61] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 36; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 38.

[62] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 38; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 37.

[63] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 39; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 39-43.

[64] Al-Āmidī, *al-Iḥkām*, Vol. IV, pp. 40-1; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 46.

[65] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 41.

[66] *"Inna al-masʾalata ẓanniyyatun ghayru qaṭʿiyyatin,"* al-Āmidī, *al-Iḥkām*, Vol. IV, p. 42; see al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 51.

[67] The Prophet of God said to Muʿādh when he sent him as a judge to Yemen: " How will you judge cases? " Muʿādh responded: " According to the Book of God. " The Prophet of God then asked: " And if you do not find? " Muʿādh responded: " I look in the Sunna." The Prophet then said : " And if you do not find? " Muʿādh responded: " I rely on my own judgment *(ajtahid raʾyī)*. " The Prophet approved this and said: " Thanks be to God who has helped the messenger of the messenger of God to what pleases God and his Prophet, " al-Āmidī, *al-Iḥkām*, Vol. IV, p. 42, see variants of this tradition in al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 52-5.

[68] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 43.

[69] Ibid., p. 54; see also, al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 57-8.

[70] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 64; al-Rāzī, *al-Maḥṣūl* , Vol. II, ii, p. 58.

[71] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 64; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 49, al-Ghazzālī, who does not accept that the meaning of this tradition indicates specifically a sanction for *qiyās*, asserts that the authenticity of this tradition is beyond doubt, *al-Mustaṣfā*, Vol. II, p. 254.

[72] *"Lā nuthbitu bihi al-qaṭʿa bi kawni al-qiyāsi ḥujjatan bal ẓanna kawnihi ḥujjatan,"* al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 65; also al-Āmidī, *al-Iḥkām*, Vol. IV, p. 51.

[73] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 65, 67; al-Āmidī, *al-Iḥkām*, Vol. IV, p. 50.

[74] Al-Āmidī, *al-Iḥkām*, Vol. IV, p. 43; al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, p. 72.

[75] Al-Rāzī, *al-Maḥṣūl*, Vol. II, ii, pp. 69-70.

[76] See Hallaq, " On the Authoritativeness, " pp. 438 ff.

[77] *"Laysat bi mujarradihā nuṣūṣan ṣarīḥatan in lam tanḍamma ilayhā qarāʾinun,"* al-Ghazzālī, *al-Mustaṣfā*, Vol. II, p. 254; the other verses to which al-Ghazzālī is referring are are IV: 83: " ...if they had referred it to the messenger and such of them as are in authority, those among them who are able to think out the matter would have known it, " and verse VI: 83 " We have neglected nothing in the Book. "

[78]. Al-Ghazzālī, *al-Mustaṣfā*, II, pp. 253-6.

[79] *"Fa man iᶜtaqada kawna al-masᵓalati qaṭᶜiyyatan, fa qad taᶜdhdhara ᶜalayhi al-nafyu wa al-ithbātu, li ᶜadami musāᶜadati al-dalīli al-qāṭiᶜi ᶜalà dhālika, wa man iᶜtaqada kawnahā ẓanniyyatan, fal-yatamassak bi mā shāᵓa min al-masāliki al-mutaqaddimati, wa Allāhu aᶜlamu bi al-ṣawābi,"* al-Āmidī, *al-Iḥkām*, Vol. II, p. 100.

[80] Al-Rāzī, *al-Maḥṣūl*, Vol. II, i, p. 298.

[81] *"Inna siḥḥata al-qiyāsi laysa maẓnūnan* [sic] *bal huwa maqṭūᶜun bihi wa law taṭarraqa ilayhi iḥtimālun lā taṭaraqa ilà jamīᶜi al-qaṭᶜiyyāti min al-tawḥīdi wa al-nubuwwati,* "ibid., p. 279.

[82] See al-Āmidī, *al-Iḥkām*, Vol. II, p. 77.

[83] Al-Rāzī, *al-Maḥṣūl*, Vol. I, ii, p. 132; see the editors comments regarding the authenticity of this tradition. Al-Rāzī cites this tradition once only, and does not seem to place emphasis on it in establishing the authoritativeness of *ẓann*. Otherwise, he could have made use of this tradition in his dicussion of *qiyās* where it is most needed. It seems that al-Rāzī was aware that this tradition is a solitary report which can only yields probable knowledge. Thus, to adduce this tradition as evidence about the validity of *ẓann* would entail a circularity.

[84] *"Inna aḥada al-naqīḍayni idhā kāna rājiḥan ᶜalà al-ākhari fī al-ẓanni fa lam yuᶜmal bi al-rājiḥi, la wajaba al-ᶜamalu bi al-marjūḥi, fa yakūnu dhālika tarjīḥan li al-marjūḥi ᶜalà al-rājiḥi, wa innahu ghayru jāᵓizin fī badīhati al-ᶜaqli,"* ibid., Vol. I, II, p. 136, cf., ibid., Vol. II, ii, p. 140.

[85] Ibid., p. 126.

[86] *"Inna ẓanna wujūbi al-ᶜamali bihi ḥāṣilun: fa wajaba al-ᶜamalu bihi dafᶜan li al-ḍarari al-maẓnūni,"* al-Rāzī, *al-Maḥṣūl*, Vol. II, i, p. 214.

[87] *"Inna al-ᶜamala bi al-khabari al-wāḥidi yaqtaḍī dafᶜa ḍararin maẓnūnin fa kāna al-ᶜamalu bihi wājiban,* "ibid., . 557.

[88] Ibid., p. 137.

[89] Ibid., p. 167.

[90] See ᶜAbd al-Jabbār, *al-Mughnī*, Vol. XVII, p. 296.

[91] Al-Baṣrī, *al-Muᶜtamad*, Vol. II, p. 737.

[92] Abū Isḥāq al-Shīrāzī, *al-Tabṣira fi uṣūl al-fiqh*, ed. Muḥammad Ḥasan Hītū (Damascus: Dār al-fikr, 1983).

[93] Al-Juwaynī, *al-Burhān*, p. 773.

SUMMARY AND CONCLUSION

Islamic law employed *qiyās* as well as other forms of reasoning since its early beginning. In the ancient schools of law, the authoritativeness of the accepted opinion of recognized scholars was subsumed under the authoritativeness of the consensus of scholars which was the sanctioning force and the actual determinative of the Sunna. By al-Shāfiʿī's time, the order of the living tradition was challenged by the traditionist opposition. Al-Shāfiʿī upheld the traditionist thesis by identifying the Sunna exclusively with formal traditions from the Prophet and by insisting upon the primacy of these traditions, next to the Qurʾān. Moreover, as the fundamental premise of his theory, al-Shāfiʿī adopted the principle of the exclusive authoritativeness and comprehensiveness of the texts of revelation, which he applied consistently in justifying his jurisprudential scheme. After al-Shāfiʿī, textual evidence becomes by and large a prerequisite of validity in Muslim legal discourse.

Al-Shāfiʿī accepted *qiyās* as a secondary supplement to the textual sources, although he acknowledged that *qiyāsī* judgments, since they exceeded the explicit bounds of their textual basis, could not be ascertained. However, al-Shāfiʿī argued that the validity of *qiyās* was conclusively indicated by revelation. To this end, he relied mainly upon the textual paradigm of the *qibla* drawing a parallel between the case of *ijtihād* when the *qibla* is out of sight and the application of*qiyās* in the absence of explicit texts. Its textual semblance notwithstanding, al-Shāfiʿī's argument in support of *qiyās* accomodated an independent rational thread: al-Shāfiʿī argued that the validity of exercising *qiyās* in the absence of texts followed necessarily from the conclusively established obligation of seeking the truth about every eventuality in revelation, in the same way that the validity of exercizing *ijtihād* when the *qibla* was out of sight followed necessarily from the obligation of seeking the direction of the *qibla* in prayers at all times.

Nonetheless, al-Shāfiʿī avoided rationalizing *qiyās* independently of the textual documentation. In so far as it is considered to be textual, the argument of the *qibla* cannot be considered conclusive even when it is assessed in light of the same epistemological criteria which were adopted by al-Shāfiʿī himself. As noted by later jurists, al-Shāfiʿī employed *qiyās* in the justification of *qiyās*. Hence, besides its being probable, as all *qiyāsi* arguments were, this argument was invalid since it fell into logicalcircularity.

Al-Shāfiʿī conceived of *qiyās* as the extension of a textual ruling to other cases which were deemed to fall within its general idea of principle (*maʿnà*). Although he gave several examples in *al-Risāla* to illustrate the application of *qiyās*, al-Shāfiʿī did not prescribe specific and detailed rules for the identification of the general *maʿnà* of the textual ruling. On the basis of the cited examples, it can be inferred that what al-Shāfiʿī accepted as *maʿnà* carinot always be characterized as the *ratio legis*, or as what later jurists called the pertinent cause (*al-ʿilla al-munāsiba*) which represented the actual *ḥikma* or *maṣlaḥa* of a ruling. Moreover, contrary to what later medieval jurists and some modern scholars have claimed, al-Shāfiʿī did not distinguish between the two main kinds of *qiyās* which were recognized in classical Muslim legal theory, namely, *qiyās al-ʿilla* and *qiyās al-shabah.* Many arguments in which al-Shāfiʿī had referred to the *maʿnà* of the ruling were classified and justified in the later treatises which we have studied, particularly in al-Ghazzālīs *Mustaṣfà* and *Shifāʾ al-Ghalīl* , under the aegis of *qiyās al-shabah.*

Throughout his discussion, al-Shāfiʿī presupposed that the judgments of *qiyās* were, generally speaking, reasonably justified by the appparent indicants and therefore, constituted *ḥaqq fī al-ẓāhir.* It seems that at al-Shāfiʿī's time the principled and systematic objection to *raʾy* and *qiyās* was not yet significant to the extent that it would have necessitated an explicit and elaborate rationalization of *qiyās*. Morever, addressing his legal theory mainly to the ancients schools of law, al-Shāfiʿī did not need to rationalize

qiyās but was in fact mainly preoccupied, in so far as legal reasoning was concerned, with establishing the invalidity and arbitrariness of *istiḥsān* , which was still widely accepted by the lawyers of his time. Finally, although the fundamental premises of al-Shāfiʿī's theory was theological, his discussion of *qiyās* and for that matter, of all issues of jurisprudence was characterestically devoid of *kalām,* in a marked contrast to al-Ghazzālī, al-Rāzī and al-Āmidī's discussions.

Long after qiyās was established as the accepted method of inference in classical Sunnī legal theory, mainstream jurists continually attempted to improve, revise and explicate the evailable evidence about it, taking into account both the objection of their opponents and the better defined epistemological criteria of their legal theory. Al-Ghazzālī, al-Rāzī and al-Āmidī insisted that reason could not establish the authoritativeness of *qiyās.* Thus, they criticised the justification of *qiyās* on the grounds of institutional necessity, and the assertion that the authoritativeness of *ẓann* was rationally indicated. Like al-Shāfiʿī, they asserted that the authoritativeness of *qiyās* was based upon the texts of revelation, although they did not adopt the same evidence which al-Shāfiʿī adduced in justifying *qiyās* : the authoritativeness of *ijithād* about the direction of the *qibla* did not imply the authoritativeness of the specific and distinct kind of *ẓann* produced by *qiyās.* Instead, in their justification of *qiyās*, they relied mainly upon the evidence of an *ijmāʿ* whose existence they attempted to prove, first, by adducing numerous traditions which attested that some of the Companions practiced *qiyās* and were not confined in their *ijtihād* to linguistic and interpretive procedures, and second, by denying the existence of any explicit objections among the Companions to such practices. Yet, the jurists encountered the major problem in substantiating the claim of an *ijmāʿ* on the basis of a relatively small number of traditions, especially since they themselves acknowledged that an *ijmāʿ* could only be verified by means of a complete census of explicitly stated opinions. Thus, al-Ghazzālī could affirm that the available evidence produced certainty about the existence of an *ijmāʿ* and hence about the validity of *qiyās* only by departing from other tenets of his

theory of *ijmāᶜ*. On the other hand, al-Rāzī and al-Āmidī acknowledged that the available reports about the Companions provided only a probable evidence about their *ijmāᶜ*, and that as a result the question of the authoritativeness of *qiyās* could not be conclusively settled. Thus, unlike al-Ghazzālī, they asserted that the question of the validity of *qiyās* was one regarding which disagreement was admitted and that the rejection of *qiyās* was a matter which was to be tolerated in religion. However, they also held that the available evidence about the validity of *qiyās* was sufficient to render *qiyās* authoritative or to justify its application for those who consider this evidence to be probable. This thesis has not been able to reconcile the value that the jurists assigned to probable evidence in establishing the authoritativeness of a source of law, with their evaluation of *ẓann* elsewhere in their discussion of *qiyās*. Further study of al-Āmidī and al-Rāzī's respective epistemological schemes and of the reaction of later jurists, particularly the commentators upon *al-Maḥṣul* and *al-Iḥkām*, to the seemingly unprecedented position of these two jurists about the question of *qiyās*, could lead to interesting and useful results.

In addition to estasblishing the textual basis of *qiyās*, the jurists also rationalized *qiyās* at two levels, the theological and epistemological level. Primarily, they took painstaking efforts to explain the function and meaning of the legal cause in terms which were compatible with the tenets of Ashᶜarite theology, by denying emphatically any relationship of efficient causality between the *ᶜilla* and the ruling. Thus, al-Āmidī emphasized the strictly *a posteriori* character of legal causes, while al-Rāzī and to a certain extent al-Ghazzālī offered an occasionalist account of the observed ethical rationality of the law, utilizing for this the theological concept of custom (*ᶜāda*). Methodologically, on the other hand, the jurists clearly priviliged the *ᶜilla* when it constitued the explanatory reason which demonstrated a relationship of pertinence to the benefit or the apparent wisdom of the ruling. However, the three jurists did not require the criterion of *munāsaba* for validating every legal cause, since they were also bound to rationalize the body of legal doctrine accepted by the earlier jurists and in which the *ᶜilla* could not be characterized as

the *ratio*. The jurists subsumed and rationalized such doctrines mainly under the aegis of *qiyās al-shabah*.

Al-Ghazzālī, al-Rāzī, and al-Āmidī discussed the question of the authoritativeness of *qiyās* in a logical scheme of systematization which was centered around the hypothetical question of the rational admissibility of *qiyās*. In this respect, they maintained that *qiyās* was a contingent legal institution whose authoritativeness was neither dictated nor precluded by reason. Moreover, they treated all the non-textual arguments of their opponents as objections to the claim of the rational admissibility of *qiyās*. As we have suggested, such a framework tended to distort the actual positions of the anti-*qiyāsist* s. Nevertheless, through their response to such objections the *qiyāsists* affirmed the rational character of the obligation to follow the dictates of *qiyās*, while repeatedly emphasizing that the authoritative basis of *qiyās* was the text of revelation.

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