



ISLAMIC DEVELOPMENT BANK  
ISLAMIC RESEARCH AND TRAINING INSTITUTE

# AL-QIYAS (ANALOGY) AND ITS MODERN APPLICATIONS

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*In the Name of God Most Compassionate, Most Merciful*

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## PREFACE

It is one of the principal objectives of the Islamic Development Bank (IDB) to promote research in Islamic economics and to explore both the theoretical and practical dimensions of the question as to how this discipline can relate to, and utilise the resources of the *Shari'a* sciences, especially those of the *fiqh*, *usul al-fiqh* and the goals, or *maqasid*, of the *Shari'a*. This is in fact the subject of the original charter which laid down the basic concept and framework of the IDB. The Bank is thus enjoined, in Article (2) of that charter, to assist and facilitate the advancement of studies and research in economics, fiscal and banking activities in accordance with the principles of the *Shari'a* of Islam.

It was in pursuance of this purpose that the Islamic Research and Training Institute (IRTI) was established and the Institute has, ever since its inception, been active in the enhancement of Islamic literature and research in general, and in carrying out theoretical and applied economic research in particular areas that help to introduce and solidify information on Islamic economics.

The holy Ramadan lecture series programme is yet another step in the direction of fulfilling the noble mission that IRTI has undertaken. The Ramadan lectures of the year 1415H was blessed with a series of important discussions that included a lecture by His Eminence Shaykh Muhammad Mukhtar al-Salami, the Grand Mufti of the Tunisian Republic, bearing the title "*Qiyas* and its Modern Applications". The eminent presenter is an accomplished jurist of reputation and credentials in Islamic law and jurisprudence. In the present essay, the author has addressed one of the well-known proofs of *Shari'a* and a familiar theme

of *usul al-fiqh*, namely analogical reasoning or *Qiyas*, which is an accepted basis of legislation and judgment in all the Sunni schools. We read to this effect in a statement of Ibn al-Qayyim who has in turn quoted Imam al-Muzani to say that “Muslim jurists, ever since the days of the Prophet (s.a.w) down to our own times have resorted to analogical reasoning in all areas of religion and have reached consensus to the effect that what resembles the truth is truth and what resembles falsehood is falsehood. No one may therefore deny the validity of *Qiyas*, for it is based on nothing other than credible similitude and resemblance”.<sup>1</sup>

The eminent writer of the present work has presented the juridical theory of *Qiyas* in which he has also included some instances of the application of *Qiyas* to contemporary issues. The product of his work shall remain like a benevolent tree with strong roots and bountiful fruit.

May Allah (s.w.t) shower His blessings on the author and make this benevolent act a firm foundation for the burgeoning of Islamic economics so as to bring benefit to the Muslim community the world over.

God knows the true intentions of His servants and He is our guide to the straight path.

***Dr. Omar Zuhair Hafiz***  
***Deputy Director, IRTI***

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<sup>1</sup> Ibn Qayyim, *I'lam al-Muwaqqi'in* (Dar al-jil edn), Vol. 1, p. 205.

## **INTRODUCTION**

### **COMPATIBILITY OF REASON AND REVELATION**

Man's eagerness to acquire knowledge is a divine endowment in him, which is testified by a reference in the Torah to the story of Adam and Eve and how they ate from the tree of knowledge. The Qur'an has on the other hand tied up knowledge to the best use man can make of the faculties God has endowed in him. Starting from Adam, the father of mankind, God taught Adam what he learnt; and then made him the audience of the revelation and he accepted the revelation and proclaimed it.

Human knowledge was then split into two branches, both reflecting man's interest in the quest for knowledge. The first branch of this knowledge is characterised by research in pure human knowledge, as in mathematics and its related fields, where man attempts to understand the laws of the universe, discover its secrets, and utilise them for his own welfare. This also includes the domains of art, its principles and laws, together with man's efforts at the sublimation and refinement of taste. These are the proper fields for man's independent activity, and the responsibility that goes hand in hand with his vicegerency on earth. Research in these areas also manifest the fruits of man's efforts; for he can determine the limits of these fields, and may from time to time return to them for correction, amendment, or invalidation.

So the spheres of human knowledge that are associated with discovery include all of his mental, material and aesthetic activities. Since man as an individual and as a species is in a state of change and



evolution, then all that springs from him is necessarily influenced by his nature and the stages of his development. Passivity in this sense stands in opposition to his natural inclination for progress that God has decreed for the human race. In this case, there are no established facts enshrined in sacredness in a way that would prevent man from examining them, and criticising them, with a view to their correction and amendment.

Islam has thus declared its basic premise about man's release from the fetters that hindered his progress; for Islam as a religion has acknowledged man's competence in the fields under his control and within the circle of his activities. Here we have the mind interacting with the senses and feelings, singly or coordinated in the different fields of human endeavor. Thus, by close contact with nature through observation and experience, both affective and effective, human knowledge can be advanced and verified.

The second branch includes fields of research where human reason and revelation are engaged in a way that makes them an integral whole, with the view of attaining man's happiness in this life, in his personal and social relations as well as in his life Hereafter. In this respect, rationality cannot operate independently of revelation, nor can revelation ignore reason. As for revelation which is contained in the Qur'an and the *Sunna*, it cannot be understood and no ruling can be extracted from it without examining the text, and applying methodological rules to ascertain its meaning through recourse to insightful *ijtihad*. This will lead to the correct formulation of legal decisions within the general framework of the five values of obligatory, recommendable, permissible, reprehensible, and forbidden. Methodological guidelines also ensure accuracy in particularisation of the general, qualification of the absolute, and the correct application of abrogation. Then, after arriving from the most reliable conjecture to a firm legal ruling, comes the application of these rulings to specific situations.

The succession of events and the occurrence of new legal cases do not mean repetition of the same situation that were encountered at the time when the text was revealed. For every new case has its own

specifications in place and time as well as in environmental circumstances that make it unique. So the *mujtahid* examines each case to see how far a legal rule might apply to a new situation and ascertain the method of its implementation. This has been expressed by Imam Ash-Shatibi under verification of the effective cause (*tahqiq al-manat*) as he wrote: "It is enough to point out that the *Shari'a* did not insist on regulating every detail of specific cases. It has instead come up with the general rules and unrestricted statements that can cover innumerable cases. Yet every case manifests certain peculiarities that are not shared by other cases in the same category; and what is commanded in general does not include every case nor does it preclude all cases, but each case has its own specific features. There is also a third and an intermediate category of cases that share both these ends. What this all means is that there is, in almost all these three categories of cases, room for the jurist to investigate further. But he has to examine under which evidence it comes; if it partakes of similarities at both ends, then it is really a difficult task."<sup>2</sup>

The same methodology applies when the jurist tries to seek guidance over the ruling of an issue, when he does not find a text in the Qur'an or *Sunna* to regulate a particular case, be it in the domain of worship, commercial transactions, or social relations. Here Islam, as the word indicates, means man's surrender to God and submission to His commands, which submission brings the believer out of the sphere of caprice to the realm of commitment to the rule that pleases his Lord and Creator. This is the purport of the following *ayah* of the Qur'an: "If they argue with you, then say: I have surrendered myself to God and whosoever that follows me; and say to those to whom the Book was brought and to the common folk. Have you (too) surrendered? If they have surrendered, then they are (rightly) guided."<sup>3</sup>

## UNIVERSALITY AND PERVASIVENESS OF *SHARI'A*

Islam is a universal religion for all humanity with all its different races, colors, nations, tribes, communities and individuals, at the time of

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<sup>2</sup> Al-Muwafaqat, Vol. 4, p. 92.

<sup>3</sup> Surat Al-'Imran, Ayah 20.

the Prophet's Message and ever since for all living generations on earth. God Most High directed the Prophet as follows: "Say, O mankind! Surely I am the Messenger of God to all of you".<sup>4</sup>

This call to humanity in the words : "O mankind!" occurs in the Qur'an 18 times. On another occasion the Qur'an expounds the universality of the Prophetic mission as follows: "And We have not sent you but a mercy to the worlds".<sup>5</sup>

The universality of *Shari'a* that Islam has proclaimed implies the pervasiveness of Divine grace and care for the whole of mankind, and it relates to every act performed by every competent individual just as it relates to all human values, norms, and laws. So for every act performed by an individual ever since attaining legal capacity until the moment of death, the *Shari'a* has prescribed a *hukm* that bears legal consequences. Thus religion means commitment: commitment to acquiring knowledge of the Divine law on all aspects of the individual and social life, for the basic norm here is that a legally competent individual should not embark on a course of action until he has known God's ruling about it. The other commitment is more practical, in the sense that the individual is committed to lead his life according to his beliefs, so that he would not be torn between his beliefs and convictions and his outward behavior. For such inconsistency leads to disrupting the attitudes of both the individual and society, and would lead in turn to tension that uproots man's composure and serenity, and ultimately his happiness.

#### **QIYAS AS A PILLAR OF THE UNIVERSALITY AND PERVASIVENESS OF SHARI'A**

The universality of *Shari'a* as regards time, place, and human nature is an incentive to the individual's choice, in what he does and what he chooses not to do. This is not compromised by the assertion that the *Shari'a* derives its authority from the injunctions of the Qur'an and *Sunna* revealed to the Messenger of God, Muhammad (s.a.w). These Divine messages came to an end with the death of the Messenger of God,

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<sup>4</sup> Surat Al-A'raf, ayah 158.

<sup>5</sup> Surat Al-Anbiya, ayah 107.

yet life is evolving and does not come to a standstill; it is indeed ever changing.

It is through its universality and all-inclusiveness that the *Shari'a* is capable of offering ideal solutions to man's problems in this life. For the Divine texts are otherwise finite, accepting neither addition nor elimination, and human life is incessant and ever changing. These three factors should be compatible with each other, and we need to look deeper into the revelation (*wahy*) in order to understand the universality and pervasiveness of the *Shari'a*.

With the demise of the Prophet Muhammad (s.a.w), the jurists among the Companions and their followers in the next generation were faced with new legal issues which they referred to the sources of the *Shari'a*. With an unquestioning commitment to the clear principles of the *Shari'a*, they did not even feel the need to explain the methodology they followed in their analogical formulations, except in some cases perhaps, where debate took place between some of the leading scholars of the time. A debate of this kind took place between the two great Imams, Malik Ibn Anas, and Al-Layth Ibn Sa'd, who debated the issue over following the practice of the people of Madinah as well as over some legal references in Malik's book, Al Muwatta. Apart from these debates, no important formulations were introduced until the time of Imam al-Shafi'i in the second half of the second century A.H. Thanks to his outstanding intelligence, eloquence, knowledge and piety, al-Shafi'i articulated many of the important principles that existed only in the minds of the previous legal scholars. He laid down the legal precepts, and codified the methodology of legal judgements for those who ventured to tread the ripe gardens of jurisprudence, now within easy reach of those interested in these studies. Al-Shafi'i wrote in Ar-Risala : "Whatever befalls a Muslim is regulated either by a binding rule, or by a positive inference. So if there is a specific ruling, then it has to be followed. But in case there is no such ruling available, the jurist has to deduce it by exercising his *ijtihad*, and *ijtihad* is *Qiyas*"<sup>6</sup> So here al-Shafi'i makes analogy as the last resort if the jurist does not find a clear injunction in the Qur'an or *hadith* dealing with the case he is trying to

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<sup>6</sup> Ar-Risala, p. 477.

determine. In fact al-Shafi'i clearly stated this at the end of Ar-Risalah, saying: "Analogy is not permissible wherever there is a text from the Qur'an or *Sunna*; as in the case of *tayammum* (dry ablution), for it is a permissible form of ablution when journeying for lack of water; but in case there is water, then *tayammum* is not permissible".<sup>7</sup>

As a branch of human knowledge, analogy is guided by divine revelation and sound reasoning in the formulation of its basic principles and methodology, and has consequently attained a prominent position, gaining respect for its adherents. Here Imam al-Ghazali says : "the noblest of human knowledge is one wherein both reason and revelation are merged together, where opinion and *Shari'a* go hand in hand. The science of jurisprudence, together with its main principles, is of this type, because it partakes of pure revelation, together with sound reasoning for its valid conclusions. Thus it is neither pure rational endeavor of the kind unacceptable to *Shari'a* nor is it based on pure conformity and imitation unattested by reason to support it."<sup>8</sup>

Thus it becomes clear that we have here another basic principle, which is that the *Shari'a* is the embodiment of the final religion that God has revealed to man but it is not final in the sense that God has neglected or abandoned the humanity, and has left it to the vagaries of its desires and prejudices, for God's mercy and grace is above all this. But the *Shari'a* is final in the sense that the human mind has become rightly-guided, worthy of the *Shari'a* as a trust, laid down by the Lord of humanity, that man should make it the basis of his judgements. This is a guarantee that human judgements could gain reliability and trust for as long as the believer is guided by the divine light of the Lord.

This strikes a note with the ideas expressed by the philosopher of Islam in the 14th Hijri century Muhammad Iqbal. In Reconstruction of Religious Thought in Islam he said: "Surely it is in Islam that Prophethood has reached its final consummation, with the realization that the need for prophethood has come to an end , with the implication that humanity will not remain for ever in need of a halter by which to be

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<sup>7</sup> Ar-Risala, p. 600.

<sup>8</sup> Al-Mustasfa, Vol. 1, 1, p. 3.

led”.<sup>9</sup> The expression “consummation (seal) of Prophethood” means that the Divine Message has gone above the limitations of time and place and that its significance is for eternity; it cannot be abrogated by any other *Shari’a*, and no revelation can ever come to reshape it or diminish its hidden potential for offering the best solutions to man’s private and social problems at all levels. God Most High said, “Muhammad is in no way the father of any of your men, but the Messenger of God and the seal of prophets; and God is Ever-Knowing of all things”.<sup>10</sup>

The leading scholars of the Muslim nation play a role similar to those of the prophets in the previous nations, who took upon themselves the task of indicating legal judgements (*ahkam*), in the interval between two successive Messengers on new cases where no clear injunctions were available.

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<sup>9</sup> Reconstruction of Religious Thought in Islam, p. 144.

<sup>10</sup> Al-Ahzab, ayah 40.

## DEFINITION AND MEANING OF *QIYAS*

What we mean by *Qiyas* here is juridical analogy, as distinct from logical syllogism which means a body of statements based on a number of cases, which in turn has to be based on another body of statements, one exceptional and the other conjunctive.<sup>11</sup>

Juridical analogy, as distinguished from logical analogy is one of the sources according to which the jurist perceives and identifies a legal ruling. Many definitions have been given to analogy; one of the earliest being that Abul-Husayn Al-Basri in his book entitled, Al-Mu'tamad where he wrote: "Analogy is establishing a law concerning an incident based on a clear injunction passed on another previous incident, so long as they share the same effective cause".<sup>12</sup>

Another definition by Al-Ghazali runs thus, "*Qiyas* is to accord a known case with a known case in establishing a law for (both of) them or negating it from them on the basis of a common link (between them), which link causes the establishment of the rule or the quality relating to them, or negating it from them".

Both of these, however, fail to meet the criteria of an acceptable definition. Abu Al-Husayn's definition insists on the dependence of knowledge of analogy on our knowledge of the original case and the new case. His definition runs, in other words, into a vicious circle. Again, al-Ghazali states that judgment in one of the two cases is valid before applying analogy. This means that establishing a judgment in both cases, whether affirmative or negative introduces into the full definition

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<sup>11</sup> At-Tajrid ash-Shafi, p. 211.

<sup>12</sup> Abu Al-Husayn Al-Basri, Al-Mu'tamad, Vol. 2, p. 103.

elements that do not inherently pertain to it; and it is well known that the application of the conditions of a full definition is a hard task indeed. That is why jurists have veered away from full definition to definition by description.<sup>13</sup>

To understand the origin of analogy and the steps necessary for its correct application, the following procedure should be adopted:

The jurist may encounter a specific case for which he has to search for a legal ruling in the event there be no text, explicit or implicit, in the Qur'an and *Sunna*, nor does he find a consensus of opinion on the matter; but may come across a similar case for which a ruling has already been given. The jurist thus establishes his judgment on the basis of similarity so long as the effective cause justifies that *Qiyas* thus comprises four essential elements:

- (a) original case
- (b) legal injunction
- (c) parallel case, and
- (d) effective cause.

So, *Qiyas* is not, as sometimes thought, a procedure based on reason alone. This is because any rule based on *Qiyas* is a *Shari'a's* rule which the jurist reaches on the basis of his belief that it is divinely enjoined, and not based merely on the jurist's reflection. *Qiyas* thus consists of relating an unknown rule to an already established one by the *mujtahid* who ascertains that they share the same effective cause.

### **JURISTIC ATTITUDES TOWARD *QIYAS***

Imam Razi surveyed the attitudes of the jurists towards *Qiyas* in *Al-Mahsul*, with a view to specifying the main trends, and the theories that are derived from them. He indicated firstly whether it is reasonable to base our judgements on analogy. Here he stated that the jurists fall into two main categories: the first category maintaining that it is

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<sup>13</sup> At-Tajrid ash-Shafi, pp. 110-112.



reasonable to say that *Qiyas* is a religiously binding ordinance. The other category maintains that it is unacceptable to think of it as religiously binding. Then those of the first category differed among themselves; some of them adopted the attitude that although *Qiyas* is a sound indication for legal judgements, it is not a religiously binding ordinance. The second category rebutted that the others have actually taken it as a basis of religiously binding obligations. Then Ar-Razi went on to investigate minutely the methodology of each group of jurists.

The Mu'tazilah and the Zahiriyyah are of the view that *Qiyas* does not provide the basis of a religiously binding ordinance.

### **QIYAS ACCORDING TO THE SUNNI SCHOOLS**

The leaders of the Sunni schools and Ibadiyyah unanimously agree that *Qiyas* is an authoritative source and proof of legal injunctions. No one disagreed with this except Dawud Az-Zahiri, who maintained that the Lawgiver has forbidden dependence on *Qiyas* unless it be an obvious *Qiyas, Qiyas jali*. It was also attributed to him that he accepted *Qiyas* in which the effective cause is specifically stated or alluded in the text and this he called inference *istinbat*.<sup>14</sup>

Ibn Hazm, the jurist traditionist of the Zahiri school and a literary figure, prohibited the use of *Qiyas* and considered it a deviation from the precedent of the Companions, and the textual framework of the *Shari'a*.<sup>15</sup> He often speaks in rebuttal of the leading schools in such terms that this is analogy and all analogy is invalid.

Among the Innovators (*mubtadi'ah*) who prohibited reliance on analogy were the Khawarij (dissenters), and the first *muhakkimah*,<sup>16</sup> while the Baghdadi Mu'tazilah like Al-Nazzam, Yahya Al-Iskafi, Ja'afar Ibn Mubashshir, and the Shi'ah in general maintained that it is rationally impossible to consider *Qiyas* as a source of *Shari'a*.<sup>17</sup>

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<sup>14</sup> Ibn Hazm, *Al-Ahkam fi Usul Al-Ahkam*, Vol. 4, p. 31. Commentary by Al-Attar on *Jam' Al Jawami'*, Vol. 2, p. 242.

<sup>15</sup> Ibn Hazm, *Al-Muhalla*, The Hundredth Question.

<sup>16</sup> *Qamus al-Shari'a*, Vol. p. 285; and *Al-Milal*, Vol. 2, p. 175.

<sup>17</sup> *Al-Ihkam fi Usul Al-Ahkam*, Vol. 4, p. 6, and after.

The negators of *Qiyas* fall into different groups. Some of them did not document their teachings, nor has there been any report of their detailed legal rulings on cases where the Lawgiver has given no injunction. Such is the situation with the Mu'tazilah. As for the Shi'ah, they depended for the pervasiveness of *Shari'a* on the views of the Infallible Imam, and they very often resorted to customary rules. But Ibn Hazm took a literalist stand, and considered whatever is not determined by the text falls under exoneration and original permissibility. This led him into inconsistencies which look strange to those who examine his jurisprudence, inspite of his vast knowledge, his brilliant mind, and quick-wittedness. One of these inconsistencies is clear when he narrated in three different ways the Prophet's *Hadith*, "Let not anyone of you urinate in the standing water and then wash himself with it". His commentary on this *Hadith* runs thus: "So, if the Prophet (s.a.w) intended to forbid anyone washing himself, other than the urinating person, he would not have kept silent on that, because of inability, or forgetfulness; and it does not concern us to go into the trouble of trying to know what he has not disclosed to us of the Unseen".<sup>18</sup> Thus he considers water impure for the urinating person, but pure for everyone else. He also says that if any of the contractors stipulate in the body of the contract any stipulation, then that invalidates the contract, and the stipulation is void, except for such stipulations as are declared permissible by the Prophet (s.a.w) himself.<sup>19</sup> Another statement by Ibn Hazm has it that "selling raisins for grapes, by quantitative disparity, is prohibited by measurement, but permissible in any way by weight".<sup>20</sup> Then he also said: "It is not permissible to conclude a transaction for wheat before taking possession of it, regardless as to whether it has come to the buyer's possession through sale, gift, or dower. If wheat is purchased in lump sum, then it has to be transported away and then measured or weighed as the case may be. But if the merchandise is barley or rice or similar foodstuffs or other materials, then it is permissible to sell them as soon as they are in the buyer's possession, even if they are not yet measured or weighed. If these are not intended for sale, the buyer has the right to dispense with them even before they are in his possession."<sup>21</sup>

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<sup>18</sup> Al-Muhalla, Vol. 1, p. 140.

<sup>19</sup> Ibid., Vol. 8, p. 412.

<sup>20</sup> Ibid., Vol. 8, p. 502.

<sup>21</sup> Ibid., Vol. 8, p. 518.

In the final analysis, the stand taken by the negators of *Qiyas* may be interpreted as a call upon the believers to apply the *Shari'a* rules that God Most High has prescribed but to suspend their faculty of reason beyond that. But when they (the *Zahiris*) reach contradictory judgements, they submit and give up. Here they are taking an inconsistent stand on one of the main principles upon which the *Shari'a* is founded, since it is a *Shari'a* that advocates the use of reason by those who are qualified to do so. God has made intellectual capacity as the criterion of understanding the perfection of the *Shari'a*, as can be seen in His words, "And if it had been from any source other than God, indeed they would have found in it many discrepancies".<sup>22</sup> So these negators in their argument and applications have adopted the principle that rules and injunctions may differ even when the acts to which they are applied are equal or nearly equal.

### **THEORY AND PRACTICE OF *QIYAS* IN THE SUNNI SCHOOLS**

Although the four Sunni leading schools have agreed on the validity of *Qiyas* and its reliability as a proof, they differ over issues both in theory and practice. I have found that all scholars who investigated the Sunni schools have held that the school of Abu Hanifah relies on *Qiyas* on the widest scale. Ibn Khaldun stated in the *Muqaddimah* that "two different approaches have been taken toward *fiqh*: One being of those who adopt *Qiyas* and personal opinion, and those are the scholars of Iraq, also known as the *Ahl al-Ra'y*, and the school of *Ahl al-Hadith*, whose followers mainly resided in the Hijaz. Since there were few scholars of *Hadith* in Iraq, they made much more use of *Qiyas* and became competent therein, which is why they have been called *Ahl al-Ra'y*. Foremost among them was Abu Hanifah and his disciples among whom this discipline became firmly established. In Hijaz, Malik and his successor al-Shafi'i led the *Ahl al-Hadith*.<sup>23</sup> According to Shaykh Al-Hajaw: "The Hanafi school has the broadest outlook and thus the most liberal on the whole; offering to the competent jurist an easy method of analogical inference. This is because the Hanafi School pays greater attention to the philosophy and rationale of the injunctions, especially in

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<sup>22</sup> Surat An-Nisa, ayah 82.

<sup>23</sup> Al-Muqaddimah, p. 446.

regard to transactions intended for the welfare and prosperity of the people. *Qiyas* became one of the fundamental principles of this school, which was able to develop *Qiyas* more than most.<sup>24</sup>

Yet after further investigation into the legal doctrines of these schools, I have found that the school of Imam Malik (may God be pleased with him) represents the broadest of all in its reliance on *Qiyas* for the deduction of rules. This is because Imam Malik gives priority to *Qiyas* over the report of a single narrator of *hadith*. To this effect Al Qarafi says in *At-Tanqih*: “To Malik *Qiyas* takes priority over the report of a single narrator, because solitary report is only a conveyor of a rule, whereas *Qiyas* includes the inherent wisdom, so *Qiyas* takes priority over such reports”. He also mentioned in a commentary the divergent report that Imam Malik has also said that *Qiyas* does not take priority over solitary report”.<sup>25</sup>

Again, after reviewing Malik’s competence in *ijtihad*, we confirm that he gives priority to *Qiyas* over solitary *hadith*. Thus in a *hadith* reported by Malik through regular informants in his *Muwatt’a* the Prophet (s.a.w) said: “When a dog licks someone’s vessel, then let him wash it seven times”.<sup>26</sup> This *Hadith* is authentic, reported on the authority of Malik and narrated by Ash-Shafi’i, Ahmad Ibn Hanbal, Al-Bukhari and Muslim as well as others. Here a disciple of Malik, Ibn Al-Qasim states: “Malik said: “In case a dog licks someone’s vessel (full of milk), then there is no harm for this milk to be consumed”. In his commentary Sahnun says, “Was it the case that Malik intended to say that the vessel had to be washed seven times when the dog licks the vessel containing milk and also containing water”? Malik’s reply was that “the *Hadith* has reached me but I do not know the truth about it”. Then Ibn Al Qasim says: It seems that he looks upon the dog as a domestic pet, and different therefore from other predatory animals. He also said that washing the vessel is understood to be only in the case of water. Stating also that he considered it a weak *Hadith*; he also said that the vessel need not to be washed in case it contains butter or milk, and

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<sup>24</sup> Al-Fikr As-Sami, Vol. 2, p. 135.

<sup>25</sup> Al-Tanqih, Vol. 2, p. 156.

<sup>26</sup> Az-Zurqani, Al-Muwatta’, Vol.2, 1, p. 67.

the leftover may be eaten. As he says. “It seems to me a grave mistake to deliberately throw away the sustenance that God has provided, merely because a dog licked in it”. He goes on to say: “We do actually eat what the dog hunts so how can we hate its saliva”?<sup>27</sup> Thus Malik considers the *hadith* as authentic as he narrated it in Al-Muwatta; and actually Ibn Al-Qasim, who speaks of its weakness, rejects its generalizations to all aspects covered by its wording, and limits its application to water, contrary to what Ibn Rushd has asserted.<sup>28</sup> Here Ibn Rushd draws an analogy between the dog’s leftover of milk or food, and the Quranic text on the lawfulness of eating of what a dog has actually bitten in the hunt: “What you have taught the beasts and birds of prey, training them to hunt and teach them of what God has taught you; so eat of what they catch for you”.<sup>29</sup> Ibn Rushd also refers here to a definite principle regarding the preservation of property; for he holds that food, part of which was eaten by the dog, so long as it has not become impure, is analogous to other forms of property which we are ordered to preserve. Again Imam Malik draws an analogy between this *hadith* and the other *hadith* narrated by him to the effect that a cat’s leftover is also pure. Here he adopted the effective cause, indicated in the text that it is not impure. For the cat is declared to be a domestic animal, that is *tawwafin*, or *tawwafat*.<sup>30</sup> The only doubt in the narration of this *hadith*, as in Muhammad Ibn al-Hassan’s narration, is over the conjunctive ‘*waw*’.

Similar to this is the *hadith* narrated in Al-Muwatta ascribed to Abdullah Ibn Umar, that the Messenger of God (s.a.w) said: “Both parties to a sale have an option of revokation so long as they do not part company, except in an option sale - *bay’ al-khiyar*”. Here Malik says, “And for this we do not have a precedent or a customary rule to be implemented”.<sup>31</sup>

So Malik maintains that the time of Majlis (session of contract) is indeterminate; it may be long or short; and this may lead to the

<sup>27</sup> Al-Mudawwana, Vol. 1, pp. 5&6.

<sup>28</sup> Al-Muqaddimat, Vol. p. 92.

<sup>29</sup> Al-Ma’idah, ayah 4.

<sup>30</sup> See Az-Zurqani’s Commentary on Muwatt’a, Vol. 1, p. 51. See also Mukhtasar of Abu Dawud, and Ma’alim As-Sunan, Vol. 1, p. 78.

<sup>31</sup> Az-Zurqani’s Commentary on Muwatta’, Vol. 3, pp. 139-140.

indefiniteness of the time of option. He based this on the analogy of the sale by option for an unknown period of time. Since selling by option for an unknown period is unanimously rejected, so is option of *session* (*khiyar al-majlis*). This is what he meant when he said : “and for this we have no precedent” and then added that : “the practice of the people of Madinah is different in this respect”. Thus we find many instances in Imam Malik’s juridical *ijtihad* to the effect that solitary *hadith* and *Qiyas* are about equal. He gives preference to *Qiyas* if it is stronger than solitary *hadith*.<sup>32</sup> So, the Malikis differ with Ash-Shafi’i and Ahmad Ibn Hanbal who do not recognize *Qiyas* in the face of authentic solitary *hadith*.

While Malik maintains that the original case is used as a basis from which to derive rules for a parallel case, and the latter may then be used as a new original case, a position which is, however, rejected by the Hanafi School. Thus the author of Fawatih Ar-Rahamut (The Openings of Limitless Mercy), says: “One of the conditions of *Qiyas* is that the original case (*asl*) of one *Qiyas* should not be a parallel case in another *Qiyas* if the effective cause is different”.<sup>33</sup> Here, Abul-Walid Ibn Rushd, a prominent jurist of the Maliki school says in defence of the Maliki position: “So long as we know the rule of a parallel case, then it becomes an original case in its own right, which could then be a basis for *Qiyas* and another effective cause may be inferred from it. The second parallel case in turn also becomes an original case after its ruling has become known”. Then he says: “And know that this is an agreed upon position of Malik and his disciples; and they do not differ over this in principle although there may be some disagreement on details”.<sup>34</sup>

Ibn Al-Qassar, one of the leaders of the Maliki school says: “*Qiyas* is applied in quantified (*muqaddarat*) ordinances, punishments (*hudud*) and expiations that are perceptible to the human mind, because analogy can proceed over them. The Hanafi school has adopted the stand that *Qiyas* does not apply to any of these. Thus we read in Al-Muhalla: “Abu Hanifa rejected *Qiyas* in prescribed punishments, expiations and

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<sup>32</sup> Al-Muwafaqat, Vol. 3, the Second Problem.

<sup>33</sup> Fawatih Al-Rahamut, Vol. 2, p. 253.

<sup>34</sup> Al-Muqaddimat (Introduction), Vol. 1, pp. 38-39.

quantified ordinances, because their inner reason is not known. To this I respond that the inner reason is understood in some of them, wherein *Qiyas* applies as in the case of analogy between the thief and one who steals from the dead (*al-nabbash*)”.<sup>35</sup>

It seems valid to say that Malik does not preclude concessionary rules (*al-rukhas*) from the scope of *Qiyas*, but applies *Qiyas* to them, although the Hanafis abstain from applying *Qiyas* to concessions, on the analysis that concessions represent a departure from normal rules, so applying *Qiyas* to them is likely to lead to frequent deviations from evidence, which is why it should not be attempted. But the Malikis maintain that the Lawgiver may choose to depart from normal evidence for a benefit superior to the benefit of that evidence. This is confirmed through induction; and giving priority to the more probable is more becoming of the All-Wise Lawgiver; it then become normal evidence. So when securing a benefit requires deviation from a certain evidence then this may be done as a matter of preference. By doing so, one would have in effect supported conformity with the evidence, not deviating from it.<sup>36</sup>

From what has been said so far, it becomes evident firstly that the Malikis give priority to *Qiyas* over solitary *hadith* if it seems preferable to them, and do not reject considering *Qiyas* in principle in such cases as the Shafi’is do. Secondly, the Malikis accept the parallel case (*far’*) of one *Qiyas* as the original case (*asl*) of another after the rule has been transmitted to the latter. This runs counter to the opinions of the Hanafis and Shafi’is.

Thirdly, the Malikis adopt *Qiyas* in expiations, prescribed punishments and quantified ordinances, and they also apply it to concessions as different from the Hanafis. This clarifies and emphasizes what I maintained about theoretical originality and the fact that the Maliki school gives the widest scope to the implementation of *Qiyas* and their reliance upon it for the inference of *Shari’a* injunctions.

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<sup>35</sup> Al-Tanqih, Vol. 2, p. 177, and Al-Banani, Hashiya, Vol. 2, pp. 22-23.

<sup>36</sup> Al-Tanqih, Vol. 2, p. 177.

Still, there remains an unanswered question, which is that both classical and modern investigators who studied the legal history of Islam are unanimous that the Hanafi school gives the widest scope for the implementation of, and reliance on, *Qiyas*, and that the Malikis have taken a middle path between the pro-*Qiyas* rationalists and the traditionalists. But what we have put forward and documented from the books of the different schools may be taken to prove the opposite.

In answer to such a problem, we would say, “Surely the Maliki relies most extensively on *Qiyas* theoretically as a source and methodology, but in regard to detailed formulation of rules on particular cases, we find Abu Hanifa’s school is the broadest in the frequent implementation of *Qiyas*, for the following reasons:

- (1) The Hanafi school started in Iraq, which was the center of the Sassanid civilization with all what it entailed in the complexity of living conditions and multiplicity of concepts which usually lead to indulgence in comfort and luxurious living. In this sense, it was an environment different from that of Hijaz, which was still simple and far from being complex, although it may still have been touched by civilization and comfort.
- (2) The Companions, who settled in Iraq and propagated there, whatever they heard and received from the Messenger of God, were in no way as numerous as those who did not move from their *Hijazi* environment. So the Prophet's traditions had more narrators and were more easily accessible in *Hijaz*.
- (3) The methodology followed by Abu-Hanifah in teaching *Fiqh* to his students was based on research in issues and concepts actually presented to them as well as issues that had yet to occur. So, the Imam did not find it enough



to rule on actual cases, but went on to assume postulates and lay theoretical groundwork for future eventualities with different concepts, conditions or causes. Then he took up every individual case and derived its ruling according to the methodological guidelines that he followed”.

Shaykh Al-Hajawi said, after an extensive treatment of the issue where a jurist works on theoretical cases that exceeds the limitations of existing facts that Abu Hanifa was the first to postulate non-existing cases and rule upon them on the understanding that if such a case takes place, then the ruling would be there. Thus he made extensive strides in theoretical jurisprudence and greatly expanded its scope.<sup>37</sup>

These three reasons forced Abu Hanifa to rely extensively on *Qiyas*, and thus, broaden the scope of establishing rules. But this does not mean, as often misconceived by conjecturers that Abu Hanifa relied on his own individual judgment in the issuance of *fatwa*. Such a misconception is no less than a dangerous accusation of Abu Hanifa and his religious devoutness. This is because reliance on one’s arbitrary judgment is tantamount to committing lies against God and adherence to a methodology other than what the Messenger of God has advocated. The meaning of *Qiyas*, as already mentioned, is search for the effective cause of a *Shari’a* ruling in the first place. So, if the effective cause is given in the text, then the question is settled; otherwise, the user of *Qiyas* has to delve deep to understand the *Shari’a* ruling so as to infer the legal cause for it. In this respect, Abu Hanifa, in his accurate theorizing and brilliant thinking has been a towering figure who was able to see how some cases were similar and some others were different in their implications something that could easily escape others. Then he ascertained the existence of the effective cause, which is a proper attribute of the ruling *hukm* and is found to be in common between the original case and the parallel case, for which a ruling is being sought. So

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<sup>37</sup> Al-Fikr As-Sami (The Sublime Thought), Vol. 2, p. 134.

he extended the ruling from the original case to the parallel one, since they both partake of the same effective cause.

### **EFFECTS OF THE EXTENSIVE USE OF *QIYAS* ON JURISTIC DEVELOPMENT**

Thus the method adopted by Abu Hanifa, following the example of Ibrahim Al-Nakha'i, is the same method that became the dominant trend of jurisprudence in the third century A.H. and ever since. So all schools of jurisprudence eventually adopted the extensive preoccupation of jurists in the deduction of rules and the pursuit practically of all rational concepts and postulates and their methodical application to individual cases. Thus *fiqh*<sup>38</sup> accumulated as a result and its scope became extensive; so this methodology was highly commended and adopted by researchers.

But this methodology, although it brought a huge wealth of detailed rules and set rational thinking in motion, also turned Islamic jurisprudence to a different direction. Since our religion is a practical religion, it does not stray into abstract postulations, and does not give priority to theoretical rationalisation at the expense of ignoring the tangible. But it is a religion based on a realistic approach that ties up reality with reason. So in establishing legal judgements it is bound by the methodology instituted by the Messenger of God in the *hadith* reported by Al-Bukhari and Muslim through their chains of narrators that he has forbidden idle talk, too much questioning and squandering of wealth. Qadi Iyàd commented on the "excessive questioning" that it is about what does not occur and no need has arisen for it. Other authentic *hadith* also forbade excessive questioning, and so did our worthy ancestors. They also considered it indulgence in exaggeration.<sup>39</sup>

This negative attitude of engagement in too many subtleties and unrealistic postulations attracted the attention of Muhammad Iqbal, the Muslim philosopher, May Allah have mercy upon him. In his lecture entitled "The Principle of Movement in the Structure of Islam", he said : "The intricate behavior of life cannot be subjected to hard and fast rules logically deducible from certain general notions. Yet, looked at through the spectacles of Aristotle's logic, it appears to be a mechanism pure and simple with no internal principle of movement. Thus, the school of Abu-

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<sup>38</sup> Fiqh is the term used for Muslim Law by Muslim jurists (The translators).

<sup>39</sup> Ikmal Al-Ikmal, Vol. 5, p. 14.

Hanifa tended to ignore the creative freedom and arbitrariness of life, and hoped to build a logically perfect legal system on the line of pure reason. The legists of Hijaz, however, true to the practical genius of their race, raised strong protests against the scholastic subtleties of the legists of Iraq, and their tendency to imagine unreal cases which they rightly thought would turn the law of Islam into a kind of lifeless mechanism".<sup>40</sup>

Thus the development of *fiqh* was fast, and yet the jurists were careful to check the sayings of the scholars of the past who gave legal opinions about what actually occurred and about what was expected to occur, and whether it was actually rare, or even impossible. So Islamic law went beyond realistic and carefully measured jurisprudence along the lines of an imaginary discipline. Shaykh Muhammad Al-Hajawi had this to say : "lives expire while none of these imaginary incidents occur; and it is only the lives of scholars that are expended. So jurisprudence entered the stage of maturity, then of senility. No wonder that excess in anything leads to decay".<sup>41</sup>

In my opinion, there is no doubt that the jurists of the Hanafi methodology became so skilled in the inference of rules that these skills became talents and made difficult deductions easy. On the other hand, this has also had negative aspects. All of this may be seen as an unfolding of the story of this life, vacillating between imperfection and perfection, and between incompetence and competence. Then one can only say with confidence that God alone has unparalleled perfection, there is no god except He, The Magnificent, The Exalted.

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<sup>40</sup> Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, p. 140.

<sup>41</sup> *Al-Fikr As-Sami*, Vol. 2, p. 132.

## THE PILLARS (ARKAN) OF *QIYAS*

*Qiyas* has four pillars: *asl* (original case); *far'* (parallel case); *hukm\_al asl* (the rule of the original case) and *'illah* (effective cause).

### 1. THE ORIGINAL CASE (*AL-ASL*)

The jurists have held different opinions about the original case. It has been said that the original case is the legal rule, or that it is the evidence of the rule, or it is the subject matter of the rule. Thus, if we draw an analogy between pledge (*al-rahn*) among sedentary population with pledge among travellers, the original case could be one of three things. According to the first interpretation, it is the permissibility of the pledge. According to the second, the reference is to the Word of God, Exalted be He that “If you are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose)” (al-Baqara, 2:283). According to the third, it is the taking of pledge when on a journey. These different interpretations do not have any practical consequences. The majority of the jurists take the original case as the subject-matter, such as pledge on a journey, and wine as the original case of *Nabidh* (date beverage) in prohibition. Among the conditions the original case must fulfil are the following : it should be a *shar'i* ruling, it should be permanent not abrogated, and it should be rational and not contrary to the norms of analogy.

For example, Khuzaymah's testimony (narrated by Abu Dawud) is considered an exceptional case which is incompatible with the norms. 'Imarah Ibn Khuzaymah has said that his uncle, who was one of the Companions of the Prophet (s.a.w) told him that the Prophet bought a

horse from a bedouin. The Prophet then asked the bedouin to follow him for payment of the price of the horse. The Prophet quickened his pace while the bedouin was too slow. A group of men tried to stop the bedouin, unaware that the Prophet had already bought the horse and they started bargaining with him about it. Then, he called and asked the Messenger of Allah: “Are you really going to buy this horse, or should I sell it”? Having heard the bedouin’s call, the Prophet asked him: “Haven’t I already bought it from you?” The bedouin answered: “No, I swear by Allah that I have not sold it to you”. The Prophet then said “But I have bought it from you”. The Arab went on saying : “Bring a witness”. Having heard that, Khuzaymah Ibn Thabit said: “I bear witness that you have already sold it” The Prophet (s.a.w) then came up to Khuzaymah saying : “What are you testifying to?” He answered “O Messenger of Allah, I confirm the truth of what you said”. Thus, the Messenger of Allah accepted the testimony of Khuzaymah as the testimony of two men.<sup>42</sup> Al Khattabi commented on this and said: “Pernicious innovators take the narrated *Hadith* as a pretext for accepting the testimony of whoever is known for his truthfulness on whatever they claim”. This interpretation indicates that the analogy is invalid, if the original case lacks the necessary conditions. Therefore it is not permissible to draw an analogy to the testimony of Khuzaymah neither in Prophet's time nor in the times that followed. This is because Khuzaymah’s case was an exception to the norm.

Drawing analogy on the number of units in prayer, and the quantities of expiations is, on the other hand, not contrary to the accepted norms of analogy.

Among the conditions on which there is disagreement one is that the original case itself should not have been established by analogy. This is the opinion of the Hanafi and Shaf’i Schools. As for the Maliki and Hanbali Schools, they allowed drawing analogy to the original case whose rule was established by a previous analogy.

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<sup>42</sup> Mukhtassar Sunnan Abu Dawud, Vol. 5, p. 224.

The jurists have added other conditions which basically relate to the rules of debate and what they consider to be acceptable or otherwise in *Qiyas*.

## **2. THE PARALLEL CASE (*AL-FAR'*)**

The parallel case is the subject-matter of analogy, like *pledge (al-rahn)* in a sedentary community, and date beverage (*al-nabidh*), being parallel cases respectively to pledge-taking among travellers, and wine-drinking.

## **3. THE EFFECTIVE CAUSE (*'ILLAH*)**

The effective cause is the main pillar of analogy. Imam Razi thus explains : “You have realized that *Qiyas* stems from two sources :

- (a) the legal rule (*hukm*) of the subject-matter as it occurs in the text which is qualified by a certain quality;
- (b) this particular quality, which also exists in the parallel case (to which the legal rule is extended); this quality is all the more important, and therefore commands priority in our investigation.<sup>43</sup> Certainly, justification and enquiry into the qualities and attributes of legal rules is a field of jurisprudence where the talents of jurists found greatest scope for expression. Thanks to their intellectual exertion they have managed to develop an accurate methodology that attests to their acumen. Thus, they have demonstrated their ability to project the *Shari'a* to be compatible with reason and contain comprehensive resources to address the needs of human beings at all times.

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<sup>43</sup> Al-Mahsul, Vol. 2, part 2, p. 177.

When we talk about this essential element of *Qiyas*, the first step we should take into consideration is to define the technical meaning of the effective cause in the legal expositions of the ulema.

The ulema of *usul* disagreed over the definition of the effective cause. This is not due to any technical differences of opinion. Rather, the disagreement stems from their differences over the principles of theology (*usul al-din*) as I shall presently explain.

**Firstly**, the effective cause (*'illah*) is an indicator of the legal rule (*hukm*). Ibn Rushd has explained this by saying: “The effective cause does not inherently necessitate the legal rule. But when the Lawgiver assigns a certain quality as an effective cause, then that is an indication of the appropriate rule. For instance, intoxication is an inherent quality of wine. Yet the prohibition of wine drinking is due to the command of the Lawgiver and not to its intoxicant quality. For this quality had existed in wine and this did not necessitate its prohibition until the Lawgiver made a ruling on it. In other words, intoxication is not the real cause. Rather, it is only a sign and indicator to the legal rule.<sup>44</sup> Whether the legal rule of the original case is established and proven by the effective cause or not is a controversial issue. The Hanafi School argues that the legal rule is established by the text, not by the effective cause. Ibn Amir Al-Hajj supports this view by saying: “Because the defining quality of the legal rule exists even without the textually prescribed ruling on a particular subject-matter”.<sup>45</sup>

The Maliki and Shafi'i schools are of the opinion that the defining quality is a sign of the legal rule of the *Asl* (original case) on the analysis that the defining quality is considered as the original indicator of analogy. Further to explain this, if we consider the legal rule of wine, independently of any analogy, then the Word of God in the Qur'an : “Eschew it.” is a sign of the legal rule. Thus if we aim at establishing this ruling to its subject-matter (in the appropriate context), the legal cause would guide us in this regard. Furthermore, if we realize that the effective cause which makes wine forbidden depends on the defining quality of wine as being a fermented liquid, hurling froth; then

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<sup>44</sup> Al-Muqaddimat, Vol. 1, pp. 39-40.

<sup>45</sup> At-Taqrir wa at-Tahbir, Vol. 3, p. 141.

prohibiting any part of the liquid depends on the presence of the defining quality in it. Likewise, establishing the legal rule of the *asl* for the mere fact that it is the original case is improper; unless the effective cause is also present in both the original and the parallel case.<sup>46</sup> But the difference of opinion on this is only in theory without having any empirical consequences.

**Secondly**, The Mu'tazila school of thought believes that the effective cause itself leads to the legal rule, which is to say that the effective cause requires the legal rule and the process resembles rational causation. Thus, if the effective cause exists, the legal rule should also follow. This method is a consequence of belief in rationality as being the determinant of good and evil.

**Thirdly**, Al-Ghazali maintains that the effective cause requires the legal rule by the ordinance of Allah. There is no difference between Al-Ghazali's opinion and the first opinion except in the way by which they arrive at that conclusion. In both opinions, there is a linkage between the effective cause and the legal rule. According to Al-Ghazali, the effective cause is the effective indicator of the legal rule. According to the first opinion, however, knowing the effective cause is necessary for knowing the legal rule.

These are the most important features of the debate over the definition of the effective cause. Al-Shawkani has, in fact, enumerated seven definitions for the *'illah* and also used several terms for it such as, *al-manat*, *al-sabab*, *al-mawjib*, *al-amara*, *al-da'i*, *al-mu'athir* (the cause, prerequisites, the sign, the motive, and the effective quality).<sup>47</sup>

#### 4. CONDITIONS OF THE EFFECTIVE CAUSE

To form the valid basis of an analogy, the effective cause must fulfil the following conditions:

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<sup>46</sup> Hashiyat al-'Attar 'ala Jalal Al Muhalla, Vol. 2, pp. 272-273.

<sup>47</sup> Irshad Al Fuhul, p. 207.



**Firstly**, It should pursue the proper objective of the legal rule, which is to obtain *Maslahah* (public interest) or implement it, or to avoid *mafsada* (evil) or minimize it.

This condition is the principal guide of the jurist in his search for the most proper quality among the qualities of the original case, and this necessitates that the jurist should be well versed in the main objectives of the *Shari'a*. In this regard, Ibn 'Ashour has said: "When the jurist is to draw analogy between a parallel case that does not have a text and an original case that does have a text, he needs to know the methods for the identification of the effective cause (i.e. *masalik al-'illah*). This is because analogy depends on the effective cause. In establishing the effective cause, he needs to know the main objectives of the *Shari'a* as by knowing the relationship of the effective cause with the *hukm*. He must also know how to extract the effective (*takhrij al-manat*), to isolate the effective cause (*tanqih al-manat*) and to eliminate any discrepancy in its application to the original case and the new case (*ilgha' al-fariq*). Don't you see that when they stipulated that the effective cause (*'illah*) should be a criterion for the underlying reason (*hikmah*), they have relied on the induction of reason and rationale that partakes in the higher objectives (*maqasid*) of *Shari'a*.<sup>48</sup> This may be explained by the prohibition of usury in wheat. The definite legal rule here is the prohibition of usury. The original case is the wheat, which has its own characteristics: colour, solidity, and storability. It is a food shared by human beings and some animals. It is also a staple food and not a luxury. It does not rot quickly, hence it is storable, and it is grown in the soil. Which one of these features is the effective cause of the prohibition? The Maliki school takes nourishment and sustenance relied upon for feeding people and satisfying their need in the present as well as in the future as the quality or reason for the prohibition of usury in wheat. In this situation, justice and equality should prevail so that the Lawgiver down principles that protect people's transactions against all types of deceitful acts. Nourishment and storability are thus considered to be the appropriate qualities for prohibition. The Shafi'i School considers nourishment a sufficient quality for prohibition. The Lawgiver's concern is not likely to be affected by the attribute of storability. Hence edibility is a sufficient basis for prohibition. The Hanafi school maintains that the

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<sup>48</sup> Maqasid al-Shari'a, pp. 15-17.

reason for the prohibition of usury is the realization of justice and equality. Quantitative justice may be manifested in anything that could be measured or weighed. The Lawgiver ordains rules to obtain justice, which is why usury is prohibited in whatever may be measured or weighed, and wheat is definitely sold by measurement.

**Secondly**, The effective cause should be an evident quality which is certain, so that it may be accepted as a criterion for the real cause; it should not be an abstract or hidden quality.<sup>49</sup>

A group of jurists maintained that if the rationale (*hikmah*) is obvious and regular, it would be a valid criterion for legal causation. This opinion has been chosen by the Maliki jurist Ibn Al-Hajib as he said : “If it is possible to ascertain (the *hikmah*) it would be a valid substitute for ‘illah”. Another Maliki jurist Al-‘Adud al-Iji has noted : “If an abstract rationale (*hikmah*) exists and it is self-evident and so regular that we could identify it and take it into consideration, it would be valid to do that and base the legal rule upon it, because we definitely know that rationale (*hikmah*) is the ultimate objective of the Lawgiver. On the other hand, it would be uncertain if it is indefinite and irregular. Once the obstacle against it is removed, the *hikmah* would be definitely taken into consideration”.<sup>50</sup> Ibn Al-Hajib apparently gives preference to *hikmah* as the criterion of ratiocination (*ta’lil*) only if the latter is self-evident and constant, not an abstract quality; contrary to what Abd al-Rahim Al-Asnawi attributed to him in his commentary on Al-Minhaj.<sup>51</sup>

A third group of jurists maintain that rationale (*hikmah*) is an absolutely valid criterion for legal causation. Imam Fakhr Al-Din al-Razi has said : “If the real quality is self-evident and constant, it is a valid criterion of ratiocination; otherwise as in the case of the need to attract a *maslahah* or avoid an evil (*mafsada*) which is called rationale (*hikmah*) by the jurists, then they differed among themselves regarding its validity as a criterion of ratiocination, but its validity is more probable in my opinion”.<sup>52</sup>

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<sup>49</sup> Sharh Al-‘Adud, Vol. 2, p. 213.

<sup>50</sup> Ibid., Vol. 2, p. 214.

<sup>51</sup> Ibid., Vol. 4, p. 261.

<sup>52</sup> Al-Mahsul, Vol. 2, p. 389.

Thus, it appears that Al-Razi tends to accept the validity of rationale (*hikmah*) as a criterion of *ta'lil*, but he does not take a firm stand on it. He usually assumes everything valid for argumentation against opponents, then he comes back to invalidate it. However, he did not manage to fully refute the given reasons for the invalidation of *hikmah*. Rather, his argumentation was weak and close to sophistry, possibly because of his awareness of the weakness of his position; he said for instance that: “It (*hikmah*) is probably valid” and he did not say “I maintain that *hikmah* is valid (for legal causation)” or something similar to this.

Having discussed the differences among the ulema of *usul* on ratiocination *ta'lil* based on *hikmah*, Dr. Muhammad Mustafa Shalabi noted that this is a simplified presentation of the differences among the jurists on the *ta'lil* based on *hikmah* or *maslahah*. He added : “Had the matter stopped at mere differences, no harm would be done. But, in their differences, they have mentioned that *ta'lil* does not occur on the basis of *hikmah*. Furthermore, they presumed that the discussion here is a mere assumption in the sense that even if a constant *hikmah* (*hikmah madbutah*) had existed, the question would still arise as to whether it would be a valid basis for ratiocination.

Then Dr. Shalabi works out enthusiastically to establish the validity of basing legal *ta'lil* upon *hikmah* by adding : “This is something which attracts the attention of scholars of *Shari'a* and the rationalised injunctions of *Shari'a* in the primary sources”. Indeed, this excites curiosity, because the Book of Allah and the *Sunna* of His Messenger have numerous examples of injunctions based upon *hikmah* and *maslahah*. Many examples of this kind are at the scholars' disposal. Indeed, he narrates types of *ta'lil* that is used and applied by the jurists since the time of the rightly guided Caliphs down to the age of the great leaders of schools of jurisprudence. He depicts the truth about *ta'lil* that is almost confined to *hikmah* to the extent that if anyone says that: “basing *ta'lil* on *hikmah* is normative it would not be an exaggeration nor would be a departure from truth”.<sup>53</sup> Then he gives examples from the Qur'an and *Sunna* and those attributed to the Companions of the Prophet

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<sup>53</sup> Usul Al Fiqh Al-Islami, p. 237.

and the leading Imams and scholars of the different schools and their followers from page 237 through to page 244.

I may classify the ulema of *usul* into two categories : (a) those who reject *hikmah* (rationale) as a basis of ratiocination; (b) those who reservedly consider it a valid basis. For instance, al-Subki the author of Jam' al-Jawami says: "Among the conditions of attaching (the parallel case to the original case) one is that the effective cause should be a constant attribute of *hikmah*". The legal cause may also be the same as the rationale (*hikmah*) in event where the injunction has been based on it. It is also said that if the *hikmah* is constant it is a valid effective cause, because of the absence of error. Another exponent (of *hikmah*) is Imam Fakhr al Din al-Razi in his book, Al-Mahsul, but I have never found any scholar so enthusiastic about ratiocination based on rationale (*hikmah*) as Dr. Shalabi.

Having pondered over this matter, I realized that I have to penetrate a little below the surface of the argumentations and evidences, and refute them, if necessary to reach the core of the issue. I assume that the jurist definitely looks for the legal rule which he thinks that God Most High has ordained for His servants. Thus, if he finds a text (from Qur'an or *Sunna*) establishing the injunction, he should exert himself within the confines of the Divine text to understand it; then he looks for the opposite opinion. Once the jurist has finished this stage of enquiry, he should formulate a ruling, being sure that he is yielding a legal rule which does not depart from the legal text. The possibility of error in this context is weak, because most of the stages of *ijtihad* he is concerned with are objective (and not personal). But in the absence of a text, the jurist bases his analogical reasoning on the '*illah* (effective cause), in which case he would be assured that he is safe from committing errors, so long as the methodology of inference that he applies in extracting the legal rule from the text is objective and not personal. It is with this purpose that the ulema of *usul* have stipulated the following conditions for the effective cause '*illah*. First, it should be an obvious quality which means that it is so perceptible that people do not differ about it. Secondly the quality should be constant and well-defined so that it leaves no scope for *ijtihad*. Finally, from among the characteristic qualities related to the original

case, the jurist must pick up the unique quality as the effective cause which is understood by intuition and acute perception. Thus, the *mujtahid* would think that there is suitability between that particular quality and the legal rule of the original case so that the *maslahah* (the public interest) or avoidance of the *mafsada* (corruption) would be realized. For example, the legality of *qasr* (shortening prayer) is a legal rule, and the quality (upon which the rule is based) is travelling, which is perceptible and quantifiable. What is legally considered travelling and what is not, is established upon the relevant texts. Travelling is considered as an effective cause because it involves hardship that invokes ease (shortening the prayer). Thus, travelling is unmistakably an objective matter, whose suitability to the legal rule becomes evident to the jurist, while, shortening the prayer certainly helps to alleviate hardship. But if the jurist determines hardship as a basis (for his ruling), then he would be dealing with a subjective quality, because what is considered hardship or not is neither obvious nor constant as it is a hidden quality and also varies from person to person. Consequently, the more the jurist is far from the objective methodology, the closer he is to committing error. So, contrary to what Dr. Shalabi maintains, *ta'lil* by itself is not a subject matter of disagreement. The subject matter of disagreement among jurists is the particular effective cause which forms the basis of analogical reasoning. The opponents of *ta'lil* criticise its exponents by saying that an evident and constant *hikmah* does not exist. Thus, the opponents were realistic. As for the exponents (those who used the *hikmah* as a basis of analogy) they were unrealistic, basing their stand on unrealistic arguments or assumptions as illustrated above. Similar to this is the reply of Imam Fakhr Al-Din al-Razi, when he maintained that “*ta'lil* on the basis of legal rule (*hukm*) exists in many cases, such as balancing establishment of the prescribed punishments between what might be said to be lethal as opposed to being a mere deterrent”. Moderation in the execution of the *hadd* (prescribed punishment) is not a legal cause nor is it a basis for the prescribed punishment. But if the prescribed punishment is not death penalty, the execution of the punishment must not attain the level of severity that destroys life.

Thirdly, the effective cause must not invalidate the *asl* because a prescribed injunction is established either by the revelation or by general

consensus *Ijma'*. The aim of the jurist's exertion is to extend the injunction of the original case to its similar case and expand the area of its application. Thus if he deduces a cause that invalidates the *asl*, then his deductive exertion would yield the reverse of what it should be. This would mean that he has failed to arrive at the effective cause '*illah*, and that his conclusion is invalid. Furthermore, the establishment of the inferential cause ('*illah mustanbata*) is a result of the establishment of the legal rule *hukm*; and if the latter is falsified, then its cause would also be falsified. Thus, the *ijtihad* of the jurist, which results in a cause invalidating the original rule, is simultaneously establishing and invalidating the legal cause. This contradiction indicates the invalidity of his legal judgment and manifests his error. For instance, some jurists consider exploiting the needs of the poor by the wealthy to be the effective cause of the prohibition of credit usury *riba* concerning gold and silver. However this is an imaginary cause of the aforementioned prohibition based on the assumption that the *Shari'a* aims at establishing a cooperative society where the powerful cannot crush the weak.

This is in line with the objective of cultivating among Muslims ties of brotherhood and cooperation and not of exploitation and domination. But if we adopt the above cause, then most of the current usurious transactions would necessarily be considered lawful. Because the majority of these usurious transactions do not occur between the needy and the wealthy. Rather, they tend to occur between the usurious bank on one hand, and businessmen on the other. The bank does not usually decide to give loans before making sure of the borrower's ability. Pledges are usually made available to guarantee the postponed repayments of outstanding loans. The bank also makes a visibility study to be certain that the activity of the borrower is profitable so that he could repay the debt, interest and other charges. Consequently, to say that exploitation by the wealthy of the need of the poor is the effective cause of *riba* leads to the permissibility of most usurious transactions especially where the borrower is not needy nor poor.

The ulema of *usul* have also mentioned other conditions for the '*illah*, most of which are not related to analogy. However, they could be necessary for rebutting the opponents of analogy in order to accept

analogy as a valid method. So they relate mainly to the debate for the purpose of vindicating a viewpoint. Consequently these conditions are classified as secondary. One such condition is exemplified by Imam Ash-Shatbi when he wrote: The fifth kind of questions which raise differences among scholars without producing practical results are considered to be secondary questions. In fact we have similar situations in all other sciences. In Arabic, we have example, such as the derivation of the verb from the nominal verbal noun *masdar*, the morphological aspects of objects *ashya'*, and the issue of the origin of a word noun (*lafz al-ism*).

But these have no practical results, beside the fact that investigation here is based regular principles; hence indulgence in such conditions is beyond the essence of science.<sup>54</sup>

### **METHODS OF IDENTIFICATION OF THE EFFECTIVE CAUSE (MASALIK AL-'ILLAH)**

There are two methods the ulema of *usul* have discussed concerning the identification of the legal cause. Imam Al-Ghazali has reminded us that methods of determining the *'illah* are very important. Thus he wrote in his book *Al-Mustasfa* : “*Qiyas* requires two premises : one of these, for example, in reference to wine drinking is intoxication, which is the effective cause of prohibition. Secondly, when it is noted that intoxication exists in *nabidh* (a beverage prepared from dates). As for the second premise, it may be proved by the senses, evidence, custom legal evidence and by all other proofs. As for the first premise, it should be proved only by *shar'i* proof such as the Qur'an, *Sunna*, consensus or other proofs. For instance, hardship is the legal cause of prohibition established by the Lawgiver in certain cases. Similarly prohibition is established by the decree of Lawgiver. The evidential basis of both is the same. The total number of the *shar'i* proofs are divided into three types namely the text (of Qur'an and *Sunna*), *Ijma'* (consensus) and *Qiyas* (analogy).<sup>55</sup> In his argument against those who do not see the necessity

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<sup>54</sup> Al-Muwafaqat, Vol. 1, p. 48.

<sup>55</sup> Al-Mustasfa, pp. 307-308.

of establishing the evidence (*dalil*) for the effective cause ('*illah*) of the original case (*asl*) on the assumption that analogical deduction exists by the mere combination of both quality and original case and that each relevant quality pertaining to original case is a '*illah*, he says:

“That is nonsense and totally worthless”. In fact the principles of *usul al-fiqh* are classified into two categories: those which are open to ratiocination/causation (*ta'lil*) and those which are not. In addition to the general agreement about the validity of ratiocination in regard to the ruling of the original case, the ulema of *usul* have agreed about the validity of this classification. It is possible that the original case is not open to causation. Even if a cause is indicated, it may be subject to causation by another quality, so there must be evidence to distinguish this quality from other qualities that are present in the *asl* to serve a common link between the original and parallel cases for establishing the rule.<sup>56</sup>

The most important matter in analogy is to identify the means leading to the '*illah*, because once the '*illah* is determined, arriving at the legal rule of the parallel case becomes an easy matter, since the rule of the parallel case is the rule of original case, from which the legal cause is inferred. It follows then that if the jurist makes a mistake in the procedure of identifying the '*illah*, the result will be another mistake in its determination: ultimately the legal rule (*hukm*) will be wrong. It is the duty of the jurist that he must follow the established procedures as long as his aim is to reach the legal rule.

The ulema of *usul* have laid down many methods for the identification of '*illah*, which may be summed up into three:

- (1) the first method contemplates the revealed text in the Book of God or the *Sunna* of the Prophet;
- (2) the second method is based on *Ijma'*; and
- (3) the third method is based on *Qiyas*, which must be consistent with the accurate procedures that lead to valid inferences satisfactory to the

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<sup>56</sup> Shifa' Al-Ghalil, p. 23.



analogue. Each of these methods is discussed separately as follows:

***The First Method: Textually Identified ‘illah***

The Lawgiver has laid down in the texts of *Shari’a* indicators that a certain quality is the ‘illah of an expressed injunction in the Qur’an and *Sunna*. These texts have been classified into three categories:

- (1) explicit (*sarih*),
- (2) instructive (*tanbih*), and allusive (*ima’*).

**The Explicit Text - *Sarih***

The explicit category is the one which indicates the legal cause literally by its original wording. It has many degrees the inferences of some of which are stronger than the others. The stronger among them is that which is exclusively directed toward causation. For example, when the text reads that the cause is so and so, the reason is such and such, “for the sake of”, or “in order to be such and such” and “to be so and so”. To give an example, Allah Almighty says: “Whatever Allah has conceded upon His Messenger (and is taken away) from the population of the town - belongs to Allah and to the Messenger, and to kindred and orphans, the needy and the wayfarer, in order that it may not (merely) make a circuit between the wealthy among you”.<sup>57</sup> This passage asserts that the distribution of *fay’* (property taken from enemy without fighting) and distributed among the specified categories mentioned is binding. The ‘illah that is given here is “in order that it may not make a circuit among the wealthy”. They are the warriors to whom *fay’* and booty would be given. This causation has been combined with other evidence to indicate that the aim is the distribution of wealth, and making it a circuit among people. Hence the circulation of goods becomes one of the five main objectives of *Shari’a* which has been mentioned in detail by Shaykh Muhammad Tahir Ibn ‘Ashur in his book *Al-Maqasid* (Objectives). These are: circulation (*rawaj*), clarity (*wuduh*), maintenance (*hifz*), stability (*thubat*) and justice (*‘adl*). Hence he elaborated some of these questions to indicate these objectives. An example is the legislation of

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<sup>57</sup> Surat Al-Hashr, verse 7.

contracts over transactions whether these contracts involve mutual exchange or donation. He considered them binding according to their formulas indicating mutual consent. The consequences that flow from these contracts are valid so long as their conditions are valid. The general rule in contracts is that they are binding. But for public convenience and the realization of basic needs, the *Shari'a* has conceded some contracts which are apparently uncertain, such as *qirad* or *mudarabah*, *salam* (advance payment sale), *muzara'a* (farm lease), *mugharasa* (free lease), including distribution of estates and all of what they contain.<sup>58</sup> This section is very important, because in it, Ibn Ashur highlighted the comprehensiveness and pervasiveness of the *Shari'a* and exposed its essence. This may be the best statement on the subject by the author (may God be pleased with him). So I followed its directions to conclude that Islamic banking is a manifestation of the objectives or *maqasid* of *Shari'a* concerning property, so long as its work in the circulation of wealth proceeds in a proper manner. We find that these institutions have been established in accordance with the *Shari'a* and they adhere to a set of scientific and meticulous procedures that are designed to prohibit sin and corruption.

The incidence of causation in the Qur'an tends to be stronger than in *Sunna*. For example, the Messenger of God said in a *hadith* reported by Imam Malik through 'A'ishah Um Al Muminin : "I have forbidden you to store up the meat of sacrificed animals because of the large crowds and caravans which came to you. But now you may eat and give charity (*sadaqah*) and also store it".<sup>59</sup> Only Imam Malik mentioned it through 'A'ishah with the words (*min ajl al-daffah*), but this expression does not occur in other narrations. Surely the strength of causation is due to the explicit and specific word (*min 'ajl*); and the perfect knowledge of *mujtahid* about these words has come through revelation and not by the narrator's personal opinion about the meaning of the *hadith*, although the possibility cannot be ruled out. This is just to say that there is a great difference between the position of the *mujtahid* in his dealing with the revealed text and in his understanding of the text. A variety of the explicit (*sarih*) causation that is weaker than causation in the first

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<sup>58</sup> Maqasid Ash Shari'a, pp. 175-180.

<sup>59</sup> Al-Muwatta, p. 229; Ikmal Al-Ikmal, Vol. 5, p. 304; Al-Bayhaqi, Vol. 9, p. 293.

category include L “*lam*”, B “*ba*”, “al-hamza”, N “*inna*” and F “*fa*”. The reason for its weakness is that these particles convey causation and some other meanings besides. To determine its relevance to causation depends on the context and the nearest meaning of causation.

L: al-Lam Ibn Hisham in his book Al-Mughni enumerated the meanings of “Lam” to up to twenty two meanings,<sup>60</sup> and Ibn Malik said : It has been reported that Lam is for possessiveness and similar meanings, like transience (*ta’diya*) as well as causation. God Most High has said : “And We have sent down to thee the Message so that you should explain clearly to people what has been sent to them”.<sup>61</sup> The ulema of *usul* give this example to illustrate absolute causation but not causation for analogical reasoning.

B: Alba: Ibn Hisham also mentioned fourteen meanings for alba. Sibawayh has similarly stated that correlation (*ilsaq*) is an inseparable and original meaning that is associated with ba. Among the examples of causation with *ba* is what Almighty God has said : “You have indeed wronged yourselves by your worship (*bi-ittikhadhikum*) of the calf”.<sup>62</sup> God also said : “Each one of them We seized for his sin (*bi-dhanbih*)”.<sup>63</sup>

Hamza and Nun: As for the *hamza* (glottal stop) it is either followed by (a) or (i), and N “noon” could either be simple or geminated, the combination of which give us four forms. As in the case of (*in*), Ibn Hisham has mentioned four original meanings: conditional, negative, single as distinct from the geminated one, which is only for emphasis and also superfluous sometimes.

He has reported from Mutarrif that (*in*) may be used for causation, but he argued against Mutarrif’s saying that this example could be interpreted to infer meanings other than causation. It is because condition has sometimes been used as a cause by the ulema of *usul*.<sup>64</sup> As for (*an*), Ibn Hisham said that some grammarians have mentioned that it

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<sup>60</sup> Al-Mughni, Vol. 1, p. 220.

<sup>61</sup> Surat ‘Annahl, Verse 44.

<sup>62</sup> Surat Al-baqarah (The Cow), Verse 54.

<sup>63</sup> Surat Al-ankabut, Verse 40; Al-Mughni, Vol. 1, pp. 108-118.

<sup>64</sup> Hashiyyat al-Sa’d upon Adud, Vol. 2, p. 234.

may be used for causation and then he objected saying that causation is not understandable by (*in*); rather it stems from the underlying (*lam*) L.<sup>65</sup> And in this case it is an infinitival (*masdariyya*) as Allah says : “They have driven out the Messenger and yourselves from your homes, simply because you believe (*an-tu’minu*) in Allah your Lord”.<sup>66</sup> As for (*anna*) and (*inna*), it is confirmed that they do not convey the meaning of causation. As for F (*fa*), it has three functions: it may be conjunctive or connective or superfluous. If the particle *fa* (f) is conjunctive, then it has three meanings: “*tartib*” (order), “*ta’qib*” (succession) and to indicate the hierarchy of each of the elements that it connects, without implying any meaning and without implying any connection that the meaning of the second quality is based on the first quality. For example the *hadith* of the Prophet: “May God grant His mercy to those who shave and then to those who cut their hairs short (*fa’l-muqsirin*). (here *fa* is used for hierarchical order).

If the particle *fa* (f) is used for order, then it is of two kinds: abstract which means that what follows is explained by the preceding; the other meaning is that details come after summing up, whether it is precedent or accompanied as Almighty Allah says: “Indeed they asked Musa for an even greater (miracle), for they said: show us Allah in public”. Their questions and their demand are the same; summing up comes before details. Another example is to say: “He performed ablution; so he washed his face, his hands, wiped his head and washed his feet; all these acts precede a complete ablution, which is the head of the conjunction”.

But when *fa* (f) is used for semantic order then its inference is for causation, whether it is prefixed to the quality or to the rule : Sa’d uddin al-Taftazani has said that according to its linguistic status, *fa* indicates order; it puts the rule after the cause, which precedes it rationally as it puts the cause of the rule preceding it externally. If the order is not for causation *fa* would not be used as a conjunctive, for conjunction with *fa* is not based only on the linguistic status, but rational argumentation is added to it, in which case the order is completely predicated on to

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<sup>65</sup> Al-Mughni, Vol. 1, p. 37.

<sup>66</sup> Al-Mumtahina, verse 1.

causation. Thus, merging these two connotations is weaker than the other types, in which causation is inherent in the meaning of the word.<sup>67</sup>

**Allusion (*al-Ima'*)**

The analogist deals with the revealed text first in order to obtain the effective cause. At times the wording of the text specifies the effective cause, whether evident or implicit, with all its ranks and classes which we have already explained. The revealed text may not contain any word indicating legal causation but the syntactic construction may allude to causation. That is because the *Shari'a* texts either occur in the Qur'an, which is the miraculous speech of God, or a pronouncement expressed by the Messenger of God, and of course, he is supremely articulate and eloquent, and enjoys the highest standing for his flawless speech. The text could also be the pronouncement of one of the Companions; and the Companions are native Arabs who have untarnished command of the language. Their close knowledge of the Qur'an and companionship to the Messenger of God increased their clarity of style and accuracy of diction. This is what impresses anyone who reflects on the text of the Qur'an or *Sunna* with the unique contribution of the Companions to the knowledge of these sources.

Thus if the mode of speech indicates causation, even in the absence of specific words to that effect, it is considered reliable enough for ascertaining the '*illah*', as shown by the following examples:

There is a juxtaposition of a ruling and an attribute, and if we do not read causation into it, the juxtaposition will make no sense, and the wording would fall below the precise standard of expression. An example of this is found in the *hadith*, narrated by the compilers of authentic Traditions. According to the wording in Al-Bukhari through Abu Hurayra, "A man came to the Prophet and said: "O Messenger of Allah, I am lost!". Then the Messenger asked: "What happened to you?". The man said : "I had conjugal relations with my wife while I was fasting". Then the Messenger of Allah said to him, "Could you find a slave to set free? .. to the end of the *hadith*."<sup>68</sup> So, unless we hold that

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<sup>67</sup> Hashiyat Al-Sa'd 'Ala'l-'Adud, Vol. 2, p. 234.

<sup>68</sup> Fath Al-Bari, Vol. 5, pp. 65/74.

conjugal relations with one's wife is the legal cause for emancipation, the wording would have been disconnected, falling short of prophetic perfection.

Another example is the *hadith* narrated by Bayhaqi, that the Prophet said to Ibn Mas'ud, "Have you had an ablution?" Then Ibn Mas'ud said : "No!". Then the Prophet said: "What is there in the utensil?" Ibn Mas'ud said: "Date beverage *nabidh*!". He (the Prophet) said: "Sweet fruit, and good water" (*tamra halwa wa ma' tayyib*), and then the Prophet performed ablution.<sup>69</sup>

Again, of this type (of *hadith*), where the rule is accompanied by an attribute is the *hadith* reported by Muslim through a chain of informants reaching Ibn 'Abbas that a woman came to the Prophet and said to him: "My mother died at a time when she was due to fast for a month". The Prophet asked her: "Do you think that if she owed a debt, would you have considered to pay it back?" She said: "Yes". So the Prophet said: "Then the debt due to Allah commands even greater priority".<sup>70</sup> Thus the woman asked about the debt due to Allah, so the Prophet mentioned a parallel debt, i.e. the debt to a human being. So here is an allusion to the fact that the benefit gained from paying back a debt to humans is also gained by paying back the debt owed to Allah.

The Lawgiver differentiates between two rules accompanied by two attributes, coming in different forms, sometimes in the form of an adjective, an allusion to purpose, an exception, or a condition, as in the following examples:

As for the first form, that is of adjective - this is seen in the following saying of the Prophet: "For the mounted fighter three shares and the fighter on foot one share".<sup>71</sup> So the differentiation here is based on the two different adjectives, in spite of their coincidence in *jihad*, indicating that the cause for giving preference to one of them over the other is that of the specification of one of them as a horseman.

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<sup>69</sup> As-Sunan Al-Kubra, Vol. 1, pp. 9-10.

<sup>70</sup> Ikmal Al-Ikmal, Vol. 3, p. 263.

<sup>71</sup> Al-Bayhaqi, Vol. 6, p. 327.

Sometimes only one attribute is mentioned as in the *hadith* narrated by Tirmidhi on the authority of Abu Hurayrah that the Prophet said: “The killer does not inherit”.<sup>72</sup> So here it is mentioned that the killer is prohibited from inheritance, and nothing is mentioned about the non-killer, since the latter’s position in inheritance is already known. So this is an indication that the specification of killing is the cause for disinheritance.

An example of the specification of a rule **by reference to its purpose** is seen in the Words of God : “And do not draw near them till they are pure”.<sup>73</sup> So the command forbidding sexual intercourse with one’s wife and seclusion until they regain their purity indicates that menstruation is the cause of prohibition.

The Lawgiver may mention together with the rule an appropriate attribute that explains it. An example of this, is the Prophet’s saying: “The judge must not adjudicate between the litigants in a state of anger”.<sup>74</sup> So the rule here is prohibition of judgment when the attribute of anger is established; and this attribute is suitable (*munasib*) for forbidding adjudication, since it leads to confused thinking, disturbance, and infirmity. Since it is known from surveying the *Shari’a* sources that these sources often combine suitable attributes with rules, it is probable that the Lawgiver has considered the suitability and gave it full consideration. Al-‘Adud has said concerning this: “if the rule and the attribute are both mentioned, then this is considered an allusion by general agreement; but if only one of them is mentioned, that is, the ruling without the attribute, or the attribute without the ruling, the ulema of *usul* have disagreed, giving three different opinions; one of which is that this should not be considered as an allusion, or it may be so considered, or thirdly: mentioning the attribute is a form of allusion, but mentioning the rule is not”.

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<sup>72</sup> Al-Ahwadhi, Vol. 8, p. 259; and Ibn Majah, Vol. 2, p. 913 have considered this to be a weak hadith.

<sup>73</sup> Surat Al-Baqarah, ayah 222.

<sup>74</sup> Reported by the Six and Ahmad Ibn Hanbal, and the wording in that of Al-Bukhari, Vol. 16.

An example of an attribute mentioned in the Words of the *ayah* which reads: “And God has made selling lawful”.<sup>75</sup> So here the attribute of permissibility occurring in conjunction with sale conveys the ruling over the validity of sale.

An example of a ruling without the specification of attribute would be to say: “wine is forbidden”; here the reference to the ruling alone provides us with the legal cause that is commonly inferred namely intoxication.

As for those who considered specification of attributes as an allusion, whether it is mentioned or not, their terminology indicates that allusion occurs whether one of them or both of them are mentioned. Those who stipulate mentioning both propose that juxtaposition does not occur except when there is a reference to both (ruling and attribute); so if only one is mentioned and the other left out, then we are out of the course of allusion into some other course.

As for those who are contented with the mention of attribute only without the ruling, it is because they consider that the cause necessitates the effect, and this will be a kind of juxtaposition, but the ruling does not indicate the cause.

### **The Second Method : Consensus Ijma’**

Consensus is a demonstrative proof of affirming the rules and there is no doubt about that. Thus we can demonstrate by consensus that the attribute may constitute the cause, according to the theoretical formulations of *usul*. But the theoreticians spoke about the identification of *illah* by consensus in a very brief manner. Imam Al-Razi thus spoke in Al-Mahsul after enumerating the means of identification of *illah* by consensus differently in its various editions, mentioning once that consensus is one of the means of establishing legal causes. But in the Halab edition (Al-Ahmadiyyah) he did not mention consensus. Again the editor thought it probable that Al-Razi considered consensus as a means of identification of legal cause, so he placed it in the main part of

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<sup>75</sup> Al-Bayhaqi, Vol. 6, p. 327.



the book, and his commentary was to the effect that it has been inadvertently left out in the Halab edition.<sup>76</sup>

But when Imam Ar-Razi started expounding his statements about each means, he neglected consensus. Similarly Abul-Husayn Al-Basri in Al-Mu'tamad did not speak about this means at all. It only occurred during his presentation under the title on the cause of the original case which is contrary to the normal rules of *Qiyas*, stating that Shaykh Abul-Husayn Al-Basri permitted analogy to be founded on a specific case (*al-shay' al-makhsus*) if the (scholars of the are *umma*) unanimous on its legal cause that has also been consistently reported.<sup>77</sup> He also mentioned consensus in the chapter "What indicates the validity of the '*illah*'" under "Additional information" in Al-Mu'tamad. He considered that the validity of the legal cause is established by the consensus of analogists to the effect that the original case which admits only a limited number of causes, must be confined to those causes in that no one can add to them; and when all of these causes become corrupt except one, then it is known that this one is the legal cause.<sup>78</sup>

As for Imam Al-Amidi, he gave due prominence to consensus as a means, and considered it the first means of identification of '*illah*', saying that, as a general rule, consensus may identify an attribute as a legal cause, whether the consensus is definitive or conjectural. He stressed the fact that if consensus that identifies the '*illah*' is definitive, its existence with regard to the original or the parallel case would still be conjectural. This is in fact one of the reasons for the existence of differences as to whether *Qiyas* is a valid proof. But the '*illah*' that is determined by decisive consensus, which is also clearly found in both the original and parallel cases is not disputed.<sup>79</sup>

Abu Hamid Al-Ghazali is actually the one who spoke extensively about the means of consensus in Shifa'a-I-Ghalil, and it is summarized in Al-Mustasfa to the effect that: "If the rule that is determined by consensus is linked to an attribute that is suitable for a legal cause, then

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<sup>76</sup> Al-Mahsul, Vol. 2, p. 191.

<sup>77</sup> Al-Mu'tamad, Vol. 2, p. 791.

<sup>78</sup> Al-Mu'tamad, Vol. 2, p. 1037.

<sup>79</sup> Al-Ihkam, Vol. 3, p. 364.

their consensus on the rule implies their consensus on the probability that the attribute is also considered effective. He gave five examples of this:

- (1) Giving priority to a full brother over a half-brother (through the father) in inheritance. This priority is a matter of consensus and the effective attribute by implication is the combination of two blood relations, which is decisive in giving priority. Analogous to this is giving priority to the full brother in marriage guardianship, since he can make a preferable choice than the half-brother.
- (2) Ignorance of the counter value is decisive in vitiating the contract of sale, and this is also determined by consensus. So the vitiating element here occurs in juxtaposition with the attribute of ignorance. The fact that ignorance is decisive in the ruling is also a matter of consensus; so by analogy with this we can determine vitiation of a marriage in which the dower is unknown.
- (3) There is consensus that the usurper is guarantor of what he has usurped if the property in his hand has perished. The legal cause of this, which is determined by consensus, is that the hand here is a hand of transgression. Parallel to this is the case of a thief who has to guarantee what he has stolen and destroyed, and the guarantee is not forfeited through the execution of the prescribed punishment for *hadd*.
- (4) A minor virgin is by consensus subject to the power of guardianship for marriage, and so is the parallel case of a minor non-virgin. That is because, by consensus, guardianship on the basis of minority in the case of marriage and in the case of property has the same effect, and also in the case of a minor male's property and marriage.

It may also be mentioned here that the opinion of the debater to prove the effectiveness of the attribute which is the subject of dispute, is unacceptable, for if a disputed attribute were to be acceptable as legal cause by consensus, then it would be acceptable for the established legal cause on the basis of the text and allusion; and this will close down the door of *Qiyas*. Then, since the debater admits that *Qiyas* is a legal methodology for establishing rules, his objection is unacceptable.<sup>80</sup>

The examples given by Imam Al-Ghazali are probably the only examples around which run the explanations in works of the ulema of *usul*, except for Ash-Shirazi in Sharh Al-Luma', where he gives an example for the legal cause agreed upon by the consensus of the Companions at the time of Umar Ibn Al-Khattab (may Allah be pleased with him). He reported that Umar Ibn Al-Khattab said about the *sawad* land in Iraqi territory: "If it is distributed among you (conquerors), it would be circulated only among the rich of you", and none differed with 'Umar on that. Thus consensus was concluded, and the legal cause for abandoning the distribution was established.

In fact I have not found this statement attributed to 'Umar in any of the authentic Books of Sunna. What has been narrated by Imam Ahmad (may Allah be pleased with him) and transmitted by Zayd Ibn Aslam after 'Umar is that he said : "Had it not been that I would be inflicting harm on Muslims, I would not have conquered any land except that I would distribute it the way that the Messenger of Allah did distribute the land of Khaybar".<sup>81</sup> All these narrations through Zayd Ibn Aslam did not mention the legal causation (to prevent its being circulated only among the rich). Furthermore, what he mentioned about the Companions' acceptance of this legal causation leading to a consensus is contradicted by what Al-Bayhaqi transmitted through Zayd Ibn Aslam to the effect that when 'Umar Ibn Al-Khattab conquered Syria, Bilal stood up to him saying : "Surely you should definitely distribute it or we would defend our standby force". To this 'Umar said : "If it means that I leave the people resourceless (after conquest) I will in no way conquer any land

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<sup>80</sup> Shifa al-Ghalil, pp. 110-142; and Al-Mustasfa, Vol. 2, pp. 293-295.

<sup>81</sup> Shaykh Shakir commented by saying that it is authentic (Sahih), Vol. 1, p. 282. In the same way it has been narrated by Al-Bukhari in Fath Al-Bari, Vol. 5, p. 414.

without distributing it into shares as the Messenger of God did with the land of Khaybar. But I would leave it to the coming generations as a booty to be distributed among them".<sup>82</sup> So here 'Umar gave as a legal cause for leaving the land in the hands of the original owners and refrained from distributing it among the conquerors (*mujahidin*) to be the fear of spreading poverty and penury among the coming generations, in case the conquerors took it solely for themselves in their possession.

Similarly Al-Bayhaqi reported on the authority of Nafi', a servant of Ibn Umar that: "When Muslims conquered Sham (Syria), Bilal was there", and I think Ibn 'Umar said that Mu'adh Ibn Jabal was also there. So they wrote to 'Umar Ibn Al-Khattab (may Allah be pleased with him) about distributing the conquered land in the way the Prophet did with the land of Khaybar. But 'Umar refused and they too refused. So he invoked against them, and said : "May Allah be my safeguard against Bilal and his Companions". Thus the dispute went so far. So how can this be the legal consensus mentioned by Ash-Shirazi? Even this so-called consensus is contradicted by Ahmad Ibn Hanbal who narrated in his Musnad, that 'Umar went back on his independent legal judgment, and adopted Bilal's judgment. Thus Ahmad reported from Zayd Ibn Aslam, from his father, that he heard 'Umar say : "Indeed in case I live to the coming year, in no way shall the people conquer any land without dividing it into shares among them, as the Prophet did with the land of Khaybar".<sup>83</sup>

It becomes evident from what has been said so far that establishing the legality of the cause by consensus is possible theoretically, but this is still far removed from realising actual consensus about the legal cause of the rules *ahkam*. The most that one can say here is that one of the Companions may have suggested *ta'lil* (ratiocination) without any objections against it from other Companions. This is far from being a consensus, since the most we can make of it is that it is a mere saying of one of the Companions. Taking the saying of one of the Companions as a legal source is not agreed upon by the ulema of *usul*, so it cannot be taken as consensus.

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<sup>82</sup> As-Sunan Al-Kubra, Vol. 6, p. 318.

<sup>83</sup> Al-Musnad, edited by Shaykh Shakir, Vol. 1, p. 214.

Ash-Shawkani has discussed the credibility of consensus as one of the methods for arriving at the *'illa* of *Qiyas*, because those who approve analogy are not the whole of the *ummah*. He goes on to say: "The claim of Imam Al-Haramayn al-Juwayni as regards discrediting the opponents of *Qiyas* as jurists and scholars of *Shari'a* is unacceptable, for it indulges in prejudice". His methodology is further weakened when he said : "Those who adopt this method do not stipulate that consensus should be definitive, but they accept probable consensus, thus adding weakness to an already weak position".<sup>84</sup> These opinions of Ash-Shawkani have many overlaps and it sounds strange to see them adopted by a jurist of his calibre, because ascertaining the methodology of *'illa* is different from accepting *Qiyas*. So the jurists may reach consensus on the identification of an attribute a legal as *'illah*, while some of them may still refuse extending the *hukm* of the relevant legal text to a parallel case.

### ***The Third Method: Inference (al-Istinbat)***

This methodology includes:

#### **1. Probing and Classification (*al-sabr wa'l-taqsim*)**

The terminology we are about to explain has come to us, with the word *al-sabr* (probing) preceding *al-taqsim* (classification).

In Arabic, the word "*sabr*-probing" originally means observing the depth of a wound, and similar things; so it includes scrutiny and testing, and getting at the core of the matter. To this also refers what Abu Bakr said to the Prophet (s.a.w) about the cavern: "Do not enter until I probe it for you!", that is, until I examine it (*asbirhu*), make sure of its state, and see if there is anyone or anything harmful.<sup>85</sup>

What is intended here by the ulema of *usul* is scrutinising the qualities which may serve as legal causes and it involves retaining that which is suitable for causation and avoiding that which is not. This step

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<sup>84</sup> Irshad Al-Fuhul, p. 210.

<sup>85</sup> Taj Al-'Arus, Vol. 11, p. 488.

is taken after ascertaining the qualities proper for causation at first sight. Probing with a view to confining the scope of enquiry here is with a view to classification; for classification here is not an absolute classification, but a confined one and in fact it comes prior to probing. An example of this is found when a Maliki scholar says: "I have looked into the qualities for which the *Shari'a* ruled that usury is forbidden in wheat and I have found out that these do not go beyond measuring, edibility and storability. Then I probed deeper and found that edibility and storability are the attributes considered by the Lawgiver in forbidding usury in wheat, and by inference, this also applies to corn.

Actually the *mujtahid* is contented if he sees the probability of a clear-cut assignment of attributes, but this probability is obtained from the suitability of some of them for causation. So the claim of the jurist about his assignment is binding, in face of his debaters, if it satisfies two conditions : knowledge and justice. So through his knowledge, one is assured of the validity of his personal judgment, and through his sense of justice one is assured of his truthfulness. Then it is for his debater to state another class to which the jurist was heedless. So it is enough for the jurist to express his view excluding the mentioned quality from causation, in the sense that he would say to his opponent: "I did not enter it into the classification, because I found at first sight that it is not relevant to causation.

There are many methods by which to prove the invalidity of qualities for causation some of these are:

- (1) Cancellation (*al-ilgha'*): This means that the ruling (*hukm*) in all of its manifestations is established without the excluded quality. For example, forbidding usury in wheat is assumed either because of its edibility, or measurability and weight, and then the jurist finds that usury is forbidden in salt, and it is not edible (for nourishment), then that would exclude the quality of edibility and affirms the quality of measurability.
- (2) Another method is when the Lawgiver is known to have nullified the quality in question and did not accredit it, and that is called *al-tardi* (exclusive). So the Lawgiver's

cancellation means that it must be excluded, whether the cancellation is absolute, as in the case of skin color, where the Lawgiver cancelled it in retaliation, in inheritance, and in the attribution of paternity. Cancellation is also encountered in special legal rules, as in the case of the purity of metal in currency exchange. But this quality is still accredited in the case of loan; the Lawgiver does not accredit gender in the emancipation of male and female slaves, although gender is accredited in testimony, appointment to judicial office, and guardianship in marriage and inheritance.

- (3) Probing may be necessary when the *faqih* establishes that there is no suitability between the rule and any of the qualities, as in the obligation of retaliation against the murderer. To say that the cause of retaliation is that the killing has taken place with a sharp instrument is not accredited. Here the jurist can say : “the fact that murder has taken place with a sharp instrument does not establish it for me as a suitable cause for the legal rule”.

## 2. Suitability (*al-Munasabah*)

Suitability is sometimes called *al-ikhalah* (imagination), *maslahah* (public interest), and *al-istidlal* (reasoning) and regard for the objectives *maqasid* of *Shari'a*. The procedure to be noted here is extraction of the cause (*takhrij al-manat*). Suitability is of central significance for *Qiyas*, and it becomes at once the source of its ambiguity as well as its clarity.<sup>86</sup>

Suitability is the assignment of the *'illah* in the original case by indicating the suitability between the *'illah* and the legal rule *hukm* as a result of scrutinising the legal rule and looking into the qualities which may be found in the original case, and then choosing what is suitable and harmonious to the legal rule. Al-'Adud al-Iji defines suitability as an attribute which is evident (*zahir*) and consistent (*mundabit*) and provides a rational basis for the *hukm* and people of sound intellect consider it to

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<sup>86</sup> Irshad Al-Fuhul, p. 214.

be an appropriate objective in the way of attaining public interest *maslahah* or avoiding corruption *mafsadah*.

A suitable attribute should also be an evident (*zahir*) quality, thus precluding that which is hidden, because what is hidden cannot be fit for causation, like love, hate and premeditation in homicide, as these are all hidden qualities.

Consistency as an attribute means that there is no disagreement about determining it; it is distinct from what is changeable and subject to disagreement, like hardship. So what is hardship for an old man is not the same for a middle-aged person, or a young person. What is hard when the weather is hot is not the same when it is cold. Thus whenever the quality is suitable, but not regular, it has to be substituted for by an evident quality which is also consistent : the *hukm* exists by its existence and non-existent by its non-existence. So it becomes an indicator of the legal rule, which is why it is also known as *mazannah* (probability).

Probability: is an evident and consistent quality, like journeying, since it is regular and obvious in relationship to hardship. Similar to this is killing with a sharp instrument which is taken as indicator of premeditation that is basically a hidden matter. Since premeditation is internal and cannot be seen, killing someone with such an instrument is a probable reason for premeditation.

One of the hallmarks of *munasabah* is that it secures the relevant objective.

The suitable quality leading to the attainment of the objective that is sought by the legal rule can realise that objective by the following means:

- (1) When the suitable attribute achieves the objective definitely, such as in the case of lawful trading, which fulfils the requirements of a valid contract.
- (2) When the suitable attribute mostly achieves the objective, as in the case of retaliation as a means of deterring murder.



- (3) When the suitable attribute may or may not achieve the desired objective and both possibilities are nearly equal. The example given here is the punishment for drinking wine. Such punishment is supposed to lead to the protection of the intellect. So the ulema of *usul* say that the number of those who drink nearly equals the number of those who do not. If this statement is taken as a theoretical supposition, then it is acceptable; but in point of fact it is not, since deterrence of wine-drinking in the event where the punishment is inflicted is probable.
- (4) The non-achievement of the objective may be more probable, as in the case of the marriage of a woman past menopause (*al-ayisah*), where it is improbable that marriage will achieve the objective of reproduction.
- (5) The achievement of the objective is definitely impossible. An example of this is the case of (absentee) marriage for the purpose of reproduction. Marriage gives rise to a presumption that the child belongs to the father. But if a man resident in the Far West marries a woman in Far East and we definitely know that they never had sexual intercourse, and then she gives birth to a child, should the child then be acknowledged by the man although we know that he did not have the chance to cause the pregnancy? Here the three Schools, the Maliki, the Shafi'i and the Hanbali do not accredit this as a legal causation, on which a legal rule can be based. But the Hanafi School accredits this legal causation; so to them the child may be acknowledged by the one who has effected a legal contract.

Another example is that of the probation period (*al-istibra'*) of the concubine. Probation here is intended by the Lawgiver for the purpose of ascertaining the non-existence of pregnancy from the first master. So if the master sells his concubine to another, and then he buys her again in the same sitting, before the latter finally departs, without any chance of retirement in privacy with her, then in this case it is definitely known that

the latter did not have sexual relations with her and that there was no chance for her pregnancy. So probation here definitely does not achieve its objective, as in the previous case.

It is only the Hanafi School which acknowledges the validity of that probation.<sup>87</sup>

(A more detailed treatment of suitability will come under *al masalih al mursala* public interests below).

### **3. Resemblance (*al-Shabah*)**

#### **Definition of *al-Shabah***

The linguistic meaning of resemblance makes it pervasive to all kinds of *Qiyas*. For in all analogy the new case is being joined to an original case because of resemblance between them. But the ulema of *usul* have developed the linguistic meaning of resemblance to indicate a special type. What is this new type? Here Ibn Al-Anbari says : "I have not seen any issue in jurisprudence more vague than determining the legal cause. Imam Al-Ghazali said after he has described the analogy of resemblance, if this description is not what the theoreticians mean by this type, then I do not know what they mean by it".<sup>88</sup>

Jalal Al-Muhalli has also said : "Analogy by resemblance has been a matter of much dispute and I have not found any valid definition for it".<sup>89</sup>

This indicates one of two concepts: either that the concept of resemblance cannot be consistently defined, since its meaning is oscillating and unstable, because it is torn out, dangling between many different extremes; if you tie it up to one direction, other directions pulls it away.

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<sup>87</sup> Al-‘Adud, Vol. 2, p. 240 and Irshad Al-Fuhul, p. 215.

<sup>88</sup> Al-Mustasfa, Vol. 2, p. 311.

<sup>89</sup> Hashiyat Al-Banani, Vol. 2, p. 167.

The other reason may be because resemblance has been applied to different concepts, and so an exhaustive definition for it is impossible.

What seems convincing to me is that both concepts have resulted in making definition difficult; and this makes it necessary to deal separately with the causes of this confusion first.

#### THE FIRST CAUSE OF CONFUSION

Resemblance (*al-shabah*) is like an attribute of causation (*ta'lil*), and this is how the ulema of *usul* have known it. We shall attempt here some of the definitions of the resemblance and its relevant concepts. Al-'Adud has thus stated that "the suitability of the attribute (*al-wasf*) is either known by looking at it or it is not:

- (1) If the suitability of an attribute is easily known, it is called *munasib* (suitable, harmonious);
- (2) If the suitability of an attribute is not known but we find that the Lawgiver has considered it in the validation of certain legal rulings *ahkam*, this is called resemblance (*al-shabah*). Hence the probability of causation in *al-shabah* is weak simply because its suitability is unknown, but it is a proximate quality to the *munasib*;
- (3) When the suitability of an attribute is not known, and it is also not certain whether the Lawgiver has considered it at all, then it is called co-extensive (*al-tard*). According to Qadi Abu Bakr al-Baqillani "It is the combination of the original case and the parallel case in a quality that does not suit the legal rule, but necessitate what suits the legal rule".<sup>90</sup> Others have defined it as the quality which does not suit the legal rule, but the effect of its proximate quality on

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<sup>90</sup> Irshad Al-Fuhul, p. 219.

another proximate quality of that legal rule is already known.<sup>91</sup>

#### COMPARING THESE DEFINITIONS

The three definitions agree that resemblance is a quality that is unsuitable to the legal rule at first sight. It is to be observed that although the relationship between the quality and the legal rule does not seem suitable, there is nevertheless a relationship, which according to al-‘Adud, the Lawgiver has considered it in some legal rules. Al-Qadi Abu Bakr spoke of this relationship when he said that the quality in question requires what is suitable to the legal rule.

The third opinion says that it is this quality which is known to be effective in the proximate species of the legal rule.

To illustrate this we refer to the stipulation of *niyyah* (intention) in dry ablution (*tayammum*), which is a matter of agreement among jurists. This stipulation has been extended to (regular) ablution *wudu*. The legal cause here is purification, and the quality of purification is arrived at through the method of resemblance. That is because purification does not suit the *niyyah*, because, if it suited the *niyyah*, it would be a stipulation for cleaning any defilement and dirt. But purification is a form of worship, and intention for worship is considered by the Lawgiver as pre-requisite such as in the case of prayer and pilgrimage. So this example shows clearly that this quality does not suit the legal rule, but the Lawgiver has considered it in some cases.

Then, for the second definition, if we combine dry ablution *tayammum* and regular ablution *wudu* as two forms of purification, this by itself is not suitable for stipulating intention *niyyah* for them but since both are forms of worship this may provide a suitable ground for this stipulation. Likewise for the third definition, we find that the class jins of purification partakes in worship, but since worship includes purification as well as prayer and pilgrimage, this class is considered within the class

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<sup>91</sup> Ibid., p. 219.

of the legal rule wherein absolute intention is general enough to include the intention for purification, prayer, and circumambulation *tawaf*.

A second example is the stipulation of the use of water in removing dirt *taharat al-khabath*, based on an analogy with purification from other defilement *taharat al-hadath*. So both have the common link that both of them are types of purification necessary for performing prayer, but the suitability relationship between purification necessary for prayer and the specification of water is not obvious. Yet we note that the Lawgiver has considered it in establishing the legal rule, which is the specification of water in ablution for prayer, circumambulation and the recitation of al-Qur'an.

The above example is also compatible with the three given definitions. As for the first definition, we see that the stipulation of water for purification from defilement is not suitable per se, but the Lawgiver has considered it as regards touching the Book (Al-Qur'an), prayer, and circumambulation. So it is not suitable in itself, but the Lawgiver considered it in some legal rules, and this makes it seem probable that it is accredited for the realisation of public interest. So, if we say that purification from dirt is analogous to purification from defilement, and thus it is needed for prayer, then we have here three qualities:

- (1) purification *taharah*;
- (2) defilement *khabath*;
- (3) cleanliness for prayer. Of these three qualities, the Lawgiver has considered two, namely purification, and cleanliness for performing prayer, and He established the legal rule upon them, and that is the specification of water for cleanliness. As for the third quality, which is purification from defilement, we find that it is not considered in any of (the known) cases. So it becomes preferable to consider what the Lawgiver has accredited to two qualities and the relevance it might have to the third (discredited) quality.<sup>92</sup>

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<sup>92</sup> Sharh Al-Adud, Vol. 2, p. 245.

The same applies to the second definition because stipulating water (for cleanliness) is not suitable in itself, but it is implicated for suitability, because it is a part of what is form of worship to Allah.

Again, as regards the third definition, we say that it is unsuitable in itself, but the Lawgiver has considered its proximate case, that is purification by water, which is more general than purification merely for prayer or circumabulation or the recitation of the Qur'an, but it also includes the proximate case for the legal rule, which is worship contingent on purification. The point that the three different definitions are different only in form but are the same as regards concept has been expressed by Al-Badakhshi in his commentary on Al-Minhaj. It is also the opinion of Shaykh Bakhit in his commentary on Nihayat As-Sul; so he says that the three opinions are the same in meaning and the difference is only in the manner of expression. That is because the quality that seems unsuitable, but the Lawgiver has considered it makes it torn between two extremes. The first of these is, that it is unsuitable so it is inclined toward the co-extensive (*tardi*); and the other extreme is the Lawgiver's consideration of it in some legal rules, which would make us inclined to consider it suitable; and this opinion is in accordance with Ibn Al Hajib's definition. But this suitability is not original, for it only conforms with the subsidiary qualities, as we have observed, it is considered by the Lawgiver in some of the legal rules. That is why it is a subsidiary kind of suitability, which is what Al-Qadi Abu Bakr has said in his definition: "There is no doubt that when the Lawgiver considers it, it suggests that its case is proximate to the case of the legal rule".<sup>93</sup>

Shaykh Bakhit has been influenced by a definition that is offered in Musallam Ath-Thubut, where the definition of resemblance (*al-shabah*) runs like this : "it is not suitable (in itself) but it is presumed as suitable because the Lawgiver has considered it in some legal rules".<sup>94</sup> Thus the author of Al-Fawatih did not pay attention to the third definition, nor did he mention it in his discussion. Of course he is right here, since what is not a suitable quality, but the Lawgiver has considered

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<sup>93</sup> Sullam Al-Wusul Li Sharh Nihayati As-Sul, Vol. 3, Vol. 110.

<sup>94</sup> Fawatih ar-Rahamut, Vol. 2, p. 301.

it in some legal rules, does not necessarily mean the same as to say that the Lawgiver has considered it as a proximate case to the proximate case of the legal rule.

Then we find that Dr. Muhammad Mustafa Shalabi has accepted what was stated by Shaykh Bakhit and elaborated on it, and he also accepted the opinion of Al-Qarafi in Al-Tanqih. But it is already known that Al-Qarafi left his book as a first draft and did not rewrite it. We get a glimpse of that, in this respect, in the example he gave of resemblance, that if the quality is liquid, and is unfit to build a bridge over it, so it is unfit for purification, although it is an example of co-extensiveness *al-tard*, and agreed upon by the ulema of *usul*. Added to that is the fact that he did not copy from Al-Qadi anything except the definition that Al-Amidi mentioned. None of the books on *Usul* that reached my hand has attributed to Al-Qadi the opinion that the quality of the proximate case is suitable for the proximate case of the legal rule.

The examples we have referred to, do not show the proximate class of the quality to have been considered in the legal rule, except by some way of arbitrariness that becomes apparent upon reflection.

What I prefer to say, in the light of this study is that the resemblance method is the method which leads to a specified legal cause, whereby there is no suitability between it and the legal rule. But since the Lawgiver has taken it into consideration in some cases it has made an impact on the jurists. The jurists have consequently been influenced and came to the conclusion that there is suitability between resemblance and the legal rule which has been indicated to them. This is the reason why the jurists are in disagreement over it (method of resemblance) as shown below :

- (1) Abu Bakr and the majority of Hanafis, Abu Ishaq Ash-Shirazi, Abu Mansur Al-Maturidi, Abu Ishaq Al-Marwazi, Abu Bakr As-Sayrafi and Al Qadi Abut-Tayyib Attabari maintain that resemblance is no authority. Dr. Mustafa Shalabi has made a mistake because he attributed to Al-Qadi Abd-al-Wahab, as he

understood from Al-Qarafi's wording that Al Qadi is Al-Qadi Abd-al-Wahab, whereas al-Qarafi means Al-Qadi Al- Baqillani. We shall give quotations from Al-Qadi Abd al-Wahhab confirming what we have said.

- (2)The majority of jurists maintain that resemblance is an authority which is why they establish their legal rules on it. This appears frequently in books on comparative studies, where jurists use resemblance in many cases to support their views in subsidiary questions. Ibn Rushd says in his explanation of the usury of excess and credit usury : "Surely, those who confine the two types of usury to the six categories, are one of two groups : Either those who have rejected *Qiyas* completely; or those who rejected analogy of resemblance in particular. The reason is that those who have joined a non-textual case to a textual injunction have accorded it on the basis of the analogy of resemblance and not according to the analogy of the legal cause. So, Al-Qadi Abu-Bakr, who does not validate the analogy of resemblance, has extended the analogy of dates to raisin only because it is similar to dates in its causation.

The fact is that almost every one of the exponents of analogy have evidence in support of the analogy of resemblance, which they have accredited in joining non-textual cases to textual injunctions. Thus the Shafi'is maintain, as regards affirming the effective cause which is based on resemblance, that if the legal rule is based on a derivative noun, this indicates that this is the meaning from which the legal cause of the legal rule has been derived. An example of this from the Qur'an is : "As to the thief, male or female, cut off their hands"; and in the *hadith*, we find : "Food for food, like for like". So here it is clear that edibility (in the case of food) is the proper quality upon which the legal rule is based.

As a matter of fact, edibility by itself is not suited to the legal rule. But it is espoused by the quality suited to the legal rule. This quality is preservation of the property which the people need for their sustenance



by prohibiting unfair dealing *ghabn* therein. The Lawgiver has accredited this quality in wheat, barley and salt.

The Malikis have added to edibility the attribute of storability. They have deduced this from the fact that the Lawgiver has enumerated specified categories to indicate that each category is to be joined to its similar category in the prohibition of usury.<sup>95</sup>

Al-Qadi Abd al Wahhab elaborates in this regard. We may deduce from the Prophet's ruling over each one of these four commodities that which we could not deduce from his mentioning one only. That is to say that by mentioning wheat the Prophet (s.a.w). included every staple food, which people generally need and which are basic to human nourishment. He also specified barley as similar to wheat, and every similar commodity which is used for food in case of necessity, such as millets and corn and similar other commodities. Surely by singling out barley as animal feed he does not exclude it from being used as food for human beings. For usury is applicable to food-stuffs regardless as to whether they are being eaten in situations of prosperity and wealth or in those of necessity and hardship. In addition, the Prophet (s.a.w) mentioned dates, which refers implicitly to honey, raisin, sugar and all sweets mostly stored as food-stuffs. Surely usury includes all varieties of sweets. Further he mentioned salt to refer to spices and what this implicates that is fit as food-stuff, since usury is not confined to food per se in isolation from what is implicated or necessary.<sup>96</sup>

Another example is drawing an analogy between the loan of animals and the loan of garments, because it is a commodity that can be given in dower and can be a charge on the person (*dhimma*) of the individual.<sup>97</sup> The legal cause of this analogy is that garments can be given as dower and can form a charge on the *dhimma* of a person. But the cause of the validity of garments loan on the basis that it can be given in dower and be established as a charge on the *dhimma* was not mentioned neither by text nor consensus *Ijma'* nor is it effective for causation. Yet the

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<sup>95</sup> Al-Bidayah, Vol. 2, p. 130.

<sup>96</sup> Al-Ishraf, Vol. 1, p. 253.

<sup>97</sup> Ibid., Vol. 1, p. 278.

permissibility of loan implicates that it is fit to form a charge on the *dhimma*; otherwise loan would be invalid, because it is based upon repayment of what the borrower has borrowed. If the loan did not devolve on personal *dhimma*, it would not be valid. Thus, in this example, causation is not based on the quality suited to the legal rule, but on another quality that espouses the former. The Lawgiver has drawn attention to this quality in some cases, as in the case of borrowing dirhams and dinars.<sup>98</sup>

#### **ARGUMENT OF THE OPPONENTS OF RESEMBLANCE**

What I have seen in the evidence of the two sides to this debate is akin to the debate of the ulema of *usul* which demonstrates their debating skill, and exposes affirmative or negative aspects of the debated issue. All of these arguments are persuasive but not certain, as they involve generalisation. An example of such generalisation is the assertion by the opponents of resemblance that *Qiyas* is proven by the practice of the Companions who have validated the analogy of suitability but not the analogy of resemblance. But who can claim after deeper investigation, that the Companions never depended on analogy of resemblance? The same applies to what the exponents of resemblance say about the generality of the Words of God as their evidence. Says He: "So take a lesson, O You who have eyes"(59:2). Despite the fact that they have laid down the rule that the most general has no bearing on what is specifically certain. Even the quoted Divine Words do not provide a general ruling on *Qiyas*. What is preferable in my view is that the cause of disagreement is rooted in the conjecture of the jurist who resorts to this method in determining the legal cause. Thus. The opponents of resemblance considered it such a weak method that a jurist could not declare that the rule established by this method is one that would please Allah, whereas the exponents of this method maintain that the probability (*al-zann*) that is engendered by resemblance is enough to justify the jurist's effort to infer the practical legal rules. Likewise, this method provides the basis of legal rules for substantive disputes.

#### **THE SECOND CAUSE OF CONFUSION**

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<sup>98</sup> Dirham is a silver currency. Dinar is a gold currency used in the early Muslim period (translator).

Resemblance has been used in two different senses. For there is an additional meaning besides the quality which is referred to as resemblance. This is the case of analogy in which the parallel case resembles two original cases, but the parallel case has stronger resemblance to one of the original cases than to the other in respect of a certain quality.

The origin of this is what Imam Ash-Shafi'i has stated : "Analogy is of two kinds. The first is that the parallel case carries the meaning (*ma'na*) of the original case. There is no dispute over this kind of *Qiyas*. The second kind is when a certain thing resembles many things each of which stands as an original case for it.

Ash-Shafi'i says: "The sound approach to resemblance in my opinion, and Allah knows best, is to check the matter: whichever is closer is joined to the one to which it resembles more closely (*ashbah*). That means we join a parallel case which resembles two original cases in preference over the parallel case which resembles only one".<sup>99</sup> Thus what Ash-Shafi'i wrote indicates that a certain thing resembles two original cases. It means that a parallel case resembles one of two original cases in one respect and resembles the other original in regard to an aspect other than the first. Thus, each aspect requires a legal rule different from the other. Hence Imam Ash-Shafi'i intended to give precedence to one over the other, on the basis of the common link between a parallel case and the original case. So whichever original case bears greater similarity, the parallel case joins it. To illustrate this we pose the question as to what are the consequences of killing a slave? In this case, two contradictory ideas are combined. The first of these is human dignity, for the slave has a right to life like other human beings; so he and a free man are alike in this respect. The dignity of mankind is the same for all human beings from the viewpoint of Islam. The second idea here is that a slave is like a commodity that is purchased and sold, and the value differs from one slave to another. Thus in this respect, his value differs in accordance with his characteristics. So he has the dual status of humanity and pecuniary value, but he has greater resemblance to a free man due to the

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<sup>99</sup> Al-Umm, Vol. 7, p. 87.

great similarity between them in qualities and legal rules that apply to them both. The leading scholars have disputed about this. Imam Ash-Shafi'i has preferred to base his ruling on the status of slavery;<sup>100</sup> he has ruled that the price of the slave should be paid according to its market value, even if it exceeds the bloodwit (*diyyah*) of a free man. Ibn 'Aliyah maintained on the other hand that the bloodwit of a slave that is paid by the killer should not be more than the bloodwit of a free man; the resemblance here is their humanity.<sup>101</sup>

This example has been repeated in the books of jurisprudence, and the ulema of *usul* have almost confined themselves to it. So I have tried to expand on this and refer to several other examples as follow:

1. Partition (*al-qismah*) : It may be defined as a contract between two or more partners, authorising each to enjoy his share and exclude others. In saying this I have set aside the definition of Ibn 'Arafah who says: "assigning undivided property possessed by certain owners by throwing lots or by agreement."<sup>102</sup> But I abandon this simply because the explanation of complete definition and clarification of each word in it would be too long.<sup>103</sup>

Partition is of three types:

- (a) Partition after adjustment and evaluation by the casting of lots.
- (b) Partition after adjustment and evaluation by agreement.
- (c) Partition without adjustment or evaluation but by agreement.

If we look into partition, we would find it similar to sale, because each partner sells his share in all parts of the partnership in exchange for some value. On the other hand, we would find that this contract does not

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<sup>100</sup> Here Imam Ash-Shafi'i does not intend the literal meaning of slavery, but he indicates that compensation for a killed slave is the counterpart of blood-wit for a free man; but Imam Abu Hanifah is more categorical about equality between a free man and a slave in this respect. (Translator)

<sup>101</sup> Sharh Al-'Adud, Vol. 2, p. 245; Nehayat As-Sawl, Vol. 4, p. 112.

<sup>102</sup> Sharh al-Rasa', p. 373.

<sup>103</sup> Ibid., pp. 373-375.

include bargaining, and each partner does not consider himself seller or purchaser. So the partition contract is in the nature of specification and assignment of rights.

The Malikis maintain that the first type of partition, which is established by throwing lots after adjustment and evaluation has the closest similarity to the assignment of rights. This is because adjustment, evaluation and lots differentiates partition from sale. So partition may be imposed as a result of unfair depreciation of value (*al-ghabn*). In addition it may be imposed by compulsion on the partner who rejects it after agreement; and partition, unlike sale, is not done by measurement or weight in objects that can be measured and weighed but by investigation (*al-taharri*). In the matter of sale, the claimant has no right to claim the decrease of the price on account of *al-ghabn*, nor is the rejector in sale compelled to proceed with the sale. Partition in nonurable goods that are sold by measurement and weight takes place by way of investigation.

The second type is partition after adjustment and evaluation by acceptance. The Maliki opinion is that this type has greater similarity to sale because it is not amenable to the casting of lots. Things in which partition is prohibited.

The third type: It is considered as pure sale in the opinion of Malikis, since it is devoid of adjustment, evaluation and the casting of lots, where there is no doubt about distinct resemblance to the assignment of rights.<sup>104</sup>

2. Al-Qarafi started his book Al-Furuq, by making a distinction between narration and testimony, where he says : "Narration is a statement about a general matter, that is not specified, while testimony is a statement about a specific matter. Then, he says : "Statements are divided into three types:

- (a) pure narration, such as Prophetic Traditions.

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<sup>104</sup> More details are found in Hashiyat al Mahdi, Vol. 2, Notebook (karrass) 66, 67; Sharh Az-Zurgani, Vol. 6, p. 195.

- (b) pure testimony, such as reports of witnesses, who bear testimony on specific matters before the judge about rights. The third type combines testimony and narration. Then he enumerated ten examples of statements which are partly similar to narration and partly to testimony. I confine myself here to two examples, since they are related to financial transactions. Interpreter of the fatwa (legal verdict) and handwritings: Malik says, concerning the interpreter: "It is sufficient to have a single person". But it has been said that they should be two. The disagreement stems from the existence of the two-fold resemblance of translation to narration and testimony. As for resemblance to narration, it is because the interpreter is appointed to a general post for the whole population without specification. As for similarity to testimony, it is because he reports about the specific *fatwa* and handwriting, and he should not go in his report beyond this specific handwriting or statement.

One who reports about the old or new defects during adjudication concerning the right to return the article purchased.

Maliki scholars are absolutely unanimous that reporting about the defects in an object of sale is testimony. The condition here is the prescribed number, because testimony here is only partly a judgement upon a certain person in favour of another person. But this may be opposed by their saying that testimony by physicians from among the People of the Book and similar other persons is acceptable, in case there is no Muslim physician available. This opinion is attributed to Judge Abu Al-Walid (Ibn-Rushd) as well as others. They said that this is the way they report (i.e. a single physician) if they are the only people who know the truth. As a matter of fact, this raises a problem over two points. Firstly, according to our principles, we (Malikis) disallow the testimony of non-Muslims over Muslims. Abu Hanifah disagreed and said that their testimony may be accepted in cases of bequest in the course of a

journey, and also their testimony against each other, but their narration (of *hadith*) is not valid, according to the Malikis. Secondly, we also do not accept their narration. Thus how can they (Abu al-Walid and those who support him) claim the validity of the testimony of non-Muslims? In fact, there is no excuse for their saying that the People of the Book are the only people who might know the truth, since every witness tells of what he knows, with the possibility that others may share the same knowledge with him. Those non-Muslims may have knowledge of certain diseases, with the possibility that others may share the same knowledge. So I do not know the relation between the veracity of their position about non-Muslim testimony and about the fact that they may be the only people who have knowledge, since every witness should have knowledge that may be shared by others. Indeed the matter is worthy of deep thought.<sup>105</sup>

This example by Al-Qarafi shows that some juristic details of *fiqh* may not be in conformity with the norms of *usul al-fiqh* at first sight. As a result, the legal rules based upon them would cause differences. The reason is that Muslim law (*fiqh*) preceded Muslim jurisprudence (*usul al-fiqh*), and because jurists did not state their opinions coupled with the sources of their evidence; some of these legal rules which are not in conformity with the norm may be seen as exceptions to the particular evidence.

### **Inference from the Manifest Text, Not From the Meaning**

The three variations of inference (*istinbat*) with which we are concerned are : probing and classification (*al-sabr wa'l-tawsim*), suitability (*al-munasabah*), and resemblance (*al-shabah*). These are abstract qualities obtained from reflection over the rational link between the *wasf* (attribute) and *hukm* (legal rule). In addition to inference based upon inner meaning, there is the inference of causation through the obvious without recourse to deep thinking and observation of the rational link. This may be divided into rotation *al-dawran* and exclusivity *al-tard*.

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<sup>105</sup> Al-Qarafi, *Al-Furuq*, Vol. 4, p. 14.

## 1 . Rotation (*al-Dawran*)

Ibn al-Hajib and Al-Amidi call this method *al-tard* (coextensiveness) and *al-'aks* (coexclusiveness) which means studying a matter from all sides. Rotation means that if a certain quality of the legal rule exists, the law too exists along with it, and if it does not exist, the legal rule too does not exist either. It may be subdivided into two types: rotation of one and the same object and rotation of two different objects.

- (a) Rotation applicable to one and the same object : grape juice, for example, is lawful before it is turned into an intoxicant, and unlawful after acquiring the intoxicating quality. If it turns into vinegar it is lawful. The prohibition is thus linked to the existence or non-existence of intoxication in one and the same object, that is grape juice. Thus we deduce through this rotation that intoxication is the effective cause '*illah* of prohibition.
- (b) Rotation applicable to two different objects. For instance, a Hanafi jurist says that plaster (*al-zas*) is measurable, that it is therefore usurious in the same way as wheat. Then if a Hanafi is asked to indicate the causation for wheat, he will say that wheat, barley, dates and salt are usurious commodities since they are sold by measurement. But garments and animals are not usurious articles since they are not measured as such. Thus the legal rule of usury is dependent on the existence or non-existence of the quality of measurement as exemplified by the two different objects, the four articles mentioned above on the one hand and garments and animals on the other.<sup>106</sup>

This example which Al-Ghazali has cited provides useful clarification. We should mention, however, that the Hanafis do not recognize the method of rotation as a basis for causation. Shaykh Bakhit says : "You should know that *dawran* (rotation) is *tard* (coextensive), meaning that the existence of the quality goes with the existence of the

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<sup>106</sup> Shifa al-Ghalil, p. 268.



legal rule, and similarly *'aks* (coexclusive) which means that the non-existence of the quality goes with the non-existence of the legal rule. This interpretation has been rejected by the Hanafis.<sup>107</sup>

Al-Qarafi gave examples of two cases. He says: the opinion of those who establish *zakah* (poor due) on jewellery that is worn depends on the fact that they consist of the two precious metals,<sup>108</sup> since the obligation is rotating with the existence and non-existence of being one of the two metals. But the existence of the proper quality is exemplified by coined metal, on which *zakah* is obligatory. The non-existence of the proper quality is exemplified by immovable property, because it is not one of the two precious metals, and hence no *zakah* is levied on it.<sup>109</sup>

#### **DAWRAN (ROTATION) AS A METHOD OF DETERMINING THE LEGAL CAUSE**

There are differences of opinion among the ulema of *usul* about the validity of rotation as a method of determining the legal cause. Here we have four opinions :

- (1) Rotation **probably** signifies causality of a certain quality.
- (2) It **certainly** signifies the causality of a certain quality.
- (3) It does not signify causality.
- (4) The distinction between coexistensiveness al-tard applicable to one and the same object **probably** indicates the causality of a certain quality, but if it is applicable to two different objects, it does not signify causality.

It is necessary to investigate the subject-matter of the dispute. Thus the object should be consistent in respect of the association of the legal rule *hukm* with the existence and non-existence of the quality *wasf*.

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<sup>107</sup> Sulam Al-Wusul, Vol. 3, p. 124.

<sup>108</sup> I.e. only gold and silver (translator).

<sup>109</sup> Al-Tanqih, Vol. 2, p. 161.

When the object does not seem to the investigator to be either one of suitability or resemblance, or probing *sabr* or classification *taqsim*, he only concentrates on the external link between the *wasf* (quality) and *hukm* (legal rule). The reason is that if we combine rational matter with rotation by which causality is made preferable, this would determine the fact that the legal cause is based on that previous method not on rotation alone. That is what Al-‘Adud and As-Sa’d have held.<sup>110</sup>

The argument of those who maintain that rotation probably indicates the causality of the quality runs as follows. If we find the link between the quality and the legal rule both in the cases of existence and non-existence, we would probably think that this quality is the effective cause of the legal rule.

The evidence for the opinion that rotation certainly signifies causality of a certain quality depends on the observance of the nature of things, because the laws of nature are the result of observing the natural relationship between the cause and its effect. For instance, if we make an experiment by exposing different things to heat, we find that they expand. Cooling them later on, we find that they shrink and stop expanding. This experiment shows the relationship between expanding and heat positively and negatively. That makes us certain that heat is the cause of expansion. Similar to this is the relation between qualities and legal rules.

The authority of the view of those who negate the relevance of rotation to causality is that the permanent conjunction of the legal rule with the quality without suitability, probing or resemblance, may either be a cause, or even a condition, or a proximate cause equal to it, and neither of these two categories provide definite indication of causality. For example, if the strong smell of wine is associated with prohibition, then when grape juice is extracted, there is no strong smell, and when it turns into vinegar, the original smell becomes absent. When grape juice turns into wine, there is a strong smell again. Thus, smell has no role in the determination of the cause for the prohibition of wine.

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<sup>110</sup> Sharh Mukhtassar Ibn al-Hajib, Vol. 2, p. 246.

Those who elaborate on conjoining the quality and the legal rule in one object, and on conjoining them in two different objects, explain the matter as follows : In the case of one object, when the legal rule is negated by the negation of the quality, no other imaginable cause could be the effective cause other than this quality. In the case of the two different objects, then it is probable that the cause of the legal rule in the other object is different from the quality of the first object.<sup>111</sup>

In my opinion, according to the investigation of the relevant evidence, rotation indicates probability. This indication of probability, in the view of some jurists does not necessarily mean that it is the view of all jurists, because probability *al-zann* is a personal matter that occur to the mind of an individual. The opponents may differ from the opinion of their counterparts on grounds of personal differences. Another reason may be that what has been mentioned about the evidence of negation is based upon the exposition of some examples in which causality is not obvious. Indeed, these examples account for the argument which made rotation a method for determining that the cause determined on the basis of rotation is probable and not certain. Had it been established for all cases, as it is for material experiments, there should have been no disagreement over it.

## **2. Coextensiveness (*Al Tard*)**

*Al-tard* is to establish a legal rule on the basis of the quality which is not known to be suited to the rule nor implicated, nor proximate, in a quality which is suited to the rule, nor is it in fact nullified from being the cause of the rule.

*Tard* is thus close to rotation, except that for rotation, the existence or non-existence of the quality is observed. As for *tard*, only the existence of a certain quality is observed. The jurists gave (rather an odd) example when stating that ablution is not valid with vinegar, because although it is a liquid like water, a bridge cannot be built over it. This quality of being liquid is available in other things such as milk and oil. However, the relationship between building a bridge upon a liquid

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<sup>111</sup> Al-Tanqih, Vol. 2, p. 161; Al-'Adud, Vol. 2, pp. 246-247.

and ablution is not obvious. All theoreticians who reject rotation as a method of determining the legal cause reject coextensiveness too. Some of them who validate rotation also validate coextensiveness. The exponents of *tard* argue that each legal rule should have a cause, but if there is no other quality known, except this quality obtained by coextensiveness, then in the nature of things, that particular quality should be considered as the effective cause. That means that the quality in question is good for causation but not, as far as one can tell, good for determining a ritual or devotional matter. They further argue that the association of a quality with a legal rule in all cases is a probable indication that it is the legal cause of the rule, especially where there is no other quality proximate to it, or associated with it but should there be one then the jurist should follow the preferable course, which is to act on the proximate and associated quality.<sup>112</sup>

The argument of the opponents of *al-tard* is that it is not considered in the revealed laws except for realisation of public interest or avoidance of evil. But in the event where neither the securing of interest nor avoidance of evil is known, we should not accredit this quality. The reason is that the consideration of the quality as a legal cause should be followed by the extension of the legal rule to similar cases, where the quality is known to exist.

Al-Karkhi maintains that *al-tard* is in favour of the debator/interlocutor and not the jurist. This means that it does not establish a new legal rule, but it may be used by the defender in supporting his argument against those who oppose it.<sup>113</sup>

These are the most important methods of determining the legal cause. While discussing the methods of determining the '*illah*' the jurists have also dealt with the disruption or nullification of cause from its effect, which invalidates causation. I have not dealt with these methods in detail, because they are not essential for *Qiyas*. However I admit that knowing the disruption of the legal cause is useful to prevent the

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<sup>112</sup> At-Tanqih, Vol. 2, p. 163.

<sup>113</sup> Hashiyat Al-Bannani 'ala Jam' al Jawami', Vol. 2, p. 170.

analogue from falling into error but I have not dealt with it since this is not the main objective of my topic.

### ***AL MASALIH AL MURSALA* (UNRESTRICTED INTERESTS)**

*Maslahah* (interest) is the singular of *masalih*, but the commentator of Al-Qamus does not add anything else in his description of this word, except saying that *Maslahah* means well-being. Thus he merged his description with that of Al-Firuzabadi. He explains the term in such terms as “(and) the Imam has seen that *al-maslahah* resides in so and so”. The singular of *al-masalih* is sometimes rendered as *al-salah* meaning benefit and welfare.<sup>114</sup>

As a word form, *maslahah* is an adverb of place (*ism al-makan*) denoting the amplitude in the origin of what is being derived, such as *ma'sada* for the place where lions abound, and *madba'ah* for the place where hyenas abound. Thus the word *maslahah* is derived from *As-salah* (well-being), which denotes the availability of benefit and its abundance.

### **THE ULEMA DEFINITION OF MASLAHAH**

*Maslahah* (benefit) is the opposite of *mafsada* (harm). Some scholars such as Al-'Adud defines it by saying: *maslahah* signifies enjoyment and the means that begets it, and *mafsada* signifies pain and its means.<sup>115</sup> According to al-Adud's definition *maslahah* is a subjective not an objective matter, because both enjoyment and pain are personal feelings. These personal matters do not amount to scientific truths.

He ('Adud) defined it in his book al-Mawaqif as “that which is congenial to human nature”.<sup>116</sup> He may mean that whatever is consistent with the innate human nature, which Al-Mighty Allah has deposited in human beings is *maslahah*. On the other hand, whatever that violates innate human nature and conflicts with the universal order is *mafsada*

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<sup>114</sup> Taj Al-'Arus, Vol. 6, p. 549.

<sup>115</sup> Sharh al-Muntaha, Vol. 2, p. 239.

<sup>116</sup> Ibid., Vol. 3, p. 146.

(corruption). This implies that his interpretation of interest is an objective interpretation, since the criterion which he uses is innate human nature. But it is quite difficult to rid human nature of the influence of habits and traditions.

Shaykh Muhammed At-Tahir Ibn ‘Ashur has defined *Maslahah* as follows : It is a quality (*wasf*) of the action which begets benefit, that is, what is permanently or mostly of benefit for the public or for some individuals.<sup>117</sup>

Shaykh Ibn ‘Ashur has thus posited *maslahah* within the framework of human action. So he excluded the substances of the material world and their attributes from the criteria on which benefit and corruption are determined. But he made the quality (*al-wasf*) as a criterion for the achievement of *salah*, for *as-salah* (well-being) and *al-maslahah* (interest) are derived from the same Arabic root. As a result, one cannot understand his definition of *al-maslahah* without understanding *as-salah*; at the same time, one cannot understand *as-salah* except by understanding *al-maslahah*. This is the vicious circle that invalidates his definition. He may have realised this difficulty; hence he interpreted (*fa-fassara*) *as-salah* as benefit *manfa’ah*. This is what Muhammad Said Ramadan has also said : *al-maslahah* is benefit in form and meaning. So whatever has benefit, whether by securing or attaining benefit and enjoyment or by preventing and avoiding evil, such as removing injury and pain, is worthy of being called *Maslahah*. In the terminology of Muslim scholars, *Maslahah* is the same as benefit or *manfa’ah* which the Lawgiver has ordained for his servants.<sup>118</sup>

From the above two definitions, it appears that interest (*Maslahah*) is synonymous with benefit (*manfa’ah*), and benefit is not confined to promoting enjoyment or removing pain. That is only one instance of *maslahah*. As a matter of fact, it is not every benefit that would be considered interest. Indeed, it cannot be considered interest, without it being ordained by the All Wise Lawgiver for His servants. This is really the important aspect of both definitions, because it draws a

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<sup>117</sup> Maqasid Ash-Shariah, p. 63.

<sup>118</sup> Dawabit Al Maslaha Fi Al Shari’a al Islamiyyah, p. 23.

distinction between the accredited public interest and what may be thought of as interests but is of no value if it has not been ordained by the All Wise Lawgiver. Thus, not every quality that seems of benefit qualifies a public interest (*Maslahah*), but only that which is deemed beneficial by the Lawgiver, and wherein beneficence outweighs corruption. So when the Qur'an speaks about wine and games of chance, it does not deny the existence of benefit in both, but it takes both out of the circle of beneficence to the circle of corruption and from goodness to evil. Almighty Allah says : "They ask you concerning wine and games of chance. Say in both of them there is great sin, and also some profit for men; but the sin in both is greater than benefit".<sup>119</sup> Imam Razi has enumerated some of the benefits of wine : to secure profit for traders; to strengthen the weak; to help digestion of food; to improve sexual ability; to relieve the aggrieved; to encourage the cowardly; to make the miserly generous; to brighten the complexion; to refresh passion; to heighten dignity and prestige. He also mentioned some of the advantages of the games of chance as follows : to increase spending upon the needy, because the gambler (in divination of arrows) does not eat the camel's meat, but he distributes it among the needy. Al-Waqidi has mentioned that one of the gamblers perhaps gained in one session one hundred camels. Thus he gains much money without hard labour, then he spends it among destitutes, and hence gets praise and good reputation.<sup>120</sup> Hence the advantages of wine are physical, financial, psychological and moral. As for the advantages of gambling, they are social and moral. In spite of these benefits which are not general, since they are acquired only in some cases, the Qur'an has discredited and debased them due to evil and corruption that go with them. Almighty Allah imposed a clear prohibition by saying : "Surely intoxicants, and games of chance and sacrificing to stones, and divination by arrows, are an abomination of Satan's handiwork: So eschew such (abomination), that ye may prosper".<sup>121</sup> We can say as a result of that the objective of *maslahah* is a quality that accrues from action that enables the individual and the community to fulfil the duties which are assigned to them in the universe within the limits set by his Creator to show man's servitude to him.

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<sup>119</sup> Surat ul Baqrah, verse 219.

<sup>120</sup> Mafatih Al-ghayb, Vol. 6, pp. 49-50.

<sup>121</sup> Surah Al-Ma'idah, verse 90.

Thus *Al-Maslahah* in *Shari'a* has the following specifications

- (1) Action should be subject to certain criteria, that is, it should enable both the individual and the community to carry out man's mission in the created world. And then corruption (*mafsadah*) is a quality of the action which impedes the individual or the community from carrying out their mission in this universe. It leads to evil (*al-sharr*), which results eventually in disorder in this world, or disruption between the present life and that of the Hereafter.
- (2) The criterion of *maslahah* includes tying up the present life and the Hereafter; neither of them should be neglected. So consideration of the interests of this world in isolation from those of the Hereafter is of little value or weight. Almighty Allah says : "And We shall turn to whatever deeds they did (in this life) and We shall make such deeds as floating dust scattered about".<sup>122</sup>

And He also said : "The similitude of those who disbelieve in their Lord is that their works are like ashes, on which the wind blows furiously on a tempestuous day. No power have they over aught that they have earned: That is erring far, far (from the goal)" (Ibrahim, 19:18).

- (3) *Maslahah* does not apply only to public interest but includes private interest, and the fact that it considers private interest does not decrease its value. But both of them have to be taken into consideration, because of their correlation, which may be apparent or hidden.

Indeed this correlation between private and public interest, in the light of the integrated view about this world and the Hereafter, definitely makes every private interest inclusive of public interest and vice versa.

Thus if we are keen on the preservation of national wealth, we should take into consideration the means for the development and

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<sup>122</sup> Surat Al Furqan, verse 23.



prosperity of national economy, whether they relate to the training of distinguished scholars in the fields of marketing, production and advertising, or of enacting laws, providing guarantees to protect national wealth against destruction and loss, quick and effective fire fighting measures, halting erosion and desertification. This understanding of the public interest of the nation is usually achieved through the individuals who have much to gain from it, because this guarantees preservation of their wealth, developing and increasing their resources. Likewise we should take into consideration guarantees for the preservation of the private wealth of the individuals because the safety of the property of individuals and helping them to achieve that, ultimately provides for the financial strength of the whole nation. So if the *Shari'a* has ordained interdiction of the idiot during idiocy, this is surely to their own interest, and so we preserve their property, until they gain maturity. The whole nation also gains through the preservation of the private property, which is a component of the wealth of the nation. Further, it would prevent the individual from becoming a burden on the nation.

For these reasons, Shaykh Muhammad At Tahir Ibn-Ashur says : It is a duty of the scholar to reflect over the hidden interests, and discover and secure them so as to safeguard the interest of the nation, the world community and world order.<sup>123</sup>

Among the types of *maslahah*, which the *Shari'a* has singled out, but which has not received their due share in the elaboration of details, is the type which is necessary for the preservation of the world order and its continuity. The *Shari'a* has laid down guarantees for the protection of this particular interest and has considered it sacrosanct so that it is not undermined or neglected, even in cases where its wisdom may be hidden from us. One such interest is the protection of life. For instance, a very old man, with little hope of remaining alive, where the physicians have unanimously declared him so, has a right to live which should be kept intact. There is no difference here between the value of his life and the life of a strong and healthy person. Likewise, neither social rank, nor intelligence has any bearing on the value of life. This has been upheld by numerous evidences in Islam. All the Qur'anic verses on the prohibition

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<sup>123</sup> Maqasid Al-Shari'a, p. 66.

of murder and its heinous consequences are general and absolute. The *hadith* which is narrated by Al-Bukhari through Sahl Ibn Sa'd As-Sa'idi also vindicates the value of life. The Messenger of Allah was informed during a battle that one of the horsemen had heroically defended the Muslims. After being dangerously wounded, he fixed his sword on the earth, put its point in his chest, and so killed himself precipitating his death. The Prophet said : "Surely a man may apparently do the deeds of the people of Paradise, while he is indeed among the people of Hell; and surely a man may apparently do the deeds of the people of Hell, while he is indeed among the people of Paradise".<sup>124</sup>

Shaykh Ibn 'Ashur says: "The purpose behind this is to warn people against careless and contemptuous behavior concerning human life, guarding against differences in judgements which may lead to the violation of social order. To safeguard this is a guarantee for the preservation of every individual and protecting the lives of people against the irresponsible whims and passions of some. This is also a guarantee for the preservation of world order against the kind of neglect which may lead to the destruction of its foundation".<sup>125</sup>

### **MASLAHAH AND ITS REFERENCE TO SOUND NATURE (AL-FITRA)**

To embark on a course of action which is expected to realise public interest and to refrain from acts which can only result in evil is a natural inclination upon which man bases his own judgement and accordingly conducts all his interactions in life. So long as the interests (*masalih*) serve as personal incentives, and evils (*mafasid*) as disincentive, it would be a source of consternation and blame if a right minded person should goes against them. This helps to confirm the fact that public interest and evil are both innate in human beings and a great deal of it is commonly shared by all humanity.

### **MASLAHAH AND HUMAN REASON**

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<sup>124</sup> Fath Al-Bari, Vol. 9, p. 9.

<sup>125</sup> Maqasid al-Shari'a, p. 67.

The evidence that Islamic legislation is premised on the well-being of individuals and that of the whole world is not confined to the explicit texts of the Qur'an and *Sunna*, but is also manifested in the following two ways.

The First Way refers to man's status in the universe. Since man in Islam is the creature who has taken upon himself the trust of fulfilling the Divine Will in developing the earth and achieving public well-being, it becomes necessary for his vicegerency on earth to meet the requirements of development by looking after his own well-being as well as the well-being of those around him, the living and the material worlds. Again, since one of the major characteristics of Divine revelation to the Messenger (peace be upon him) is guidance to the attainment of truth, knowledge of good and acting upon it, it becomes necessary to realize that the objective of the *Shari'a* of Islam is to help man know what is good and in public interest, and then to commit himself toward it, and know what is evil and corrupt and thus be able to avoid it.

If man becomes confused about maintaining the criterion of good and evil, he would be unable to fulfil his mission, since due to his ignorance, he would lose sight of his well-being and follow the path of corruption owing to his fallacy of image and deviation. Even if he gained knowledge but did not start applying it to the reality of his life, or if his knowledge is contradicted by his deeds, then knowledge itself would be impeded, and no realization of its consequences would be possible for him.

The Second Way is to contemplate the injunctions of the *Shari'a*, including injunctions related to acts of worship and man's relation with his Creator, as well as rules pertaining to his livelihood and relations with other men and the universe at large. It is clear that every single injunction of the *Shari'a* is predicated on the welfare of people. So people's success and happiness depend on following these injunctions, just as failure in the compliance and application of these injunctions results in misery and frustration. Even the portions of the texts on obedience and compliance include wisdom, as pointed out in God's

Glorious Words : "Neither their flesh nor their blood attain to Allah; but piety from you shall attain to Him".<sup>126</sup>

So every injunction, however hidden it may be, has a certain wisdom and intended well-being behind it, and it is meant to be a training in obedience and guidance to the straight path. Hidden benefits may come to light with their secrets, either with the advance of human knowledge, or with the sudden blaze that opens the hearts and minds with the illumination of the Divine light that God bestows on the gifted. And then what is purely an act of devotion and compliance (*ta'abbudi*) acquires a special meaning and becomes a rational act with an obvious wisdom, and clearly subject to causation.

By this I mean that what is expressed as an act of devotion (*ta'abbud*) has two rational aspects:

**The first aspect** is the special wisdom which the injunction has specified and the quality of the act which the *Shari'a* has defined together with its surrounding circumstances. This aspect may be hidden or obvious as already stated. So if the wisdom of the injunction is not obvious it is a form of devotion and worship; and if the wisdom of the injunction has an obvious rationale, it goes out of the circle of mere devotion to the domain of rational causation. So the circle of devotion becomes smaller and, more specific, and it constricts or abrogates the other (i.e. rational) domain. An example of this is trying to find out the cause for specifying the time for each of the five prayers, the number of *raka'at* (bowings) and the fact that there is one *rak'ah* (bowing) and two *sujud* (prostrations), and similar specifications.

**The second aspect** is a general one comprising all devotional rules, intending to train the self into compliance. For obedience is a cultural value that cannot be attained except with training and guidance; it is a virtue upon which depends social cohesion and orderliness. This is precisely what is understood from the foregoing *ayah* which reads: "But piety from you shall attain Him". So here the pronoun refers to what is

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<sup>126</sup> Surat Al-Hajj, ayah 37.

explicitly mentioned," their flesh and their blood". So the *ayah* has counterbalanced two opposites, one of them negative and the other positive. The negative here is the attainment of the benefit of flesh and blood by Allah, and the positive is that the benefit should attain piety that is settled in the heart so the heart achieves consolidation and power. So, in the *ayah*: "flesh and blood" are actually negatively attained by Allah, and positively related to the attainment of piety, for *nawal* (attainment) as interpreted by Ar-Raghib is : "what man attains as *sillah* (close relation), with his Lord, and this is the meaning of the *ayah* to him".<sup>127</sup>

So this interpretation is more direct and less constrained than other interpretations. Thus Abu Hayyan says in Al-Bahr : "The pleasure of Allah shall never attach to flesh given as donation or to the blood shed by slaughtering. Intended here are the owners of "flesh and blood", and the meaning is that the sacrificers and slaughterers do not satisfy their Lord except by sincerity, devotion and taking into consideration the requirements of piety to achieve the purpose of what they sacrifice, in conformity with the ordinances of *Shari'a* and considerations of piety.

If these are not taken into consideration, neither sacrifice nor slaughter will avail them anything, even if they constantly engage themselves in doing this.<sup>128</sup>

Shaykh Ibn 'Ashur understood that the word *an-nayl* (attainment), at the beginning of the *ayah*, has been used in its literal sense, that is "reaching"; but in the second part of the *ayah* it is used figuratively by way of metaphor. Here the dependence of Divine Knowledge on people's piety upon the attainment of what they have slaughtered for Allah is through general attainment in both of them; and "attainment" is used figuratively by way of an euphemistic metaphor for the like and the likened on the basis of resemblance which conveys added stylistic beauty.<sup>129</sup>

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<sup>127</sup> Al-Mufradat, p. 510.

<sup>128</sup> Al-Bahr Al-Muhit, Vol. 6, p. 370.

<sup>129</sup> Al-Tahrir wat-Tanwir, Vol. 17, pp. 287-289.

Surely trying to reach the depth of the secrets of worship in this way equips the rules of worship as a whole with proper means by which to facilitate righteousness of the individual and the society, and so it is an objective to be aimed at for the achievement of guidance that is emphasized by the Qur'an, starting from the opening Surah (Al-Fatihah) to the last Surah (An-Nas).

Al-Qarafi has said that all ritual devotion have benefits, which we are, however, unable to perceive by our intellect. So he says that the specification of times for rituals is intended as a form of benefit found in these specific times, although we do not perceive the secret for that.

This is true of every form of suprarational injunction means the benefit of which is not known to us, not because there is no benefit in it but because we do not perceive it. This is in conformity with the general principle that the *Shari'a* takes into consideration and often gives priority to the benefits of the individuals so that they gain Divine favor. Then Al-Qaraf goes on to give an example which makes his ideas clearer, saying: "An example of what I have just said is the likeness of a king who is in the habit of offering to jurists only green cloaks. Then when we see him offer a green cloak to someone we do not know, we understand that this person is a jurist, since this is the habit of that king. When we try to induce and explore the injunctions of *Shari'a*, we find that these are predicated on the masalih. Thus Allah (Exalted be He) does not command anything except that which is good and never prohibits except that which is harmful. Then when we come across things the nature of which is unknown to us, but they are few in number compared to what we already know, we say these things also belong to the same category of masalih (interest)".<sup>130</sup>

### **THE CRITERION OF PUBLIC INTEREST (DABIT AL-MASLAHAH)**

The definition thus far stated indicates that the criterion of unrestricted interest in the first place is what facilitates man's success in his acquisition of the knowledge of this world, and then utilising this

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<sup>130</sup> Al-Tanqih, Vol. 1, p. 257.

knowledge in the way that makes him develop a better and superior conduct. This is also tied up to what emphasizes his mutual cooperation with other members of the human family, always with the view that he does not have a free hand in his undertaking, but he is to give account for what he commits and omits, and give account on the Day of Judgement to Allah who made him successor in the earth, Who is always observing him, and Who does not leave out of account anything small or great. The scholars of the Muslim community *ummah* have looked into public interests in the light of this criterion and classified them into three ranks.

## **RANKS OF MASLAHAH**

### **The First Rank: The Essential Interest**

This is the rank of essential interests (*al-masalih al-daruriyya*) of the whole of mankind. They are essential because, without them, human communities will be afflicted with chaos, and in the absence of some of them, man would lose his equilibrium, and would be deprived of happiness in this world and triumph in the Hereafter, and the *umma* would soon be worn out, decadent and doomed to annihilation. Al-Ghazali, and also Ash-Shatibi and other theoreticians have stated that this rank includes the safeguarding of religion, life, intellect, property and offspring. Ibn 'Ashur has considered that the above-mentioned interests are only examples which are not exhaustive.<sup>131</sup>

The safeguarding of these interests may be attained in two ways: the first way is through what establishes their pillars and consolidates their foundations, and then taking positive measures to achieve these interests. The second is to know and avoid disruption befalling these interests or expected to befall by taking measures to avoid such disruption.<sup>132</sup>

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<sup>131</sup> Maqasid Ash-Shari'a, p. 79.

<sup>132</sup> Al-Muwafaqat, Vol. 3, p. 8.

Every one of these essential interests may initially be related to the nation as a whole, or may be related to individuals, as has been indicated in this investigation. Both types of interests, whether of the nation in general or the individual in particular constitute the primary objective. Thus every public interest would also benefit the individuals, whether they feel that or not. Conversely, what is accomplished with regard to the private interest of individuals would also reflect on the common good of the nation, since the nation is a multitude of individuals.

The safeguarding of religion, which is one of the essential interests, is realized positively by observing its five pillars, starting from the two attestations (*ash-shahadatayn*) to pilgrimage. This also includes knowledge of that parts of the *Shari'a* injunctions that is obligatory on each individual, knowledge that would enable him to perform what Allah has ordained upon him. This would further include the undertaking by a section of the nation to study in depth the commands of Allah addressed to the believers concerning matters that the individual believers may be too busy to know by themselves. Here Allah says : "So, if only a section of every grouping should march out to gain knowledge of religion, and to warn their people, when they return to them, that would help them to beware".<sup>133</sup>

Protection of religion also includes, among other things, measures by a group of the learned members of the community to refute pernicious doubts, and furnish evidence against the skeptics. The State should likewise uphold the responsibility of safeguarding this objective by fighting innovators and heretics, who try to propagate falsehood among the feeble-minded, or those who follow their caprice, with the purpose of rocking the very basis of national unity.

To protect religion also necessitates defence of Muslim lands against the enemies, through equipping of a standing army, and manufacture of arms necessary for self-defence. Also needed here is establishment of competent and specialized agencies in defence affairs and war, since evidence has proven that negligence or weakness here would end up with the decline of Muslims and the dominance of

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<sup>133</sup> Surat At-Tawbah, ayah 123.



disbelief, leading eventually to the extinction of the Muslim community, as happened centuries ago in Al-Andalus (Spain).

As for self-preservation (*hifz al-nafs*), this includes the preservation of life of every individual, and the preservation of the life of the nation in a way that makes it necessary for every individual to enjoy the right to physical health that enables him to perform his role in the world around him. Here the State has the role of providing for the livelihood of the people, and also ensure their security by means of organizing a police force and institutions for scientific research. This will ensure health and stability in the life of the nation, and also secure ample food supplies and efficient irrigation facilities.

Still related to self-preservation is the gearing and orientation of scientific research towards fighting disease, especially contagious disease, as well as applying the law of just retaliation according to its proper conditions.

As for the preservation of intellect (*hifz al-'aql*), this can be achieved by helping every individual to develop his mental abilities by offering him the means of education and learning. I do not only mean by this schools and institutions, but also the obligation that Islam imposes on every individual to study and to educate himself throughout his life. We have seen that nations which neglect education, and which do not make education a primary necessity of public life and ensure that it is facilitated through all available means, these nations soon fall into decadence and are swallowed up by other nations enjoying superior of knowledge. Here the two obligations, the individual and the social obligations of the state overlap. The State provides the means, and the individuals do not waste the opportunities offered them by the State.

The intellect also needs to be protected from those who demoralize the youth by propagating ideas that debilitate their minds and dissipate their effort in the paths of wilderness and loss. Again, here is included the prevention of what corrupts the mind temporarily or permanently, like wine and narcotic drugs, and enactment of the necessary deterrent punishment for those who indulge in drug trafficking and distribution.

As for the preservation of wealth in the positive sense, the *Shari'a* has ordained acquisition of wealth through lawful means, and enacted laws for the protection of the rights of individuals as well as those of the community, and the circulation and transfer of property among them. The State has to take charge of maintaining public services, like the building of dams, means of communication, fire brigades and similar other facilities. To protect wealth, penalties are prescribed for offences against other peoples' wealth by way of usurpation, cheating or trickery. Violators are penalized by means prescribed punishments (*hudud*), by discretionary deterrent punishments (*ta'azir*), and measures that ensure justice through a clean judiciary and indemnification against loss.

The protection of offspring (*al-nasl*) includes what Allah has ordained with regard to procreation, and complete preservation of lineage. Legitimate marriage has thus been ordained, and all forms of sexual relationship outside marriage have been proscribed. Although offspring could still be born if people give up having a family according to the rules of *Shari'a*, this will ultimately end up in the deterioration and corruption of society. Statistics thus tell us that one third of the newborns in the United States have unknown fathers, and the mothers take upon themselves alone the responsibility of bringing them up. This situation has caused deficit in the appropriations allotted for their help. What is worse is that the problem is gradually getting out of control. But because the mass media have an eye only on the material side of the problem, and tend to evaluate the problem in dollars amounts, and how to raise the needed funds, they have neglected the social dimension of the problem, and the future effects of this problem although these are considerably more dangerous.

The offspring has to be protected in the negative sense by the prohibition of castration and mutilation of procreative organs, as well as ban on homosexuality and lesbianism. The right course here is the prohibition of fornication and adultery and inflicting the prescribed punishment on their perpetrators. Al-Qarafi has mentioned in the book [At-Tanqih](#) that some jurists also consider safeguarding of personal honour (*al-'ird*) necessary for the preservation of the community. This,

he added is necessary simply because Allah does not allow the violation of honour, in the same way as He does not allow murder or disbelief.<sup>134</sup> This sounds a little strange, coming from Al-Qarafi, who is well-known for his sharp insight and depth of analysis, simply because the basic assumption here is to define what is necessary. There is no doubt that the violation of honour may lead to the deterioration of social relations and the weakening of ties among individuals, this does not, nevertheless, amount to the rank of necessity that is deemed to be essential for the survival of the community.

Commenting on what the jurists have said about the necessity of safeguarding the honour Shaykh Tahir Ibn 'Ashur had this to say : "I think this is not valid. The right thing is to say that it is complementary (al-haji). What made some jurists, like Tajuddin As-Subki, who in his book Jam 'Al-Jawami', considered its preservation necessary is based on his view of the prescribed punishment for false accusation (*al-qadhif*) in the *Shari'a*; but we do not adhere to the correlation between what is necessary and what is subject to a prescribed punishment. That is why neither Al-Ghazali nor Ibn Al-Hajib has considered honour to be one of the essential interests".<sup>135</sup>

### **The Second Rank: Complementary Interests Al-Haji**

Ash-Shatibi defined this as an interest which, when observed, relieves distress and difficulty (*al-haraj*), and which, if not observed, leads in most cases to the loss of desired objectives. So, if this type of interest is not observed, those subjected to the rules of *Shari'a* (i.e. the *mukallaf*) would generally suffer difficulty and distress; but this would not amount to corruption and chaos that is expected as a result of the collapse of essential interests. He gives the following examples: concessions (*al-rukhas*), enjoyment of good things, and exceptional contracts, like advance-payment sale (*salam*) and irrigation leases (*al-musaqat*).<sup>136</sup>

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<sup>134</sup> At-Tanqih, Vol. 2, p. 158.

<sup>135</sup> Maqasid Ash-Shari'a, p. 82.

<sup>136</sup> Al-Muwafaqat, Vol. 2, p. 11.

Dr. Al-Buti adheres to Ash-Shatibi's opinion.<sup>137</sup>

But restricting the complementary interest to the removal of hardship would be tantamount to narrowing its scope. This is because complementary interests include interests needed by the community, but the need here does not reach the rank of what is necessary and essential. By this is meant that if these interests are not secured, the survival of the nation would not be at risk, nor would the individuals be subjected to total loss or annihilation.

Yet neither the individual nor the community would be able to keep their upright standards in a way as to make them eligible for the vicegerency of God in the earth.

An example of this second rank of interests is given by Imam Al-Ghazali when he spoke of granting the guardian the right to give a minor person in marriage. He says : "Guardianship over a minor means taking care of his needs until he attains the age of puberty. For if the minor is left on his own, he would soon be faced with the threat of annihilation and eventually this would lead to the collapse of the human race. But taking care should not include giving him in marriage, since this is a matter of complementary interest, because all the good opportunities for marriage that are in the interest of the ward are not always available at any given time. But if a good opportunity arises, and the guardian sees it as such, then he should conclude the marriage contract on behalf his minor ward".

Al-Ghazali goes on to say : "Other examples in this respect are the observance of equality (*kafa'a*) in marriage, provision of a proper dower (*mahr al-mithl*) in marriage. For these do not come up to the rank of what is necessary, since the offspring can still survive even when his social status is not observed, although married life with the observance of equality in social status is more likely to be more enduring and successful.<sup>138</sup>

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<sup>137</sup> Dawabit Al-Maslaha, p. 120.

<sup>138</sup> Shifa'al Ghalil, 165-168, quoted in general sense.

The notion of complementary interest has been precisely expounded by Shaykh Ibn ‘Ashur when he said: "This is what is needed by the community to realise benefit and gain the adequate management of its affairs. Thus if such needs are not met, society will not be corrupted, but will be in a state of disorder. The ulema of *usul* have given other examples such as sale, lease, loan and irrigation contracts. Here it seems that most cases of what is permissible in these transactions belong to the class of complementary interests. The marriage contract also falls under this heading; and so is the case of what supplements the essential interests in the way of blocking, for example, the means that lead to corruption. We may add to this the setting up of a judicial system, a system of chastisement and a police force to implement the injunctions of the *Shari’a*.<sup>139</sup>

From the point of theorizing and arriving at a consistent definition of complementary interest, we find that Shaykh Ibn ‘Ashur has been most adept in defining it. But when he began to give examples, these were confused. So he considered the preservation of lineage as an example of complementary interests, although such preservation is a pillar of the building up of societies, and in its absence, societies would soon corrupt, and the purpose and mission of the vicegerency of man in the earth would not be fulfilled. For moral decadence and promiscuity would threaten the foundation of society.

Al-Ghazali has skilfully depicted the state of the community when chaos afflicts the family when he said : "feminine virginity should be an objective to be preserved, since unlawful solicitation therein would end up in confusing the basis of family identity and bring disgrace to marriage relationships. Thus we see how in our day and age the spread of anti immune deficiency syndrome (AIDS) brings home to us the message that the preservation of lineage is necessary for the survival of the human race.

Then Ibn ‘Ashur said that the establishment of administrative justice and a system of penal sanctions for the defence of basic interests is necessary as society cannot be protected if it does not have an effective

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<sup>139</sup> Maqasid Ash-Shari’a, p. 82.

and respectable judicial system, nor can the *Shari'a* endure or be effective if it is not protected by a regular judiciary. Disruption of the judiciary will naturally be followed by disruption in security and social order, and this leads to the weakness of economy and brings about a crisis of confidence among the people. The end result is the decline of society and its dissolution into other societies.

Once again, complementary interests comprise the five values, namely the preservation of religion, life, lineage, intellect and property. What gives the Muslim community its distinctive characteristics is regulation of complementary interests, like the building of mosques, calling for prayer and the building of hospitals as a means of protecting life. Also included in the category of complementary interests are such permissible actions as hunting, fishing, and the enjoyment of good food, clothing and housing facilities. What is also considered as complementary interest is the preservation of wealth by enacting laws for indemnity, documentation of contracts and establishing specific forms of companies.

The preservation of intellect as a complementary interest entails the establishment of educational programmes in special institutions of learning, and also establishing mental and psychiatric hospitals. The preservation of lineage as a complementary interest entails encouragement of family and marriage, and taking measures to safeguard against illegal marriages and exchange of marriages (*al-shighar*) which is a device aiming at the elimination of dower.

### **The Third Rank of Interests: *Al-Tahsini* (Embellishment)**

This rank has been defined by Al-Ghazali as follows : “Some cases of embellishment interest pertain to the rank of convenience or relieve, not demanded through neither necessity, nor need, but may lead to welfare, amplitude and comfort. This is also an objective of the *Shari'a*, for the *Shari'a* promotes tolerance, ease and rectitude. These objectives are realised through adopting whatever is considered desirable and complementary to the higher classes of interests.<sup>140</sup> One of the

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<sup>140</sup> Shifa' al-Ghalil, p. 162.

characteristics of this rank is that it mostly includes imaginary and persuasive cases.<sup>141</sup>

Al-Ghazali has thus considered ease (*al-taysir*) in the various fields of legislation as an integral part of embellishment. He considered that whatever aspires to perfection and desire should be appended to this category. Here he is different from Ash-Shatibi who says: "As for embellishments, it means adopting what is commensurate with good habits and avoiding defilements that are disdained by sound minds. All of these cases come under the category of sound moral values".<sup>142</sup> Ash-Shatibi has thus confined this category to what Al-Ghazali considered as supplementary to embellishments. Dr. Said Ramadan Al-Buti followed in the footsteps of Ash-Shatibi, but he was more explicit in excluding flexibility and reprieve (*al-tawsi'ah*) from the category of embellishments. So he says: "As for embellishments their exclusion does not lead to distress"; then he linked this category more closely to sound moral values.<sup>143</sup>

Shaykh Muhammad Tahir Ibn 'Ashur was closer to the opinion of Abu Hamid al-Ghazali, albeit with greater depth, as he considered embellishments to be public interests that achieve for the community perfect efficiency and order, so that the Muslim nation could offer, for its security, prosperity and happiness, a model to other nations; and that would attract other nations to establish good relations with it or even to establish unity with it. That is because good traditions are an effective way for the achievement of close relationship and unity, whether these traditions pertain to decorum in the field of covering the private parts, or to matters of common custom. In general, such traditions are marks of high standards of human achievement.<sup>144</sup>

Finally, what I have so far attained after enquiring into the *Shari'a* sources, and after taking into consideration the opinions of the ulema of *usul* is that embellishment refer to the sort of interests which are complementary to human conduct and enhance the values and standards

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<sup>141</sup> Ibid., pp. 169, 172.

<sup>142</sup> Al-Muwafaqat, Vol. 2, p. 11.

<sup>143</sup> Ad-Dawabit, p. 120.

<sup>144</sup> Maqasid Ash-Shari'a, p. 83.

of civilization as a whole. For undoubtedly any legislation that does not take into consideration human convenience and ease in its actual application would end in dissatisfaction and distress and would eventually be opposed and rejected. That is why it is considered desirable by the *Shari'a* that what it offers in the way of ease and removal of hardship should be pursued; and this has helped a great deal in its dissemination. That is also why people embraced Islam in large numbers. Among other advantages of embellishment is the interest that it promotes in educating the nation into performing its obligations in the best way possible and the constant efforts that it advocates at improvement in all areas.

So all attempts that are aimed at higher levels of achievement, whether in the fields of worship, financial transactions or education, as well as in other fields of human activity that aspire to perfection and continuous improvement pertain to the category of embellishments. The following example is taken in regard to the performance of prayer : the Prophet has commanded the person who failed to observe apprehensive composure in prayer is to perform the same prayer again. The Prophet also said : "Surely Allah has ordained fairness in everything", and has urged every Muslim to aspire to better deeds and better words. This rank of embellishment, as a class of interest, is not, however, essential for the fulfilment of man's vicegerency in the earth, and negligence in this respect does not lead to distress and difficulty, but it helps in the development of the abilities of individuals and the community, by giving full consideration to both. This implies such necessary attributes, for both the individual and community, as self-respect, power and fortitude that would grant dignity and honour that is worthy of admiration and is conducive to the integrity of the Muslim personality and conduct. This is one side of the Divine grace that is pointed out in the words of the Lawgiver, exalted be He, when He said: "You have been the best nation brought out for mankind".<sup>145</sup>

## **METHODS OF DETERMINING THE UNRESTRICTED AND RESTRICTED PUBLIC INTEREST**

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<sup>145</sup> Surat Al-'Imran, ayah 110.



### **Definition of *Maslahah Mursala* (Unrestricted Public Interest)**

As already shown, there is a close relation between the *Shari'a* and the realisation of the interests of people in their life here and in the Hereafter. But the methods by which the public interests are identified and understood - so that action could be taken to implement them in all their different ranks and manifestations, whether permissible, commendable or obligatory, and the evil *mafsada* that invokes the demand to refrain from them by way of reprehension or prohibition these methods do not look, at first sight, obvious nor are they devoid of confusion. Evidence of such confusion is found in the representative assemblies of some countries. The majorities in these assemblies enact such laws as they believe are in the interest of the people who authorized and elected them. Actually some of these laws abrogate what has already been passed before, as soon as these legislative bodies have a new majority of a different socio-economic persuasion. So the kind of legislation issued by a representative assembly of leftist orientation will soon be reversed as soon as the majority shifts to a rightist ideology. The question that arises here is this : Is a human being by himself able to discern completely what public interest is? Of course a man's choice of what he thinks more suitable to him is tied up to different influences. These are the influences of time and place, as well as customs and traditions agitating in the society he has been brought in. Other influences are personal studies and research, as well as what might have entered one's heart, whether it is the light of true belief or what has engulfed him in the way of rejection and disbelief, to mention only a few such influences. So we do not consider as public interest except that which Divine Revelation has helped man to understand and embrace. For these are devoid of fake imagination and caprice. To establish the legal rule upon these interests reassures the *mujtahid* (independent legal scholar) that he beholds a vision that is derived from Revelation, and that he does not follow what he fancies as interest, but clearly follows the *Shari'a* of Allah, not conjectures nor personal whims.

When the jurist looks for the legal rule of a case that is presented to him, he is not keen to know, nor to inform his questioner, of the interest as it appears to him, but he tries to arrive at the legal rule as

commanded by Allah; and the questioner should also seek to know the legal rule as ordained by Allah, and not as he himself sees as his own interest.

Thus public interest, as we have already pointed out, should have two aspects that cannot be disengaged from one another: one is temporal and the other is related to the Hereafter. The person subject to Divine law (i.e. the *mukallaf*) lives his life under the canopy of servitude to Allah in conformity with His Divine words, which proclaim: "And in no way did I create the jinn and humankind except to worship Me".<sup>146</sup>

It becomes therefore imperative for the *mujtahid* to ascertain that the interest he has imagined is a genuine interest, not a mere fancy intimated to him by influences that are legally not credible. Thus, if it occurs to the mind of the *mujtahid* that a certain course of conduct on the part of the *mukallaf* would be conducive to public interest, he is bound by a duty not to drift after what flashed in his mind, but to investigate whether what he imagined is guaranteed to be a genuine public interest. Thus he has to search, in different ways, in order to ascertain the approval of the Lawgiver of what came to his mind. And here we have seven methods as follow:

- (1) He may find a *Shari'a* text *nass*, or a consensus of opinion *Ijma'* that the quality he thought would secure the interest that the Lawgiver has ordained by stipulating a text to that effect, and this is the highest form of conviction that the interest in question is upheld and accredited by the *Shari'a*. An example of this is the causation of the legal rule nullifying ablution if one touches one's sexual organ, since the Prophet has said : "Whoever touches his sexual organ must perform a fresh ablution before praying". Another example is the causation for the guardianship over the minor's property, since we find here that minority is a cause for guardianship over property. The cause '*illah*' in both these rulings are clearly conveyed in the relevant text.

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<sup>146</sup> At-Dhariyat, ayah 56.

- (2) The jurist may not find a legal text in which the Lawgiver has acknowledged the *Maslahah* in question but finds that the Lawgiver has authorised the legal rule in conformity with it. Then he finds that the Lawgiver has acknowledged the genus of the quality for the same legal rule, as in the quality of minority in indicating guardianship over property. Here consensus has established that minority is the legal cause for guardianship. So if the jurist wants to investigate guardianship, he finds that the attribute of minority is also the legal cause of guardianship over marriage, since the concern over preserving the rights of the minor extends to both types of guardianship. So the attribute of minority here is the same, and the legal rule is comprehensive enough to cover both cases of guardianship over property and guardianship over marriage. Here it seems that the exertion of the *mujtahid* has gone beyond guardianship of property to comprehend guardianship in general.
- (3) The jurist may not find a legal text indicating that the Lawgiver has acknowledged a certain quality, but he finds that the Lawgiver has based the legal rule in conformity with it. Then he finds that the Lawgiver has acknowledged the genus of that quality in respect of the same legal rule. An example of this is found in the legal rule by which the Lawgiver has made it permissible to combine two prayers (*jam' al-salatayn*) in case of a journey or pilgrimage. Suitability (*al-mula'ama*) is apparent here between the alleviating effect of this legal rule and what a traveller may find when on a journey or what a pilgrim finds in his travels from 'Arafat, Minà and Makkah among the crowded throngs. So here the legal rule is based on the rationale of alleviation of hardship and it is invoked whenever the need arises for it. Thus it is acknowledged that the effect of hardship in the legal rule which combines two prayers is a general one and applies equally to instances of hardship in journey or pilgrimage. So if the *mujtahid* exerts himself and joins al-Maghrib and il-'Isha (early and late evening prayers) in the event of heavy rainfall or darkness due to hardship that is

experienced in both cases, then he has applied the same legal rule to a similar case, which is combining through a common attribute that covers instances of hardship caused by journeying or pilgrimage, or rain, although every case of hardship also has its own specific characteristics.

- (4) The jurist may not find a legal text or consensus indicating that the Lawgiver has acknowledged a certain interest, but finds that the Lawgiver has based the legal rule in conformity with it. Then he finds that He has accredited the genus of the quality (*jins al-wasf*) within the genus of the legal rule (*jins al-hukm*). An example of this is the rule by the Lawgiver about retaliation in pre-meditated murder so as to achieve the public interest in respect of the preservation of life. The Lawgiver has acknowledged the genus of the quality, which is aggression through pre-meditated crime, but aggression as a quality of the legal rule of retaliation is more general which includes both limbs and life. So the quality is the crime, be it murder or injury to limbs; and the legal rule, which is retaliation is also general to include life or limbs or other similar cases. Thus, if the *mujtahid* constructs an analogy that killing by a heavy instrument is equal to killing by a sharp instrument, he would then have adopted the absolute quality of aggression through premeditated crime which the Lawgiver has acknowledged by determining the legal rule of absolute retaliation as giving effect to one genus when found in another genus.<sup>147</sup>
- (5) The jurist may not find a legal text or consensus establishing that the Lawgiver has accredited the *Maslahah* in question, but he finds that the *Shari'a* has validated a legal rule in conformity with it, then he does not find evidence to accrediting the genus of the quality within the genus of the legal rule, or the type (*naw'*) of the quality within the genus of the legal rule, or the genus of the quality within the type of the legal rule. An example of this may be found when the *mujtahid* finds the legal text to the effect that the killer does

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<sup>147</sup> Jam Al-Jawami', Vol. 2, pp. 325, 366; Also Sharh Al-'Adud, Vol. 2.

not inherit. Going deeper in his search for the cause as to why the killer is forbidden from inheritance, the idea may flash suddenly in his mind that the killer is a person who decides to speed up securing his portion of the deceased person's inheritance in an unlawful manner. So the All-Wise Lawgiver absolutely prohibits him from attaining this purpose. The legal cause becomes obvious to the *mujtahid* in relation to its legal rule in the following formula: Anyone who speeds up something before its due time, then the rule is that he is punished by depriving him of it.

We are looking here at a quality or attribute which is independent by itself, for which the jurist does not find anything in the *Shari'a* that makes him confident that what he has imagined is valid for establishing his legal rule. Imam Ibn Al-Hajib has called this quality the "strange but suitable" (*al-mula'im al-gharib*). It is suitable because suitability has flashed in the mind of the *mujtahid*. It is strange because there is no indication from the *Shari'a* text or from consensus of anything near or remote to it.

Of course such a quality should be acknowledged, as it can be included in the supportive evidence of analogy. On the basis of such an opinion, the wife who is irrevocably divorced in death sickness (*marad al-mawt*) should have received her share of the inheritance. So the husband in such a case is treated contrary to his intention, and his wife does not lose her right to inherit. Another example is of one who concludes a marriage contract with a divorced woman while she is still in her waiting period (*'idda*) that must be observed before remarriage. The husband in this case has speeded up the marriage before its due time and is therefore punished by the prohibition of the marriage he has attempted prematurely, according to the opinion of some jurists.<sup>148</sup>

- (6) It may appear to the *mujtahid* that a special quality is suitable to the legal rule, but the *Shari'a* has ordained that it should not be considered; and consensus has upheld the same. An

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<sup>148</sup> Sharh Al-'Adud ala Mukhtasar Ibn Al-Hajib, Vol. 2.

example of this is imposing upon a rich person who has committed the sacrilege of not observing the fast in Ramadan the punishment to fast another two successive lunar months, which is evidently a more deterrent penalty, since his opulent living is coupled with his thinness of religious observance. The reason being that he is not deterred by the alternative expiations of emancipating a slave or feeding the poor. Although all the three forms of expiation are imposed by way of deterrence, yet the Lawgiver did not single out this quality as eligible, and He nullified it, since the *Shari'a* has ordained a certain option or order in the expiations, which does not begin with fasting.

Another example is the prohibition of taking in marriage a second wife, when this leads the husband to act unjustly toward his co-wives. The Lawgiver has admittedly ordained justice in polygamy, yet the Lawgiver has overruled that quality (absolute justice) and marrying more than one wife is still made permissible as is indicated in the following Qur'anic text : "And you shall never be able to do justice between co-wives even if you are eager (to be just), so do not tilt away completely (from one) to leave the other as if she were in a state of suspense".<sup>149</sup>

- (7) The jurist may not find a legal text or consensus regarding the establishment of the legal rule or nullifying it, nor does he find a case parallel to it of the same type, or approximate to its genus. Yet the interest that the quality in question establishes in the formulation of the legal rule is firm and obvious to the mind of the *mujtahid*, although no ruling can be found in the *Shari'a* to indicate that what came to the mind at first instant is valid. So this interest is not supported by any direct indication of the same type or genus as the Lawgiver has upheld. This is what we call unrestricted interest (*maslahah mursala*) which is elaborated below.

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<sup>149</sup> Surat An-Nisa', ayah 129.

In the definition of *maslahah* (interest) above, we mentioned that it is a quality resulting from an action which helps the individual and/or the community to carry out the proper function assigned to them in the world around them within the limits ordained by their Creator to demonstrate their complete obedience to Him. By unrestricted interest, we mean that it is not confined to a certain type and/or approximate genus through a text or consensus; hence the interest becomes unqualified and absolute.

### **Examples of *Maslahah Mursala***

1. Firstly the collection of the Qur'an : It was a ruling arrived at by the Companions of the Messenger of Allah when they became apprehensive of the possibility that the Qur'an may be forgotten after the death of its memorizers. The Companions did not have a text to validate the compilation of the Qur'an, neither from the sayings of the Messenger nor from his deeds. This is what has been narrated through Zayd Ibn Thabit (may Allah be pleased with him), when he said : "At the time when many the Companions were killed at the battle of Yamamah, Abu Bakr (may Allah be pleased with him) asked me to see him; when I arrived, I found 'Umar (may Allah be pleased with him) there. Then Abu Bakr said: "'Umar came and said to me that there has been massive killing of the memorizers of the Qur'an at the battle of Yamamah, and I fear that this may happen to other memorizers who are still alive, which might mean that much of the Qur'an would be lost. It is my opinion that you should command the Qur'an to be collected. Zayd Ibn Thabit said that Abu Bakr replied : "How dare I do something not done by the Messenger of Allah?". Then 'Umar said to me : "By Allah, I can see benefit in Collecting the Qur'an".<sup>150</sup>

Thus collecting the Qur'an was identified as a matter of public interest according to Abu Bakr's words : "By Allah, it is beneficial"; and the fact that there was no text from the Messenger of Allah concerning a matter of the same type or genus. This is supported by the fact that Abu Bakr hesitated in saying : "How dare I do something not done by the Messenger?". So, the Companions agreed to collect the Qur'an, and this

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<sup>150</sup> Al-I'tisam, Vol. 2, p. 99.

was actually carried out based on the opinion that collecting the Qur'an was in the public interest.

Unifying the Muslim *umma* on one identical reading of the Qur'an: With the exception of Ibn Mas'ud, the Companions of the Messenger of Allah were of the opinion that the Muslim community must be unified on one identical reading, hence the decision to set fire to the variant copies of the Qur'an found all over the Muslim lands. This was endorsed by the *hadith* narrated by Anas to the effect that Hudhayfa Ibn Al-Yaman (may Allah be pleased with them all), while fighting with the people of Syria and Iraq to conquer Armenia and Azirbijan, was deeply disturbed by their differences in the reading of the Qur'an. So Hudhaifa said to 'Uthman (may Allah be pleased with him): "Set this (Muslim) community right before they differ about the way they read the Qur'an, as the Jews and Christians differed about their scriptures". 'Uthman (may Allah be pleased with him) verified the text of the Qur'an which was collected in the time of Abu Bakr and which was safeguarded at *umm al-mu'minin* (the mother of the believers) Hafsa's house (may Allah be pleased with her). Then he authorized each of the following Companions : Ziyad Ibn Thabit, Abdullah Ibn Al-Zubayr, Sa'id Ibn Al-'As and Abdul Rahman Ibn Hisham to make a copy of the Authorized text. Then 'Uthman sent one copy of the authorized text to all the provinces, and gave orders to set fire to the other copies of the Qur'an except the authorized one.

By the same token, committing the whole community to one identical reading is also not supported by any evidence from the Qur'an or *Sunna*. Nevertheless, this commitment is considered a public interest, which is suitable to what has been definitely ordained by the *Shari'a*. Among these is the injunction of uprooting the source of conflict about the fundamentals of religion. This is also a factor that safeguards the unity of the nation and protects the faith against distortion.<sup>151</sup>

The above two rulings of the Companions about joining both the first case of collecting the Qur'an as well as the second case of unifying the community on one identical reading belong to the general rule

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<sup>151</sup> Ibid., p. 100.



preserving the unity of the Muslim community through safeguarding its scripture against loss or dispute about its text.

Ash-Shatibi has given more details on this subject, highlighting the various areas whereby establishing legal rules is based on unrestricted interests. After mentioning the above two examples, he says: "When this ruling is firmly established, you may join to it the scholarly works on *hadith* and similar works when there is fear of their loss. Further, it is also supported by *hadiths* against the concealment of knowledge. I hope that this book Al-I'tisam that I have written is of the same type".<sup>152</sup>

2. Ash-Shatibi said that the Companions ruled that craftsmen should be liable to compensation for the goods that are lost or destroyed in their custody. Ali said: "This is the only method by which to safeguard people's interests". To explain this example, we assume that the owner of the property entrusted his property to a craftsman and handed it to him willingly. Thus the craftsman would carry out the task in return for a fixed wage. This means that the craftsman is not liable to give compensation if he claims that the loss of that property is not due to his fault. This was what people customarily did at that time.

Later on various nations embraced Islam. Some of these nations absorbed the new religion espoused with the apprehension of Allah and concern for the preservation of people's rights. Others had not yet developed strong awareness of the relationship that bound them up with their brothers in Islam. Neither were their hearts disturbed when injustice was inflicted upon others. Rather, they were overwhelmed by the desire to enjoy the life of this world. This type of people had unfortunately increased in numbers. This was a necessary result of the cultures wherein they were brought up. So a great number of craftsmen used to claim that they lost what they had taken. At the same time, the owner of the property may not have been able to provide evidence for the craftsman's negligence. As a result, the Companions agreed over the craftsmen's liability for paying compensation on account of what was lost in their custody. The reason for their consensus is that adopting the rule of non-liability for paying compensation by craftsmen whose trustworthiness is

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<sup>152</sup> Al-I'tisam, Vol. 2, p. 101.

taken for granted leads to one of the following situations. Either people refrain from hiring craftsmen which would result in the decline of crafts and great difficulty for those in need of their services, or else the craftsmen should conduct their business under the rule of liability for paying compensation to those who lost their property without negligence. Thus, the Companions agreed that the interest of preserving people's property and keeping the labor force working are achieved better when the craftsmen are held liable for paying compensation.<sup>153</sup> To this type of unrestricted interest, Ash-Shatibi added the prescribed punishment of wine drinking by eighty lashes. This punishment was basically a discretionary punishment (*ta'zir*) which did not reach to the level of prescribed punishment. So the ruling that the punishment for wine drinking was to be eighty lashes, like the punishment of false accusation against chaste women, is established through probability, instead of certainty. Considering that a drunken person would first have his tongue unleashed and then his lust, because the warmth of wine could lead him to the utterance false accusation. This ruling is based on the premise that the Lawgiver considers the probability of the quality as a substitute for that quality. For instance, the Lawgiver considers travelling as hardship even if the hardship in it may not materialise. He also considers sexual penetration equivalent to ejaculation, and substitutes penetration for ejaculation even if there is no ejaculation, applying the same ruling to both.

Another example is pretrial detention of the accused person if there is circumstantial evidence of his involvement in a crime in the event he abstains from making a confession. There might be false indications and thus an innocent person may be penalised without due cause. But due to the weakness of the religious conscience, the jurists held that the accused person may be detained so that the properties and lives of people are protected against loss.

Imposing taxes on the affluent members of the community is another example. In the event where the military situation of the Muslim community necessitates purchasing arms, and there is a deficit in the

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<sup>153</sup> Ibid., 102.

public treasury and the Muslim ruler is known for his justice, he may levy additional taxes for that purpose.

Similarly indulgence in prohibited transactions beyond necessity, when such transactions are widely practiced is yet another example. A Muslim may in such situations go beyond the level of essential needs for food, clothing and housing. For if he confines himself to minimal subsistence, industries would come to a halt, and man would not be able to fulfil his mission in the earth and people may remain in distress till they perish. This would result in the destruction of religion. But going beyond necessity is contingent upon legitimate needs, and should not be taken as a pretext for indulgence in what is prohibited or indulgence in the enjoyment of luxury.

Another example is killing a group of persons for one. The Qur'an unequivocally states: "And therein We prescribed for them: life for life".<sup>154</sup> So if one person kills another through premeditated aggression, the killer is liable to retaliation. But if a group of individuals collude and deliberately cooperate to kill one person, and consequently destroys the victim's life without a just cause, a problem arises due to the plurality of murderers. This is because the Qur'anic text does not envisage the incident where a life is destroyed by the joint action of several criminals. 'Umar Ibn Al-Khattab (may Allah be pleased with him) executed a group of persons for killing one, and this is the opinion of Malik and Ash-Shafi. Their argument for inflicting retaliation through executing several people for the killing of one is based on the analysis that it is only in this way that aggression can be averted. If we leave the life and blood of one individual unprotected, this would lead to the destruction of the source of the legal rule for retaliation that protects life. It would also lead to a situation where one who makes up his mind to kill an innocent person may seek the help of others to carry out the murder and feel that he would escape retaliation. Consequently protection of life by the means of retaliation, which is what the Lawgiver has intended, would not be realized. The inference here is not based on legal analogy, because drawing an analogy between killing by several individuals and killing by one individual is not valid. This is because there is a difference between the two cases. In the first case, death stems from the

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<sup>154</sup> Surat Al-Ma'ida, ayah 45.

murderous act of one person, whereas in the second case death does not stem from the act of one particular person but through the joint action of several individuals.<sup>155</sup>

## UNRESTRICTED INTEREST AND *QIYAS*

Almost all the works of the ulema of *usul* agree that the sources from which the legal rule is deduced through the application of unrestricted interest are not the same as the sources from which the legal rule is deduced through the application of analogy. Further, establishing the legal rule through analogy is quite different from establishing it through the modality of unrestricted interest.

But whenever I have given deep thought to analogy and unrestricted interest I have found myself in a situation where I can barely make a distinction between them concerning the basis of inference, rather I find that the proofs establishing analogy resemble greatly those of the unrestricted interests and the former apply to the latter. It is therefore not surprising to see that those who reject analogy as a legal proof are also inclined to reject the validity of unrestricted interests as a basis of legal judgement.

I found in this regard that Shaykh Muhammad Tahir Ibn 'Ashur, in his book *Maqasid Ash-Shari'a*, has completely tied up analogy and unrestricted interests with one another, giving preference to inference from unrestricted interest over inference by means of analogy. This is because there is a striking difference between them as two mental constructs. Analogy is no more than an application to a specific issue of a similar ruling which often partakes in probability. As for public interest, it applies to a general issue as a matter of certainty. Thus, the difference between them pertains to the difference between a certain issue and a probable one as regards the degree of assurance that they convey. Shaykh Ibn Ashur says : "Our aim is not just to know that the *Shari'a* takes public interest into consideration. Rather, we aim at knowing the various types of public interests which we know that the *Shari'a* intends to secure. Thus, we certainly obtain from this knowledge a general view of all the various types of masalih. So when we face specific events

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<sup>155</sup> Al-I'tisam, Vol. 2, p. 107.

which never occurred during the early period in Islam, and we lack similar legal rules issued by the Lawgiver, we know how to include those specific events under the general principles and establish for them similar legal rules based upon these general principles. Thus, by doing so, we feel satisfied that we establish the proper rulings of *Shari'a* within the scope of the true intentions of the *Shari'a*.<sup>156</sup>

The jurist may face events with no explicit text to cover them, due to the fact that they are new and were unknown during the time of legislation. In addition, these events may not be all that similar to one another. So the jurist would include those new events under the general cases determined by definite legal rules. These may then be applied again in order to establish for the new event the definite legal rule of the general case. From this it seems that the legal rule for the new event stems either from extending the new event to a specific case or from extending it to a general case of the general principles of *Shari'a*.

Ibn 'Ashur then elaborates by saying: "We should not hesitate to accept the validity of establishing legal rules by reference to public interest, because if we accept the authority of analogy as a legal source which is joining a specific event for which there is no known specific legal rule to another specific case with an established legal rule in the text due to their similarity in respect of the effective cause '*illah*, which, in most cases, is a probable specific interest, because we rarely have prescribed legal causes. Hence, the evidence is stronger for us to accept the validity of analogy based on a new general interest, for which no ruling is known in the existing law, and base our analogy on a general principle accredited by *Shari'a* through induction of *Shari'a* texts, which is either certain or probable and coming close to certain. It would not only be preferable to accept the validity of such analogy, but that the analogy so attempted would be based on a more relevant legal argument".<sup>157</sup> Thus, he explicitly states that the unrestricted interests are the domain in which two types of analogy converge : these are the specific analogy (*al-Qiyas al-juz'i*) and the general analogy (*al-Qiyas al-kulli*)".

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<sup>156</sup> Maqasid Ash-Shari'a, p. 83.

<sup>157</sup> Ibid.

Then he emphasizes the above by saying : "I do not think that there is a jurist who would, after giving deep thought, hesitate to decide that constructing analogy over these new cases on the basis of their resemblance to the established ones during the legislative period of Islam, or the subsequent period of the learned scholars who agreed on the parallel cases would be preferable and superior to constructing analogies between specific interests, whether public or private, some of them forming the basis of others. This is because doubt may arise as regards three aspects of these specific interests:

- (1) the evidential bases of the analogies concerned;
- (2) ascertaining the qualities by which joining the parallel case to the original case is established;
- (3) validity of the basis of, as opposed to the similarity of the categories of public interest which are relied upon, whether certain or probable, and their underlying evidential basis involving either deduction or induction from the sources of *Shari'a*.<sup>158</sup>

Then Shaykh Ibn Ashur concludes : "Are not these public interests, with their characteristics, more worthy to be joined to their similar categories which are established and induced from the principles of *Shari'a*. Those who oppose considering public interests are definitely not very different to those jurists who reject analogy altogether".

Thus, he reached the conclusion that those who use specific analogy must also accept analogy that is based on unrestricted interests as a type of analogy. Indeed, it is more worthwhile and preferable to be taken into consideration. Otherwise they would contradict themselves by their acceptance of analogy as a legal source.

From the aforementioned, we realize that establishing a legal rule for a new case that is experienced in Muslim society for which there is no legal text may be attempted by analogy based upon joining an

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<sup>158</sup> Ibid., p. 84.

unspecified legal rule of the parallel case to a specified legal rule of the original case because of the similarity of their legal cause. We would join what is facing the Muslim community to similar general events during the time of Revelation, or to those unanimously agreed upon during the time of the erudite scholars. This is because the *Shari'a* is premised on the general objective of securing public interest and avoiding evil. Furthermore, Allah has ordained that His *Shari'a* is to command permanent validity, allowing for the development of the human personality and environment, safeguarded and immune from deviation and corruption and fit to achieve benefit for humanity.

## CONTEMPORARY APPLICATIONS OF *QIYAS*

In the first part of this research, I dealt with the theoretical aspects of analogy to the effect that the potentials of this principle are really extensive. The potentials of analogy run hand in hand with legislation in the course of time and in respect of the depth that may penetrate every aspect of human activities, with the purpose of determining the legal rule for each case. As a matter of fact, this is a way of providing the ideal solution for new and recurrent problems.

Since the Islamic Research and Training Institute, which is a subsidiary branch of the Islamic Development Bank, has taken a greater interest in economic matters, we would primarily tackle the economic field where analogy will definitely offer much-needed solutions for current problems.

### THE CURRENT PROBLEMS

The first case facing all economists is knowledge of the legal rules of the currencies that are used in financial transactions.

**Banknotes** : Ever since the prophetic time and after that until the First World War, transactions were conducted in currencies that were coined in gold or silver. Other types of metal were also coined to make it easy for people to deal in cheaper items. Therefore, numerous Prophetic *hadiths* were narrated to specify transactions in gold and silver for sale and purchase, borrowing, partition (*qisma*), donation, making wills, endowments, and exchange of one item for another. The *hadiths* also indicate the minimum prescribed amounts of *zakah*, (poor due), dower,



blood-money and *jizya* (poll-tax). They further give details on the rules governing the exchange of services such as wages for human labour, or material gains such as leases, rewards, and rentals. The textual evidence also indicates permissible transactions in various types of companies and a variety of other economic activities. But the role of gold and silver has come to an end. Gold and Silver have been replaced by banknotes which are the sole units of currency used for economic transactions all over the world. Furthermore, starting August 1971, banknotes are no longer guaranteed by gold in international transactions. At that time, the USA stopped converting its currency into gold. Before that date, countries had to pay in gold in return for accumulated accounts of transactions with other states. Thus, there is no text, either in the Qur'an or in the *Sunna* of the Messenger of Allah on banknotes because they were not used at the time of revelation. For this reason, also, Muslim jurists have not addressed the matter either individually or collectively.

This is a very serious issue because if we consider banknotes equal to gold and silver, we have to apply the rules of gold and silver to banknotes. But if we do not equate banknotes with gold and silver, banknotes would be seen as a merchandise. Had we done this, banknotes would have no criteria for evaluation and pricing and the result would be that the legal rules of gold and silver currencies do not apply to banknotes.

A solution to this problematic should provide a foundation upon which legal rules for every economic activity may be based, and issues may be addressed as to determining the permissibility or otherwise of commercial transactions. For this reason, banknotes were the topic discussed at the *Fiqh* Academy of Makkah. The same topic was discussed at the *Fiqh* Academy affiliated to the Organisation of Islamic Conference in two of its sessions : in its third session held in 1408H/1987 and the fifth held 1409H/1988. Serious research presented during these sessions dealt with the issue in depth, and also covered comprehensively detailed juristic opinions concerning this issue. They also tackled the consequences of the above two possibilities related to banknotes and their relationship to gold and silver. The resolution of the Islamic *Fiqh* Academy No (9) D/3/07/86 states that banknotes are considered as

currency. They have all the attributes of currency and are fully valid as unit of pricing. They also qualify for the application of all the legal rules established for gold and silver with respect to usury, *zakah*, advance payment sale (*salam*) and similar transactions. Here we find an example of juridical analogy. The parallel case is the banknotes, the original case is gold and silver currency; the legal cause is being a unit of currency and the legal rule is prohibition of usury in both, as well as the levying of *zakah* on them and the legality of using banknotes as capital for advance payment sale (*salam*). Then the resolution generalized the legal rules to include currency-exchange, dormant partnership (*mudaraba*), lease, reward (*ja'ala*), partnership and all other types of transactions in banknotes.

The above resolution was preceded by the resolution of the Islamic *Fiqh* Academy No D 2/7-1406 in Makkah. This resolution is as follows :

**Firstly**, Banknotes are independent currency units and are to all intents and purposes governed by the same rules as gold and silver currencies. So, *zakah* is obligatory on them. Both types of usury, namely usury of excess (*riba al-fadl*) and/or credit usury (*riba 'al-nasi'a*) are prohibited on them completely; this is so because of the legal cause '*illah* which they have in common of being the unit of price (*al-thamaniyya*) that was present originally in gold and silver and by analogy in banknotes. Thus, banknotes invoke the same legal rules as currencies in respect of the obligations that are imposed by *Shari'a*.

**Secondly**, Banknotes are considered an independent currency as in the case of gold and silver and all other types of currencies. Likewise, banknotes are considered each as a separate genus according to the different issuing authorities of currency all over the world. For instance the Saudi banknotes are one independent genus and the American banknotes are another. Thus, each banknote is an independent currency. From the above we conclude the following:

- (1) It is absolutely not permissible to sell banknotes in exchange for each other or for other types of currencies such as gold or

silver in credit based usury. So, it is not permissible, for instance, to sell Saudi Riyals for other currencies in excess usury or credit usury without immediate payment.

- (2) It is not permissible to sell the same type of banknotes in exchange for each other in excess usury or credit usury whether the transaction is credit based or hand to hand with immediate delivery on both sides.
- (3) It is absolutely permissible to sell specific banknotes in exchange for other banknotes of different type, if delivering them is hand to hand.

**Thirdly**, *Zakah* is obligatory on banknotes when their value reaches the prescribed amount of gold and silver liable for *zakah*, or when banknotes come up to the prescribed quorum alone or together with other currencies merchandize, or property intended for trade.

**Fourthly**, Banknotes may be used as capital for advance payment sales (*salam*) and for commercial partnerships.

Both resolutions of the two Academies agree on the necessity of applying the legal rules of gold and silver currencies to banknotes. Nevertheless, the Academy resolution at Makkah followed up the details that contemplated the results of analogy, to the extent of establishing the new legal rule (equating banknotes with gold and silver currencies). This decision overruled some of the previous opinions which are not deduced by analogy, such as the specification that banknotes are similar to other assets in regard to meeting the quorum of *zakah*. This ruling is not a result of analogy; rather, it reflects preference for the opinion of those who agree to equate the banknotes with other assets, against those who do not do so without actually having any proof. Jurists have differed with each other on the other hand about the legality of considering gold and silver to be added together so as to reach, in their total, the prescribed amount liable for *zakah*.

This resolution had been previously adopted by the Fatwa Committee of the Faisal Islamic Bank. It is stated in the opinion of this Committee, which was given in reply to question No 24 : "that banknotes

such as dollars are included in the legal rules of usury by analogy with gold and silver for the legal cause of being units of pricing ".<sup>159</sup>

**Comment:** It should be noticed that the *Shari'a* Advisory Committee of Faisal Islamic Sudanese Bank had based its formal legal opinion (*fatwa*) on *Qiyas*. This means that it went out of the domain of imitation *taqlid* to the domain of independent legal ruling *ijtihad*. Being an imitator *mugallid*, the Committee is not authorized to base its opinion on the sources from which the legal rule has been deduced. Rather the imitator has a limit not to be exceeded, that is, to verify what he follows, then carefully understand it and then try to apply it to a suitable specified incident. This explicitly indicates that independent legal ruling *ijtihad* is still capable of providing Muslims with *Shari'a* rulings. *ijtihad* has never been closed nor does anyone have the right to close by his personal opinion, what the Lawgiver has clearly ordained.

Another case for the application of *Qiyas* is asking pledge *rahn* from a partner the bank may agree with another partner to enter a contract of partnership on a specific deal or enter a diminishing partnership (*al-sharika al-mutanaqisa*) that terminates in ownership. In this case, the Islamic Bank wishes to hold pledge from its partner to secure the rights of the Bank in repayment of the financial facilities offered to the partner. The *Shari'a* Supervisory Committee of Faisal Islamic Sudanese Bank has been asked : Is it legally permissible for the Bank to ask a partner to offer a pledge of the same value as of the bank financing so that the Bank has the right to take back its money in case the money wrongfully perishes or is lost through negligence on the side of the partner? The *Shari'a* Supervisory Committee responded as follows :

The Maliki school is of the opinion that it is permissible to take a pledge from the partner if the aim is to secure what is wrongfully or negligently lost by the partner. Al-Khirshi said : "We stipulate that the pledge should be for a debt to exclude transactions that are in the nature of trust. So, it is not permissible to pay money for a *mudarabah* and also take a pledge". Shaykh Al-'Adawi commented on that : "Because if the

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<sup>159</sup> The Fatawa by the *Shari'a* Supervisory Committee of Sudanese Faysal Islamic Bank, p. 96.

trust is lost or perished, the trustee is not responsible for compensation. This is true if the trust has been lost without negligence. But it is valid for the bank to take a pledge stipulating that the partner is liable for repayment of the trust in case it is lost through negligence; thus, there is no difference between a pledge and suretyship (*al-daman*) for the Maliki school.

The Hanbali school makes a distinction between a pledge and suretyship. They do not accept a pledge in what does not involve an obligation but permit suretyship in the same. They argue that taking a pledge would be costly to the debtor because the thing pledged remains in the hand of the creditor and the debtor has no right to dispose of it. This is contrary to a suretyship contract.

This is the rule for the possessed pledge (*al-rahn al-hayazi*). According to the Maliki school, it is valid to take a pledge in the form of landed property for trust (*al-rahn al-'iqari al-i'timani*); because if they (Maliki) accept taking a possessed pledge by priority, they would also *afortiori* accept taking pledge of landed property for trust where the pledged property is not possessed by the bank. This type of pledge is also permissible according to the Hanbali school by analogy to suretyship, because they draw a distinction between taking pledge and suretyship (by rejecting the first and accepting the second), because the thing pledged would remain in the hand of the creditor and this is true only in case of the possessed pledge. As for the pledge of landed property for trust, the thing pledged is not possessed by the creditor, so there is no difference between the debtor and the surety.<sup>160</sup>

This legal opinion (*fatwa*) maintains the following :

- (1) The bank has the right to ask the partner to offer the bank a pledge of landed property as a guarantee so that the bank could secure its rights if the partner wasted or neglected the property of the partnership.

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<sup>160</sup> Ibid, pp. 110-111.

- (2) This *fatwa* is derived from the Maliki school by inference and is derived from the Hanbali school by analogy.
- (3) The *fatwa* talks here about the pledge of landed property for trust (*al-rahn al-'iqari al-i'timani*), which means taking the title deeds of the property as pledge. Since the current laws in almost every states have made ownership dependent on the completion of written documents, it follows that any type of disposal, whether by way of charity or exchange as well as suretyship is not valid when the ownership is incomplete. This is because the owner would have only the right of usufruct and not the right of disposal as his right of disposal is restricted during the duration of the pledge. This type of pledge has been mentioned by Shaykh Muhammad Tahir Ibn 'Ashur in his interpretation of the Qur'anic phrase which reads that "a pledge with possession - *fa-rihanun maqbudatun* - (may serve the purpose)". He inferred from this that a pledge is effective even if the creditor does not enforce the debtor to transfer possession because the Qur'anic verse makes the possession a quality of the pledge, not its essence. So the quality of the pledge has established the meaning of the pledge in the sense that it can be without taking possession. Then he said : "The people of Tunisia are content with taking official documents as pledge when they pledge their immovable properties and lands. They consider this as real possession in case of taking a pledge for a loan.<sup>161</sup> Thus, when Shaykh Ibn 'Ashur did not find in the works of the previous jurists any statement in reference to considering the possession of the title deeds of a property as substitute to real possession but found it as a common workable method in Tunisia, he considered it an acceptable legal method for pledge taking. This method is generally accepted by both the Muslim judges and by Muslims in general in their documentation. The *Shari'a* Supervisory Committee called this type of pledge-taking as a pledge on realty (*al-rahn al-'iqari*); but I would rather call it "pledge of contracts or

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<sup>161</sup> At-Tahrir and At-Tanwir, Vol. 3, p. 122.

documents (*rahn al-'uqud wa'l-rusum*). The *Shari'a* Supervisory Committee considered this type of pledge permissible in the Maliki school according to their investigation. This means that the Maliki school has not identified a text dealing with this type of pledge. Rather, they made it legal according to their deduction and they consider this to be an analogy of the superior (*Qiyas al-awla*).

As for the Hanbali school, they made it legal by way of analogy. The original case here is the permissibility of taking a pledge from the partner to repay the money in case of default or loss. The parallel case here is taking a pledge in landed property by taking their title deeds. The legal cause is the right of the partner to suretyship in order to secure his right.

#### **SECURING A PLEDGE (*RAHN*) FROM A PARTNER**

The creditor in a pledge (*al-murtahin*) is not legally entitled to have the pledge in repayment from the debtors as a matter of priority over other creditors, unless the pledge is in his possession, as ordained in the words of Allah: "A pledge with possession (may serve the purpose)". This verse indicates that a pledge should be given and possessed by the creditor so that he has the priority of taking back the pledge in repayment of his debt when the debtor defaults or declared bankrupt. Thus, taking back the official documents of the pledged property is a parallel case to the original case of possessing the pledge itself, because in both cases, the owner has no right to dispose of his property at all, for fear evidently of depriving the creditor from regaining his debt.

#### **CREDIBILITY OF *AL-MASALIH AL-MURSALA***

The creation of Islamic banks is not supported by any specific evidence from the Qur'an, *Sunna* or *Ijma'* (consensus), that might indicate their legality. As a matter of fact, establishing banks is a new development in the area of financial partnership (*sharikat tamwil*), and they conduct commercial activities in many countries. They are also, a center of currency exchange and a center for visibility studies and

services as well as a source of useful financial information. They serve as economic entrepreneurial institutions where partners own their shares, but apart from attending the general meetings of these banks, they have no right to interfere in the day-to-day activities of the bank. Their shares consisting of cash and credit etc. are bought and sold in the market. The rules and regulations of accounting are not yet definitely specified among all Islamic Banks.

Indeed, this general and inexhaustive description of this system, indicates clearly that Islamic Banks are new Institutions introduced after the Western model, but based on avoidance of prohibited or dubious activities that may compromise in integrity of Islamic transactions.

In my opinion, establishing Islamic Banks is legally premised on unrestricted public interest which means preserving the wealth of the Muslim community in a way that enables them to independently deal with their wealth and obtain benefit through investments that makes their economy prosperous. This may be done by paving the way for easy methods of dealing, financing, marketing and creating new jobs for the labour force. Thus, the relationships between the various parts of the world due to advantages of easy contacts between all countries, make it necessary to have the facility of banking institutions. So, neither merchants nor industrialists can dispense with the facilities and benefits that are offered by the banks. These banks are established and based on principles alien to the established norms and principles of Muslim economy. Thus, there arose a general need for the creation and establishment of Islamic Banks.

It has thus become apparent that establishing Islamic Banks is a consequence of the need for preserving property which is a necessity of normal living. Money is also a complementary element to the essential interest of the preservation of property. As mentioned above, what is supplementary to the essential interest (*al-daruri*) is considered a complementary interest (*al-haji*). If the latter is not upheld, the life of the Muslim community becomes difficult. The community would also be unable to proceed with their economic development in its various manifestations in tandem with the rest of the world. With this type of



contemporary legal applications of analogy which are based on authentic principles, several instances of analogy concerning new problems have been seen, some of which are discussed below :

### **The First Example**

Among the legal verdicts (*fatawa*) on economic questions issued by the Kuwait Finance House is an answer based on analogy to the following question :

What is the *fatwa* about depositing an amount of gold by some foreign banks with some currency exchangers so that the latter may sell that gold on behalf of the depositing bank? These foreign banks sometimes take a guarantee, and sometimes they do not, according to the degree of confidence they might have in the currency exchange dealer. Then the latter sells the gold (or some of it) at the current rate either to other exchangers, or buys it himself, on the assumption that he would deduct the price from the deposit which he has at the foreign bank?

### **The answer is**

Praise be to Allah and blessing be upon the Messenger of Allah. According to the rulings of *Shari'a*, the currency exchanger is an agent for the depositing bank in respect of the gold he has in trust with him. Originally, the trusts (*al-amanat*) are not guaranteed except when they have been lost through negligence or waste. But due to the corruption of conscience, the trustees may give surety for paying compensation by any method of suretyship. We have the best example of our rightly-guided ancestors. They made craftsmen responsible for paying compensation when property that is placed in their hand is lost.<sup>162</sup>

This legal opinion talks about the responsibility of the agent deciding that he is responsible for paying compensation for what he lost. Here, the agent is seen in an analogous position to that of the craftsman. This legal opinion raises some points to be discussed :

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<sup>162</sup> Vol. 1, pp. 51-52.

**Firstly**, The question is not about suretyship, but about demand on the part of the bank from the currency exchanger to deposit a pledge to secure repayment. This is supported by the fact that the currency exchanger may deduct the price from his bank deposit. Thus, it is to take a pledge from the currency exchanger to guarantee his liability, and this is permissible.

**Secondly**, The analogy upon which the above reply is based may be scrutinised, because the legal rule for the original case here is the liability of craftsmen for paying compensation for the property lost in their hands. This is the view of many Companions. ‘Ali (may Allah be pleased with him) said: "This is the only way for the people to protect their property".

Ash-Shatibi said: "Public interest in this case is linked to the people’s need for craftsmen. They usually stay away from the property that is placed in their custody and they do not often take the necessary care to protect them. Thus, if the craftsmen are not liable for compensation while the people are in dire need of their services, the result would be one of two possibilities: either people would totally stop hiring craftsmen, a situation which causes hardship to the people; or craftsmen would work without liability for compensation which may prompt them to claim loss and destruction of property leading in dishonesty and neglect of people’s property and laxity over taking precautionary measures. Thus liability for loss here is in the public interest, and this is the meaning of the saying of Imam ‘Ali<sup>163</sup>: "This is the only way for the people to protect their property". So, the legal cause for which the craftsmen are held liable is the unrestricted public interest which falls under the complementary haji class of interests. Ash-Shatibi explained this legal cause in detail, indicating that the need of the people for craftsmen is a matter of general interest. If they know that they are not liable for compensation, craftsmen in most cases would neglect their duties, and would be careless as regards preservation of articles that are placed in their custody. So imposing liability on craftsmen will impress upon them to take precautionary measures to protect articles handed over to them. Likewise, if the craftsmen are not held liable, that might lead to dishonesty. By the nature of their work, shops of craftsmen are usually not protected against

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<sup>163</sup> Al-I’tisam, Vol. 2, p. 102.

the possibility of theft. So, craftsmen may have a pretext for claims that articles had perished.

As for the offices of currency exchangers, these are fully protected, but the need for currency exchangers is not a matter of public interest. Thus, in our opinion, the analogy that is attempted is unacceptable. Furthermore, the assumption that corruption of conscience belongs only to our current era is not acceptable, since when anarchy spreads, conscience becomes corrupt, and Muslims did not strictly follow the religious rules in many periods of history. In each historical era, jurists wrote bitterly about the fact that Muslims deviated from the straight path ordained by their religion. In addition, had we accepted that analogy with the above assumption, we would have to impose a liability on all trustees. This would have resulted in contradiction, since the basis of transaction here is the assumption that the trustee is simultaneously honest and dishonest, because delivering the articles to the trustee implies the voluntary act of the person who delivered his article to him by his own free will. On the other hand, imposing liability on the trustee in case he claims that the article perished is a distrust in his presumed honesty.

The trustees who are not liable for compensation are enumerated (in an Arabic poem) by Ibn 'Asim as follows:

1. The trustees entrusted are in no way liable.
2. Like father, like guardian, like dealer and money holder.
3. Likewise the investor partner, the principal, and the craftsman with no care for his craft.
4. Same is the craftsman at his job whether for the customer or at home.

### **The Second Example**

His Eminence Shaykh Mustafa Al-Zarqa, a well-known scholar, maintains that insurance is a permissible contract. In this presentation, I do not intend to look into the core of insurance, one of the issues about which contemporary jurists have greatly differed. Each of these jurist

have advanced certain viewpoints of their own. But, what I aim at here is to investigate the analogy upon which Shaykh Al-Zarqa based his opinion regarding the permissibility of insurance. However, it is well-known that refuting the underlying evidence does not necessarily indicate the invalidity of an opinion. His Eminence has presented the following evidence, inter alia, to show the validity of the insurance contract.

**Validity of liability against road hazards:** If someone advises another to go through a particular way because it is safe saying that : "I guarantee your safety (and would compensate you) if any harm is inflicted on you". So the man accordingly took that way but his property was stolen. The advisor would consequently be liable for compensation. This opinion has been explicitly stated in the Hanafi school regarding the surety contract (*al-kafala*). Then, Shaykh Al-Zarqa pointed out that Ibn ‘Abidin does not accept this analogy, as he mentioned in his valuable commentary : "Raddu Al-Muhtar". Ibn ‘Abidin supports his opinion by saying: "This is what seems obvious to me after thoroughly investigating this issue, so please follow this opinion, for you will not find anything similar to it in any book other than this one".<sup>164</sup> To sum up, Ibn ‘Abidin’s reply runs thus : we say that if the person intentionally deceives the traveller while he is aware of the hazards, he is liable. As for the trader who used to take responsibility for compensation, he probably did not intend to deceive the merchants. Further, in the event where both the insurer and the insured are both aware of hazards, the insurer is not likely to take liability because of realizing the hazards”. Shaykh Mustafa commented by saying that Ibn ‘Abidin unconvincingly drew a distinction between accepting liability for compensation and guarantees against road hazards. Thus, the analogy upon which Shaykh Mustafa established the permissibility of insurance represents only one opinion in the Hanafi school. The original case here is liability for compensation of whoever guarantees the safety of another by saying to him: "You take this way and I am liable for your belongings. So, if these were stolen or usurped, liability for loss is imperative. The parallel case is the owner of the insurance company when he says to the trader : "You carry this commodity on board the ship and I am liable for its safe arrival to its destination”. Thus, if the ship sinks on its route, he is liable. The legal

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<sup>164</sup> Hashiyat Ibn ‘Abidin, Vol. 3, p. 250.

cause that links the original and the parallel cases here is that whoever undertakes to perform a lawful task is liable to fulfil his obligation. This analogy apparently looks valid. But we took no notice of the difference between the original and the parallel cases. In the original case of the liability against road hazard, the guarantor does not take anything in return. It was an act of goodwill (*tabarru'*) and there is nothing in the Hanafi school to say that the guarantor is entitled to a return. As for the parallel case of insurance, it should be included in the domain of contracts of exchange. In this case, the insurance company is only liable in the event where the insured person pays a fixed amount in cash agreed upon in advance. There is a difference between *tabarru'* and commutative contracts. Do you not see that credit sale of gold for gold is unanimously prohibited, while lending gold in return for similar gold is unanimously permissible, if not commendable?

Shaykh Mustafa also drew an analogy between an insurance contract and a binding unilateral promise, which is upheld by the Maliki school, especially if the analogy is based on a cause. He also includes insurance in the same category. Thus, a man should fulfil his promise when saying to another : "Get married and I would lend you the dower for the bride." Likewise, if a man said to another : "Drive you car this way and I would be liable for any damage that is caused as a result". The analogy here is not valid because a binding unilateral promise falls under donation while insurance is a contract of exchange, where each partner looks after his own rights. The *Shari'a* does not allow them to get involved in another contract of exchange in which one side of the exchange is unknown. This is because compensation is not a safe matter, rather it is a matter that involves financial losses. The liability for risk in this case fluctuates between zero and hundredfolds of what the insurance company might have received.

Here I have no intention of collecting all the legal opinions (*fatawa*) issued by eminent jurists who base their opinions on *Qiyas*. Rather I aim at indicating the dangers of adopting analogical deduction where people may be involved in committing mistakes. The analogist who is a *mujtahid* dealing with a certain case must be highly qualified in exercising independent reasoning *ijtihad*. It is not an easy matter for a

Mufti to claim that he has attained the status of *mujtahid*. As a matter of fact, many of the jurists who based their verdicts (fatawa) on *Qiyas*, when asked if they claim that they are *mujtahids*, they would categorically deny it. However, discussion and scientific debate may unconsciously lead the interlocutor into unintended results of which he was completely unaware, and to which he was driven. Hence I conclude, here, by saying that although *Qiyas* opens new avenues for economic legislation it should be attempted collectively and not individually. In this way, the analogist would be safe and satisfied with his understanding that the legal rule resulting from his analogy about the issue under discussion is the ruling of Allah. This is the required degree of effort to be undertaken in the formulation of *fatwa*. According to a renowned *hadith*, the Mufti is rewarded once if he makes an error and rewarded twice if he is right.

Allah is All-Knowing and All-Wise. For me, He is my Best Reckoner and He is The Best Guardian.

Neither prestige nor power can be attained except through Allah, The Ever Exalted and The Ever-Magnificent .

Written by one submissive to His Lord, Muhammad Mukhtar Al-Salami, The Grand Mufti of the Tunisian Republic, On the tenth of Rajab 1415H.

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<i>Hashiyat Al-Dusouqi 'ala Ash-Sharh Al-Kabir</i>	Muhammad Ibn Arafah Al-Dussouqi	Al-Azhariya 1345
<i>Sharh al-Rassa' 'ala Hudud Ibn Arafah</i>	Mohammad Al-Ansari Al-Rassa'	Al-Tunusiya 1350
<i>Sharh Abd Al-Baqi Al-Zurqani 'ala Mukhtassar Khalil</i>	Abdel Baqi Al-Zurqani	Al-Misriya 1307
<i>Al-Mahalla</i>	'Ali Ibn Hazm	Dar Al-Fikr
<i>Fatawi Hay'at Al-Riqaba Ash-Shar'iya</i>	Bank Faisal Al-Islami	Al-Itihad Al-Duwali Lil Bunuk Al-Islamiya 1982
<i>Fatawi Beit Al-Tamweel Al-Kuwaiti</i>	Al-Hay'ah Al-Shar'iyya	Matabi' Al-Khat 1407-1408
<i>Al-Mudawwana</i>	Abu Al Sa'd Sahnoun Al-Tunoukhi	Dar Al-Fikr 1398
<i>Al-Muqaddimat wa Al-Mumahhidat</i>	Abu Al-Walid Muhammad Ibn Rushd Al-Jadd	Dar Al-Gharb 1988
<i>Mawsu'at Al-Fiqh Al-Islami</i>	Lajna min Al-'Ulama'	Kuwait