Masālik al-ᶜIllah in the Convention of *Qiyās*: An Investigation of its Foundations and Contemporary Application

By

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Under the supervision of

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Declaration

I do hereby declare that *Masālik al-ᶜIllah in the Convention of Qiyās: An Investigation of its Foundations and Contemporary Application* is my own work. I furthermore hereby state that this work has not been submitted before for any degree or examination at any other university, and that all the sources I have used or cited have been included in conformity with acceptable academic protocol.

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Signed……...

Note on Translation, Transliteration and Dates

While I am aware that transliterating technical Arabic terms at times may make for cumbersome reading, however the exact meaning of these terms is important and therefore unavoidable, as they allow for varied translations and meanings for the terms being used. For example, the Arabic term *munāsabah* literally means suitability but it also holds a very specific technical meaning that is descriptive of an established methodology of identifying legal cause (*ᶜillah*). To avoid confusion regarding the translation of the Arabic terminology used as it relates to both contextual and technically specific meaning, I have thus opted to transliterate key Arabic words.

To ensure the transliteration of Arabic words is standardized and consistent, I have utilized the format of the *International Journal of Middle Eastern Studies* (IJMES). I have tried to faithfully and consistently transliterate all Arabic words that have not been anglicized and popularly used words such as Imam, Sunnah, Hadith and Quran that have been adopted into the English language I have left in their common form. Other Arabic terms I have given in English with the Arabic transliteration following in brackets, such as: analogical reasoning (*qiyās*), independent reasoning (*ijtihād*) and legal cause (*ᶜillah*).

I have omitted the definite particle (*al*) when citing proper names, such as those associated with scholars, and retained them for complete names. I have thus quoted names in their commonly known forms unless otherwise indicated by the text of translated sections, or my personal preference. The letter *tāʾ marbūṭa* (ة) is indicated by a *hāʾ* (هـ) and *tāʾ* (ت) respectively such as in (*ᶜalāmah*) and (*ᶜalāmatuʾl-fiᶜl*) as it relates to the standard rules of Arabic reading.

I have used a few standardized abbreviations in this thesis, such as d. for died, ed. for editor or edition, and n.d. for not dated.

All dates, unless otherwise stated, follow the Gregorian calendar. Where two dates are given, the first date indicates the Muslim date followed by the Gregorian date. A single date followed by the abbreviation AH indicates the Muslim date. The letter *ṣād* (ص), in its transliterated form (*ṣ*), follows the mentioning of the Prophet (*ṣ*), indicating the salutations that are prescribed by Islamic law.

Translations of Quranic verses were taken from *The Quran* by Saheeh International Translation, while hadith translations were taken from the online hadith depository sunnah.com and Darussalaam International Publications. I have however altered some of these translations to improve clarity.

Transliteration Chart

ء	ʾ		ق	**Q**
ب	**B**		ك	**K**
ت	**T**		ل	**L**
ث	**Th**		م	**M**
ج	**J**		ن	**N**
ح	**ḥ**		هـ	**H**
خ	**Kh**		و	**W**
د	**D**		ي	**Y**
ذ	**Dh**			
ر	**R**		**Short vowels**	
ز	**Z**		ءَ	**A**
س	**S**		ءِ	**I**
ش	**Sh**		ءُ	**U**
ص	**ṣ**		**Long vowels**	
ض	**ḍ**		آ	**Ā**
ط	**ṭ**		اِيْ	**Ī**
ظ	**ẓ**		اُوْ	**Ū**
ع	ʿ		**Dipthongs**	
غ	**Gh**		اَوْ	**Aw**
ف	**F**		اَيْ	**Ay**

Key Words

Uṣūl al-Fiqh

Adillah Naqliyyah (textual evidence)

Adillah ᶜAqliyyah (rational evidence)

Ijtihād

Qiyās

Aṣl (the original case)

Ḥukm

Farᶜ (the new or parallel case)

ᶜIllah (effective/legal cause)

Masālik al-ᶜillah (methods of identifying the *ᶜillah*)

Contents

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Any shortcomings of this thesis are as a result of my own deficiencies. No blame may be attributed to the aforementioned contributors.

Abstract

This study examines the foundations of the various methods of identifying legal cause (*masālik al-ʿillah*). It studies its various theories, spanning the classical and premodern period and investigates its application in contemporary times. The investigation analyses the theories of *masālik al-ʿillah* while placing the legal cause (*ʿillah*) contextually within the convention of analogical reasoning (*qiyās*). The findings of this investigation are then used to study practical applications of identifying legal cause, in a selection of three case constructions of *qiyas*, under the topic of suicide attacks. My approach to selecting these contemporary case constructions is based upon three primary considerations: the effective reach or impact that these case constructions have on modern Muslim society, the availability of sufficient academic material, and my own extensive readings on these cases.

Chapter 1

Placing *masālik al-ᶜillah* within the broader topic of *qiyās*

The sources of Islamic law are primarily categorised as being either textual evidence (*adillah naqliyyah*) found in the sacred texts (*naṣṣ*), or rational evidence (*adillah ᶜaqliyyah*) found in sources of law that are based upon human reasoning (*raʾy*). Whilst the sacred texts, along with the consensus of scholars (*ijmāᶜ*) are the only absolutely agreed-upon sources of law, it is the sources of rational evidence that have spawned more diverse outcomes in scholarly rulings (*fatāwā* sing. *fatwā*) and consequently, persistent controversy. In the absence of perspicuous (*muḥkam*) directives from the sacred texts, the pursuit of *fatwā* by way of independent reasoning (*ijtihād*) is legitimised. An independent jurist (*mujtahid*)[1] may exert his scholastic competencies to discover a legal verdict based upon a comprehensive application of the various sciences of *ijtihād,* such as legal theory (*usūl al-fiqh*), legal maxims (*al-qawāᶜid al-fiqhiyyah*) and the higher objectives of the law (*maqāṣid al-sharīᶜāh*). The very nature then, of legal processes based upon human reasoning, is that of inconsistent and often contradicting legal outcomes. The bias, the methodology and juridical ability (*al-ahliyyah al-ᶜilmiyyah*) of scholars are some factors that contribute to the diverse legal outcomes.

Analogical reasoning (*qiyās*), it has been argued, does not fall under the genre of rational evidence.[2] The proponents[3] of this argument insist that the process merely constitutes the transference of a ruling (*al-ḥukm*) from an original case (*al-aṣl*), whose

[1] An independent jurist qualified to perform *ijtihād*. There are various requirements that have been ascribed to the *mujtahid*, and these vary from one school of legal thought (*madhhab*) to another. The independent religious authority (*mujtahid muṭlaq*) for instance, derives his legal verdict independent from any *madhhab* and could thus establish his own school of thought.

[2] 'Rational evidence' here does not refer to the philosophical concept of demonstrative proof (*burhān*), but instead refers to proof that relies on human intellect as contemplated in the science of *uṣūl al-fiqh*.

[3] Abū al-Ḥasan al-Karkhī (d. 340AH) see footnote 52 of this thesis; Abū Bakr Ibn Fūrak (d. 406AH) see footnote 49 of this thesis; Muḥamad b. ᶜAlī al-Shawkānī (d. 1250AH) see footnote 53 of this thesis.

basis is already established by textual evidence. This ruling is then simply applied to a new case (*farᶜ*) due to a common legal cause (*ᶜillah*) or *ratio decidendi*, that exists in both the original and new case. Thus, in essence, analogical reasoning is an extension of a ruling that is sanctioned by textual evidence. It is, however, the *ᶜillah*, or more specifically the approach to identifying the *ᶜillah*, that necessitates the extensive application of human reasoning. As with all reason-based sources of law, many frameworks and protocols for identifying the *ᶜillah* were developed over the history of the development of Islamic legal theory. This study aims to examine the foundations of these frameworks and protocols and to peruse their application in contemporary legal verdicts.

Background to the problem

The need for establishing clearly defined methodologies of *ijtihād* came as a direct consequence of new legal cases that surfaced after the death of the Prophet (*ṣ*). Since no legal injunctions existed in the sacred texts that would resolve these new cases directly, classical jurists occupied themselves with developing and defining principles of *ijtihād* to delimit its scope and application. There were two main discourses that emerged from these developments. Firstly, that any new case, void of reference in the sacred texts, was to be treated as a non-religious matter that required no religious ruling and was to be considered as a mercy from God. This is based upon the hadith report: "Verily God, The Most High, has laid down religious obligations, so do not neglect them; and He has set limits, so do not overstep them; and He has forbidden some things, so do not violate them; and He has remained silent about some things, out of compassion for you, not forgetfulness - so do not seek after them."[4] Secondly, that original cases in the sacred texts should be further examined to identify broader principles of Islamic law (Sharia) that may be applied to new cases in an attempt to discover rulings intended by God. Al-Shāfiᶜī (d. 204AH) is said to be one of the first of the classical scholars who attempted to narrow down the

[4] *Sunan al-Dāraquṭnī*: *kitāb al-raḍāᶜ*, hadith 4398; *Jāmiᶜbayān al-ᶜilm wa faḍlih li Ibnᶜ Abd al-Barr*: *bāb mā jāᵓa fī dhammiᵓl-qawl fī dīni Allah*, hadith 2012.

scope[5] and process of *ijtihād*. Many modes or approaches to *ijtihād* were subsequently developed, but none as significant and simultaneously controversial as *qiyās*. While al-Shāfiᶜī considered *qiyās* synonymous to *ijtihād*,[6] other legal theorists (*uṣūliyyūn*) positioned it as a fourth source of law after the Quran, Sunnah[7] and the consensus of the scholarly community (*ijmāᶜ*). There is a variant view that holds that the traditions of the Prophet's (*ṣ*) Companions (*aqwāl al-ṣaḥābah*) may precede *qiyās* in this ranking, a view which seems to be more evidently present in the practical application of independent reasoning by the early Imams of the schools of legal thought (*madhāhib* sing. *madhhab*).[8] *Qiyās* nonetheless remains the most relied upon mode of independent reasoning in dealing with contemporary legal cases, which have exponentially increased due to rapid sociological and technological developments in the backdrop of the ever evolving global economic, political, social and cultural landscapes Muslims find themselves in.

In the light of this, *qiyās* and the processes of identifying legal cause impacts the lives of hundreds of millions of Muslims around the world. These processes influence the rulings that affect everything from what Muslims may eat or not and what they can wear or not, to very serious issues such the permissibility of acts of war. It is then, needless to say, that this topic transcends theoretical utility, to serve a practical function of resolving critical issues faced by contemporary Muslim society.

Statement of the problem

"Change in law, like society, is perennial".[9] However, never has the Muslim world experienced more erratic or quantifiable change in its entire history as it has in the past century. The impacts of this reality have spurred renewed interest in the systems of Sharia that are designed to address 'new' or contemporary cases. *Qiyās* is the foremost of such systems and within its application, methods of identifying legal cause (*masālik al-ᶜillah*) serves as the catalyst or enabling factor of

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5 Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence* (New Delhi: Adam Publishers and Distributors, 2009), p. 1.

6 Majid Khadduri, *al-Shāfiᶜī's Risāla: Treatise on the Foundations of Islamic Jurisprudence*, 2nd ed. (Cambridge: The Islamic Texts Society, 1961), p. 288.

7 This refers to textual evidence of the Prophet Muḥammad's (*ṣ*) sayings, actions and tacit approvals.

8 Muḥammad b. ᶜAlī al-Shawkānī, *Irshād al-fuḥūl ilā taḥqīq al-haqq min ᶜilm al-uṣūl*, 2 vols. (Riyadh: Dār al-Faḍīlat liᵓl-Nashr waᵓl-Tawzīᶜ, 2000), vol. 2, p. 187 (hereinafter *Irshād*).

9 Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, preface.

its operation. The ascertainment of legal cause (*ᶜillah*) "acquires a special significance in the context of analogical deduction. *ᶜIllah* is an essential requirement, indeed the *sine qua non* of *qiyās*."[10] Methods of identifying the *ᶜillah*, however, are scattered throughout the classical works and those of the premodern era. It is possible to describe these methods, through its expansion over the centuries, as having developed into a plethora of possible approaches to identifying 'plausible' effective cause of legal verdicts. Over the centuries, jurists have drawn upon these myriad approaches in different ways, resulting in a wide range of rulings. This study will examine the foundations of the various methods of identifying the *ᶜillah* in Islamic legal theory, to identify the consistent priorities or protocols that ought to be satisfied in the pursuit of a systematic operation of analogical reasoning.

Thesis statement

In the process of formulating contemporary legal verdicts pertaining to emerging new cases, scholars have relied on an array of methodologies to manage the process of identifying the *ᶜillah* in the convention of *qiyās*. The foundations of these methodologies, that outline the processes of identifying the *ᶜillah*, and the manner in which these processes may be applied to contemporary cases, form the nucleus of this research endeavour.

Aims of the study

1. To provide a detailed reference for the methods of identifying legal cause (*masālik al-ᶜillah*) in the convention of *qiyās*.
2. To distinguish between the decisive and probable methods of identifying the *ᶜillah.*
3. To study a purposeful selection of contemporary verdicts formulated on the basis of *qiyās*, in light of the findings in the two aforementioned aims of this study.

[10] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), p. 42.

Research questions

1. Have the methods of identifying the *ᶜillah* in the convention of *qiyās* been clearly defined, compiled and recorded?
2. What are the theories that distinguish between the decisive and probable methods of identifying the *ᶜillah*?
3. How can the methods of identifying the *ᶜillah* be applied in the formulation of legal verdicts surrounding contemporary cases?

Motivation for the research endeavour

My preference for this research topic is strongly influenced by my personal interest in the dynamics of Islamic law. Having worked and studied within the context of the Muslim minority community of South Africa, as well as having experienced the application of Sharia in Muslim majority countries, it has become apparent to me that there is a need for greater analysis and understanding of the systems of Sharia that provide for changing and new circumstances. This is particularly important as developments in technology have altered the way in which Muslims engage with religious rulings. In centuries past, local scholars, who were informed of political, economic, social, cultural and historical contexts, provided rulings for the laity of their locality. New forms of information and communication technologies and specifically social media have significantly changed this. For instance, a person seeking a religious ruling where he lives in South Africa may find rulings given in very different contexts, without consideration for the context wherein such rulings may be applied. Due to these changes, there is a much greater need for critical engagement with Sharia rulings, and the processes utilised to justify them. Amongst these processes, *qiyās* and its associated methods of identifying legal cause (*masālik al-ᶜillah*), are of great importance in providing answers to these new cases that require rulings from the Sharia.

It is my view that an exposition of *qiyās* may be a stepping stone towards further inquiry, into the copious verdicts based upon this mode of independent reasoning. A study of this nature, may initiate the much-needed dialogue between scholars and those subjected to their rulings, to

jointly evaluate the circumstances of the Muslim community so as to identify solutions that may be derived from the application of *qiyās.* This will in turn fill the vacuum created by the lack of consultation between scholars and the Muslim community. It will allow new cases and their surrounding circumstances to be better understood by scholars so as to bolster the accuracy of the application of *qiyās* in general, and the exercise of identifying legal cause (*masālik al-ᶜillah*) in particular. Such consultation may be the factor that contributed to the profound success of early jurists like ᶜUmar b. al-Khaṭṭāb (d. 24 AH) who was renowned for consulting the Muslim community so as to better understand the new cases of his time. The commonly cited example of this is where he consulted his daughter on the time duration women could bear being without their husbands who were conscripted to serve in the Muslim army.[11]

The efficacy of the Sharia's responses to new cases has been severely impeded by the many imbalances and inconsistencies in the *fatwā* generation process, and more so by the limited ability of the Muslim community to hold their scholars to account for their rulings (*fatāwā*). With religion being the powerful instrument of persuasion that it is, I found it imperative to produce an academic resource that will elucidate the fundamental considerations that scholars may be guided by when formulating rulings, with regards to methods of identifying legal cause (*masālik al-ᶜillah*) in the convention of *qiyās*.

Importance of the study

Qiyās is the most relied upon method or mode of independent reasoning, as it is the most theoretically developed approach to solving new legal cases. By most accounts, it is the fourth source of Islamic law and also the foremost source of rational evidence. The legal cause is the most important component of analogical reasoning, making its identification the enabling factor of the effective functioning of *qiyās*.

[11] *Sunan Saᶜīd b. Manṣūr*: *kitāb al-jihād, bāb al-ghāzī yuṭīlū al-ghaybat ᶜan ahlihi*, hadith 2463.

Despite the importance of *qiyās* in general, and methods of identifying legal cause (*masālik al-ᶜillah*) in particular, the latter has been a relatively neglected area of academic study. Attempts to evaluate the current application of *masālik al-ᶜillah* as an integral component of contemporary *fatāwā* have been largely inadequate. This will be further highlighted in the forthcoming literature review.

My study attempts to contribute to overcoming these adequacies, and will endeavour to serve as a springboard for further inquiry into the methods of identifying legal cause so as to appropriate their utility in emerging contemporary cases.

Delimitation of the study area

The exercise of identifying legal cause is not a component of *qiyās* alone. The phenomenon of seeking an effective legal cause (*ᶜillah*), condition (*sharṭ*),[12] sign (*ᶜalāmah*), wisdom (*ḥikmah*) or cause (*sabab*) of rulings or laws, relate to various sciences of *ijtihād* such as legal theory (*uṣūl al-fiqh)*, legal maxims (*al-qawāᶜid al-fiqhiyyah*) and the higher objectives of the law (*maqāṣid al-sharīᶜah*), among others. This study will focus on (methods of identifying legal cause) as it relates to *qiyās* specifically. Works of the Sunni schools of legal thought, ranging from the classic period to the premodern era, will be consulted for all aspects of the study while modern sources will be used to analyse and contextualise the application of these methods in contemporary cases. *Qiyās* will be discussed only insofar as to contextually place the methods of identifying the *ᶜillah* within the application of *qiyās*.

Literature review

Qiyās, generally, has been afforded considerable attention in the works of legal theory. Methods of identifying the *ᶜillah*, however, are infrequently addressed as a separate subject. This literature review attempts to locate the most relevant works to the study, of both dedicated works on *masālik al-ᶜillah* in the convention of *qiyās*, as well as

[12] Badr al-Dīn al-Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, 1st ed., 8 vols. (Cairo: Dār al-Kutubī, 1994), vol. 7, p. 237 (hereinafter *al-Baḥr*).

larger comprehensive works on *uṣūl al-fiqh* and *qiyās* respectively, that significantly address this area of study.

Abū Ḥāmid al-Ghazālī's (d. 505AH) *Shifāʾ al-ghalīl fī bayān al-shabah waʾl-mukhīl wa masālik al-taʿlīl*, provides an invaluable exposition on effective cause and its associated branches in legal theory, at its matured development. It is a detailed and comprehensive work encapsulating, especially, the model developed by the Shāfiʿī School. The book is one of the influential works in this area of study and points out important sources, from the earliest period, all the way through to sources of al-Ghazālī's era. This work is al-Ghazālī's unique contribution to the topics pertaining causes behind Sharia rules.

The work provides various definitions for *qiyās*, *ʿillah*, and legal indication (*dalālah*), and provides clear distinctions between these concepts. It examines the validity of extending the causes of Sharia rules, founded upon its primary sources, to new cases that arise with parallel circumstances, lucidly explaining the scope of its application. Public benefit (*maṣlaḥah*), as it relates to the discussion on legal cause, is addressed along with the phenomenon of legal causes made up of more than one quality, providing various examples on the topic. He also provides various prerequisites for the types of rules that may be used as a basis for constructing *qiyās*, as it relates to the conditions and relationships between the original case and the new case. Al-Ghazalī typically argues on the basis of logical proofs, which provides valuable direction to this thesis, especially in the areas of identifying legal cause based upon rational evidence.

Al-Muwāfaqāt fī uṣūl al-sharīʿah (Compatibility in the Principles of Islamic Law) by Abu Isḥāq Ibrāhīm al-Shāṭibī (d. 790AH) is a classical Arabic reference text in the fields of legal theory and the higher objectives of the law (*maqāṣid al-sharīʿāh*). Al-Shāṭibī discusses the types of objectives of Sharia as a means of refocusing Islamic legal tradition on its central precepts. The significant area covered by this book that is pivotal to the current study is the rational approaches to identifying legal cause. The parallels between the two fields of legal theory and *maqāṣid al-sharīʿāh* are invaluable to the topic. As previously explained, establishing the *ʿillah* presents the most problematic component in the operation of *qiyās*. Al-Shāṭibī explores the role of reason,

social context and adaptability as being intrinsic considerations of identifying the *ᶜillah*. This is especially valuable, in analysing methods of identifying legal cause, viewed as conjectural and having disputed utility. These speculative methods of identifying legal cause creates space for extrapolation and inference that is centred on broader principles and the objectives of the Sharia, an area that contains much greater difference of opinion amongst scholars.

Al-Qiyās ḥaqīqatuhu wa ḥujjiyyatuhu (Analogy: Its Reality and Proof) by Muṣṭafā Jamāl al-Dīn is a published Master's thesis that was first submitted to the Faculty of Sharia, University of Baghdad in 1970. It is one of the most prominent modern works in Arabic dedicated to the subject of *qiyās*. However, the thesis inadequately, and often inaccurately, addresses the topic of methods of identifying legal cause (*masālik al-ᶜillah*), through the omission of important discourses, especially by its detractors such as the Ẓāhirī School. A good attempt was made in Jamāl al-Dīn's thesis to look at the practical application of *masālik al-ᶜillah* in relation to its theories.

Mālik's Concept of ᶜAmal in the Light of Mālikī Legal Theory by Umar Faruq Abd-Allāh is a PhD dissertation that was first submitted to the Department of Near Eastern Languages and Civilisations, University of Chicago in June 1978. He convincingly presents Mālik's engagement in *qiyās* that was structured upon broad legal maxims as opposed to specific legal causes (*ᶜilal*) derived from specific texts. He argues that it was the later Mālikī jurists and legal theorists that tried to reformat Mālik's methodology in *qiyās* to conform to a model of *qiyās* that the later legal theorists were accustomed to. The dissertation is a good attempt at conceptualising what *qiyās* looked like during this early period.

Analogical Reasoning in Islamic Jurisprudence by Ahmad Hasan has since 1982, remained the most detailed English work dedicated to *qiyās*. He lucidly presents the topic of *qiyās*, organized through all of its main components of which the *ᶜillah* is a topic that is fairly extensively discussed. The presentation, however, comprises only classical examples of the theories of identifying the *ᶜillah* and offers no contemporary case studies to contextualise the practical application or value of these theories. This book has been invaluable in giving this thesis direction, especially as it relates to the

classical sources. It appears that Hasan heavily relied on the works of Imam al-Shawkānī who consulted, from the earliest sources of legal theory, to the works of his contemporaries. Hasan's book effectively collates theoretical concepts, providing topics that speak directly to this study, such as: conditions of legal cause, kinds of legal cause, methods of determining legal cause, and modes of reasoning in legal cause.

In two other pertinent journal articles by Hasan, *Modes of Reasoning in Legal Cause: al-Ijtihād fī ʾl-ᶜillah* and *The Conditions of Legal Cause in Islamic Jurisprudence*, the author attempts to further focus the discussion on methods of identifying the *ᶜillah*. A similar vacuum in contextualisation and application is created in these articles as in his book.

Approximating Certainty in Ratiocination: How to Ascertain the ᶜillah in the Islamic Legal System and How to Determine the Ratio Decidendi in the Anglo-American Common Law by Umar Moghul is a fairly extensive journal article concerned with identifying a clear understanding of methods of identifying legal cause (*masālik al-ᶜillah*). Moghul compares the two systems of identifying legal cause from an Islamic legal theory perspective, namely, ascertainment of the *ᶜillah* and the Anglo- American Common Law's approach to determination of *ratio decidende*.

Non-Analogical Arguments in Sunni Juridical Qiyās by Wael Hallaq is a journal article that discusses methods of reasoning in constructing positive and substantive law, ranging from syllogistic to inductive arguments, along with irregular deductions such as relational arguments. He argues that these methods of reasoning are not unique formulations of Islamic legal theorists, and that they can be understood through the fields of logic and dialectic approaches thereby lifting some of its inherent obscurity in the works of legal theory.

He discusses various contentions pertaining to legal indications, such as language of Quranic statements (*dalālah al-lafẓ*), denotations in the text (*madlūl ᶜalayhā*), the not specifically stated (*ghayr manṣūṣ ᶜalayhā*), the *a fortiori* (*qiyās biʾl-awlā*) cases, and

perspicuous analogy (*qiyās jālī*). He also provides invaluable direction to this thesis on the arguments posed by the antagonists of *qiyās*, especially surrounding the classification of legal indications as either inferential reasoning or being purely linguistically based.

Al-Kāfī al-wāfī (The Amply Sufficient) by Dr Muṣṭafā Saᶜīd al-Khinn is a contemporary work in Arabic that has strategically structured the branches of legal theory to provide an easily understood exposition on the subject, in contrast to the very complicated presentations done by the early scholars of the science. It unfortunately discusses the science almost entirely void of imperative contemporary discourses on *masālik al-ᶜillah* in the convention of *qiyās*, and insufficient attention is given to the participative role of *masālik al-ᶜillah* and *qiyās* in *fatwā* formulation.

This study seeks to improve and expand upon the work of the aforementioned literature, and to address the apparent gaps within the topic, especially those related to an enhanced understanding of the practical application of *masālik al-ᶜillah*.

Research methodology

This study will extract the foundations of *masālik al-ᶜillah* from the authoritative subject references, giving priority to the primary Arabic sources as well as the secondary English sources.

Special attention will be given to examining the full span of its theory and practice, starting from the classical and premodern periods to the era of the crystallization of the Sunni schools of legal thought, through to its modern precepts. This will be vital to better understand how the emergence of contemporary cases may be addressed by its theory and practice.

A detailed exposition of the various juristic differences will be presented along with their respective supporting arguments. While the study will seek to analyse the various arguments, it is not the aim of this study to argue in favour of, for instance, a particular position or process.

Rather, it aims to foster an appreciation of juristic difference that supports a better understanding of the diversity in contemporary rulings as a result of the various processes they are drawn from. The first stage of this study attempts to provide a comprehensive reference for outlining the various methods of identifying the *ᶜillah*. The second stage, that being the final chapter of this thesis, will entail analysis of contemporary *fatāwā*, in the form three select case constructions, where *qiyās* served as the mode of *ijtihad*. This second stage will also entail identifying and applying select theory of the previous chapters to identify plausible legal causes for the case constructions in question.

Theoretical Framework

The study will adopt the theoretical framework of imam al-Shawkānī as outlined in his *Irshād al-fuḥūl*, which presents the views of the earlier classical scholars as well as the later scholars of jurisprudence and legal theory up to his time. The classical scholars have differed greatly about the decisive methods for determining legal cause, from al-Āmidī who suggested six methods to al-Rāzī who proposed ten methods, namely, textual evidence, scholarly consensus, suggestion and allusion (*al-īmāʾ waʾl-tanbīh*), suitability (*al-munāsabah*), effectiveness (*al-taʾthīr*), rotation (*al-dawrān*), elimination of alternatives (*al-sabr waʾl-taqsīm*), resemblance (*al-shabah*), coextensiveness (*al-ṭard*) and clarifying the point on which the ruling is hinged or refinement of the basis of the ruling (*tanqīḥ al-manāṭ*). Since al-Shawkānī is a later *mujtahid* that died in the 13th century AH, he had the luxury of scrutinizing all the earlier views in the major works on legal theory.

His work is aptly titled *Irshād al-fuḥūl ilā taḥqīq al-haqq min ᶜilm al-uṣūl* (Guidance of the Luminaries to Achieving the Truth in the Principles of Law) as al-Shawkānī set out to determine the correct view (*al-rājih*) of the contending views regarding the principles of Islamic jurisprudence, in general. The sequence in which he presents the *masalik al-ᶜillah*, specifically, is of significance, as he does not do so arbitrarily, but with the specific intention of ranking the *masalik* from those that are unanimously accepted by the scholars to those that are strongly disputed. Al-Shawkānī further draws a distinction between the *masalik al-ᶜillah*, which are established by textual evidence

and scholarly consensus and those that are established by inference (*al-istinbāṭ*). The chapters of the current study are thus presented with this distinction in mind. Chapter Two, therefore, discusses the four *masalik al-ᶜillah*, which are established by textual evidence and (*al-ijmāᶜ*) in the following order: scholarly consensus (*al-ijmāᶜ*), textual evidence (*al-naṣṣ*), suggestion and allusion (*al-īmāᵓ waᵓl-tanbīh*) and actions of the Prophet (*ṣ*) (*fiᶜl al-Nabī*) whereas Chapter Three discusses the methods of elimination of alternatives (*al-sabr waᵓl-taqsīm*), suitability (*al-munāsabah*), resemblance (*al-shabah*), coextensiveness (*al-ṭard),* rotation (*al-dawrān*), refinement of the basis of the ruling (*tanqīḥ al-manāṭ*) and verification of the basis of the ruling (*taḥqīq al-manāṭ*).

Al-Shawkānī's ranking of these eleven methods, for determining legal cause, is also valuable from the perspective of his impartiality as an independent *mujtahid* who is not affiliated to any particular school of thought and is thus unconstrained by the partisanship that is sometimes detectable in the writings of scholars who subscribe to a particular *madhhab*.

Chapter 2

Methods of identifying legal case, deemed valid by the majority of jurists[13]

The central controversy over the legitimacy of *qiyās* comes as a direct result of the uncertainty of the validity of the legal cause itself. This has been a major source of contention and disagreement amongst scholars throughout the centuries, resulting in significantly different opinions, in a myriad of legal matters. Therefore, employing methods for determining the legal cause (*ᶜillah*) that are based on decisive (*qaṭᶜī*) evidence largely limits the ambit of debate.

The methods of identifying legal cause (*masālik al-ᶜillah*) have been categorised according to the extent that jurists have adopted or accepted their utility. In this regard they have been divided into three categories, namely, valid (*al-ṣaḥīḥah*), meaning those methods agreed upon by the majority of jurists as having acceptable utility; void (*al-fāsidah*), methods that are deemed invalid; and conjectural or suspicious (*al-mutawahhamah*), referring to methods that are viewed as conjectural and having disputed utility.[14] The valid methods are further proven by textual evidence and scholarly consensus, while the conjectural methods are established by inference or

[13] The technical expression 'majority of scholars' (*jumhūr al-ᶜulamāᵓ*) in the works of jurisprudence, indicate agreement on a legal issue by more than two of the four popular Islamic schools of legal thought. In the event that a legal position is equally split, creating a two vs two scenario between the four schools of legal thought, scholars of a particular school of thought who believe contrary to the legal stance of their school join the position of the opposing two schools, and, therefore, may tip the scale of the equal split in favour of the opposition to create a 'majority'. Another distinction often made is that use of the plural *jamāhīr*, indicates a closer proximity to consensus as opposed to the expression *jumhūr al-ᶜulamāᵓ*. See *Sharḥ zād al-mustaqniᶜ* by al-Mukhtār al-Shinqīṭī, vol. 14, p. 341. It is worthy of note, that a scholar's claim to the agreement of *jumhūr al-ᶜulamāᵓ* is often only an indication of the sum of positions of his contemporaries within the four schools of legal thought and, it may include the position of all previous scholars up to, and sometimes including, his era.

[14] Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 11.

extrapolation (*istinbāṭ*). Al-Shirāzī (d. 476 AH) has termed this very division of valid and conjectural, as original (*al-aṣl*) and extrapolation (*al-istinbāṭ*).[15]

As a direct consequence of the aforementioned categorisations, the textual evidence (*al-naṣṣ*) itself has also been divided into two categories, namely, decisive (*al-qaṭᶜī*) and probable (*al-ẓannī*), the former being *qiyās* based upon the legal cause that is identified by decisive methods and the latter being *qiyās* where the *ᶜillah* is identified by speculative methods.[16] These categorisations are distinguished by the type of method that is employed to identify the legal cause.

The textual evidence, for ascertaining the legal cause, has also further been divided into three broad categories, namely, explicit (*al-ṣarīh*), apparent (*al-ẓāhir*) and suggestion and allusion (*al-īmāᵓ waᵓl-tanbīh*). The explicit textual evidence directly states the legal cause and no difference of opinion may exist as to its validity.[17] The apparent textual evidence indicates to the legal cause in the form of a probability and 'pointing to it', that is understood by the language or certain Arabic particles that are associated with indicating cause. The aforementioned categorisations will be further expanded upon in the coming discussions dealing with the various methods of identifying legal cause (*masālik al-ᶜillah*).

Al-Zarkashī (d. 794AH) has defined the state within *qiyās*, where employing means to establish legal cause becomes an imperative:

> When the mere presence of a common link (*jāmiᶜ*) between the original case (*al-aṣl*) and the new case (*al-farᶜ*) is not sufficient for [the functioning of] *qiyās*, then it is imperative when considering it [as proof], to take into account evidence that points to it [being legal cause], the evidence [having] to be [based] either upon textual

[15] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 232.
[16] Ibid. p. 232.
[17] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 211.

evidence, scholarly consensus or extrapolation. These would require clarification of the means to establish the legal cause.[18]

Here, al-Zarkashī uses the term 'common link' to denote a quality (*waṣf*) that may be indicative of the legal cause.

While the majority of jurists subscribe to the three sources of evidence mentioned by al-Zarkashī (textual evidence, scholarly consensus and extrapolation), it is worthwhile noting that the Mālikī scholar, *al-qāḍī* ʿAbd al-Wahhāb (d. 422AH), in his book *al-Mulakhkhaṣ*,[19] includes the intellect as a fourth source of evidence.[20] It is important to note that 'intellect' in this context mentioned by *al-qāḍī* ʿAbd al-Wahhāb, refers to the application of rationale independent of any inference from the textual evidence. This is distinctly different from extrapolation, which seeks to extract an obscure meaning from the textual evidence. But *al-qāḍī* ʿAbd al-Wahhāb's position here stands contrary to the view held by the majority of scholars who exclusively accept the sources of evidence for identifying legal cause to be only by way of the aforementioned traditional means of textual evidence, scholarly consensus and extrapolation.[21] This is perhaps due to the long-standing precedent these sources of evidence have had in the tradition of the Sunni schools of legal thought.

From the aforementioned sources of evidence, various methods of identifying legal cause have been derived. The number of these methods is disputed amongst jurists; al-Āmidī (d. 631AH) discussed seven, al-Qarāfī (d. 684AH) mentions eight and al-Bayḍāwī (d. 685AH) identified nine.[22] Al-Rāzī (d. 606AH) has mentioned ten, namely, textual evidence, scholarly consensus, suggestion and allusion (*al-īmāʾ waʾl-tanbīh*), suitability (*al-munāsabah*), effectiveness (*al-taʾthīr*), rotation (*al-dawrān*), elimination

[18] *al-Baḥr*, vol. 7, p. 234.
[19] Al-Shawkānī disagrees with al-Zarkashī with regards to the title of this book. He prefers the correct name to be *al-Takhlīṣ fī uṣūl al-fiqh*. This view is given further credence by this title's mentioning in *Shajarat al-nūr al-zakiyyāt fī tabaqāt al-Mālikiyyah* by Muḥammad Makhlūf. See vol. 1, p. 154 of the book.
[20] *Irshād*, vol. 2, p. 879.
[21] *al-Baḥr*, vol. 5, p. 184.
[22] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 233.

of alternatives (*al-sabr waʾl-taqsīm*), resemblance (*al-shabah*), coextensiveness (*al-ṭard*) and clarifying the point on which the ruling is hinged or refinement of the basis of the ruling (*tanqīḥ al-manāṭ*). Al-Rāzī acknowledges that other methods have been accepted by a faction of the jurists, but that he and his colleagues of the Shāfiʿī School consider those methods to be weak.[23] The predominant exclusion of these 'weak' methods, from the major works on legal theory, across the spectrum of the four schools of legal thought, seems to support al-Rāzī's selection of methods. Al-Rāzī's methods are simultaneously representative of the most prominent methods discussed by the four schools of legal thought. This chapter focuses on the methods of identifying legal cause that are considered valid by the majority of scholars.

The order of precedence of the methods discussed here has been disputed by jurists.[24] I have thus arranged the methods, explored in this chapter, in the order of precedence provided by al-Shawkānī. This is because his work somewhat sums up the developments in the legal theory that had transpired up to his time. Al-Shawkānī provides the reader with the following order of these methods: scholarly consensus, textual evidence, suggestion and allusion (*al-ʾīmāʾ waʾl-tanbīh*) and the Prophet's (*ṣ*) actions (*fi ʿl al-nabī*).[25]

The scholars of legal theory have, at times, discussed the reasons and methods used for giving precedence or 'value' of one method over another. In some cases, the order in which these methods are presented, in the major works of Islamic legal theory, may be viewed as indicative of precedence, as well as their established precedence in the other sciences of independent legal reasoning.

The comparative value of scholarly consensus and textual evidence is an example of the aforementioned point in question. The scholars of legal theory have differed with regards to giving precedence to the one over the other. Those who give precedence to

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[23] Faḥr al-Dīn al-Rāzī, *al-Maḥṣūl*, 3rd ed., Ṭāhā Jābir Fayyāḍ al-ʿAlwānī (ed.), (Jeddah: Muʾassasat al-Risālah, 1997), vol. 5, p. 137 (hereinafter *al-Maḥṣūl*).

[24] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 233.

[25] *Irshād*, vol. 2, p. 880-920.

the scholarly agreement over textual evidence consider it more preferred, arguing that the latter is open to the possibility of abrogation.[26] On the other hand, those who give precedence to the former, view it as being greater in stature, due to its sacrosanctity, over all other sources of law and that it is in fact, the very point of reference for scholarly consensus.[27]

The occurrence of scholarly consensus, in its general sense, is often difficult to prove, considering the complexity in tracing dissenting voices. Scholarly works, at times, inaccurately lay claim to unanimous agreement amongst scholars on legal verdicts, claims that often go unchallenged.

Thus, from the perspective of evidence, textual evidence does appear to be preferred, irrespective of the phenomenon of abrogation. This is because proving abrogation and determining veracity of textual evidence is a process that is better established, with more definitive rulings, as compared to the exercise of verifying claims to the existence of scholarly agreement.

This chapter, however, begins with scholarly consensus, as presented by al-Shawkānī, that is, as it relates to the position or order in which these methods are mentioned. Notwithstanding that the legal value of these methods will be individually examined as they are encountered in this study.

1. Scholarly consensus (*al-ijmāᶜ*)

Scholarly consensus, as a method for identifying legal cause, is traditionally of two types: firstly, that which is based upon an explicit legal cause and secondly, that which is based upon the premise of justification (*aṣluhu al-taᶜlīl*).[28]

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[26] *al-Baḥr*, vol. 7, p. 234.

[27] ᶜAlāʾ al-Dīn al-Samarqandī, *Mīzān al-uṣūl fī natāʾij al-ᶜuqūl*, Muḥammad Zakkī ᶜAbd al-Barr (ed.) (Qaṭr: Maṭābiᶜ al-Dawḥat al-Ḥadīthiyyah, 1984), vol. 2, p. 843 (hereinafter *Mīzān al-uṣūl*); *al-Baḥr*, vol. 7, p. 235.

[28] *Mīzān al-uṣūl*, vol. 2, p. 827.

An example of the first type is the case of justifying the placing of guardianship over the wealth of minors. In this instance, a Quranic verse specifies that: "*[Guardians should] Test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them*".[29] Ibn ᶜAbbās (d. 67AH) and Mujāhid (d. 104AH) explain that 'testing' refers to the testing of intelligence, while Mujāhid views 'marriageable age' to indicate puberty. Saᶜīd b. Jubayr (d. 96AH), Ibn ᶜAbbās and al-Ḥasan al-Baṣrī (d. 110AH) hold that 'sound judgement' would be reflected in their good practice of religion and wise dispensing of money that is occasionally entrusted to them.[30] The legal cause of foolishness or immaturity, in the case of mandatory guardianship, has been established by scholarly consensus, and thus the legal verdict of instituting guardianship is further extended to the marriage of minors as well. It also appears that the Quranic verse unambiguously denotes that sound judgement may revoke the requirement of mandatory guardianship, thereby supporting the notion of an explicit legal cause that is established here by scholarly consensus.

An example of the second type that is based upon the premise of justification (*aṣluhu al-taᶜlīl*) is the consensus of the Righteous Forebears (*al-Salaf*)[31] asserting that interest (*al-ribā)* found in the four commodities of barter - that has been sanctioned by the textual evidence –, namely, wheat, barley, dates and salt, all contain a common legal cause with other barter commodities that have not been mentioned by textual evidence. To them it is implied that the rulings surrounding the four barter commodities could be extended to other commodities.[32] The literalist Ẓāhirīs do not accept this extension of the ruling of interest to barter commodities beyond the four explicitly mentioned[33] in

[29] Quran, 4:6.

[30] ᶜImād al-Dīn Ibn Kathīr, *Tafsīr al-Qurʾān al-ᶜAẓīm*, Muḥammad Ḥusayn Shams al-Dīn (ed.), 9 vols. (Cairo: al-Maktabat al-Tawfīqiyyah, n.d.) vol. 2, p.187 (hereinafter *Tafsīr Ibn Kathīr*).

[31] Normally refers to the first three generations of Muslims, although a variant view would define this as the scholars of the first three centuries of Islam.

[32] *Mīzān al-uṣūl*, vol. 2, p. 827.

[33] ᶜUmar b. al-Khaṭṭāb reports that the Messenger (*ṣ*) said: "The bartering of gold for gold is usury, except if it is from hand to hand and equal in amount, and wheat grain for wheat grain is usury except if it is from hand to hand and equal in amount, and dates for dates is usury except if it is from hand to hand and equal in amount, and barley for barley is usury except if it is from hand to hand and equal in amount". See *Ṣaḥīḥ al-Bukhārī*, *kitāb al-buyūᶜ*, *bāb mā yudhkaru fī bayᶜ al-ṭaᶜām waʾl-ḥukrati*, hadith 2134.

the Prophetic tradition.[34] The majority of jurists agreed that while the prohibition of delay (*al-nasīʾa*) and excess (*al-tafāḍul*) in the four commodities is a ruling of specificity, it may none the less be extended to other commodities of the same species if the basis for prohibition of the four is found in them. The Mālikīs hold that the legal cause for interest in the four barter commodities is: the exchange of the same species of food crops that is frequently stored.[35] The Shāfiʿīs simply see the legal cause as being food from the same category of food crops, while the Ḥanafīs view it as a commodity that is customarily measured or weighed along with it being of the same crop category.[36] It is evident that the three schools have all structured their identification of the legal cause on the common premise of justification.

The majority of jurists accept scholarly consensus as one of the methods of identifying legal cause, as alluded to by al-Bāqillānī al-Mālikī (d. 403AH).[37] He states: "…and this is not acceptable according to us [referring to the scholars who reject *qiyās*], so surely the proponents of *qiyās* are not [representative of] all of the [scholarly] community, and evidence is not established by their opinions [alone]".[38] The protagonists of scholarly consensus should, however, submit to the fact that the antagonists of *qiyās*, those who contest all or some aspects of *qiyās*, do constitute a significant portion of the scholarly community and that the proclamation of such would be diminished without them.[39]

Al-Juwaynī (d. 478AH) has a substantially more rigid stance on the matter. He states that:

> Those averse to *qiyās* are neither from among the scholarly community, nor of the custodians of the Sharia, for certainly the bulk of the Sharia

[34] Ibn Rushd, *The Distinguished Jurist's Primer* (*Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*), Imran Ahsan Khan Nyazee (trans.), 2 vols. (Berkshire: Garnet Publishing, n.d.), vol. 2, p. 159.
[35] Ibid.
[36] Ibid., vol. 2, p. 160.
[37] *al-Baḥr*, vol. 5, p. 185.
[38] Ibid.
[39] *Irshād*, vol. 2, p. 880.

originates from legal reasoning since the textual evidence does not [even] constitute a hundredth of the Sharia.[40]

Al-Shawkānī has called al-Juwaynī's proclamations 'bizarre', and his dismissal of the antagonists of *qiyās* from the scholarly community as a "most baseless of untruths" and "ugliest manifestations of bigotry".[41] Of greater annoyance to al-Shawkānī, is al-Juwaynī's claim that textual evidence constitutes less than a hundredth of the Sharia. To him it signals a gross lack of understanding of the textual evidence of the Sharia, even from a giant of the Shāfiᶜī School such as al-Juwaynī.[42]

Ibn al-Samᶜānī (d. 489AH) reports another view from the colleagues of al-Shāfiᶜī, explaining that al-Shāfiᶜī himself did not allow *qiyās* based on legal rulings arrived at by scholarly consensus, and where the textual evidence for the said consensus, was unknown.[43] This, it seems, would diminish scholarly consensus, as a method of identifying legal cause, since the textual evidence, in question, would be even more difficult to trace than the evidence for the claimed consensus itself.

The proponents of scholarly consensus, furthermore, do not stipulate whether the consensus in question is limited to the decisive (*al-qaṭᶜī*) type, but instead seem to also accept the speculative (*ẓannī*) form of it.[44] Al-Ījī (d. 756AH) does, however, submit that the position of the antagonists of *qiyās* should be considered under certain circumstances, such as in the case of the difference of opinion with regards to the legal cause that is determined by speculative consensus or, when some disparity is claimed to exist pertaining the legal cause of the original case and that of the new case. Al-Ījī includes cases where a quality (*waṣf*), purported to be the legal cause for both the

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[40] ᶜAbd al-Malik b. ᶜAbd Allāh b. Yūsuf al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, Ṣalāḥ b. Muḥammad al-ᶜUwīḍah(ed.), 2 vols. (Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1997), vol. 2, p. 776 (hereinafter *al-Burhān*).
[41] *Irshād*, vol. 2, p. 880.
[42] Ibid., p. 881.
[43] *al-Baḥr*, vol. 7, p. 236.
[44] *Irshād*, vol. 2, p. 881.

original and new cases, is of the probable type. Under these circumstances, he submits that, the legal cause can be challenged, and may consequently be rendered doubtful.[45]

The discussion here then, has shown the various dependencies or requirements that scholarly consensus has as method of identifying the legal cause. It is worthy of note though that the legal cause that has been established by a decisive scholarly consensus may not be contradicted by later endeavours of the jurists.[46]

2. Textual Evidence (*al-naṣṣ*)

In his explanation of textual evidence as a method of identifying the legal cause al-Shāfiᶜī states: "Whenever we find in the wording of the Legislator[47] that which points to the [ruling being] constructed, in the form of evidence or an indication, we hasten to accept it, and it is the foremost means [to identify the legal cause]".[48] The legal cause established by textual evidence, as mentioned by al-Shāfᶜī, is popularly termed *al-ᶜillah al-manṣūṣah* (legal cause that is stated in the textual evidence) in the classical works of legal theory.

Al-Āmidī (d. 631AH) has divided textual evidence into two types. First, textual evidence that articulate the legal cause by its very wording such as "the legal cause for this ruling is such-and-such", and second, that which employ Arabic particles that indicate cause (*ḥurūf al-taᶜlīl*).[49] He has not given any examples for the former. His examples of the latter, 'Arabic particles that indicate cause', are included in the remaining discussions of this chapter.

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[45] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 235; Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 13.

[46] Umar F. Moghul, Approximating Certainty in Ratiocination: How to ascertain the ᶜillah in the Islamic Legal System and How to Determine the Ratio Decidendi in the Anglo-American Common Law, *The Journal of Islamic Law*, vol. 4, No. 125 (Fall / Winter 1999), p. 38.

[47] This refers to God and His Messenger (ṣ), as their legislation is encountered in the sacred texts of the Quran and Sunnah.

[48] *al-Baḥr*, vol. 5, p. 186.

[49] Bernard G. Weiss, *The search for God's law: Islamic jurisprudence in the writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), p. 596.

Al-Shawkānī asserts that there is no difference of opinion with regard to accepting the legal cause established by textual evidence (*al-ᶜillah al-manṣūṣah*). The contention among scholars though, is whether the acceptance of this kind of legal cause does in fact fall in the ambit of *qiyās* or, if it is merely an exercise of acting on the directive of the text itself.[50] The former is the viewpoint of the majority of jurists while the latter is the position of the antagonists of *qiyās*.

Amongst the antagonists, Abū Bakr Ibn Fūrak argues that the legal cause established by textual evidence is in fact not a matter of *qiyās*. He views it as a 'mere reliance' on the literal meaning of the text when the wording, articulating the justification of legal cause, is not open to varying interpretations. Under these conditions, it should be treated as proof, guided by a generally confirmed text, not as a form of *qiyās*.[51] However, a literal meaning has context, and can be interpreted accordingly.

The Ḥanafīs require only that a measure of legal reasoning be needed to determine legal cause in order to justify recourse to the use of *qiyās*.[52] The proponents of *qiyās* provide for this scenario under their classifications of analogy that are, namely, *qiyās* whose legal cause is stated in the text (*qiyās manṣūṣ al-ᶜillah*), analogy of the superior (*qiyās al-awlā*) and obvious analogy (*qiyās jalī*).[53] But even these classifications being modes of *qiyās*, as opposed to direct reliance on the text, is disputed among the proponents themselves. Abū al-Ḥasan al-Karkhī, the Ḥanafī scholar, goes contrary to the position of the Ḥanafī School and claims his view is echoed by some of the early Shāfiᶜīs, that as proponents of *qiyās*, they submit, that when a new case is examined through *qiyās* by way of a legal cause that is stated in the text, then it becomes a case of acting by textual evidence itself.[54] Al-Shawkānī views the dispute in this area as one

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[50] *Irshād*, vol. 2, p. 882.
[51] *al-Burhān*, vol. 2, p. 61; *al-Baḥr*, vol. 5, p. 186.
[52] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 197.
[53] Ibid., p. 201.
[54] Abū al-Khaṭṭāb al-Kalwadhānī, *al-Tamhīd fī uṣūl al-fiqh*, Mufīd Muḥammad and Muḥammad b. ᶜAlī b. Ibrāhīm (eds.), 4 vols. (Mecca: Markaz al-Baḥth al-ᶜIlmī wa Iḥyāᵓ al-Turāth al-Islāmī - Jāmiᶜah Umm al-Qurrāᵓ, 1985) vol. 3, p. 443.

confined to the premise of language, which, to a significant extent, simplifies the broader contention surrounding *qiyās*.[55]

The textual indications (*ḥurūf al-taᶜlīl*) of the legal cause appear commonly in the form of phrases, words or particles in the Arabic language that convey the meaning of cause. For this reason it would be imperative, in any exposition of this phenomenon of the language, to include the actual Arabic text in its transliterated form, so as to dispel any uncertainty of the specific language constructions being discussed. Another important problem to deal with is the variation of legal value or classification that has been given to these phrases, words or particles. I will attempt to simultaneously group the types of indications and to provide the classification and definition given by their respective proponents.

It has been previously stated that various particles, nouns and verbs have been utilised for indicating legal cause. Particles such as *kay*, *al-lām*, *idhan*, *min*, *al-bāʾ*, *al-fāʾ*[56] and *inna*;[57] nouns such as *li ajli* or *min ajli*, *jarrāʾ*, *ᶜillah*, *sabab*, *muqtaḍā*,[58] *mūjib*, *muʾaththir* and *li ᶜilmi*,[59] have been included in various sub categories and classifications of textual evidence indicating legal cause. Verbs indicative of identifying legal cause are, for instance, found in the wording: 'I justify this' (*ᶜallaltu kadhā*) or 'I supported this with that' (*naẓartu kadhā bikadhā*)[60] and 'I compare this to that' (*shabbahtu kadhā bikadhā*)[61]. It is important that these indications be utilised in the context of justifying legal cause, since the mere use of these words would not suffice as an indicator of legal cause. Al-Zarkashī emphasised that these indications may carry more than one possible meaning but that the context of the wording would point to the correct legal cause.[62]

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[55] *Irshād*, vol. 2, p. 886.
[56] *al-Baḥr*, vol. 7, p. 237.
[57] This is mentioned by al-Shawkānī in the *Irshād*, vol. 2, p. 882.
[58] *al-Baḥr*, vol. 7, p. 237.
[59] *Irshād*, vol. 2, p. 883.
[60] *al-Baḥr*, vol. 7, p. 237.
[61] *Irshād*, vol. 2, p. 883.
[62] *al-Baḥr*, vol. 7, p. 237.

From the aforementioned it can be deduced that the types of words, that is, particle, noun and verb, applied within context, may be an approach to categorise the textual evidence of the legal cause. This study, however, categorises the textual evidence of the legal cause by its legal value and will rely on word-type as a secondary means of classification. I will thus first provide the divisions of textual evidence by the scholars of legal theory followed by an elucidation of those divisions individually.

Al-Rāzī (d. 606AH) defines the methods of identifying legal cause (*masālik al-ᶜillah*) by way of textual evidence as "that [textual evidence] which has an obvious indication to the legal cause, whether [its indication] is decisive (*qāṭiᶜah*)[63] or probable (*muḥtamalah*)[64]".[65] What he means by *qāṭiᶜah* is that the expression is indicative of legal cause to such an extent that it cannot convey a meaning other than the identification of legal cause, be it literally or figuratively.[66] The following sub-sections further examine the examples of al-Rāzī's decisive and probable classifications.

Decisive indication (*al-qāṭiᶜah / al-qaṭᶜī*)

The decisive (*al-qāṭiᶜah*) indication is an explicit expression by the language of the text that conveys the meaning of legal cause. Five decisive expressions are given, namely, "it is for this reason (*li-ᶜillati kadhā*)", or "for this cause (*li-sababi kadhā*)", or "as a consequence of this/that (*li ajli hādhā/dhālik*)", or "for this effect (*li-muʾaththiri kadhā*)", or "for this outcome (*li-mūjibi kadhā*)".[67] The aforementioned may be illustrated by the verse: "*As a consequence of that* (*min ajli dhālik*), *We decreed upon the Children of Israel that whoever kills a soul, unless for a soul or for corruption [perpetrated] in the land, it is as if he had slain all of mankind*".[68] Al-Ghazālī (d.

[63] This is more commonly referred to as *al-qaṭᶜī*. I have used *al-qāṭiᶜah* as it's the exact term used by al-Rāzī.
[64] This is more commonly referred to as *ẓannī*. I have used *muḥtamalah* as it's the exact term used by al- Rāzī
[65] *al-Maḥṣūl*, vol. 5, p. 139.
[66] Muḥammad Dakūrī, *al-Qaṭᶜiyyat minaʾl-adillat al-arbaᶜah*, 1st ed. (Medina: ᶜAmādat al-Baḥth al-ᶜIlmī biʾl-Jāmiᶜat al-Islāmiyyah biʾl-Madīnat al-Munawwarah, 1999), p. 443; *al-Maḥṣūl*, vol. 5, pp. 139-40 and pp. 452-53.
[67] *al-Maḥṣūl*, vol. 5, p. 139.
[68] Quran, 5:32.

505AH), cites examples from hadith reports for decisive indication, such as:[69] "The ruling of seeking permission is in the interest of [preventing] the [lustful] gaze (*li ajliʾl-baṣar*)"[70] and "I had only prohibited you as a result of the caravan (*li ajliʾl-dāffah*)".[71] In both of these reports al-Ghazālī demonstrates his understanding of textual evidence decisively identifying the legal cause.

Probable indication *(ẓannī / muḥtamalah*)

With regards to the probable indications, al-Rāzī has mentioned three particles of speech that are indicative of legal cause, namely, the *lām*, *inna* and the *bāʾ*. These are indicative of textual evidence that does not directly identify the legal cause.[72] An example of the *lām* articulating the meaning 'to establish this', is for instance observed in the verse: "*I did not create the Jinn*[73] *and mankind except in order [for them] to worship Me* (*li yaʿbudūni*)".[74] For al-Rāzī, the letter *lām* in the aforementioned verse is the *prefixed lām of purpose* (*lām al-taʿlīl*) or subjunctive particle *lām*, which in the Arabic grammar denotes an indication of purpose.

The indication by the particle *inna* is demonstrated by the hadith report narrated by the Companion Abū Qatādah al-Nuʿmān al-Anṣārī (d. 40 / 54AH) who reported that, with regards to a cat drinking from the same vessel as people, the Prophet (*ṣ*) said: "Indeed it (*innahā*) is not unclean, certainly it (*innahā*) is one of those males or females who go around [living] among you".[75] From a grammatical standpoint, this particle type, the particle of emphasis (*ḥarf al-tawkīd*) is used to denote reinforcement or corroboration.

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[69] Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā*, Muḥammad ʿAbd al-Salām ʿAbd al-Shāfī (ed.) (Beirut: Dār al-Kutub al ʿIlmiyyah, 1993), p. 308 (hereinafter *al-Mustaṣfā*).

[70] *Saḥīḥ al-Bukhārī*: *kitāb al-istiʾdhān*, *bāb al-istiʾdhān min ajliʾl-baṣar*, hadith 6241.

[71] *Ṣaḥīḥ Muslim*: *kitāb al-aḍāḥī*, *bāb bayān mā kāna minaʾl-nahyi ʿan akli luḥūm al-aḍāḥī baʿda thalāthatin fī awwali al-Islām wa bayān naskhihi wa ibāḥatihi ilā matā shāʾ*, hadith 4856.

[72] *al-Maḥṣūl*, vol. 5, p. 139.

[73] Creatures mentioned in the Quran and hadiths who are created of fire or hot wind and live unseen alongside humans. See Jonathan A.C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld Publications, 2009), p. 278.

[74] Quran, 51:56.

[75] *Sunan Abī Dāwūd*: *kitāb al-ṭahārah*, *bāb suʾr al-hirrah*, hadith 75; *Sunan al-Tirmidhī*: *abwāb al-ṭahārah*, *bāb mā jāʾa fī sūʾr al-hirrah*, hadith 92.

It appears that the contextual emphasis made by the particle *inna* conveys a form of 'highlighting' of the cause or reason for the ruling in question.

An example of the indication by the letter *bāʾ* is demonstrated by the verse: "*That is because they (bi annahum) opposed Allah and His Messenger* (*ṣ*)".[76] Al-Shawkānī views this meaning as the purport of the text (*ḥāṣil al-kalām*) in this verse.[77] In this verse the *bāʾ* represents *the bāʾ of cause* (*al-bāʾ al-sababiyyah*), which in the Arabic grammar denotes an indication of cause or purpose. It can be observed from the aforementioned examples that both the grammatical implication as well as contextual application of the particles in question may convey an implied indication to the legal cause.

Various other divisions and categories have been prescribed for textual evidences that indicate legal cause. Al-Zarkashī divided textual evidence for identifying the legal cause into the explicit (*al-ṣarīḥ*) and apparent (*al-ẓāhir*) indications.[78] Al-Mardāwī (d. 885AH) has provided three divisions of textual evidence, namely, the explicit (*al-ṣarīḥ*), apparent (*al-ẓāhir*) and suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) indications, which is also attributed to Ibn al-Bannāʾ (d. 720AH), al-Bayḍāwī, al-Subkī[79] (d. 771AH), al-Burmāwī (d. 831AH)[81] and others. [80]

The division of textual evidence into the two categories of the explicit (*ṣarīḥ*) and suggestion and illusion (*al-īmāʾ waʾl-tanbīh*), is attributed to Abū al-Khaṭṭāb al-Kalwādhānī (d. 510AH),[82] al-Muwaffaq al-Dīn Ibn Qudāmah (d. 620AH), Ibn Ḥamdān (d. 695AH), Ibn al-Ṭūfī (d. 716AH), Ibn *qāḍī* al-Jabal (d. 771AH), Ibn al-Ḥājib and

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[76] Quran, 59:4.
[77] *Irshād*, vol. 2, p. 882.
[78] *al-Baḥr*, vol. 7, p. 238.
[79] He was Tāj al-Dīn al-Subkī, the grandson of the famous jurisprudent Taqī al-Dīn al-Subkī. He was a scholar of the Shāfᶜī School, an expert of Arab history and a senior judge of Damascus.
[80] He is Shams al-Dīn al-Burmāwī, a scholar of the Shāfᶜī School who specialised in jurisprudence and legal theory. He served in the judiciary of Burma and wrote extensively on law.
[81] ᶜAlāʾuddīn al-Mardāwī, *al-Taḥbīr sharḥ al-taḥrīr fī uṣūl al-fiqh*, ᶜAbd al-Raḥmān al-Jibrīn, ᶜAwaḍ al-Qarnī and Aḥmad al-Sarrāḥ (eds.), 8 vols. (Riyadh: Maktabat al-Rushd, 2000), vol. 7, p. 3323.
[82] He was a Shaykh of his time from the Ḥanbalī School. He was the student of *al-qāḍī* Abū Yaᶜlā.

others.[83] The suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) indication will be discussed as a separate method of identifying legal cause in this chapter. In what follows, the focus of attention will thus be on the remaining divisions of the explicit (*al-ṣarīḥ*) and the apparent (*al-ẓāhir*) indications.

The explicit indication (*al-ṣarīḥ*)

Al-Āmidī has defined the explicit indication (*al-ṣarīḥ*) as "that which does not require any inquiry and reasoning (*istidlāl*), but rather it is a wording that is known in the [Arabic] language to be indicative of it [the legal cause]".[84] Similarly, al-Abyārī[85] (d. 616AH) states: "By *al-ṣarīḥ* it is not intended to mean that which is not open to interpretation, but rather, it is the contextual meaning of [conveying] causation (*taᶜlīl*) within it - depending on the apparent text's indication of that meaning [causation]".[86] This, in essence, is the distinction between the explicit (*al-ṣarīḥ*) indication and the decisive indication of the legal cause. The latter is not open to varying interpretations, while the first is.

The explicit indication also has various categories. The first categories to be discussed here are identical to the first three decisive indications postulated by al-Rāzī, namely, the phrases: 'for this legal cause' (*li ʿillati kadhā* or *li sababi kadhā*) and 'for this cause' (*li ajli kadhā*).[87] A subtle variance to the latter, 'as a result of this cause' (*min ajli kadhā*), is included under the explicit indication, which is not earlier listed under the decisive indications.[88]

Most of the aforementioned indications, however, are disregarded as explicit (*ṣarīh*) by Ibn al-Samᶜānī and al-Aṣfahānī (d. 749AH). They have only accepted *li ajli kadhā*, *min ajli* and *li ajli* and excluded the remaining indications. They defined the wording of

[83] ᶜAlāʾuddīn al-Mardāwī, *al-Taḥbīr sharḥ al-taḥrīr fī uṣūl al-fiqh*, vol. 7, p. 3323.
[84] *al-Baḥr*, vol. 7, p. 238.
[85] Some manuscripts also refer to him as al-Anbārī and Ibn al-Anbārī. See *Irshād*, vol. 2, p. 910.
[86] Ibid.
[87] I have previously cited examples of these under the discussion of decisive indication (*qāṭiᶜah*).
[88] *Irshād*, vol. 2, p. 883.

causation that is required for explicit indication, as "a way by which the legal cause is known without any further means apart from the text itself ... because they serve the purpose of articulating what the ruling is as a result of".[89] They also highlighted that the 'stronger' direct indication that is independent of 'further means', such as by way of a particle, is of higher legal value.[90]

The next category of the explicit indication comprises phrases like '*kay yakūnu kadhā*'. Al-Juwaynī, in clarifying this,[91] cites the verse: "…*so that (kay) it will not be a perpetual distribution [of wealth] between the rich from among you*".[92] Al-Rāzī, however, does not accept this particle as an explicit indication.[93] Another example of a contested indication is 'in that case' (*idhan*), which is seen as a category of the explicit indication by al-Shirāzī[94] and al-Ghazālī,[95] while al-Juwaynī has classified it as an apparent indication of the legal cause under his discussion on the expression of the command form (*ṣīghat al-amr*).[96]

Al-Shawkānī mentioned a category of the explicit indication denoted by the grammatical construction *accusative of purpose* (*mafᶜūlun lahu*),[97] which is used to specify motive behind an action. This is demonstrated in the verse: "*They place their fingers in their ears against the thunderclaps out of fear of death* (*ḥadhar al-mawt*)",[98] or the phrase: "I beat him for the purpose of [instilling] discipline (*ḍarabtuhu taʾdīban*)".[99] Here, fear of death and instilling discipline, respectively, are indicative of the purpose for the action in question and thus al-Shawkānī considers this construction as indicative of explicit textual evidence.

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[89] *al-Baḥr*, vol. 7, p. 239.
[90] Ibid.
[91] *al-Burhān*, vol. 2, p. 31.
[92] Quran, 59:7.
[93] *Irshād*, vol. 2, p. 884.
[94] Ibrāḥīm b. ᶜAlī b. Yūsuf al-Shīrāzī, *al-Lumaᶜ fī uṣūl al-fiqh*, 2nd ed., (Beirut: Dār al-Kutub al-ᶜIlmiyyah, 2003), p. 110 (hereinafter *al-Lumaᶜ*).
[95] *Irshād*, vol. 2, p. 884.
[96] *al-Burhān*, vol. 1, p. 152.
[97] This is also commonly referred to as *mafᶜūl li-ajlihi*.
[98] Quran, 2:19.
[99] *Irshād*, vol. 2, p. 884.

Categories of the explicit indication (*al-ṣarīḥ*) have been encountered that have also been classified as decisive indication (*al-qaṭᶜī*). Much difference of opinion exists amongst the jurists with regards to the actual definitions of these categories along with the subsequent legal value they hold. I will further examine the specificity of indications of the legal cause and attempt to identify those areas of commonality in the various subcategories of this discussion.

The apparent indication (*al-ẓāhir*)

The apparent indications (*al-ẓāhir*) that are identical to the three categories of indications encountered under the categories of probable indications (al-*ẓannī*) will now be discussed. The foremost being the prefixed particle of purpose (*lām al-taᶜlīl*) or subjunctive particle *lām*, which has been demonstrated in the verse: *"[He] who created death and life in order to test you (li-yabluwakum) [as to] which of you is best in deed*".[100]

Inna (with double *nūn*) is yet another apparent particle for indicating the legal cause, as demonstrated by the hadith report:[101] "Certainly it (*innahā*) [the cat] is but of those [creatures] who dwell among you".[102] Al-Abyārī rejects *inna* as a particle for indicating the legal cause, claiming that consensus among the grammarians existed to this effect. Ṣadr al-Sharīᶜah (d. 747AH), while acknowledging its inclusion in this category by the majority of jurists, argues similarly to al-Abyārī, that it is merely for emphasising the statement (*al-taʾkīd*) and that it has no role in indicating legal cause. He considers the legal causation (*al-taᶜlīl*) apparent in the cited hadith report as being understood from the context of the statement being made.[103]

[100] Quran, 67:2.
[101] *Sunan Abī Dāwūd*: *kitāb al-ṭahārah*, *bāb suʾr al-hirrah*, hadith 75; *Sunan al-Tirmidhī*: *abwāb al-ṭahārah*, *bāb mā jāʾa fī sūʾr al-hirrah*, hadith 92. See page 37, footnote 75, cited in the previous discussion under 'probable indication'.
[102] *Irshād*, vol. 2, p. 884.
[103] *al-Baḥr*, vol. 5, p. 192.

The prefixed particle *bāʾ* has also been accepted as an apparent indicator of the legal cause. Ibn Mālik (d. 672AH) has set as a condition for its validity that, in most cases, it should be interchangeable with the particle *lām*. He cited various examples of this from the sacred texts, such as the verses: "*That is because they (bi-annahum) opposed Allah and His Messenger* (*ṣ*)"[104]; "*For wrongdoing (fa-bi-dhulmin) on the part of the Jews, We made unlawful for them [certain] good foods which had been lawful to them [before], and for their averting (bi-ṣaddihim) from the way of Allah many [people]*"[105]; *"So each We seized because of his sin (bi-dhanbihim)*"[106]; and the hadith report: "None of you shall enter Paradise by way of his deeds (*bi-ʿamalihi*)".[107] Al-Āmidī and al-Ṣafī al-Hindī (d. 715AH) also viewed the prefixed *bāʾ* as an apparent indicator of the legal cause, citing the verse: "*As reward for what they used to do (bi mā kānū yafʿalūn)*".[108] Al-Zarkashī has also attributed the view to the Muʿtazilah, who argue that it is in fact based upon the grammatical expression of 'cause and effect'.[109]

Thus far, the particles of apparent indications (*al-ẓāhir*) of the legal cause that are synonymous to the particles of probable indications (*al-ẓannī*), mentioned earlier, have been looked at. The particles that are unique to the apparent indications will now be discussed.

The particle *an al-maftūḥah al-mukhaffafah* (أَن) is considered an apparent indicator of the legal cause and is demonstrated by the verse "*Then should We turn the message away, disregarding you, because you are (an kuntum) a transgressing people*?"[110] The particle *in* (إِن) *al-maksūrah al-sākinah* is also regarded as an apparent indication, but it

[104] Quran, 8:13.
[105] Ibid., 4:160.
[106] Ibid., 29:40.
[107] *Musnad al-Imām Aḥmad b. Ḥanbal*: *musnad Abī Hurayrah*, hadith 7597. The convention for *musnad* hadith works may appear to differ from other hadith works cited in this thesis. That is because *musnad* works primarily reference hadith reports to its narrator as opposed to the *kitāb* and *bāb* format. However, in the minority of cases where *kitāb* and *bāb* format has been used, such references will be provided.
[108] Quran, 46:14.
[109] *al-Baḥr*, vol. 5, p. 192.
[110] Quran, 43:5.

has to simultaneously function as a conditional particle and the cause of the ruling delivered by the text.

Al-Juwaynī has included the particle *fāʾ* to denote investigation (*al-taʿqīb*), sequence (*al-tartīb*) and causation (*al-tasbīb*).[111] The *fāʾ* acts as a particle of legal causation whenever a connection is created between the ruling and the quality (*waṣf*) via this particle. This may occur when the ruling precedes the *fāʾ* that is attached to the legal cause, or, where the legal cause precedes the *fāʾ* that is attached to the ruling.[112] The former is demonstrated by the hadith report: "Do not cover his head, for indeed he (*fa-innahu*) will be resurrected pronouncing the *talbiyyah*[113]"[114] while the latter is seen in the verses "*The [unmarried] woman or [unmarried] man found guilty of fornication, lash each one of them (faʾjlidū) with a hundred lashes*"[115] and "*[As for] the thief, [whether] male or female, amputate (faqṭaʿū) their hands*".[116] These constructions of the *fāʾ*, in relation to the legal cause, clearly present the legal verdict for fornication as being lashed and for theft, having limbs amputated.

The particle *laʿalla*, that conveys the meaning 'so that', is yet another apparent indicator of legal cause.[117] The Kūfan grammarians view its use in the Quranic text to be purposed for clarification, and denoting the meaning of 'hope' (*tarajjī*).[118] They demonstrate its application by the verse: "*O mankind, worship your Lord, who created you and those before you, so that you (laʿalla-kum) may become righteous*."[119]

Ibn Mālik has mentioned the particle *idh* as an apparent indicator of the legal cause, citing the verse:[120] "*And when (idh) you have withdrawn from them and that which they*

[111] *al-Burhān*, vol. 1, p. 51.
[112] *al-Baḥr*, vol. 7, p. 246.
[113] A remembrance chanted by pilgrims engaged in the rituals of Hajj.
[114] *Saḥīḥ al-Bukhārī*: *kitāb al-janāʾiz*, *bāb kayfa yukaffan al-muḥrim*, hadith 1268.
[115] Quran, 24:2.
[116] Ibid., 5:38.
[117] *Irshād*, vol. 2, p. 884.
[118] *al-Baḥr*, vol. 7, p. 249.
[119] Quran, 2:21.
[120] *al-Baḥr*, vol. 7, p. 250.

worship besides Allah, then retreat (faʾwū) to the cave".[121] He also included the particle *ḥattā* and demonstrates its application by the verses:

> *Fight those who do not believe in Allah.… until (ḥattā) they have paid the poll tax (jizyah).*[122]
>
> *We will surely test you until (ḥattā) We make evident those who strive among you.*[123]
>
> *Fight them until (ḥattā) there is no [more] tribulation and [until] worship is [exclusively] for Allah.*[124]

Al-Shawkānī has argued that the particles *laʿalla*, *idh* and *ḥattā* contain an apparent weakness that cannot be overlooked when compared to the corpus of indications of legal causation. He has, however, not elaborated, beyond this statement, any substantiation of his view.[125]

Other textual indications of the legal cause have not been clearly placed within the aforementioned categories that have been discussed. Al-Qarāfī has, for instance, included *lā jarama* as an indication of legal causation.[126] He cites as example the verse: "*Assuredly (lā jarama), they will have the Fire, and they will be [therein] neglected*".[127] With this, he further included most of the particles that are indicative of condition (*sharṭ*) and recompense (*jazāʾ*).

He demonstrates this principle through the verse: "*Then after distress, He sent down upon you security [in the form of] drowsiness, overcoming a faction of you, while (wa)*

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[121] Quran, 18:16.
[122] Ibid., 9:29.
[123] Ibid., 47:31.
[124] Ibid., 2:193.
[125] *Irshād*, vol. 2, p. 886.
[126] *al-Baḥr*, vol. 5, p. 197.
[127] Quran, 16:62.

another faction worried about themselves".[128] Al-Juwaynī argues that the *wāw*, translated here as 'while', in context, conveys the meaning of *when* (*idh*).[129]

Other indications, such as particles, that are afforded far less consensus or attention in the works of legal theory are discussed in the works of grammar and philology. These may be consulted to evaluate the indicators that have been too obscure to be included in this study.

It has been highlighted that the four main categorisations of textual indications of legal cause, namely, decisive (*al-qaṭʿī*), probable (*al-ẓannī*), explicit (*al-ṣarīh*) and apparent (*al-ẓāhir*), have both disputed classification and utility of its respective textual indications. While much of the resultant disparities could be further investigated and evaluated, such an ambition is beyond the scope of this study since it merely seeks to establish the foundations of the various methods of identifying legal cause, and has no intent of seeking the 'most correct' methods of identifying legal cause. Rather, the study seeks to uncover the mechanisms proposed and employed to identifying the legal cause, as presented by the legacy of Sunni scholarship.

3. Suggestion and Allusion (*al-īmāʾ waʾl-tanbīh*)

Suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) is predominantly classified as a valid method of identifying the legal cause in the works on legal theory. While some scholars have included it under the method of textual indication (*al-naṣṣ*), others have viewed it as an independent method.[130] It will thus be included as the third method of legal cause identification in this chapter.

Ibn al-Ḥājib has defined suggestion and allusion as "the coupling [of a ruling] with a quality (*waṣf*), which, were it not for this quality or [anything that could be utilised as]

[128] Quran, 3:154.
[129] *al-Burhān*, vol. 1, p. 51.
[130] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 238.

its equivalent being considered for legal causation [of this ruling], it would be considered farfetched, so it [the quality] carries the purpose of the legal cause to avoid the farfetchedness".[131] He contextualised this definition with the hadith report of the Bedouin who confessed to the Prophet (*ṣ*): "'I have had sexual intercourse during [the hours of fasting in] Ramadan'. The Prophet (*ṣ*) replied: 'Free a slave'".[132] This, Ibn al-Ḥājib explains, is tantamount to the Prophet (*ṣ*) saying: "When you've had sexual intercourse during the hours of fasting, then expiate".[133] The example cited by Ibn al-Ḥājib seems to aptly support his definition that requires the removal of farfetchedness, this would be the case of the freeing of a slave were it not as expiation for breaking compulsory fast.

Al-Zarkashī explains the method of suggestion and allusion as follows:

> It is indicative of legal causation through observance (*biʾ l-tizām*), since it is understood through meaning [and] not [via] the literal text, and if it was, it would be [considered to be] of the explicit (*al-ṣarīḥ*) methods of identifying legal cause. The perspective of its indication is that its mere mentioning [along] with the ruling prevents it [the ruling] from not having benefit, because it [the ruling] would be futile [with its absence], thus it is imperative that it exists for [some kind of] benefit, that being either as the legal cause [itself] or as an aspect or condition of it and the more apparent (*al-aẓhar*) of it is its being the legal cause, since it constitutes the mass of adaptability of the Sharia.[134]

From al-Zarkashī's definition it can be seen that the indication by way of suggestion and allusion ought not to be as directly understood from the text as in the case of the

[131] Muḥammad b. ʿAbd al-Raḥmān al-Aṣfahānī, *Bayān al-mukhtaṣar sharḥ mukhtaṣar Ibn al-Ḥājib*, Muḥammad Muẓahhir Baqā (ed.), 3 vols. (Jeddah: Dār al-Madanī, 1986), vol. 3, p. 87 (hereinafter *Bayān al-mukhtaṣar*).
[132] *Musnad al-Imām Aḥmad b. Ḥanbal*: *musnad Abī Hurayrah*, hadith 7900.
[133] *Bayān al-mukhtaṣar*, vol. 3, p. 87.
[134] *al-Baḥr*, vol. 7, p. 251.

explicit (*al-ṣarīḥ*) indications. It should enable a realised benefit from the ruling, which should surface as the most apparent of the possibilities of legal causes. It is interesting to note that he views this approach to legal cause identification as a prolific source of adaptability of the law itself.

Various manifestations of suggestion and allusion indications have been discussed by jurists. Al-Āmidī presented the most comprehensive discussion of this topic, which includes forms of suggestion and allusion by other jurists. They will be examined as they appear in the following listing.

Types of indications that constitute suggestion and allusion

The first type of suggestion and allusion occurs when a connection is formed between the ruling and the legal cause by means of a prefixed *fāʾ*. This, in turn, may take two distinct forms:

- When the *fāʾ* is prefixed to the legal cause and the ruling precedes it. This is demonstrated by the hadith report that has previously been analysed concerning the pilgrim in consecration (*iḥrām*): "Do not cover his head, for indeed he (*fa-innahu*) will be resurrected pronouncing the *talbiyyah*".[135] The ruling here, to not cover his head, precedes the legal cause that is prefixed by the *fāʾ*, which indicates that he will be resurrected pronouncing the *talbiyyah*, which in turn, may allude to the notion that he will in fact be resurrected in a state of consecration (*iḥrām*) as a result of him dying in that state.

- When the *fāʾ* is prefixed to the ruling and the legal cause precedes it, which may occur in two ways:

[135] *Saḥīḥ al-Bukhārī*: *kitāb al-janāʾiz*, *bāb al-kafn fī thawbayn*, hadith 1265.

- When the *fāᶜ* is prefixed to the speech of the Legislator,[136] Ibn Qudāmah demonstrates this rule[137] by the verse: "*They ask you about menstruation. Say, 'It is harm, so keep away (faᶜtazilū)*[138] *from [your] women during menstruation*'."[139] This is also demonstrated by the hadith report "Whosoever apostates from his religion, then kill him (*faqtulūhu*)".[140]

- When the *fāʾ* is prefixed to the statement of a narrator of the hadith report.[141] Examples of this category are presented by Ibn Qudāmah with the hadith report: "The Messenger of Allah forgot [during the course of prayer] and then fell into prostration (*fa-sajada*)",[142] and also by al-Ghazālī with the hadith report:[143] "Māᶜiz committed adultery and thus was stoned (*fa-rujima*)".[144]

The second type of suggestion and allusion comprises the occurrence of an entire event that is presented to the Prophet (*ṣ*), and he subsequently gives a ruling in response to it. In such a case the entire event will be viewed as the legal cause. To demonstrate, al-Āmidī cites as an example, the hadith report of the Bedouin that confessed to the Prophet (*ṣ*):

> 'I had intercourse with my wife in [the hours of fasting in] Ramadan'. He [the Prophet (*ṣ*)] asked: 'Can you set a slave free?' He said: 'No'. He then asked: 'Can you fast for two consecutive months?' He said: 'No'. The Prophet (*ṣ*) then asked 'Can you feed sixty poor people?' he said

[136] In this context it means the words of God or the words of the Prophet (*ṣ*).
[137] Ibn Qudāmah al-Maqdisī, *Rawḍat al-nāẓir wa junnat al-munāẓir fī uṣūl al-fiqh ᶜalā madhhab al-Imām Aḥmad b. Ḥanbal*, 2 vols. (Beirut: Muʾassasat al-Rayyān liʾl-Ṭabāᶜat waʾl-Nashr waʾl-Tawzīᶜ, 2002), vol. 2, p. 197 (hereinafter: *Rawḍat al-nāẓir*).
[138] Meaning: to refrain from sexual intercourse with them.
[139] Quran, 2:222.
[140] *Saḥīḥ al-Bukhārī*: *kitāb al-jihād*, *bāb lā yuᶜadhdhabu bi ᶜadhāb Allāh*, hadith 3016.
[141] *Rawḍat al-nāẓir*, vol. 2, p. 198.
[142] *Sunan Abī Dāwūd*: *kitāb al-ṣalāh*, *bāb sajdatay al-sahw fī-himā tashahhud wa taslīm*, hadith 1039.
[143] Abū Ḥāmid al-Ghazālī, *Shifāʾ al-ghalīl fī bayān al-shabah waʾl-mukhīl wa masālik al-taᶜlīl*, Ḥamd al-Kabīsī (ed.) (Baghdad: Maṭbaᶜat al-Irshād, 1971), p. 29 (hereinafter *Shifāʾ al-ghalīl*).
[144] *Sunan Abī Dāwūd*: *awwal kitāb al-ḥudūd*, *bāb rajm Māᶜiz b. Mālik*, hadith 4422-24.

'No'. The Prophet (ṣ) then gave him some dates and instructed him to give it in charity.[145]

This indicates that the entire event of intercourse during the fasting hours of Ramaḍān is the legal cause for expiation, and what is implied by the response of the Prophet (ṣ) was as if he was saying: "When you've had intercourse then expiate by freeing a slave, or fasting for two consecutive months, or by feeding sixty poor persons".

The third type of suggestion and allusion occurs when the Legislator's statement mentions a quality (*waṣf*) along with the ruling to such an extent that if that quality is not the legal cause; the statement would be void of any use. This occurs either by the use of a question in its place or a question with regards to its parallel case.[146] These may take three forms:

- The first form occurs when the Legislator mentions the quality instead of a ruling, without a question being posed.[147] This is demonstrated by the hadith report of Ibn Masᶜūd (d. 42AH) when he presented water, in which dates were steeped (*nabīdh*), to the Prophet (ṣ) for ritual ablution (*wuḍūᵓ*). The Prophet (ṣ) performed the ritual ablution and said "Good dates and pure water".[148] The hadith report clearly shows the permissibility of performing ritual ablution with the water that was used to steep dates. This is evident from the Prophet's (ṣ) mere mentioning of the quality of the water, along with the ruling that the water remained pure, before any question was posed to him by Ibn Masᶜūd.

- The second form occurs when a question prompts the Lawgiver (in the case of the Prophet (ṣ)), by asking a question pertaining a quality within the question and then he pronounces its ruling. In such a case the quality would be accepted

[145] *Sunan Abī Dāwūd*: *kitāb al-ṣawm*, *bāb kaffārah man atā ahlahu fī Ramaḍān*, hadith 2390.
[146] Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, ᶜAbd al-Razzāq ᶜAfīfī (ed.), 4 vols. (Beirut: al-Maktab al-Islāmī, 2004), vol. 3, pp. 256-57 (hereinafter *al-Iḥkām*).
[147] Ibid., vol. 3, p. 257.
[148] *Sunan Abī Dāwūd*: *kitāb al-ṭahārah*, *bāb al-wuḍūᵓ biᵓl-nabīdh*, hadith 84.

as the legal cause of the given ruling. Al-Āmidī clarifies this notion with the example of the hadith report where the Prophet (*ṣ*) was asked about the permissibility of trading fresh dates for dried dates of equal quantity:[149] "The Prophet (*ṣ*) asked: 'Does the [weight of] fresh dates decrease when they are dried?' They [the questioners] replied: 'Yes', thus he said: 'In that case, no (*fa lā idhan*)'."[150] The Prophet's (*ṣ*) response shows that a decrease in weight, is the legal cause of the prohibition of the aforementioned trade, clearly showing that the quality enquired by the Prophet (*ṣ*) was also the legal cause, which was necessary to prevent a scenario of inconsequence.

- The third form mentioned by al-Āmidī concerns the hadith report of the lady from the Khath^{c}am tribe who asked the Prophet (*ṣ*): "'O Messenger of God, the command of Allah has come for His slaves to perform Hajj, but my father is an old man and cannot ride. May I perform Hajj on his behalf?' He said: 'Yes, because if your father owed a debt you would pay it off?', [to which] she replied: 'Yes'".[151] Here the Prophet (*ṣ*) mentioned the parallel case of the father's owed pilgrimage in relation to the case of natural debt incurred by man, alluding to it being the legal cause of the ruling he had given her. If this was in fact not the legal cause, the statement of the Prophet (*ṣ*) would be entirely inconsequential.[152]

A group of jurists hold the view that the condition for understanding legal causation under this type of suggestion and allusion is that the evidence must indicate that the ruling is given in the form of an answer to a question, since it is possible that the ruling could be derived as a result of an indication, for instance, to recommence with an activity. Al-Shawkānī demonstrates this point by the example of a teacher who is about to commence with a lesson. The student in the class suddenly informs the teacher of

[149] *al-Iḥkām*, vol. 3, p. 257.
[150] *Musnad al-Imām Aḥmad b. Ḥanbal*: *musnad al-^{c}Asharah al-Mubashshirīn bi^{c}l-jannah*, *musnad Abī Isḥāq Sa^{c}d b. Abī Waqqāṣ*, hadith 1534.
[151] *Sunan Ibn Mājah*: *abwāb al-manāsik*, *bāb al-ḥajj ^{c}an al-ḥayy idhā lam yastaṭi^{c}*, hadith 2909.
[152] *al-Iḥkām*, vol. 3, pp. 257-58.

the death of the Sultan. The teacher, on receiving this news, instructs the pupil to continue reading his lesson. This does not indicate that the legal cause for the instruction of reading is as a result of the news of the Sultan's death. The motive of the instruction is for the pupil to continue with his work and not to busy himself with matters that does not concern him at that moment.[153]

In the fourth type of suggestion and allusion a distinction is made between two rulings and their associated qualities. Al-Āmidī has cited various texts to demonstrate this type, such as the hadith report:[154] "For footmen there is one share and for horsemen there are two shares".[155] Al-Shawkānī comments that the directive in the hadith report points to the cause of apportionment of single and double shares respectively for footmen and horsemen, by the mere mentioning of qualities, of the soldiers' relation to the shares that they receive.[156]

A 'singular' form of this type of suggestion and allusion also exists, and is indicated by the hadith report: "The killer does not inherit from the one he kills".[157] Here, the killer is singled out by mentioning his quality, that of being a killer of someone he is to inherit from, with the ruling of not inheriting.[158]

Yet another form of suggestion and allusion exists where a conditional distinction is made by the Legislator such as in the hadith report: "Gold [is to be paid for] by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, [payment being made] hand to hand. If the commodities differ then trade as you wish hand to hand".[159] Here, the conditional distinction is made between identical commodities vs differing commodities as a condition for trading in equal measure vs unrestricted measure.

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[153] *Irshād*, vol. 2, p. 888.
[154] *al-Iḥkām*, vol. 3, pp. 259-60.
[155] *Musnad al-Imām Aḥmad b. Ḥanbal*: *abwāb al-jihād*, *bāb qismat al-ghanāʾim*, hadith 2854.
[156] *Irshād*, vol. 2, p. 889.
[157] *Musnad al-Imām Aḥmad b. Ḥanbal*: *musnad al-ᶜAsharah al-Mubashshirīn biᶜl-jannah*, *awwal musnadᶜUmar b. Khaṭṭāb*, hadith 346.
[158] *al-Iḥkām*, vol. 3, p. 259.
[159] *Ṣaḥīḥ Muslim*: *kitāb al-musāqāt*, *bāb al-ṣarf wa bayᶜ al-dhahab biʾl-wariqi naqdan*, hadith 1587.

Al-Āmidī goes on to include Quranic examples under this type of suggestion and allusion. He explains that it may denote extent (*al-ghāyah*) as in the verse: "*And do not approach them until they are pure*"[160]; exception (*al-istithnāʾ*) demonstrated by the verse: "*then [give] half of what you specified, unless they forego the right or the one in whose hand is the marriage contract foregoes it*"[161]; and the expression of redress (*lafẓ al-istidrāk*) that is clarified with the verse: "*Allah will not impose blame upon you for what is meaningless in your oaths, but He will impose blame upon you for [breaking] what you intended of oaths*".[162]

A fifth type of suggestion and allusion comprises the mentioning of a quality after or during the speech of the Legislator, that if it were not the legal cause of the stipulated ruling it would create a drift in the language (*khabṭ fī ʾl-lughah*) and confusion in the speech (*iḍṭirāb fī ʾl-kalām*) of the Legislator, which would be impossible to ascribe to the Legislator.[163] Al-Āmidī, to demonstrate this, cites the verse: "*O you who have believed, when [the adhān] is called for Friday prayers, then proceed to the remembrance of Allah and leave trade*".[164] This verse carries the explanation that Friday prayer is in fact the legal cause for its associated rulings of, one, responding to the prayers and, two, abandoning any form of trade during this time. If it was not the legal cause for prohibiting trade, presumably due to it posing a possible obstacle to the attendance of Friday prayers, then its mentioning would be inconsequential, since trade does not automatically prevent the attendance of prayer.[165]

The remaining types of suggestion and allusion are those compiled by al-Zarkashī in his *al-Baḥr al-muḥīṭ*, providing an additional four forms of suggestion and allusion. They are as follows:

[160] Quran, 2:222.
[161] Ibid., 2:237.
[162] Ibid., 5:89.
[163] *al-Iḥkām*, vol. 3, p. 260.
[164] Quran, 62:9.
[165] *al-Iḥkām*, vol. 3, p. 260.

A sixth type of suggestion and allusion occurs with the assigning of a ruling to a quality by the pronouncement of a condition with an associated recompense (*jazāʾ*).[166] This is demonstrated by the verse: "*Whosoever is God conscious, He will make a way out for him, and He will provide for him from where he could not imagine*".[167] The verse implies that the condition of 'God consciousness' is associated with the recompense of help and provision from God. "Whosoever *places his trust in God, then He will suffice him*",[168] meaning: as a result of him placing his trust in God, God will suffice him since recompense follows the fulfilment of the condition of trusting in God.[169] Al-Zarkashī also provided hadith reports to this effect: "He who offers prayer for the dead, for him is [the reward of] one *qīrāṭ*"[170] and "If anyone revives dead land, it belongs to him".[171]

The seventh type of suggestion and allusion entails that legal causation is expressed by the absence of the ruling as a result of the presence of a preventing factor (*al-māniᶜ*).[172] This is demonstrated by the verses:

> *And if it were not that the people would become one community [of disbelievers], We would have made for those who disbelieve in [God] The Most Merciful, for their houses, ceilings and stairways of silver upon which to mount...*[173]

> *And if Allah had extended [excessively] provision for His servants, they would have committed tyranny throughout the land.*[174]

[166] *al-Baḥr*, vol. 7, p. 256.
[167] Quran, 65:2-3.
[168] Ibid., 65:4.
[169] *al-Baḥr*, vol. 7, p. 256.
[170] *Ṣaḥīḥ Muslim*: *kitāb al-janāʾiz*, *bāb faḍliʾl-ṣalāti ᶜalā al-janāzati wa ittibāᶜihā*, hadith 945.
[171] *Muwaṭṭaʾ Mālik*: *kitāb al-ʾaqḍiyyah, bāb al-qaḍāʾ fī ᶜammārati al-mawāt*, hadith 26.
[172] *al-Baḥr*, vol. 7, p. 257.
[173] Quran, 43:33.
[174] Ibid., 42:27.

> *And if We had made it a non-Arabic Quran, they would have said, 'Why are its verses not explained in detail [in our language]*?[175]

The eighth type of suggestion and allusion is indicated by the dislike of God (as mentioned in the sacred texts) of the claim that He has not created His creation with any benefit or wisdom in mind.[176] Various verses demonstrate this, such as the statements:

> *Then did you think that We created you uselessly and that to Us you would not be returned?*[177]

> *Does man think that he will be left neglected?*[178]

> *We have not created the heavens and earth and that [which lies] between them in play*.[179]

The ninth type of suggestion and allusion is indicated by the dislike of God that mankind should ascribe likeness to differing things and ascribe difference to like things.[180] This is indicated by the verses: "*Then will We treat the Muslims like the criminals*?"[181] and: "*The believing men and believing women are allies of one another*".[182] What is implied is that likeness may not be ascribed between Muslims and criminals, likewise difference should not be ascribed between believing men and woman in the context of them being allies to one another. It appears, like the previous two types of suggestion and allusion, that a considerable dependence is placed on the context of the wording of the text.

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[175] Ibid., 41:44.
[176] *al-Baḥr*, vol. 7, p. 258.
[177] Quran, 23:115.
[178] Ibid., 75:36.
[179] Ibid., 44:38.
[180] *al-Baḥr*, vol. 7, p. 258.
[181] Quran, 68:35.
[182] Ibid., 9:71.

Suitability (*al-munāsabah*) of the quality purposed to be the legal cause by way of suggestion and allusion

Jurists have differed whether the quality (*waṣf*) stipulated to identify the legal cause must be suitable (*munāsib*) for the ruling, when suggestion and allusion is the method of identifying the legal cause. Al-Zarkashī discussed three views regarding this.

- The stipulation of a suitable quality is necessary, like in the aforementioned cases of fornication, theft and illicit breaking of fast in Ramadan. If there was no suitable quality in these cases the process of legal causation would be tantamount to ruling by impulse. This is the view of al-Juwaynī and al-Ghazālī.[183]

- Al-Rāzī reports a second view claiming that, the overwhelming majority of jurists do not require this stipulation since the mere arrangement of the legal cause upon the ruling suffices. This view is also preferred by Ilkiyā al-Ṭabarī (d. 505AH).[184]

- A third position holds that the stipulation of a suitable quality is preferred when the process of legal causation is understood from the angle of suitability (*al-munāsabah*), as in the case of the third, fourth and fifth types of suggestion and allusion. This is the view of Ibn al-Ḥājib who cites as example the hadith report: "The judge should not pass judgement whilst in a state of anger".[185] He goes on to explain, that when legal causation is understood from an angle other than suitability (*al-munāsabah*) then the stipulation of a suitable quality is not preferred.[186]

[183] *al-Baḥr*, vol. 7, p. 258.
[184] Ibid., p. 259.
[185] *Ṣaḥīḥ Muslim*: *kitāb al-ʾaqḍiyyah, bāb karāhati qaḍāʾ al-qāḍī wa huwa ghaḍbān*, hadith 1717.
[186] *al-Baḥr*, vol. 7, p. 259.

The varying definitions of suggestion and allusion along with theories and textual examples of its various types have been discussed, as proposed by the jurists. It is evident that the indirectness of this method would generate more diverse outcomes with respect to possible legal causes of rulings found in the sacred texts. It is interesting to note that this method, however, is still included as a valid method to identify the legal cause. In terms of legal value it can be assumed that, by its placement as the third of the valid methods of identifying the legal cause, in the major works of legal theory, that it has a lesser value compared to the methods of consensus and textual evidence. However, its significance as a method of identifying the legal cause cannot be overlooked, considering the plethora of legal cases in the sacred texts that would not meet the requirements of the methods of consensus and textual evidence.

The last of the valid methods discussed in this chapter will now be discussed, as found in the works of legal theory, namely, the actions of the Prophet (ṣ).

4. Actions of the Prophet (ṣ) (*fiʿl al-Nabī*)

Using the actions of the Prophet (ṣ) has also been acknowledged as a valid means to identify legal cause. The topic of identifying the legal cause by the actions of the Prophet (ṣ), receives very little attention in the works of legal theory. This is perhaps as a result of its perceived simplicity or, because instances of its appearance or applicability to cases in hadith literature are rarely found.

In his *al-Taqrīb waʾl-irshād*, al-Bāqillānī explains that when the Prophet (ṣ) performs an action after something occurs, it may be understood that his action is as a result of the event that occurred. He cites the example of the Prophet (ṣ) prostrating after forgetfulness in prayer. It may be accepted that the prostration comes as a direct result of his forgetfulness in prayer, that is, his forgetfulness is the legal cause of prostration in this instance.[187] This method requires that no ruling is pronounced by the Prophet

[187] *al-Baḥr*, vol. 7, p. 262.

(ṣ), and that only his action, in response to an event, prompts an indication to the legal cause.

Such instances, however, rare, do exist in the hadith reports, where no particular ruling is articulated by the Prophet (ṣ), but by way of his reaction or physical response to an event, it can be perceived to be indicative of a ruling that comes as a result of a particular cause.

This theory appears simpler to conceptualise when the event is immediately or closely followed by a 'reflex' or immediate response by the Prophet (ṣ). But how does varying proximity between event and reaction affect the operation of this method?

This may also apply to events where the action is performed by other than the Prophet (ṣ), such as the Companions, but it is implied that the actions are caused by the Prophet's (ṣ) actions. A case in point is the hadith report that give account of the Prophet's (ṣ) actions after the stoning of Māʿiz b. Mālik, a Companion, who confessed to committing adultery and insisted on being expiated through capital punishment.[188] A hadith report narrated by the Companion Abū Barzah al-Aslamī, states: "The Messenger of God (ṣ) did not pray on Māʿiz b. Mālik, nor did he prohibit [anyone] from praying on him".[189] In another report by the Companion Abū Burdah it states: "The Prophet (ṣ) did not pray on Māʿiz b. Mālik, nor did he prohibit [anyone] from praying on him".[190] An important note to proceed: other hadith reports do shed further light on the ruling of praying on persons who are executed by capital punishment. The current exercise though, is merely interested in demonstrating the application of this method of identifying the legal cause as opposed to establishing the veracity of the overall legal content of this case.

The account given by al-Aslamī and Abū Burdah refers to events that unfolded after the stoning of Māʿiz. The prayers offered for the deceased occurs after a considerably longer time following the stoning and even longer after the confession made by Māʿiz. Yet, it is evident that the Prophet's (ṣ) omission of prayers on him indicates to either

[188] *Saḥīḥ Muslim*, *kitāb al-ḥudūd*, *bāb man iʿtarafa ʿalā nafsihī biʾl-zinā*, hadith 1694.
[189] *Sunan Abī Dāwūd*, *bāb al-ṣalāt ʿalā man qatalat-hu al-ḥudūd*, hadith 3186.
[190] *al-Sunan al-Kubrā*: *bāb al-ṣalāt ʿalā man qatalat-hu al-ḥudūd*, hadith 6831.

the stoning or the confession to adultery. Al-Baghawī (d. 516AH) reports on some of the derived contention in this case. He states that al-Zuhrī (d. 123AH) ruled that the one who is stoned to death is not prayed upon, while Mālik argued that the community could pray on him but not the judge that had instituted the sentence of death by stoning.[191] Here the question arises as to, how would the Prophet's (*ṣ*) own omission of an act or his approval of that act by others, constitute specificity to him or general applicability to all? It seems evident that the two varying positions of al-Zuhrī and Mālik contain some consideration of this question. The focus here, however, is the utility of identifying the legal cause with this method as opposed to the finer details of the legal verdicts derived from it.

Another form of this method is the Prophet's (*ṣ*) abandonment of an action that may normally have been something the Companions were instructed to do, like the example of leaving the use of perfume, hunting and other activities that is avoided by the person in the ritual state of performing ʿUmrah or Ḥajj. What seems apparent from his purposeful neglect of these things is that it is as a result of the ritual state.[192] What seems evident is that in spite of the rare instances of the legal cause being identified by the actions of the Prophet (*ṣ*), it is a viable method nonetheless.

In this chapter the various methods of identifying the legal cause that are considered valid by the majority of jurists have been covered, namely, scholarly consensus, textual evidence, suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) and the actions of the Prophet (*ṣ*) (*fiʿl al-nabī*). They have been presented in the order of the level of importance or legal value given to them within the major works of legal theory. The following chapter will examine the methods of identifying the legal cause that are considered to be of probable utility by jurists.

[191] See al-Baghawī's discussion on the hadith report: *Sharḥ al-Sunnah*: *bāb al-shahīd fī sabīl Allāh lā yughsal wa lā yuṣallā ʿalay*, hadith 1500, taken from vol. 5, p. 371, of this book.
[192] *al-Baḥr*, vol. 7, p. 262.

Chapter 3

The Probable Methods of Identifying Legal Cause

In the previous chapter the decisive methods of identifying legal cause (*masālik al-ᶜillah*) that are accepted by the majority of jurists to be valid have been examined. This is as a result of the direct reliance that these methods have on the textual evidence of the Sharia. Naturally, a greater reliance on textual evidence by way of words and phrases or particles, produce stronger agreement between jurists.

In this chapter, however, an area that has produced much greater difference of opinion will be examined, where the influence of reason goes beyond the scope of the sacred texts. These methods are viewed as conjectural or probable and having disputed utility.

An important point that needs to be considered with regards to these speculative methods is that the word *ᶜillah* (legal cause) and *waṣf* (quality) is often used interchangeably. This is the case in most works on legal theory. This interchangeable use is rarely found in the discussion on the decisive methods, perhaps because the legal cause is taken directly from the textual evidence. With speculative methods, the approach predominantly deals with a quality that is extracted and purposed for being the legal cause. It is no wonder then that legal theorists have used these two terms, both synonymously and interchangeably, considering that in essence the one is ultimately representative of the other. What follows is the discussion on the eight probable methods of identifying legal cause, namely, suitability (*al-munāsabah*), elimination of alternatives (*al-sabr waʾl-taqsīm*), resemblance (*al-shabah*), coextensiveness (*al-ṭard),* rotation (*al-dawrān*), refinement of the basis of the ruling (*tanqīḥ al-manāṭ*) and verification of the basis of the ruling (*taḥqīq al-manāṭ*).

1. Elimination of Alternatives (*al-sabr waʾl-taqsīm*)

Elimination of alternatives (*al-sabr waʾl-taqsīm*) is the second of the probable methods of identifying legal cause. Some of the more literal translations provided for *al-sabr waʾl-taqsīm* in the modern English literature are: probing and division[193] or, observation and classification.[194] Elimination of alternatives[195] appears to be a more contextually correct translation of this method, as the study will show.

Linguistically it means to probe or test, and more specifically, to probe and test the extent of a wound.[196] In the context of this discussion, the investigator of the legal cause proceeds by identifying / classifying the various qualities that are present in a legal case, and then probes each of these qualities individually through a process of elimination to finally uncover a suitable legal cause.[197]

This uncovering of suitability has been divided into two categories.[198] The first category, exhaustive probing (*al-munḥaṣir*), involves the rotation between the exclusion (*al-nafyi*) and adoption (*al-ithbāt*) of qualities, while the second category, inexhaustive probing (*al-muntashir*), examines the probability of excluding qualities. These two categories are now examined in further detail.

Exhaustive probing (*al-munḥaṣir*)

Exhaustive probing is a process that attempts to isolate the qualities that are possibly indicative of legal causation in the original case. It then tests those same qualities in relation to the new case in an attempt to disqualify those qualities that are not suitable as the legal cause on the basis of proof provided by jurists. This disqualification may

[193] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 330.
[194] Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 19.
[195] Bernard G. Weiss, *The search for God's law: Islamic jurisprudence in the writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), p. 595 (hereinafter *The search for God's law*).
[196] *Lisān al-ʿArab*, vol. 4, p. 340; *Nihāyat al-wuṣūl*, vol. 8, p. 3361.
[197] *Nihāyat al-wuṣūl*, vol. 8, p. 3361.
[198] *al-Burhān*, vol. 2, p. 35; *al-Mustaṣfā*, p. 311.

take various forms such as: the quality appears to be invalid (*mulghan*); or it appears to be a coextensive quality (*waṣfan ṭardiyyan*). Furthermore, the quality may be found to contain some infringement (*naqḍ*), interruption (*kasr*), concealment of meaning (*khafāʾ*) or uncertainty (*iḍṭirāb*), in relation to the broader content of the law. After the consideration and application of the aforementioned forms of disqualification, the remaining quality would be affirmed as the legal cause.[199] Further elaboration has been given with regards to methods of disqualification such as invalidation, coextensiveness and suitability of qualities.

Disqualification by invalidation requires that the ruling is established by way of a specified legal cause, while the remaining qualities are disqualified by jurists, because they perceive these qualities to have no bearing on the established ruling. The specified legal cause then, is an independent quality that always provides the basis for which the ruling is established.[200]

Disqualification by coextensiveness is premised on the event that all qualities, excluded by the investigator, are also qualities not considered by the Lawgiver. For instance, the Lawgiver has not considered tallness or shortness, or blackness and whiteness in the laws of retaliation cases, expiation, inheritance and manumission of slaves.[201]

Disqualification may also be effected by the investigator that does not find the quality to be suitable as the legal cause for the ruling. This is because of his integrity as a jurist and the level of scholarship that allows him to make such an assessment of suitability. Any contestation by the antagonist is also entertained, since he is also a jurist who is entitled to have his findings and opinions respected.[202]

[199] *al-Baḥr*, vol. 7, p. 284; *al-Mustaṣfā*, p. 295.
[200] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 334.
[201] Ibid.
[202] Ibid., p. 335.

Al-Shawkānī cited examples of the use of exhaustive probing, as it relates to decisive (*al-qaṭᶜiyyāt*) and speculative cases. As a decisive case, he cites the example of probing the qualities of the universe, that of being eternal and temporal. The quality of being eternal is disqualified, thus subsequently it is affirmed that the universe is temporal.[203] As a speculative case he cites the example of probing the qualities of maize, for its inclusion as a usurious commodity, in its analogy to wheat, where, it is like the investigator saying: "I investigated the qualities of wheat that may be indicative of usury, and I identified measurability, edibility and taste as possibilities. But taste and edibility are not suitable qualities due to such and such evidence, thus measurability is selected".[204]

Al-Rāzī presented these three identical qualities and added 'property' as a fourth quality, to state the same case of maize compared to wheat analogically, and he subsequently selected edibility.[205] The Ḥanafī view is the selection of measurability and dismissing the other three qualities.[206]

Ṣafī al-Dīn al-Hindī views the application of exhaustive probing in actual legal matters as a complex exercise.[207] It seems that, in a bid to delimit its function, he sets further conditions for its validity, such as requiring that the ruling of the original case must be warranted by a suitable legal cause. He also demands that agreement should exist amongst jurists that the legal cause is not of a compound nature (*tarkībat fīhā*), as in the case of usury contained in maize and wheat, where the legal cause is composed of more than one quality (i.e. edibility and measurability).[208]

In the event that no such agreement has been established then exhaustive probing would be invalid.[209] This is because the compound legal cause would be affected by the

[203] *Irshād*, vol. 2, p. 892.
[204] *al-Baḥr*, vol. 7, p. 284; *Irshād*, vol. 2, p. 893.
[205] *al-Maḥṣūl*, vol. 5, p. 217.
[206] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 332.
[207] *Nihāyat al-wuṣūl*, vol. 8, p. 3362.
[208] Ibid.
[209] *Irshād*, vol. 2, p. 893.

various qualities it is comprised of and adjoined to. This scenario would only further complicate the process of probing and selecting suitable qualities for determining the legal cause.[210]

Another condition is that all the qualities, that could possibly be the legal cause, should be probed or that the investigator should profess that he is incapable of identifying more qualities. This, in other words, is an exhaustion of qualities that may be the legal cause. It would also suffice that he declares, in response to the antagonist: "I researched all possible qualities and did not find qualities beyond what I have mentioned". Here, the basis for proving exhaustion is the non-existence of more qualities. This is the case when the investigator is competent at research.[211]

The aforementioned condition has been disputed by some jurists such as al-Ṣafī al-Aṣfahānī who has argued against this declaration of exhaustive probing, in response to the antagonist. To state his case he uses the declaration: "I have searched and examined and I did not find other than these [qualities], so if you were able to obtain another legal cause then make it known, and if not, then you are compelled by that which has compelled me".[212] Al-Aṣfahānī views this response as invalid, because the probing by the investigator does not suffice as a proof against the antagonist. In fact, he finds it inconceivable that the investigator would seek limitless acceptance of his findings and compelling his opponent thereby. In relation to this, Ibn Burhān (d. 518AD) had further distinguished between the probing of a *mujtahid* and that of a non-*mujtahid*.[213]

Inexhaustive probing (*al-muntashir*)

The second category of 'elimination of alternatives' is inexhaustive probing, which is characterised by one of two scenarios. One, the probing does not at all revolve around

[210] *al-Baḥr*, vol. 7, p. 284; Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 19.
[211] *al-Baḥr*, vol. 7, pp. 284-85.
[212] Ibid., p. 285.
[213] Ibid.

the disqualification and affirmation of qualities. Two, when disqualification and affirmation is employed, the qualities are not disqualified with certainty, thereby proffering the affirmed quality as merely probable.[214]

Jurists have disputed the utility of inexhaustive probing and consequently various views have been formulated. The first view holds that it does not constitute unrestricted proof, neither in decisive nor speculative cases. Al-Juwaynī has attributed this to a faction of the jurists.[215] A second view contends that it constitutes proof in practical cases only, because it appears to the investigator as an overpowering probability. This is preferred by al-Juwaynī, Ibn Burhān, Ibn al-Samᶜānī and al-Ṣafī al-Hindī.[216] Furthermore, a third view states that it constitutes proof on the condition that the scholarly community agrees upon the legal causation of the original case. This is preferred by al-Juwaynī. He, however, emphasizes that the agreement required here, is only that of the proponents of *qiyās*, as he disregards the antagonists as being from the scholarly community.[217] And lastly, a fourth view argues that it constitutes proof for the investigator of *qiyās* and not the antagonist, which is preferred by al-Āmidī.[218] This is because the claim of inexhaustive probing by the investigator that leads to a probable identification of the legal cause cannot be considered proof against the antagonist.

Thus far, the two categories of 'elimination of alternatives', namely, exhaustive and inexhaustive probing have been discussed. The differences of opinion regarding their respective utility as an indication of the legal cause as well as conditions set for it by jurists have been identified. With regards to the general validity and legal value of elimination of alternatives, much contention also exists. The jurists who have affirmed its validity will first be discussed.

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[214] Ibid., p. 286.
[215] *al-Burhān*, vol. 2, pp. 110-11.
[216] *al-Baḥr*, vol. 7, p. 286.
[217] *Tashnīf al-masāmiᶜ*, vol. 3, p. 287.
[218] Ibid.

Ibn al-ᶜArabī argued that it is definitive evidence for identifying the legal cause. He further ascribed this view to Abū al-Ḥasan al-Māwardī (d. 550AH),[219] *al-qāḍī* al-Bāqillānī, and the rest of the Shāfiᶜī scholars. He states: "It is valid. It is articulated in the Quran [both] implicitly and explicitly in many instances."[220] For the implicit articulation of elimination of alternatives he provides the verse:

> *And they say, 'That which is in the bellies of these animals is exclusively for our males and forbidden to our females. But if it is [born] dead, then all of them have shares therein'. He will punish them for their description. Indeed, He is Wise and Knowing*.[221]

For the explicit example he provides the verses:

> *[They are] eight mates - of the sheep, two and of the goats, two. Say, 'Is it the two males He has forbidden or the two females or that which the wombs of the two females contain? Inform me with knowledge, if you should be truthful*.[222]

> *And of the camels, two and of the cattle, two. Say, 'Is it the two males He has forbidden or the two females or that which the wombs of the two females contain? Or were you witnesses when Allah charged you with this?' Then who is more unjust than one who invents a lie about Allah to mislead the people by [something] other than knowledge? Indeed, Allah does not guide the wrongdoing people*.[223]

These examples are provided in *al-Baḥr*.[224]

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[219] He was Abī al-Ḥasan ᶜAlī b. Muḥammad al-Māwardī who was a highly learned Imam of the Shāfiᶜī School and a leading judge of Baṣra of his time. See *Hadiyyatuʾl-ᶜārifīn*, vol. 1, p. 689.
[220] *al-Baḥr*, vol. 7, p. 287; Abū Ḥāmid al-Ghazālī, *al-Mankhūl min taᶜlīqāt al-uṣūl*, p. 351.
[221] Quran 6:139.
[222] Ibid. 6:143.
[223] Quran 6:144.
[224] *al-Baḥr*, vol. 7, p. 287.

Then there are jurists who have rejected elimination of alternatives as a method of identifying legal cause. Al-Abyārī argued that elimination of alternatives cannot be accepted as evidence for identifying legal cause. He commented on its two components, probing (*al-sabr*) and classification (*al-taqsīm*) respectively and views probing as no more than an examination of qualities and verifying it, while classification is a mere replication of disqualifying some of those qualities. This, he believes, does not constitute evidence in any case, but that jurists who practiced it were merely tolerated by their peers as a result of it.[225]

Ibn al-Munayyir has a similar issue with the seeming redundancy of elimination of alternatives. He argues that the qualities being disqualified by this method may not be completely excluded from being a suitable quality for other methods of identification such as suitability (*al-munāsabah*), resemblance (*al-shabah*) and coextensiveness (*al-ṭard*). The categorised qualities of these methods either represent public interest or it does not. When the quality's public interest can be established it falls under the method of suitability. When its public interest is indirectly known it is matter of resemblance and when its public interest cannot be established it is a matter of coextensiveness which is a method rejected by most jurists. Furthermore, he views that elimination of alternatives, where definitive suitability of the quality cannot be established, as having no benefit in supporting its own validity as a method of identifying legal cause.[226]

The Ḥanafī and Ḥanbalī Schools have completely rejected elimination of alternatives as a method to identify legal cause, while it has predominantly been accepted by the Shāfiᶜī and Mālikī Schools.

[225] ᶜAlī b. Ismāᶜīl al-Abyārī, *Al-Taḥqīq waʾl-bayān fī sharḥ al-burhān fī ᶜuṣūl al-fiqh*, ᶜAlī b. ᶜAbd al-Raḥmān Bassām al-Jazāʾirī (ed.), 4 vols. (Kuwait: Dār al-Ḍiyāʾ, 2013), vol. 3, pp. 162-63.
[226] *al-Baḥr*, vol. 7, p. 287.

2. Suitability (*al-munāsabah*)

The linguistic meaning of *al-munāsabah* is 'agreeability' or 'harmony'.[227] Ibn al-Aᶜrābī (d. 231AH) explains that the suitable (*al-munāsib*) legal cause indicates 'harmony' or that which has 'relation to' the ruling. Similarly, the Arabic word *nassābah* refers to the person who has extensive knowledge of genealogy, such as the Companion, Abū Bakr al-Ṣiddīq (d. 12AH), who was reported to have been "a man with [expert] knowledge of [blood] relation" (*kāna rajulan nassābatan*).[228]

Suitability (*al-munāsabah*) has been explained to be constructed upon speculative thought or imagination (*al-ikhālah*),[229] human good, reasoning and consideration of the objectives of the law. Al-Zarkashī, in commenting on its derivation states: "It is [also] called 'deduction or extraction of the basis of the ruling' (*takhrīj al-manāṭ*),[230] because it 'brings into view' the legal basis of the ruling. It is a pillar of the area of *qiyās* and [the reason for] its copious [use], and the body of [both] its ambiguity and lucidity".[231]

Al-munāsabah has also alternatively been described as the identification of a legal cause that appears to be suitable for the ruling, while simultaneously being 'safe' from any conflict or 'blame' from the sacred texts or any other authoritative source.[232] Al-Rāzī discussed two views of the jurists with regards to the definition of *al-munāsabah*.[233]

The first view describes *al-munāsabah* as that which leads man to some form of achievement (*al-taḥṣil*) and preservation (*al-ibqāᵓ*). Achievement is indicated by the

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[227] Abū Faḍl Jamāl al-Dīn, *Lisān al-ᶜArab*, 3rd ed., 15 vols. (Beirut: Dār Ṣādir, 1993), vol. 1, p. 756. (hereinafter *Lisān al-ᶜArab*).
[228] Ibid.
[229] Derived from the word *khāla* with the meaning to 'imagine' or 'assume' (*ẓanna*), as it is an attempt to imagine the causality (*ᶜilliyyah*) of the quality (*waṣf*) associated with the ruling (*ḥukm*). See *Nashr al-bunūd ᶜalā marāqī al-suᶜūd*, vol. 2, p. 164, by ᶜAbd Allāh b. Ibrāhīm al-Shinqīṭī (d. 1235 AH).
[230] *Bayān al-mukhtaṣar*, vol. 3, p. 108.
[231] *al-Baḥr*, vol. 7, p. 262.
[232] Ibid.; *Bayān al-mukhtaṣar*, vol. 3, p. 108; *al-Burhān*, vol. 2, pp. 759-63; *al-Mustaṣfā*, pp. 296-306; *Shifāᵓ al-ghalīl*, p. 144.
[233] *al-Maḥṣūl*, vol. 5, pp. 157-58.

acquisition of some form of benefit whereas preservation is indicated by the repelling of harm, which is the very aim of preservation, either to remove or prevent any possibility of harm. In this way, both achievement and preservation may be known with certainty or by speculation, pertaining matters that are either of a religious or worldly nature.[234]

In the same vein, benefit is explained to be tantamount to pleasure or whatever leads to it, while harm is indicated by pain or whatever leads to it. Pleasure then, brings about the realization of harmony, while pain is the realization of the contrary. But al-Rāzī argued that it is impermissible to restrict the definition of harm and benefit in this way, since these are from amongst the most apparent qualities that man can discover for himself, simply because they are self-evident.[235]

The second view explains that the suitable (*al-munāsib*) legal cause is 'in harmony' or agreement with the actions of the men of understanding pertaining matters of habit. Al-Rāzī clarifies this view by citing the statement: "This pearl is suitable (*munāsib*) to this pearl, so as to be located together in a single harmonious string [of a necklace]".[236]

Like al-Rāzī, al-Zarkashī also discussed two definitions of *al-munāsabah* presented by the two contending groups of scholars. The first group opposes the idea that legal cause can be justified with regards to God's legislation surrounding all worldly issues, while the second group sanctions the idea.[237] The first group states:

> It [the suitable legal cause] is in harmony with the actions of the men of understanding, in matters of habit only, meaning: with respect to what they understand will lead to the attainment of a specific purpose [of reaping benefit or repelling of harm], in the course of habit.[238] The second group places no restriction on matters of

[234] Ibid.
[235] Ibid.
[236] Ibid., p. 159.
[237] *al-Baḥr*, vol. 7, p. 263.
[238] Ibid.

habit alone, stating: "It is that which brings benefit to man, or repels harm from him".[239]

Al-Dabūsī (d. 430AH) added that it is that which, when presented to the men of understanding, would receive their acceptance.[240] He, however, sees this as an impracticable condition to utilise with regards to the antagonists of *qiyās* as they would be able to claim that their intellect does not accept the presented legal cause to be suitable. He thus limited *al-munāsabah* as being a proof for the proponent of *qiyās* and not as evidence against the antagonist.[241]

Al-Ghazālī disagrees with this limitation set by al-Dabūsī, arguing that, it is in fact, possibly a proof against the antagonist, when the details of suitability are accurately clarified. To al-Ghazālī, when suitability is clearly justified then the antagonist's obstinate rejection thereof need not be considered.[242] Al-Shawkānī, in view of this, agrees that citing evidence does not require more than the aforesaid 'accurate clarification' as mentioned by al-Ghazālī.[243]

Ibn al-Ḥājib described the suitable legal cause as "an 'apparent' (*ẓāhir*) and 'consistent' (*munḍabiṭ*) quality that occurs rationally as a result of the ruling constructed upon it – that which is suitable to be purposed for the attainment of benefit or the repelling of harm".[244] He further specified that in the case where the quality is 'obscure' or 'inconsistent', then its places of applicability is considered, and it will be treated as a 'place of probability' (*maẓinnah*). He explains this by saying: "Whatever is hidden [from the intellect] cannot specify the hidden [ruling]".[245] He gives examples of two cases to demonstrate the obscure and inconsistent quality. The first being that, prayers are joined and shortened in the case of travelling because of the quality of

[239] Ibid.
[240] *Bayān al-mukhtaṣar*, vol. 3, p. 111.
[241] *al-Iḥkām*, vol. 3, p. 270.
[242] *Shifāʾ al-ghalīl*, p. 143.
[243] *Irshād*, vol. 2, p. 898.
[244] *Bayān al-mukhtaṣar*, vol. 3, pp. 108-11.
[245] The interpolated wording to Ibn al-Ḥājib's statement here, is given by Shams al-Dīn al-Aṣfahānī in his explanation (*sharḥ*) of Ibn al-Ḥājib's work. See *Bayān al-mukhtaṣar*, vol. 3, p. 112.

difficulty, but this difficulty is an inconsistent quality, since the level of difficulty could differ vastly under varying circumstances. A wealthy traveller could, for instance, have all the luxury to facilitate his journey. The second example, that demonstrates the obscure quality, is the case of the death penalty imposed on the defendant charged with premeditated murder. Premeditation may be obscure in some instances.[246] Both of the aforementioned cases contain a 'place of probability', for 'difficulty' in the case of the former, and 'premeditation' in the case of the latter. What seems apparent here is that Ibn al-Ḥājib accepts that *al-munāsabah* premised on 'place of probability', is an acceptable category of *al-munāsabah*.

Al-Juwaynī has argued in favour of the utilisation of *al-munāsabah* for identifying legal cause, claiming that the Companions had used it. He asserts that they were known to have supplemented cases for which no directly applicable text existed. Text that, to them, was highly probable to have contained corresponding meaning or having resembled it.[247]

Al-Aṣfahānī has mentioned a refutation of al-Juwaynī's view in the *al-Risālat al-Bahāʾiyyah*.[248] There, it is argued, that there are no reliable reports of statements traced to the Companions that they unrestrictedly relied upon the highly probable indications of *al-munāsabah*. The refutation then goes on to highlight that cases of ritual worship may not be addressed with this type of indication, arguing that it is unknown to be used as such. Al-Juwaynī submits that: "It is more appropriate to apply it with regards to general indications to *qiyās*, such as is indicated by the verse, '*Then reflect (faᶜtabirū), Oh people of understanding*'[249] and the response of Muᶜādh b. Jabal (d. 19AH) 'I will exert my reasoning'[250]".[251]

[246] *Bayān al-mukhtaṣar*, vol. 3, pp. 108-11.
[247] *al-Baḥr*, vol. 7, p. 264.
[248] Ibid.
[249] Quran, 49:2.
[250] *Musnad al-Imām Ahmad*, *hadith Muᶜādh b. Jabal*, hadith 22007.
[251] Aḥmad b. Maḥmūd b. ᶜAbd al-Wahhāb al-Shinqīṭī, *al-Waṣf al-munāsib li sharᶜ al-ḥukm*, 1st ed. (Medina: ᶜAmādat al-Baḥth al-ᶜIlmī biʾl-Jāmiᶜat al-Islāmiyyat biʾl-Madīnat al-Munawwarah, 1994), p. 170.

Al-Shawkānī provided four broad divisions of *al-munāsabah* that brings together the most comprehensive and inclusive discussions on the topic. These divisions are as follows: consideration of the extent to which the objective of law is achieved, consideration of the objectives of the law itself, the law's consideration of the suitability of the legal cause, and suitability of the legal cause by way of its quality of effectiveness (*al-taʾthīr*) and agreeableness (*al-mulāʾamah*).

The focus will now be shifted to discussing these four divisions in greater detail.

i) The first division: Consideration of the extent to which the objective of the law is achieved.

The suitable legal cause has been classified with regards to the extent that the objectives of the law are achieved as a result of it. It is primarily divided into definitive (*al-yaqīnī*) and probable (*al-ẓannī*), but the categories that fall within the aforementioned division will also be discussed.

a) The first category is based upon the suitable quality where the objective of the law is definitively achieved and is demonstrated by the example of public interest that is fostered by the laws of trade.[252] Here the purchaser may acquire ownership of things, and the seller is compensated for his goods, by permissible means and mutual consent.

b) The second category is based upon the suitable quality where the objective of the law is probably achieved. This is demonstrated by the example of retaliation laws (*qiṣāṣ*)[253] that pursue the protection and preservation of human life, by

[252] *al-Baḥr*, vol. 7, p. 265; *al-Iḥkām*, vol. 2, p. 272; *Irshād*, vol. 2, p. 899; Ṣafī al-Dīn al-Hindī, *Nihāyat al-wuṣūl fī dirāyat al-uṣūl*, Ṣāliḥ b. Sulaymān al-Yūsuf and Saᶜd b. Sālim a-Suwayḥ (ed.), 9 vols. (Mecca: al-Maktabat al-Tijāriyyah, 1996), vol. 8, p. 3293 (hereinafter *Nihāyat al-wuṣūl*).

[253] *Qiṣāṣ* includes, but is not limited to the practice of capital punishment. The Quranic verse explains some of the forms of retaliations for harm inflicted upon human life "*And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has*

instituting capital or suited retaliatory punishment to ward off harm or threat to life.[254] It may be found that some people will not be deterred by these measures of retaliation, but it is probable that most people would be. One would thus expect that more people are deterred by the threat of retaliation than those who are not.

c) The third category is indicated when there is doubt whether the objective of the law is achieved by the suitable quality. It is equally plausible that both failure and success may be achieved pertaining to the objective of the law. Under this category, al-Zarkashī cites the example of the penalty imposed on those guilty of alcohol abuse – as a means of protecting the intellect. In this case, the number of those who fear the penalty and consequently refrain from drinking may be equal to the number of people who would persist in drinking.[255] This scenario could present itself if the penalty for drinking is not strictly implemented.

d) The fourth category is based upon the notion that it would be improbable that the objective of the law would be achieved by the suitable quality in question. Al-Zarkashī points to the case of the married woman who does not experience menstruation,[256] while the commonly known objective of marriage is procreation. In this case, it is highly improbable that the objective of procreation will be achieved.[257]

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revealed - then it is those who are the wrongdoers" (Quran, 5:45). The Quran clearly states that the motive for *qiṣāṣ* is for the preservation of life: "*And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous*" (Quran, 2:179). It is worthy of note that the rules of *qiṣāṣ* provides for the possibility of reconciliation and pardoning by the victim or his/her remaining heirs "*And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers*" (Quran 5:45) and "*O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment*" (Quran, 2:178).

[254] *al-Baḥr*, vol. 7, p. 265; *al-Iḥkām*, vol. 2, p. 272; *Irshād*, vol. 2, p. 899; *Nihāyat al-wuṣūl*, vol. 8, p. 3293.

[255] Ibid.

[256] The female who does not have a menstrual cycle.

[257] *al-Baḥr*, vol. 7, p. 265; *al-Iḥkām*, vol. 2, p. 272; *Irshād*, vol. 2, p. 899; *Nihāyat al-wuṣūl*, vol. 8, p. 3293.

Al-Āmidī has highlighted that these four categories are placed in this order by way of their legal value. The first being, because of its certainty, the second because of probability, the third because of doubt and the fourth because of improbability that the objective of the law would be fulfilled.[258] Al-Zarkashī reports, that justifying legal cause with the last two categories, categories three and four, are disapproved of by many scholars.[259]

Ṣafī al-Dīn al-Hindī has placed some restrictions on these categories of suitable qualities in the following words:

> The most correct view is that it [the suitable quality based upon the extent of the fulfilment of the objective of the law] is permissible if it [concerns] the isolated of exceptional cases and, if the [suitable] quality in most cases is [known to be] of the categories (*al-jins*) that [in fact] enables fulfilment of the objective of the law, and if [in the event that] it does not, then no [it is not correct].[260]

To clarify his view, he cites the examples of the married woman who does not menstruate and the concession given to the traveller.[261]

A fifth category of the suitable quality is mentioned by al-Zarkashī that is premised on the objective of the law not being achieved at all. In this scenario it is explicitly found that the objective of the law is defeated (*ghayr thābit*)[262] by the quality in question. The Ḥanafīs accept the justification of legal cause with this type of quality.[263] Al-Zarkashī, on the other hand, argued that the correct view is that it is not to be considered, whether or not the case entails matters of ritual worship or not. To clarify his view, he cited the

[258] *al-Iḥkām*, vol. 2, p. 272.
[259] *al-Baḥr*, vol. 7, p. 265.
[260] *Nihāyat al-wuṣūl*, vol. 8, p. 3293.
[261] Ibid.
[262] The addition of the word 'not' (*ghayr*) is from the editor's notes of *Irshād*, vol. 2, p. 899. It clarifies the original statement by al-Zarkashī from *al-Baḥr*, vol. 7, p. 265, that excludes the word '*ghayr*'. This addition of *ghayr* is in line with the overall context of the statements and examples cited in the original text of *al-Baḥr*.
[263] *al-Baḥr*, vol. 7, p. 265.

case of ascribing paternity to a man from the east who marries a woman from the west who then falls pregnant, while he had never physically met her.[264] The majority of scholars would view the child that she bears as illegitimate, arguing that it would be defeating the purpose of marriage that they had never met or consummated the marriage, and then to ascribe paternity to the man. The Ḥanafīs view wedlock as the suitable legal cause of paternity, and thus view the child as being legitimate and consequently they ascribe paternity to the husband.[265]

ii) The second division: The consideration of the objectives of the law itself.

The previous section focused on the extent to which the objectives of the law are achieved, by way of the suitable quality being purposed for legal cause. This section will look at the suitable qualities that are provisioned by way of the objectives of the law itself. These suitable qualities have further been divided into necessity (*al-ḍarūrī*), need (*al-ḥājī*) and betterment (*al-taḥsīnī*). The type of 'necessity' (*al-ḍarūrī*) will be discussed first.

a) Suitability with respect to the objectives of the law pertaining to necessity (*al-ḍarūrī*)

The objectives of necessity are embodied in the protection of the five primary objectives (*maqāṣid*) of the Sharia. It must simultaneously not be in conflict with the Sharia itself, but should rather be in absolute support of the preservation thereof.[266] Scholars of legal theory have cited various examples to demonstrate and define these five objectives, namely, protection and preservation of one's: faith, life, intellect, procreation and wealth.[267] Some examples will be examined that are indicative of these in some detail.

[264] Ibid.
[265] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 263.
[266] *Nihāyat al-wuṣūl*, vol. 8, p. 3295.
[267] Ibid.; Jasser Auda, *Maqāṣid al-Sharīᶜah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought (IIIT), 2008), p. 31.

Firstly, the protection of life has been supported by the laws of retaliation. It is a fundamental necessity, and as such, homicide has been prohibited across all Abrahamic and many other faiths. Were it not for the threat of retaliation against perpetrators of murder or crimes that are inflicted upon human life, humanity would experience much loss of life and any system of public safety would be completely derailed.[268] The Quranic verse has highlighted the objective behind the laws of retaliation stating: "*And there is for you in legal retribution (qiṣāṣ) [saving of] life, O you [people] of understanding, that you may become righteous*".[269]

Secondly, the protection of wealth is provided for by the prohibition of, and heavy penalties imposed for, the various acts that threaten wealth. The penal code for robbery or plundering of people's property (*ghaṣb*), theft and embezzlement, serves as a deterrent to these crimes. Various laws that ensure liability, provide for the protection of financial transactions. The severity of punishment considers the critical necessity of wealth as a support of life.[270]

Thirdly, the preservation of progeny is provided for by laws such as the prohibition and punishment of illicit sexual relations like fornication and adultery. These aim to ensure legitimate paternity and consequent accountability for and preservation of progeny.[271]

Fourthly, the protection of faith is supported by laws such as the counselling and punishment of apostates, and waging war against the infidels and enemies of Islam. Likewise, the laws surrounding the non-Muslim living in an Islamic state (*dhimmī*) ensure his freedom to practice his religion, but prohibit him from evangelism directed at Muslims.

Fifthly, the protection of the intellect is supported by the punishment of the illicit manufacture, distribution and consumption of alcohol. This is because the intellect of

[268] *al-Baḥr*, vol. 7, p. 266.
[269] Quran, 2:179.
[270] *al-Baḥr*, vol. 7, p. 266; *Nihāyat al-wuṣūl*, vol. 8, p. 3296.
[271] Ibid.

the individual is the very foundation of every act that influences public interest. The deficiency and impairment of human intellect, caused by alcohol abuse is undeniable and so is its contribution to the decay of public interest.[272] This is a matter that scholars of legal theory have agreed upon, according to al-Zarkashī.[273]

An objection has been raised as to whether the Sharia is in fact in full agreement with the aforementioned five objectives. Al-Zarkashī argues that the objection is premised on the dispute of whether the law inevitably seeks public interest. He correlates this with the somewhat parallel difference of opinion on whether the law must contain legal cause. For instance, with regards to the protection of the intellect, scholars have considered that alcohol was permitted in the previous legal systems of the Jews and Christians, as well as the early period of Islam. In fact, as late as the sixteenth year after the first Quranic verse was revealed, coinciding with the period just after the battle of *Uḥud*, the consumption of alcohol was permitted.[274] Al-Ghazālī argued that the previous legal systems did not allow drinking to an extent of drunkenness. In his view the extent of intoxication that impairs the intellect, has been prohibited in all Abrahamic scriptures.[275]

In response to this argument, Ibn al-Qushayrī[276] (d. 514AH) cites the view of Abū Bakr al-Qaffāl (d. 365AH)[277] that "prolifically transmitted texts[278] point to the unrestricted permissibility of alcohol consumption [in previous legal systems]" and "there is no basis that the permissibility excluded the extent of intoxication or impairment of the

[272] Ibid., vol. 7, p. 266.
[273] Ibid.
[274] Ibid.
[275] *Irshād*, vol. 2, p. 901.
[276] He was ᶜAbd al-Raḥīm b. ᶜAbd al-Karīm al-Qushayrī, a scholar of the Ashᶜarī theological school of thought and the Shāfiᶜī School. See *Ṭabaqāt al-Shafiᶜiyyah* by Ibn al-Subkī vol. 7, pp. 159-66.
[277] He was Muḥammad b. ᶜAlī al-Qaffāl al-Shāshī Khurasānī, an Imam of the scholars of jurisprudence, legal theory and language of the Shāfᶜī School. He was a student of Abū al-Ḥasan al-Ashᶜarī and teacher of al-Juwaynī. See *Ṭabaqāt al-Shafiᶜiyyah* by Ibn al-Subkī vol. 3, p. 200.
[278] This is known as *mutawātir* or 'massively transmitted' hadith reports. It is an important concept in the criticism of hadith texts from a legal theory perspective, to describe hadith that is so prolifically transmitted that its veracity is unquestionable. See Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World*, p. 280.

intellect".[279] This is also the opinion of al-Nawawī (676AH) who argued: "As for those who claim that drinking without becoming intoxicated does not reach the [legal] extent of prohibition, there is no basis for it".[280]

Al-Shawkānī asserts that there is no restriction to the permissibility of liquor in the Abrahamic scriptures, with the absence of drunkenness as a condition. He argues that the sacred texts in fact prescribe liquor for the purpose of getting drunk under some circumstances.[281] To al-Shawkānī, this contradicts the claim that all legal systems agree on the impermissibility of drunkenness.

Thus far the five primary objectives of the Sharia have been covered, specifically as they relate to the suitable quality, which indicates that necessity is fulfilled by the rule of law. Some of the later scholars though, have included a sixth objective of the Sharia, namely, the protection of honour. They argue that it is in the nature of wise men to sacrifice their lives and their wealth in order to preserve their honour, as a display of sacrificing necessity for an even more required necessity, that being honour. The Sharia has in some instances legislated heavy punishment in the interest of preserving honour. Some have argued that the protection of honour should be even more vehemently guarded than the other five objectives considering that man will at times overlook harm against himself or his wealth, but very few would overlook the harming of his honour.

In support of this, the renowned fourth century poet Abū al-Ṭayyib al-Mutanabbī (d. 354AH)[282] wrote:

[279] *al-Baḥr*, vol. 7, p. 267.
[280] Abū Zakariyyā al-Nawawī, *Sharḥ al-Nawawī ᶜalā Muslim*, 3rd ed., 9 vols. (Beirut: Dār ᵓIḥyāᵓ al-Turāt al-ᶜArabī, 1972), vol. 13, p. 144 (hereinafter *Sharḥ al-Nawawī*).
[281] In the Bible, this seems to be the case in Proverbs 31:6 to 7, although numerous other verses contrast and contextual the use of alcohol.
[282] See annotation *Irshād*, vol. 2, p. 902.

Yahūnu ᶜalaynā an tuṣāba jusūmunā wa taslama aᶜrāḍ lanā wa ᶜuqūl[283]

"It is easy for us to have our bodies afflicted ... while our honour and minds are preserved."

In addition to what has been previously mentioned, al-Āmidī has further described a form of suitable legal cause that is based upon an objective that complements the five primary objectives of the Sharia. The 'complement to necessity' legal cause (*mukammil al-ḍarūrah*), may be demonstrated by laws that pre-empt the encroachment of the necessary objectives of the law. He cites various examples of the 'complement to necessity' such as the prohibition of, and consequent punishment, for small quantities of alcohol consumed, as this may lead to consumption to the extent of intoxication.[284] Al-Shawkānī mentioned corresponding examples such as the prohibition of innovation in religious matters and the accompanying precaution with regards to punishing those who practice and call to it; and the precaution with regards to protection of lineage by prohibiting the lustful gaze and physical contact between the sexes as a precursor to illicit sexual intercourse.[285]

b) Suitability with respect to objectives of the law of need (*al-ḥājī*)

Al-Juwaynī has defined the suitable quality that is indicated by the objectives of the law of need (*al-ḥājī* or *al-maṣlaḥī*[286])[287] in the following words: "It is that which is connected to general needs up to, and [sometimes] including, the extent of necessity".[288] He demonstrated this by using the example of renting a home stating that rental is premised on the basic need for housing due to the inability to own such housing, through acquiring a loan facility, or similarly not being able to access share tenancy.[289] Al-Zarkashī, however, does not think that the objectives of need could

[283] *Irshād*, vol. 2, p. 902.
[284] *al-Iḥkām*, vol. 2, p. 272.
[285] *Irshād*, vol. 2, p. 902.
[286] Al-Bayḍāwī (d. 785AH) uses *maṣlaḥī* instead of *al-ḥājī*. See annotation 3 of *Irshād*, vol. 2, p. 902.
[287] *Shifāʾ al-ghalīl*, p. 168; *al-Baḥr*, vol. 7, p. 268. *al-Burhān*, vol. 2, p. 79.
[288] *al-Burhān*, vol. 2, p. 79.
[289] Ibid.

include, or overlap, the objectives of necessity, but admits that the inability to fulfil a need could lead to an objective of necessity.[290] It is evident that without these needs being fulfilled, man could face much difficulty that may even reach levels of great harm to him.[291] Thus, the lines between necessity and need could become blurred, depending on the context.

The authoritativeness of the legal cause based upon need has also been disputed with respect to its obviousness and obscurity. Its suitability, based upon the objective of need is, at times, obvious, but stops short of the level of being explicitly obvious (*al-qaṭ'ī*) as in the case of the objective of necessity. It may also be obscure, as in the case of meanings that are extracted.[292] The degree of obviousness or obscurity, thus, influences the degree of authoritativeness.

Some examples have been cited in the works of legal theory to demonstrate the above contexts of obvious and obscure cases. In the case of the minor girl wanting to marry, a guardian is required to ensure that a suitable dower is secured based upon what the generally accepted dower is for girls of similar social standing. He will also consider matters like the socio-religious compatibility of the suitor, all in the interest of a stable marriage. So, while these are all needs being addressed by the guardian, they are not necessities required for a valid marriage.[293] Ibn al-Ḥājib has cited the example of the appointment of a wet-nurse, in some instances this is merely needed, but in the case of a child that has no mother or alternative access to milk, finding a wet-nurse would be a matter of necessity.[294] Similarly, the previous examples with regards to the laws of trade, rental, loan facility and share tenancy, are all needs that if not met, may lead to loss of necessities.[295] This all lends credence to the argument that needs may overlap with necessity in some cases.

[290] *al-Baḥr*, vol. 7, pp. 268-69.
[291] See annotation *Irshād*, vol. 2, p. 902.
[292] *al-Baḥr*, vol. 7, p. 268-69; *al-Burhān*, vol. 2, p. 79.
[293] *Bayān al-mukhtaṣar*, vol. 3, p. 118.
[294] Ibid.
[295] *al-Baḥr*, vol. 7, p. 268-69; *al-Burhān*, vol. 2, p. 79.

c) Suitability with respect to objectives of refinement (*al-taḥsīnī*)

Al-Shāṭibī defined the objectives of refinement (*al-taḥsīnī*)[296] in the following words: "It is the practice of that which leads to meritorious habits, and the avoidance of immoral behaviour that is frowned upon by the superior intellect, and it brings together the most noble of character".[297]

Al-Ghazālī, on the other hand, defined it as follows: "It is that which is not a matter of necessity or need, but that which falls in the scope of refinement (*taḥsīn*), beautification and facilitation (*taysīr*), for purposes of virtue and for guarding the best ways of habits and dealing (*muᶜamalāt*)".[298]

It has also been defined as "that which is not in conflict with the broader principles [of the Sharia]".[299] This is demonstrated by the prohibiting of immoral and obscene acts. Such prohibitions are "justified as they motivate high moral standards" as stated in the verse: "*Those who follow the Messenger (ṣ), the unlettered Prophet (ṣ), who they find mentioned in the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong, and makes lawful for them the good things and prohibits for them obscene things*[300]".[301]

Al-Shāfiᶜī classified it as that which is customarily known to be desirable (*mustaḥabb*), such as is mentioned in the hadith report: "I have but been sent to perfect the most noble of character".[302]

After giving his definition, al-Ghazālī discussed the case of the desirability of a suitable witness. He explains that the prohibition of the slave being a suitable witness is

[296] Matters that are commendable or that relate to refinement and luxury.
[297] Ibrāhīm b. Mūsā al-Shāṭibī, *al-Muwāfaqāt*, 1st ed., Abū ᶜUbaydah b. Ḥasan Ālī Salmān (ed.), 7 vols. (al-Khubar: Dār Ibn ᶜAffān, 1997). vol. 2, p. 11 (hereinafter *al-Muwāfaqāt*).
[298] *al-Mustaṣfā*, p. 175.
[299] *al-Baḥr*, vol. 7, p. 270.
[300] Quran, 7:157.
[301] *al-Baḥr*, vol. 7, p. 270.
[302] *al-Sunan al-kubrā*: *bāb bayān makārim al-akhlāq wa maᶜālīhā*, hadith 20782.

due to his lack of nobility, considering that the role of being a witness reflects a position of nobility. He further points out that the slave is engrossed in his duties towards his master, and this, along with his lowly status, cannot be reconciled with the requirements of being a witness.[303]

But Ibn Daqīq al-ᶜĪd (d. 702AH) opposed al-Ghazālī's contention. He argues that the emergence of the witness is merely based upon his worthiness to testify so as to prevent further harm by the transgressor on trial, which in fact reaches the level of necessity; not that of refinement. He considers that criticism of the slave's status for testifying as an issue of refinement would be unreasonable, when his testimony is needed in a case of necessity.[304]

Al-Zarkashī agrees with Ibn Daqīq al-ᶜĪd that if credible proof is presented for opposing the slave's testimony, there would be some basis for his exclusion as a witness, but in this case, considering the legal cause of 'lowly status' or 'lack of nobility' would be problematic.[305] He also attributed a view to the Shāfiᶜī scholars that they knew of no support or basis for rejecting the testimony of the slave, as alleged by al-Ghazālī.[306]

Al-Ghazālī further contends that the slave's guardianship of a minor is rejected, a case that would fall under the category of need. He argued that his guardianship over minors would require his preoccupation with their needs and free time to execute his duties toward them, even while he is preoccupied with the duties of his master. Thus his entrustment with guardianship would constitute harm to the minor. Al-Ghazālī emphasises that the question of guardianship differs from the question of bearing testimony, because testimony is required occasionally while guardianship has more consistent and frequent demands.[307]

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[303] *al-Mustaṣfā*, p. 175; *Shifāʾ al-ghalīl*, p. 169.
[304] *al-Baḥr*, vol. 7, p. 271.
[305] *Irshād*, vol. 2, p. 903.
[306] *al-Baḥr*, vol. 7, p. 271; *Irshād*, vol. 2, p. 904.
[307] *Shifāʾ al-ghalīl*, p. 170.

iii) The third division: The law's consideration of the suitability of the legal cause.

The suitable (*al-munāsib*) quality that is purposed to be the legal cause has been categorised by the law's consideration of its validity. This consideration assumes three distinct categories, namely, a) The quality is known to be considered valid by the law, b) the quality is known to be considered invalid by the law, and c) it is not known whether the quality is considered valid or invalid by the law.

Al-Rāzī explained the three categories saying: "[With regards to] the suitable quality (*al-waṣf al-munāsib*) it is either known that the Legislator considered it [as a legal cause], or it is known that he (the Legislator) invalidated it, or that neither of the two [conditions] is known."[308]

The aforementioned considerations are informed by the harmony (*mulāʾamah*) and effectiveness (*al-taʾthīr*) that the suitable quality displays in relation to the ruling.[309] The category in which the law's consideration of the quality is known will be discussed first.

a) The law's consideration of the quality is known (*ʿulima iʿtibār al-sharʿ lahu*).

There are various requirements with regards to this category. Firstly, by saying the law's consideration of the quality is 'known', it means that this 'knowledge' is predominant.[310] For instance, an action may contain both 'good' or public interest and 'bad' or corruption, but the law concerning this action is based on the objective of

[308] *al-Baḥr*, vol. 7, p. 272; *al-Maḥṣūl*, vol. 5, p. 163; Shihāb al-Dīn al-Qarāfī, *Nafāʾis al-uṣūl fī sharḥ al-Maḥṣūl*, ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwiḍ (eds.), 1st ed., 9 vols. (Mecca: Maktabat Nizār Muṣṭafā al-Bāz, 1995), vol. 7, p. 3258 (hereinafter *Nafāʾis al-uṣūl*); *Nihāyat al-wuṣūl*, vol. 8, p. 3301; Badr al-Dīn al-Zarkashī, *Tashnīf al-masāmiʿ bijamʿ al-jawāmiʿ li Tāj al-Dīn al-Subkī*, Sayyid ʿAbd al-ʿAzīz and ʿAbd Allāh Rabīʿ (ed.), 4 vols. (Cairo: Maktabat Qurṭubah, 1998), vols. 3, pp. 294-95 (hereinafter *Tashnīf al-masāmiʿ*).

[309] *Irshād*, vol. 2, p. 904.

[310] *al-Baḥr*, vol. 7, p. 273; *Irshād*, vol. 2, p. 904.

achieving the 'good'. In such a case, the level of the 'good' must be predominant over the level of the 'bad' that will be achieved by implementing the law.[311]

But the outcome of implementing the law should not be equally good and bad or be dominated by the bad. This is unacceptable to sound human reason, as argued by Ibn al-Ḥājib.[312] For example, if one were to ask a sane person to sell his items at a price that is equal to his costs, or at a loss, this would be seen as invalid transacting in the minds of wise men.[313] Ibn al-Ḥājib also commented on a general view that, suitability cannot be established by either of the two scenarios, that being: 'good equals bad' or 'good is dominated by bad'. This is because the bad does not survive alongside the good, whether equal to it or dominating it.[314]

This view has been challenged with the example of prayer being performed on usurped land. The element of good derived by it may be equalled or surpassed by the element of bad. Thus, if suitability is annulled by the equal presence or dominance of bad, then this prayer should be declared invalid. Evidently, prayer is not annulled by its performance on usurped land, thus suitability may not be annulled.[315]

Ibn al-Ḥājib responds by explaining the prayer would be annulled if the good and bad, in this case, originate from their relation to one and the same thing. The good of prayer does not emanate from the usurped land, nor does the usurped land emanate from prayer. Prayer remains valid on un-usurped land, so does usurped land remain bad even if other activities like work or agriculture is conducted on it.[316] A more relevant example though, would be the case of fasting on the day of Eid, as mentioned by Hasan.[317] Here a contradiction exists between the motive of the command and the

[311] *Bayān al-mukhtaṣar*, vol. 3, p. 118.
[312] Ibid.
[313] Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 28.
[314] *Bayān al-mukhtaṣar*, vol. 3, p. 118.
[315] Ibid., p. 121.
[316] Ibid.
[317] Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 28.

prohibition, which relates to the same thing. In this case to establish dominance of good over bad would be impossible, and thus fasting on Eid would be invalid as no suitable cause can be established for it.[318]

There is no difference of opinion with regards to the outcome of laws that contain good only or where the good dominates the bad. As a general rule, where the good is present with the bad, it must be established that the good in fact dominates the bad. This will be established with various methods of pointing to the preferring of the good over the bad, and they will differ from case to case, such as the extent of its apparentness and the extent of the scrutiny it requires. These will require thorough investigation and reasoning. Another method, termed *ijmālī*, is used where it cannot be determined that the good dominates the bad. In this case the law is still applied, while not on the basis of the dominance of the good being established, but simply out of unquestioning adherence (*taʿabbud*) to the command of the law.[319] An example of such unquestioning adherence could be demonstrated by the case of a small Muslim army engaging in battle with a much larger army. Though it would seem apparent that the demise of the smaller army would be imminent, that is, the bad dominates the good, the unquestioning adherence to the command to fight will be required.

Another requirement under this category is that the law's consideration should not be indicated by the sacred text (*al-naṣṣ*), scholarly consensus (*al-ijmāʿ*) or suggestion and allusion (*al-īmāʾ waʾl-tanbīh*). These are not indications of *al-munāsabah*, but are rather indications of the decisive methods of identifying the legal cause that have been discussed in Chapter Two. The knowledge of the 'law's consideration' of the quality, is expressed by the ruling being supported by a clear basis, that is extracted, from the angle that the ruling is legally sounder upon the basis of the legal cause in question. This is the view of al-Ghazālī in his *Shifāʾ al-ghalīl*.[320]

[318] Ibid.
[319] *Bayān al-mukhtaṣar*, vol. 3, p. 121.
[320] *al-Baḥr*, vol. 7, p. 273; *Irshād*, vol. 2, p. 904.

It has been previously stated that in the books of legal theory, the terms legal cause (*ᶜillah*) and quality (*al-waṣf*) are often used synonymously and interchangeably. The respective terms cited in the source texts will thus be cited to stay true to the original Arabic texts that have been translated. Now, the law's consideration of the quality, purposed as the legal cause, has also been divided into four states as mentioned by al-Rāzī:

> As for the first category (The law's consideration of the quality is known), it is [further] divided into four states, it is either that the type (*al-nawᶜ*) [of the quality] is considered in relation to the type or categories (*al-jins*) of that ruling, or the category [of the quality] is considered in relation to the type or categories of that ruling.[321]

The four states contemplated here is more clearly articulated as the following combinations: i) the type of the quality is considered in relation to the type of the ruling, ii) the type of the quality is considered in relation to the categories of the ruling, iii) the category of the quality is considered in relation to the types of the ruling, and iv) the category of the quality is considered in relation to the categories of the ruling. These four combinations will be further clarified through contextual examples that are forth coming.

i) The first state: The type of the quality is considered in relation to the type of the ruling. It is also defined as the specificity (*khuṣūṣ*) of the quality is considered with the specificity of the ruling, and the generality (*ᶜumūm*) of the quality is considered with the generality of the ruling. This is demonstrated by the analogy drawn between (a) the case of murder with a heavy object, and (b) the case of murder with a sharp object. The law of retaliation is applied because of the common factor of intentional malicious killing. This example has been

[321] Ibid., p. 272; *al-Maḥṣūl*, vol. 5, p. 163; *Nafāʾis al-uṣūl*, vol. 7, p. 3258; *Nihāyat al-wuṣūl*, vol. 8, p. 3301; *Tashnīf al-masāmiᶜ*, vol. 3, pp. 294-95.

given by al-Isnāwī (d. 772AH) and Tāj al-Dīn al-Subkī.[322] Al-Qarāfī states that the effect of the specificity of the 'quality' of intentional malicious killing is known in the specificity of the ruling, which requires compulsory retaliation with regards to murder by a blunt or heavy object.[323]

Al-Shawkāni added another example using the analogy of drunkenness by soaked grapes with the case of drunkenness by soaked dates, when these two beverages have fermented. When the specificity of the quality of intoxication is ascertained, it calls for the specificity of the ruling of prohibition. Here, there is full agreement of the legal cause being intoxication and along with the ruling of prohibition in both cases, even with the difference of the two beverages.[324] This state has been termed 'harmonious suitability' and is accepted by the all the proponents of *qiyās*.[325]

ii) The second state: The type of the quality is considered in relation to the categories of the ruling. Al-Ghazālī demonstrates this by the analogy made between (a) the case of brothers of the same mother and father who take precedence in matters of succession over the brothers of only the same father, in the issue of guardianship required for the supervision of a marriage contract, and (b) the case of their precedence in matters of inheritance. While their eligibility for precedence as guardians of marriage contracts is not known, their precedence in the category of precedence is known through the case of inheritance. Thus, through analogy, precedence is bestowed upon them, with respect to what is established from the case of inheritance, due to the absence of clear legislation to indicate otherwise.[326]

Al-Zarkashī attempted to highlight the difference between the first and second state. He comments on their difference based upon the contrast between common types of the law of the former vs common categories of the law of the latter. He points out that a

[322] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 275 (from note 101); Taqī al-Dīn al-Subkī, *al-Ibhāj fī sharḥ al-Minhāj*, 3 vols. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995), vol. 3, p. 60.
[323] *Nafāʾis al-uṣūl*, vol. 7, p. 3272.
[324] *Irshād*, vol. 2, p. 905.
[325] Ibid.
[326] *al-Baḥr*, vol. 7, p. 273; *Shifāʾ al-ghalīl*, p. 197.

closer relation exists between the common categories of the law as in the case of 'precedence' granted to the full brothers.[327]

iii) The third state: The category of the quality is considered in relation to the type of the ruling. Al-Bayḍāwī and al-Zarkashī demonstrated this state by the example of the analogy of being exempted of repaying missed prayer during menses, with being exempted of repaying the omitted segments of prayer by the traveller who shortens his prayer. They identified the common quality of these two cases to be hardship faced in the case of menstruation and travel. The quality of hardship is identified as a common category of quality and being exempted of repaying prayer, in both cases, is of the same type of ruling.[328]

iv) The fourth state: The category of the quality is considered in relation to the categories of the ruling. Al-Ghazālī demonstrated this state, by the analogy of the case of 'punishment for drunkenness' with the case of 'punishment for slander'. The punishment for drinking was forty lashes in the time of the Prophet (*ṣ*) and was then increased to eighty lashes by ᶜUmar after his consultation with the Companions. They reached consensus on the matter due to the original basis for the case of slander. It is understood that drunkenness is a 'place where it can be expected' for slander or defamation to occur.[329]

b) The law's invalidation of the quality is known (*ᶜulima ilghāʾ al-sharᶜ lahu)*

In this category it is known that the law has invalidated the quality that is purposed to be the legal cause. The commonly used example to demonstrate this category is the case of expiation required for breaking fast in Ramadan due to coitus. Some of the classical jurists contended that the "fasting of two consecutive months as expiation"[330]

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[327] Ibid., p. 273.
[328] *al-Baḥr*, vol. 7, p. 273; *al-Ibhāj fī sharḥ al-Minhāj*, v. 3, p. 60
[329] *al-Baḥr*, vol. 7, p. 274; *al-Ibhāj fī sharḥ al-Minhāj*, v. 3, p. 60.
[330] *Ṣaḥīḥ al-Bukhārī*, *kitāb al-adab*, *bāb mā jāʾa fī qawl al-rajul waylak*, hadith 6164; *Ṣaḥīḥ Muslim*, *kitāb al-ṣiyām*, *bāb taghlīẓ taḥrīm al-jimāʾ fī nahār ramaḍān ᶜalā al-ṣāʾim wa wujūb al-kaffārah*, hadith 1111.

be mandatorily instituted against a king who is found guilty of this offense. They believed the objective of deterrence will only be achieved, in the context of a king, with fasting of two consecutive months as expiation. This is because the options of 'emancipation of a slave' and 'feeding of sixty poor persons' would be too easy for the king and consequently will not deter him. But this is an analogy that the law invalidates, from the perspective that expiation was prescribed without any distinction made between different classes of people. The hadith report[331] unrestrictedly prescribes expiation to be any of the aforementioned three types. So, the legal ruling of singling out one form of expiation is in conflict with the textual evidence and is, therefore, invalid.[332]

c) The law's consideration and invalidation of the quality is unknown (*lā yuᶜlam iᶜtibāruhu wa ilghāʾuhu*)

Under this category it is not known whether the law has considered or invalidated the quality. It has also been defined as: "That consideration for which no support exists, in terms of a clear-cut basis from the principles of the law".[333] Al-Bayḍāwī has termed this category as being the unrestricted suitable quality (*al-munāsib al-mursalah*)[334] while al-Shawkānī termed it the unrestricted public interest (*al-maṣāliḥ al-mursalah*).[335] It is commonly known that the case for 'sole propriety' is based upon unrestricted public interest.[336] Al-Zarkashī argued that the scholars of all the schools of legal thought are contented with the use of *al-munāsabah* in its general sense, and that 'unrestricted public interest' is in fact an expression of *al-munāsabah*, thereby echoing the view of al-Shawkānī.[337]

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[331] This hadith report has previously been discussed in Chapter Three, *Musnad al-Imām Ahmad b. Ḥanbal*: *Musnad Abī Hurayrah*, hadith 7900, see page 46, footnote 132, of this thesis.
[332] *al-Baḥr*, vol. 7, p. 274; *Nihāyat al-wuṣūl*, vol. 8, p. 3303.
[333] Ibid.
[334] ᶜAbd al-Raḥīm b. al-Ḥasan b. ᶜAlī al-Isnāwī, *Nihāyat al-sūl sharḥ minhāj al-wuṣūl,* 1st ed. (Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1999), vol. 1, p. 328 (hereinafter *Nihāyat al-sūl*).
[335] *Irshād*, vol. 2, p. 906.
[336] Ibid.
[337] *al-Baḥr*, vol. 7, p. 275.

Al-Rāzī explained that in most cases, a quality is given credence to be purposed as the legal cause, when it is assumed that the law considers it. The more instances that are found where the law considers the quality, the stronger the assumption will be that the quality is the legal cause. Every instance where the quality and the ruling are linked via greater specificity, then the assumption is also greater that the quality is in fact the legal cause. In these instances, the quality is more affirmed to be the legal cause and will inevitably be preferred over those qualities that are more general than it.[338]

He also argues that the suitable quality, that is known to be invalidated by the law, should be disregarded by default. On the other hand, when it is not known whether it is invalidated or considered by the law, then it is evaluated according to more specific qualities beyond its being a quality of public interest, and if not, then it is generally considered as a quality of public interest. This scenario al-Rāzī has termed as unrestricted public interest.[339]

Ibn al-Ḥājib has also viewed this category of the suitable quality as being unrestricted public interest. He discusses three scenarios with regards to it being rejected or accepted as a quality purposed as the legal cause. He states: "(i) If it is [classified as] unusual (*gharīb*) or (ii), if its invalidation [by the law] has been established, then it is unanimously rejected. (iii) If it is [classified as] harmonious (*mulāʾim*)... then it is decisively accepted".[340]

The first two scenarios would prompt the unanimous rejection of a quality purposed as the legal cause, that being: (i) classification as unusual and (ii) confirmed to be invalidated by the Lawgiver. The third scenario (iii) requires that the harmonious quality should be decisively accepted. This is the view of al-Juwaynī and al-Ghazālī and was attributed to Imam Mālik and al-Shāfiᶜī. Al-Ghazālī added the prerequisite that the public interest must be of the type 'general definitive necessity' (*ḍarūriyyah*

[338] *al-Maḥṣūl*, vol. 5, p. 165.
[339] Ibid., pp. 165-66.
[340] *Bayān al-mukhtaṣar*, vol. 3, pp. 123-24.

qaṭᶜiyyah kulliyyah). Ibn al-Ḥājib, on the other hand, preferred the rejection of the third scenario.[341]

iv) The fourth division: Suitability of the legal cause by way of its quality of effectiveness (*al-taʾthīr*) and agreeableness (*al-mulāʾamah*).

The suitable legal cause has also been categorised by its quality of being effective (*muʾaththir*) and agreeable (*mulāʾim*) pertaining the ruling (*al-ḥukm*). The suitable quality may in fact either be (i) effective (*muʾaththir*) or (ii) ineffective (*ghayr muʾaththir*). When it is ineffective it is further subdivided into agreeable (*mulāʾim*) and disagreeable (*ghayr mulāʾim*). When it is disagreeable it is further subdivided into: unusual (*gharīb*), unrestricted (*mursal*), and invalidated (*mulghan*).[342] A closer examination will now be made of the individual characteristics of the aforementioned categories and subdivisions of the suitable quality.

The scholars of legal theory, as previously mentioned, have also defined the relation between legal cause and ruling through levels of proximity. They use the terms type (*al-nawᶜ*), substance (*al-ᶜayn*) and categories (*al-jins*) to locate this notion of proximity. The forthcoming discussion is also indicative of that.

(i) The effective (*muʾaththir*) quality is indicated either by textual evidence or scholarly consensus, as being the legal cause. This quality clearly demonstrates that the effect (*al-taʾthīr*) of the substance (*al-ᶜayn*) of the quality is found in the substance of the ruling. This has also been stated as: the effect of the type of the quality is found in the type of the ruling.[343] To demonstrate this, al-Ghazālī explains that intoxication is the substance of the consumption of wine, that is, people drink to become intoxicated, and the substance of the ruling requires the prohibition of intoxication. He further

[341] Ibid.
[342] *Bayān al-mukhtaṣar*, vol. 3, p. 123; *Nafāʾis al-uṣūl*, vol. 7, p. 3271.
[343] *al-Baḥr*, vol. 7, p. 275.

explains that beer contains the substance of the quality of intoxication and is thereby explicitly linked to the ruling of prohibition.[344]

(ii) The ineffectual (*ghayr muʾaththir*) quality is further subdivided into agreeable (*mulāʾim*) and disagreeable (*ghayr mulāʾim*):[345]

- The agreeable quality has been described as a quality that is suitable for being the legal cause when the Lawgiver considers its substance in the substance of the ruling. This is demonstrated whenever the Lawgiver has sequenced or ordered the ruling in accordance with the quality. It is termed 'agreeable' because of its being in agreement with what the Lawgiver has considered in legislation. This type of suitable quality is not established by way of textual evidence or scholarly consensus as in the case of the effective quality.

- The disagreeable (*ghayr mulāʾim*) quality has been further classified into unusual (*al-gharīb*), unsupported by text (*al-mursal*) and invalidated (*al-mulghā*):

    - The unusual (*al-gharīb*) quality is a kind of suitability where the substance of the quality is considered in the substance of the ruling, only by the construction of that ruling upon the basis of that quality.[346] The substance of the quality, however, is not considered in the category of the ruling, nor is the substance and neither the category` of the ruling considered in the category of the quality, neither by way of textual evidence nor scholarly consensus. This can be observed in the quality of intoxication in relation to the prohibition of alcohol. It is evident that the substance of intoxication is considered in the substance of the ruling, by the construction of the ruling of prohibition upon the premise or quality of intoxication.

[344] *al-Mustaṣfā*, p. 320.
[345] *Bayān al-mukhtaṣar*, vol. 3, p. 123.
[346] *al-Baḥr*, vol. 7, p. 276.

Ibn al-Ḥājib demonstrated the unusual quality by the examples of the following analogically compared cases: The granting of inheritance to the woman who is divorced out of spite by her husband on his death bed, appended to the case of the killer who is prohibited from inheriting from the person he killed.[347] Here the *qiyās* is premised on the comparison of a 'contrary objective'. It appears that the killer acts illicitly to obtain his legitimate inheritance while the heritor attempts to block the legitimate right of the inheritor, his wife, by pronouncing divorce on his death bed. While suitability seems apparent, the public interest in question here is not a familiar consideration outside of the context of these two cases, and as such is classified as unusual. This type of quality has been rejected unanimously according to al-Zarkashī.[348]

- The unrestricted (*mursal*) quality is characterised as not being supported by textual evidence or scholarly consensus, or as being considered by the law. Ibn al-Ḥājib rejected the unrestricted quality,[349] while al-Ghazālī accepted it when it is of the 'general definitive necessity' (*ḍarūriyyah qaṭ'iyyah kulliyyah*) type.[350] He demonstrates this by the example of infidels who use Muslims as human shields in battle against the Muslims. He argues that it is permissible to fight the infidels even if the Muslim human shields are killed in the process. This is because the three aforementioned conditions are met. It is a necessity to protect the Muslims, and it is definitive that more loss of life would be incurred if they don't fight back, and the interest of the general Muslim community takes preference over the interest of the individual, in this case,

[347] *Bayān al-mukhtaṣar*, vol. 3, p. 124.
[348] *al-Baḥr*, vol. 7, pp. 280-81.
[349] *Irshād*, vol. 2, p. 908.
[350] *al-Mustaṣfā*, p. 176.

represented by the human shields.[351] But this, al-Ghazālī states, will not be valid if even one of the three conditions are not met, such as a situation where it is not guaranteed that the Muslims' attacking will incur less harm, or that it is absolutely necessary to suffer the loss of the human shields.[352]

° The invalidated (*al-mulghā*) quality is a quality that has not been considered by the Lawgiver, but yet it is rationally agreeable to the ruling. This has been demonstrated by the example of stopping the cultivation of grapes to prevent the making of wine. That would be invalid in terms of the law.

Under this division of *al-munāsabah*, the fourth division, an almost identical controversy occurs as has previously been discussed under the third division category (a). Difference of opinion exists with regards to the validity of a quality with respect to the proportion of the bad (*al-mafsadah*) and the good (*al-maṣlaḥah*) that is associated with the given quality purposed as the legal cause.[353]

When the good is in conflict with an equivalent presence of the bad, then it defeats the quest for good. This is the position of the majority of legal theorists and is preferred by al-Ṣaydalānī (d. 415AH)[354] and Ibn al-Ḥājib. This is because the deterrence of the bad takes preference over the obtainment of the good, considering that *al-munāsabah* functions in the context of customary or non-ritual (*ʿurfī*) matters.[355]

[351] Ibid.
[352] Ibid.
[353] *al-Baḥr*, vol. 7, pp. 280-81.
[354] He was the Jurisprudent, hadith scholar and Imam, Muḥammad b. Aḥmad al-Naysābūrī, the teacher of Imam al-Bayhaqī.
[355] *al-Baḥr*, vol. 7, pp. 280-81.

When there is no clear indication that the bad outweighs the good, then this type of quality may be accepted. If no good is obtained the quality is unanimously rejected. This is the view of al-Rāzī and al-Bayḍāwī.[356]

3. Resemblance (*al-shabah*)

The third probable method of identifying legal cause is resemblance (*al-shabah*) that has elicited various definitions by the jurists.

Some of them have defined it as: "The citing of a quality as evidence of the legal cause, after having compared it with that which resembles it, while the quality is something general seeking to establish something specific [ruling]. This is because every exercise of *qiyās* requires the parallel case (*al-farᶜ*) to resemble the original case (*al-aṣl*) by way of a connection (*al-jāmiᶜ*) between the two of them".[357] They conclude that it is imperative to assure absolute prudence when applying *al-shabah*.[358]

Some scholars, however, have rejected its validity as a method of identifying legal cause. Al-Abyārī states: "I have not seen in legal theory any case that is more disregarded than it [*al-shabah*]".[359] Al-Juwaynī argued that "its delimitation is not possible", while al-Zarkashī held the contrary view.[360] Much contention exists with regards to its definition.[361]

Al-shabah has also been defined as the reconciliation between the original and parallel cases with a quality that alludes (*mustalzim*) to its own encompassment of a requisite wisdom (*al-ḥikmah al-muqtaḍiyah*) to the ruling, without any specific indication (*min*

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[356] Ibid.
[357] Ibid.
[358] *Mīzān al-uṣūl* vol. 2, p. 864; *Fawātiḥ al-raḥmūt* vol. 2, p. 302.
[359] *al-Baḥr*, vol. 7, p. 293.
[360] Ibid.
[361] See discussions under this topic: *al-Burhān*, pp. 825-45; *al-Mustaṣfā*, vol. 3 pp. 310-18; *al-Mankhūl*, pp. 378-84; *al-Maḥṣul*, vol. 5, p. 201; *al-Iḥkām*, vol. 3, pp. 294-98, *al-Baḥr al-Baḥr*, vol. 7, pp. 293-94; *Fawātiḥ al-raḥmūt*, vol. 2, pp. 301-02.

ghayri taʿyīn).[362] An example of this definition is illustrated by al-Shāfiʿī's statement with regards to ritualistic intention (*niyyah*) in performing ritualistic ablution (*wuḍūʾ*) and *tayammum*[363]. He stated: "Two matters of ritual purity [i.e., *wuḍūʾ* and *tayammum*], so how can they be different [from one another]?"[364] By this he means that *tayammum* requires ritualistic intention in the view of all the jurists, then so too should ritualistic ablution, as the two resemble one another.[365]

Al-Rāzī, provides two perspectives with regards to its definition. The first he attributes to *al-qāḍī* Abū Bakr al-Bāqillānī, who discusses *al-shabah* in relation to other methods of identifying legal cause, namely, suitability (*al-munāsabah*) and the 'coextensive' quality (*al-ṭard*). He explains that *al-munāsabah* is based upon the quality that is suited directly (*bi dhātihi*) to the ruling, while *al-shabah* is based upon the quality that is not suited to the ruling directly, but merely alludes to a quality that is indirectly suited to the ruling. The coextensive quality, on the other hand, is neither suited to the ruling directly, nor does it allude to a quality that is indirectly suited to the ruling.[366] Al-Bāqillānī does not accept *al-shabah* as an authoritative method of identifying legal cause. He argues that *qiyās*, in general, is justified by the Companions' use of it, and that there is no account of them resorting to the method of *al-shabah*. Al-Abyārī, however, asserts that regarding its utility, there is a difference of opinion, but its exclusion as a method identifying legal cause may be based upon stubbornness on the part of the antagonists.[367]

The second perspective al-Rāzī presents is his own. He describes *al-shabah* as being constructed upon the quality that is not suited to the ruling, but where the effect (*al-taʾthīr*) of a closely related category (*al-jins al-qarīb*), on a closely related category of

[362] *al-Baḥr*, vol. 7, p. 294.
[363] This is the ritualistic act of performing dry ablution, with the use of clean earth (eg. in the form of clay, dust or sand etc.). This act is sanctioned by the Sharia in scenarios where ritualistic ablution with water is unfeasible, such as when clean water is unavailable or when the use of water would exacerbate illness.
[364] *al-Baḥr*, vol. 7, p. 294.
[365] Ibid.
[366] *al-Maḥṣul*, vol. 5, p. 201; Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 297.
[367] *Irshād*, vol. 2, p. 910.

ruling, is known through textual evidence. He emphasises that the quality is neither suitable nor considered with respect to the ruling.[368]

Al-Zarkashī reports al-Bayḍāwī's description of *al-shabah* as: "The connection of the parallel case with the ruling, because of the overwhelming resemblance of the parallel case with the original case by way of qualities, without [those qualities initially] being believed to be the basis of legal causation in the ruling of the original case".[369] *Al-shabah* has also been described as: "That [quality] which is not suited to the ruling, but the consideration of a closely related category is known with regards to a closely related category [of the ruling]".[370]

Furthermore, the difference between *al-shabah* and *al-ṭard* has also been the subject of dispute.[371] These two methods have often been defined and described in relation to one another. Al-Zarkashī differentiates between them as: ".... *al-shabah* is the connection between the two [the *farᶜ* and *aṣl*] via a quality that alludes to suitability ... while *al-ṭard* is the connection between the two, by the mere coextensiveness [of the quality to the ruling] while being safe from invalidation [by the law]".[372]

On the other hand, al-Ghazāli differentiated between the two and described *al-shabah* as a method that:

> ... necessarily goes beyond *al-ṭard* by way of being a suitable connective quality for the legal cause of the ruling, while it is not suited to the ruling [directly] ... if this is not what they mean by *qiyās al-shabah*, then I don't know what they mean by it and by what they distinguish it from coextensiveness (*al-ṭard*).[373]

[368] *al-Maḥṣul*, vol. 5, p. 202.
[369] *al-Ibhāj fī sharḥ al-Minhāj*, vol. 6, p. 2358; *al-Baḥr*, vol. 7, p. 294.
[370] *al-Baḥr*, vol. 7, p. 296.
[371] *Irshād*, vol. 2, p. 892.
[372] *al-Baḥr*, vol. 7, p. 294.
[373] *al-Mustaṣfā*, vol. 2, p. 311; *al-Baḥr*, vol. 7, p. 294.

Al-Zarkashī summarises that, *al-shabah* and *al-ṭard* both have the common feature of having an absence of apparent suitability directly to the ruling. They differ, he explains, in that, in the case of *al-ṭard*, the Legislator is known to have not considered it, and in the case of *al-shabah*, it is termed a resemblance, in view of the known absence of direct suitability to the ruling. The *mujtahid* is absolutely certain of the absence of its suitability, and the Legislator's consideration of it. It is similar to the *al-munāṣib* quality, and thus it is situated between *al-munāsabah* and *al-ṭard*.[374]

Ibn al-Ḥājib contrasted *al-shabah* with *al-ṭard*, stating that the one's presence signifies the absence of the other. He also contrasted it with the suitable quality (*al-waṣf al-munāsib*), that is suited to the ruling directly (*bi dhātihī*): "... because its suitability [the suitability of the resembling quality], is [based upon] rationale, when the legislated text (*al-shar*^{c}) does not [directly] arrive at it, like [the quality of] intoxication in the case of the prohibition [of wine]".[375] He provides a second example, that of ritual purification for ritual prayer (*al-ṣalāh*), here water is specified, just as in the case of removing physical impurity such as feces. Its suitability to the ruling is not apparent, and instead, its consideration with regards to touching the Quran and performance of ritual prayer is alluding to suitability.[376]

There are also various contending views with regards to *al-shabah*'s validity as proof for determining legal cause. Firstly, it is considered proof by the majority of scholars, and secondly, it is not accepted as proof.[377] Ibn al-Sam^{c}ānī states that most of the Ḥanāfī's do not accept *al-shabah* as a method of identifying legal cause. He attributes this opinion to al-Bāqillānī, Abū Manṣur, Abū Isḥāq al-Marwazī, al-Shīrāzī, Abū Bakr al-Ṣayrafī, and Abū al-Ṭayyib al-Ṭabarī.[378]

[374] *al-Baḥr*, vol. 7, p. 294.
[375] *Bayān al-mukhtaṣar*, vol. 3, p. 133.
[376] Ibid., p. 131.
[377] *Irshād*, vol. 2, p. 892.
[378] *al-Baḥr*, vol. 7, pp. 300-02; *Fawātiḥ al-raḥmūt*, vol. 2, p. 302.

Another view holds that it is considered valid when it is unquestionably perceived as the cause (*manāṭ*) of the ruling, by way of it alluding to the *ʿillah* of the ruling. When that is the case, *qiyās* constructed upon it is valid, as long as its resemblance is either in form (*ṣurah*) or meaning (*al-maʿnā*). This view has been attributed to al-Rāzī.[379]

With regards to the *mujtahid*, al-Ghazālī considers it as proof for him with respect to his right as a *mujtahid*, whenever he perceives it to be overwhelmingly probable (*ghalabat al-ẓann*) as the legal cause. As for the user of *qiyās*, he unrestrictedly accepts the position of the *mujtahid*.[380] Furthermore, other scholars have agreed that it constitutes proof when constructed upon overwhelming probability in the mind of the *mujtahid*,[381] and that acting on it is obligatory.[382]

Al-shabah has been rejected as a proof of legal cause from two perspectives. Firstly, the resembling quality that is suited to the ruling is accepted by agreement, but where no such suitability is established then it is viewed as a coextensive quality that is rejected. But the proponents of *al-shabah* object to this contention and they insist that while the resembling quality is not suited to the ruling directly, it implies suitability, or it may be known that the effect of its most likely category, on the ruling, is known through textual evidence. This is distinctly different to the coextensive quality that has neither direct nor implied suitability to the ruling.[383] The antagonists, however, maintain that they do not accept that implied suitability can substitute the requirement of suitability itself.[384]

The second perspective, that of al-Bāqillānī, is that the various methods of constructing *qiyās* ought to have their basis in the practice of the Companions and it cannot be established that they relied upon *qiyās al-shabah*.[385] Al-Rāzī rejects this claim and

[379] *al-Maḥṣul*, vol. 5, p. 203.
[380] *al-Mustaṣfā*, p. 318.
[381] *al-Baḥr*, vol. 7, p. 304.
[382] *Irshād*, vol. 2, p. 913.
[383] *al-Maḥṣul*, vol. 5, p. 205.
[384] *Irshād*, vol. 2, p. 913.
[385] *al-Maḥṣul*, vol. 5, p. 205.

argues that his School relies on the general meaning of the Quranic text: "*So reflect, O people of insight*"[386], and that acting on such or other means of probability is necessary.[387] The antagonists responded that the required level of probability is not established by *qiyās al-shabah*, nor does the cited Quranic verse justify the point of acting on probability as contemplated by al-Rāzī.[388]

It may be observed that because of the close relationship and subtle differences between the suitable (*al-munāsib*), resembling (*al-shabah*) and coextensive qualities (*al-ṭard*), this prompted legal theorists to discuss these methods, in relation to one another. It is again evident, that the greater use of rationality impacts on the contention surrounding the use of these methods.

4. Coextensiveness (*al-ṭard*)

The fourth probable method of identifying legal cause is coextensiveness (*al-ṭard*).

Al-Rāzī defines *al-ṭard* as the quality that is not known to be suited to the ruling, nor implied (*mustalzim*) of being suited to it, that is, whenever such a ruling arises along with the quality, in all cases, except in the parallel case that is in dispute (*maḥall al-nizāᶜ*). This, he says, is the intended meaning of *al-ṭard*, a viewpoint that he attributes to the majority of the Shāfiᶜī scholars. He further emphasises that the ruling is seen to occur along with the presence of the quality, even in a single case, reaching a strong indication of probability that it points to the legal cause.[389]

He justifies the aforementioned Shāfiᶜī position as follows: Firstly, an examination of the Sharia rules points to the fact that the unusual or rare (*al-nādir*) legal cases, in all legal categories, are connected to the norm or majority (*al-ghālib*) of legal cases. Thus, if it is observed that a quality is associated with a ruling, except in a single rare case,

[386] Quran, 59:2.
[387] *al-Maḥṣul*, vol. 5, p. 205.
[388] *Irshād*, vol. 2, p. 913.
[389] *al-Maḥṣul*, vol. 5, p. 221.

and a similar quality exists in a parallel case, the quality must be treated as an *ᶜillah* of the ruling in the single rare case too, by connecting the rare case with the majority of cases.[390] Al-Rāzī demonstrates this with an example. When the horse of the judge is parked outside the residence of the sultan, it indicates a high probability that the judge is in fact inside the palace of the sultan. This illustrates the resultant effect of comparing between the majority of cases and the single case that supports the consideration of the quality in this specific instance.[391]

The antagonists have argued that *al-ṭard* is premised on the idea that the coextensive quality simultaneously exists with respect to the presence or absence of the ruling. This cannot be established unless the ruling is proven to be applicable to the parallel case simultaneously as that would create a circular argument that would be invalid.[392] To this, the proponents respond that they do not apply this rule of 'coexistence between ruling and coextensive quality' simultaneously to the parallel case in dispute, and, therefore, no circular argument is created. The antagonists further argued that there are many things that are related to each other (i.e. the existence of one arising from the presence of the other), but they may have no causal effect on each other, such as the essence of God and His attributes that, correlates, yet, no cause and effect relationship exists between them.[393] To this the proponents respond that while *al-ṭard* occurs in some legal cases as being disconnected from causal effect between quality and ruling, it does not detract from its alluding to the *ᶜillah*. They illustrate this through the example of cumulonimbus clouds being an indicator of rain. The absence of rain simultaneously occurring during the presence of cumulonimbus clouds does not diminish it as an indication of rain. They conclude that *al-munāsabah*, *al-dawrān*, *al-taʾthīr* and *al-īmāʾ waʾl-tanbīh* are all, at times, void of causality, but that does not detract from them being indicators of causality in instances when it is apparent as an indicator, as in the example of cumulonimbus clouds being an indicator of rain.[394]

[390] *Nihāyat al-wuṣūl*, vol. 8, p. 3376.
[391] Ibid.
[392] *al-Maḥṣul*, vol. 5, p. 222.
[393] Ibid.
[394] Ibid.

Some legal theorists have also classified *al-ṭard* and *al-dawrān* as one and the same thing, while in essence they are not. The difference between the two is that *al-ṭard* is constructed upon the relationship of: 'presence of the quality along with presence of the ruling', not of its absence. *Al-dawrān* on the other hand, is constructed upon the relationship of both 'presence or absence of the quality in relation to the ruling'.[395] Al-Shawkānī attributes the later view on the difference between *al-ṭard* and *al-dawrān* to al-Hindī who views it as the position of the majority.[396]

The validity of *al-ṭard* as evidence for legal cause has also been contested.[397] Three main positions emerge in this regard. One, it unrestrictedly does not constitute proof and, two, it is unconditionally accepted as proof.[398] The majority of jurists (*fuqahāʾ*) and theologians (*mutakallimūn*) hold the first view. The third position holds that it constitutes proof with certain prerequisites but it is not unconditionally a proof. Al-Rāzī and al-Bayḍāwī accepted *al-ṭard* as a proof whereas al-Karkhī accepted it in the area of logic and disallowed it in the practice of legal interpretation or for giving *fatwā*.

Al-qāḍī Abū al-Ṭayyib al-Ṭabarī stated that some of the later scholars of his School were of the opinion that it indicated the soundness of causality and that it was adopted by a faction of Ḥanafī scholars in Iraq. This formed the basis of their position on the case of hastening (*saʿyi*) between *al-Ṣafā* and *al-Marwah*. To them it is merely hastening between two hills, which could be likened to hastening between any two hills, so they do not consider it a pillar (*rukn*) of Hajj.[399] Al-Zarkashī comments that no intelligent person would doubt their stance as an absurdity.[400] Al-Dabūsī dismissed the scholarship of anyone who used *al-ṭard* as a proof or indicator of identifying legal cause.

[395] *Irshād*, vol. 2, p. 915.
[396] Ibid.
[397] *Mīzān al-uṣūl*, vol. 2, p. 860.
[398] *Irshād*, vol. 2, p. 915.
[399] *al-Baḥr*, vol. 7, p. 315.
[400] Ibid.

In summary, it appears that *al-ṭard*, in most cases, has been rejected as a method of identifying legal cause. It is not premised on suitability as stipulated by the majority of jurists, nor implied suitability, as in the case of *al-shabah*, but it may be valid when the causality of the quality proposed as the *ᶜillah* is established by separate evidence.

5. Rotation (*al-dawrān*)

The fifth probable method of identifying legal cause is rotation (*al-dawrān*). It has been defined as: The presence of the ruling along with the presence of the quality, and that it emerges with its emergence in a single form or case. This has been illustrated by the case of the prohibition of intoxication from drinking grape juice. As soon as the grape juice does not intoxicate, it is no longer prohibited, and when intoxication is found in it, the prohibition is also found. When the presence of intoxication ceases, such as when the grape juice turns into vinegar, its prohibition too ceases. This indicates that intoxication is the *ᶜillah*.[401] Thus, the rotation of the quality along with the rotation of the ruling is indicative of that quality being the *ᶜillah*.[402] Ahmad summarises the aforementioned definition as: "When a certain quality of the ruling exists, the ruling exists along with that certain quality, and if it does not exist, the ruling too does not exist".[403]

Legal theorists have differed with regards to its validity and utility as a method of identifying legal cause. Firstly, some of the Muᶜtazilah considered it as an absolute (*al-qatᶜī*) method of identifying legal cause. Ibn al-Samᶜānī reported it as being considered as the strongest of proofs by many of the Ḥanafīs and that their scholars in Iraq fervently applied it.[404]

[401] *al-Baḥr*, vol. 7, p. 308; *al-Ibhāj fī sharḥ al-Minhāj*, vol. 3, p. 73; *al-Mustaṣfā*, p. 307.
[402] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence*, p. 315.
[403] Ibid.; Ahmad Hasan, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), p. 40.
[404] *al-Baḥr*, vol. 7, p. 309; *Nihāyat al-wuṣūl*, vol. 8, p. 3352.

Secondly, the majority of scholars have considered it as having probable utility for determining the *ᶜillah*, with the condition that no rival quality (*muzāḥim*) exists. This is because the legal cause, in its essence, does not necessitate the derivation of a ruling. This, they explain, is merely like an erected sign (*ᶜalāmah manṣūbah*), so when the quality rotates with the ruling it is merely probable that it is specified (*muᶜarraf*) as the *ᶜillah*.[405]

Ṣafī al-Dīn al-Hindī regarded *al-dawrān* as a preferred method of identifying legal cause while al-Juwaynī remarked that the scholars who subscribe to logical debate (*al-jadal*) consider it as the strongest of methods. *Al-qāḍī* Abū al-Ṭayyib al-Ṭabarī, too classified it as one of the strongest of methods.[406]

Some legal theorists argued that *al-dawrān* does not suffice as a method on its own, neither as an absolute nor probable method. Al-Shawkānī ascribed this view to Abū Manṣūr al-Baghdādī (d. 429AH)[407], Ibn al-Samᶜānī, al-Ghazālī, al-Shīrāzī, al-Āmidī and Ibn al-Ḥājib.[408] They argued that *al-dawrān* can occur in the absence of a causal relationship between the quality and the propositioned legal cause, in which case it cannot be a proof for causality. When no effect (*maᶜlūl*) is observed with the rotation of the *ᶜillah*, with regards to its presence and absence, then this cannot justify the *ᶜillah* absolutely, neither in apparent nor implied forms.[409]

The remaining discussions on 'refinement of the basis of the ruling' (*tanqīḥ al-manāṭ*), 'verification of the basis of the ruling' (*taḥqīq al-manāṭ*), and 'deduction or extraction of the basis of the ruling' (*takhrīj al-manāṭ*), have been discussed by al-Shawkānī under the heading of methods of identifying legal cause, to the exclusion of *takhrīj al-*

[405] Ibid.
[406] *al-Baḥr*, vol. 7, pp. 309-10.
[407] He is ᶜAbd al-Qāhir b. Ṭāhir, al-Ustādh Abū Manṣūr al-Baghdādī, one of the great early figures of the Shāfiᶜī School. He authored works in annotations and juristic differences. Some of his famous writings include: *Bulūgh al-madā fī uṣūl al-hudā*; *Taʾwīl mutashābih al-akhbār* and *Al-taḥṣīl fī ʾl-uṣūl*. See *Aᶜlām al-nubalāʾ*, vol. 17, p. 572*; Hidāyat al-ᶜārifīn*, vol. 1, p. 606 and *Kashf al-ẓunūn*, vol. 1, p.254.
[408] *Irshād*, vol. 2, p. 918.
[409] Ibid.

manāṭ. However, these topics are also discussed under the heading of 'independent reasoning in legal cause' (*al-ijtihād fī ʾl-ᶜillah*).

6. Refinement of the basis of the ruling (*tanqīḥ al-manāṭ*)

The linguistic meaning of *tanqīh* is given as: refinement (*tahdhīb*) and differentiation (*tamyīz*).[410] It is also called refined speech (*kalām munaqqaḥ*), in the sense that it contains no superfluity (*ḥashwah*). The term *manāṭ* is also given as a synonym for *ᶜillah*.[411]

Ibn Daqīq al-ᶜĪd explained that its application with regards to the *ᶜillah* falls under the science of figurative language, because when the ruling is associated with the quality that is propositioned as the *ᶜillah*, it is like something sensed or perceived (*al-maḥsūs*), indirectly. It entails resemblance of what is understood (*al-maᶜqūl*) with the senses, and that it is eventually adopted as nomenclature (*al-iṣṭilāḥ*) amongst the jurists, since it would not have been understood from a different angle.[412]

Legal theorists provide their own definition of *tanqīh al-manāṭ*.[413] They describe it as connecting the parallel case with the original case by the cancellation of any dissimilarity. Ṣafī al-Dīn al-Hindī explains that *tanqīḥ al-manāṭ* is a category of specific *qiyās*, at a level beneath the category of unrestricted *qiyās*, but that both these categories, more often than not, produce speculative results.[414]

Al-Ghazālī remarks that *tanqīh al-manāṭ* is unanimously accepted, and that he does not know of any difference of opinion, amongst scholars, with regards to its permissibility.[415] This contention, however, has been challenged on the basis that agreement cannot simply be established by the proponents of *qiyās* to the exclusion of

[410] *Lisān al-ᶜArab*, vol. 2, pp. 624-25.
[411] *al-Baḥr*, vol. 7, p. 322.
[412] Ibid.
[413] Ibid. pp. 322-23; *al-Mustaṣfā*, pp. 323-24; *al-Maḥṣūl*, vol. 5, pp. 230-31; *al-Iḥkām*, vol. 3, p. 303.
[414] *al-Baḥr*, vol. 7, p. 323, *Nihāyat al-wuṣūl*, vol. 8, p. 3381.
[415] Ibid., p. 323.

the antagonists. Agreement must be subject to the original debate surrounding the acceptability of *qiyās*.[416] It is important to note, that this alleged agreement may be premised on the antagonists' acceptance of *tanqīh al-manāṭ*, as an approach within *ijtihād*, and not specifically as a method of identifying legal cause.

Al-Abyārī believes *tanqīh al-manāṭ* falls outside the scope of *qiyās* and, that it is a separate interpretive phenomenon.[417] This description as an 'interpretive phenomenon' outside of *qiyās* appears to tie up with the acceptance of it by the antagonists.

Al-Rāzī contends that *tanqīh al-manāṭ* is in fact tantamount to the method of *al-sabr waʾl-taqsīm* and does not recognise it as a separate method.[418] But his claim has been countered by the argument, that the apparent difference between the two is the concept of limitation or confinement (*al-ḥaṣr*) that is a significant feature of *al-sabr waʾl-taqsīm*, while *tanqīh al-manāṭ* is premised on identifying and invalidating dissimilarity.[419]

7. Verification of the basis of the ruling (*taḥqīq al-manāṭ*)

Al-Ghazālī explains that *taḥqīq al-manāṭ* is premised on causality (*ʿilliyyah*) of an *ʿillah* that is known by the text, and or consensus. Thus, *ijtihād* can be exercised by it in cases of dispute, like the verification (*al-taḥqīq*) that the grave robber (*al-nabbāsh*) is a thief. [420]

Al-Shaṭibī, with regards to the *ʿillah* being known by the text, does not state whether the *ʿillah* needs to be indicated explicitly or by way of inference by the text. He requires only that the ruling be established by any source of the Sharia. He classifies

[416] Ibid.
[417] *al-Baḥr*, vol. 7, p. 323.
[418] *al-Baḥr*, vol. 7, p. 323.
[419] *Irshād*, vol. 2, pp. 919-20.
[420] *al-Baḥr*, vol. 7, pp. 322-23; *al-Mustaṣfā*, p. 323. *al-Iḥkām*, vol. 3, p. 303.

taḥqīq al-manāṭ as being either general or particular, and expressed a more general and comprehensive conception of it.[421]

This method of identifying legal cause is named 'verification of the basis of the ruling' (*taḥqīq al-manāṭ*), because the quality or 'basis of the ruling' or *ᶜillah*, is already known to be as such. The verification merely aims to establish the quality's relevance with regards to the specific case (*al-ṣūrah al-muᶜayyanah*).[422]

Al-Ghazālī considers *taḥqīq al-manāṭ* as a form of *ijtihād* and states that there is no difference of opinion amongst the Imams regarding its validity, and thus it cannot be a form of *qiyās*, that is well-known to have disputed utility.[423]

Al-Shawkānī, under his discussion of *taḥqīq al-manāṭ*, includes Ibn al-Ḥājib's classification and correlation of it, into: *qiyāṣ* with regards to the *ᶜīllah*, *qiyās* with regards to indication (*dalālah*) and *qiyās* with regards to meaning of the original case.[424] It is very important to note, that the word *qiyās*, in the context of Ibn al-Ḥājib's presentation, means juristic reasoning or *ijtihād*. It is a common feature among early jurisprudents and legal theorists, like al-Shāfiᶜī, to use the term *qiyās* synonymously with *ijtihād*.

Ibn al-Ḥājib further elaborates that *qiyāṣ* or *ijtihād* with regards to the *ᶜīllah* is that which is made apparent by the *ᶜillah*. Like what is said regarding *nabīdh*[425] drink, it intoxicates so it is prohibited like wine. He then explains *qiyās* with regards to indication (*al-dalālah*) as not having its *ᶜillah* mentioned or known, but that a concomitant quality (*waṣf mulāzim*) is provided for it, such as the analogy of beer justified with the ruling of wine, by way of its strong odour.[426] But it is the third

[421] Ahmad Hasan, Modes of Reasoning in Legal Cause: al-Ijtihād fiʾl-ᶜillah, *Islamic Studies*, vol. 22, No. 1 (Spring 1983), p. 80.
[422] *Irshād*, vol. 2, p. 920.
[423] *al-Baḥr*, vol. 7, p. 324; *al-Mustaṣfā*, p. 230; *Irshād*, vol. 2, p. 920.
[424] *Bayān al-mukhtaṣar*, vol. 3, p. 140; *Irshād*, vol. 2, p. 920.
[425] In this context it referes to a drink made of dates or raisens steeped in water until fermentation occurs.
[426] Ibid., vol. 3, pp. 140-41.

category, '*qiyās* with regards to meaning of the original case', that relates to the discussion here. Ibn al-Ḥājib explains that the original and parallel cases are connected by a process of nullifying or cancelling out dissimilarity or discrepancy, and this, in essence, is *tanqīh al-manāṭ*.[427]

In summary, the study of this chapter, namely, the probable methods of identifying legal cause, point to the vast disagreement with regards to their definition, application, validity, classification and authority. They do appear, nonetheless, to be valuable methods of probing legal cause, where the more definitive methods are not viable.

The conclusion of this chapter leads to the final chapter of this thesis. The primary objective of this forthcoming chapter is to examine contemporary case constructions of *qiyās* where the classical model of *masālik al-ʿillah* may be applied.

[427] Ibid., vol. 3, p. 141.

Chapter 4

Contemporary case constructions based upon *qiyās*. How may the classical model of *masālik al-ᶜillah* be applied?

In this chapter I present three case construstions pertaining to the contemporary topic of suicide attacks. In my survey of potential cases to demonstrate this, it became evident that *muftīs* rarely spend much time justifying or explaining the legal cause upon which their respective cases of *qiyās* are premised. They merely pronounce a verdict of a new case based on a precedent for which a clear legal verdict already exists. I thus concluded it to be more practical to evaluate such legal causes through the theory presented in the previous chapters to demonstrate how *qiyās* can be applied in the formulation of legal verdicts in contemporary cases.

In selecting cases for detailed analysis for the discussion, I have applied two primary selection criteria:

1) To include cases having significant impact on the Muslim community. This is to ensure that cases that are most relevant to the lives of the modern Muslim society are addressed.
2) To include cases for which sufficient academic material or resources exist for an extensive examination of these cases.
3) To include cases where I have had extensive reading.

I have selected the topic of suicide attacks through which I have subsequently identified three analogical case constructions that scholars have used to justify their *fatāwā* on the question of its permissibility or prohibition. A primary aim of this approach is to compare the various constructions that have been formulated in respect of the same new case, that is, the legal ruling of suicide attacks.

The case of suicide attacks

Suicide attacks have been a prominent feature of the various conflicts in the Muslim lands in recent decades. A 1995 *fatwā* by the Egyptian cleric, Yūsuf al-Qaraḍāwī, restricted the legitimacy of this practice to the occupied territories such as Palestine,[428] while other scholars have unrestrictedly sanctioned it as a legitimate tool of contemporary warfare.[429]

Many arguments, from different angles, have also been proffered with regards to suicide attacks, by Muslim scholars around the globe.[430] Firstly, scholars have addressed its legal status from a harm-benefit perspective. Various harms have been identified that are directly suffered as a consequence of these attacks. The Saudi *muftī*, Muḥammad b. Sāliḥ al-ᶜUthaymīn, argued that retaliation by opponents, to suicide attacks incur greater loss for the Muslim fighters such as the suffering caused to the family left behind of the suicide attacker, as experienced by the Palestinians.[431] Tahir-ul-Qadri also pointed out that the image of Islam and the Muslims is tarnished by these attacks and that they bring Islam into disrepute.[432] Jihadists, on the other hand, have argued that numerous benefits are gained from these attacks such as striking terror into the hearts of their enemies and breaking their spirit, which in turn prevents them from mixing with the 'occupied' community or harassing or exploiting them.[433] They also highlight the loss of lives suffered by their enemies and particularly the ratio between the losses of single suicide operatives to the large-scale deaths of enemy combatants.[434]

Secondly, scholars have highlighted the numerous consequences associated with some suicide attacks that are categorically prohibited in the sacred texts. This angle to the debate, on the legality of suicide attacks, has prompted large-scale condemnation by leading Muslim clerics,

[428] Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings* (London: Minhaj-ul-Quran International, 2010), p. xxv.
[429] Gibrīl Ḥaddād, *Inghimas in 'Suicide' Warfare*, livingislam.org, Web. 20 March 2019. {https://www.webcitation.org/query?url=http://www.livingislam.org/k/ighm_e.html&date=2011-05-28}.
[430] Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings*, pp. 239-49; ᶜAbd al-ᶜAzīz b. Bāz; Muḥammad b. Sāliḥ al-ᶜUthaymīn, *Ruling on blowing oneself up*, islamqa.info, Web. 21 March 2019, {https://islamqa.info/en/answers/217995/ruling-on-blowing-oneself-up}.
[431] Ibid.
[432] Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings*, p. 89.
[433] Yūsuf b. Ṣāliḥ al-ᶜUyarī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations* ([place of publication unknown]: At-Tibyan Publications, n.d.), p. 8.
[434] Ibid., p. 9.

even by those who strongly sympathise with the objectives behind them. The deliberate killing of innocent women and children,[435] the aged,[436] workers[437] and monks[438], have been prohibited by the Prophet (*ṣ*) as they are all considered non-combatants who are not to be harmed according to the Islamic position on warfare. The Sharia has also gone to the extent of prohibiting the mutilation of combatant corpses,[439] an act that some scholars have equated with bomb blasts used in suicide attacks.[440]

Thirdly, scholars have debated whether suicide attacks are in fact legally the same as suicide 'proper'[441] as articulated by the sacred texts, whether suicide attackers are sanctioned by any textual evidence or whether they are like war heroes plunging into the thick of battle (*inghimās*)[442] leaving no or very little prospect of survival. For the purpose of the case study, I will focus on the third area of the debate.

There are a number of challenges that arise in addressing this particular aspect of the broader debate. For example, with the global war on terror, the jihadist discourse on the topic is often

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[435] ᶜAbd Allāh b. ᶜUmar reported that: "A woman was found killed in one of these battles, so the Messenger of God (*ṣ*) forbade the killing of women and children". *Ṣaḥīḥ Muslim: kitāb al-jihād waʾl-siyar, bāb taḥrīm qatl al-nisāʾ waʾl-ṣibyān fī ʾl-ḥarb*, hadith 4320.

[436] Jarīr b. ᶜAbd al-Ḥumayd reports that Abū Bakr al-Siddīq said: "In war, do not kill the child, a woman, the feebly aged, and do not burn the crops nor the date palms nor destroy homes and do not cut down fruit bearing trees". Muṣannaf Ibn Abī Shaybah*: kitāb al-siyar, bāb man yunhā ᶜan qatlihī fī dār al-ḥarb*, hadith 33122.

[437] Rabāḥ b. Rabīᶜ reported that he joined an expedition with the Prophet (*ṣ*), when he approached Khālid b. Walīd and said: "Do not kill the children nor the wage earners". *Nayl al-awṭār*: *kitāb al-jihād waʾl-siyar*, *bāb al-kaff ᶜan qaṣdi al-nisāʾ waʾl-ṣibyān waʾl-ruhbān waʾl-shaykh al-fānī biʾl-qatl*, hadith 3322.

[438] Ibn ᶜAbbās reports that when the Prophet (*ṣ*) dispatched an army for battle, he said: "Go forth in the name of Allah Most High, fighting in the cause of Allah whoever disbelieves in Allah. Do not be treacherous nor fetter nor mutilate, and do not kill the children nor the people in towers (i.e. monks or persons typically living under religious vows of abstinence and obedience)". *Nayl al-awṭār*: *kitāb al-jihād waʾl-siyar, bāb al-kaff ᶜan qaṣdi al-nisāʾ waʾl-ṣibyān waʾl-ruhbān waʾl-shaykh al-fānī biʾl-qatl*, hadith 3324.

[439] Sulaymān b. Burayd reports "When the Messenger of God (*ṣ*) appointed anyone as a leader of an army or detachment he would especially exhort him to fear Allah and to be good to the Muslims who were with him. He would say: 'Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. Make a holy war, do not embezzle the spoils; do not break your pledge; and do not mutilate [the dead] bodies; do not kill the children'." *Ṣaḥīḥ Muslim: kitāb al-jihād waʾl-siyar, bāb taʾmīr al-imām al-umarāʾ ᶜalā ʾl-buᶜūth wa waṣiyyatihi iyyāhum bi ādāb al-ghazwī wa ghayrihā*, hadith 4294.
This order pertains to dead combatants, since mutilation was commonly practiced among the pagan Meccans.

[440] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, pp. 49-56. See also a list of scholars that al-ᶜUyayrī mentions to have issued verdicts in support of suicide attacks at footnote 112 on page 56 of this same treatise.

[441] To manage the clarity of distinguishing between (a), the debated phenomenon of suicide attacks, and (b), the concept of suicide that is categorically prohibited by Sharia law, I have added the word 'proper' in quotation marks whenever the use of the word suicide refers to (b), i.e., categorically prohibited suicide.

[442] Literally it means: plunging into, and in the context of battle, plunging into the thick of battle.

removed from its sources both in the Arabic and English language. URL links provided in academic literature, to materials of jihadist Islamic scholars, are often taken down, or replaced by non-related websites such as pornographic sites or 'domain under construction' landing pages. I have thus, for the jihadist view on the topic, primarily relied on the translated works of Yūsuf b. Ṣāliḥ al-ᶜUyayrī (d. 2004), a prominent Saudi jihadist strategist,[443] who is recognised as being the first leader of al-Qaeda on the Arabian Peninsula. He was also "an important ideologue, whose ideas give a much more coherent view of jihadism... as it has been adopted by a new generation (of jihadists)".[444]

The phenomenon of suicide attacks remains a stark reality of the ongoing battle between jihadist movements and opposing forces in the various conflict zones. But it appears that attempts at constructing *qiyās*, generally, and identifying the respective legal causes for suicide 'proper' or *inghimās*, specifically, has not provided clear legal theory to substantiate these conflicting views.

I will attempt to select plausible methods of identifying legal cause from the preceding chapters of this study and then apply their theories in a bid to better understand the legal causes of the three case constructions that have been selected.

Construction 1: Suicide attacks are like acts of suicide 'proper' that is unequivocally prohibited in the Quran and Sunnah.

Al-ᶜUyayrī submits that "not every martyrdom operation is legitimate, nor is every martyrdom operation prohibited..."[445] He regards the term suicide bombing as an incorrect and fabricated definition that was invented to discourage fighters from such activities.[446]

He further views suicide 'proper' as being an act driven by sadness, lack of patience and weakness or absence of faith. The one who kills himself, driven by these motivations or qualities,

[443] Roel Meijer, Yūsuf al-'Uyairī and the Making of a Revolutionary Salafi Praxis, *Die Welt des Islams*, New Series, vol. 47, Issue 3/4, Islam and Societal Norms: Approaches to Modern Muslim Intellectual History, (2007), p. 424.
[444] Ibid., p. 422.
[445] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 7.
[446] Ibid.

he concedes, is threatened with Hell-Fire and incurs the curse of Allah. He argues that this is distinctly different from the one who sacrifices his life, fighting in the cause of God, out of faith and sincerity with the intention to establish His religion.[447] Ultimately, he argues that suicide attacks are not like the notion of suicide 'proper'. Al-Albānī strongly agreed with al-ʿUyayrī's view stating:

> This is not suicide. Because suicide, is when a person kills himself to escape a hard life which he is going through... No one does that, except one who is displeased with his Lord, and rejecting the Decree of Allah. Rather, this is jihad in the path of Allah... he (the fighter) goes forth, as many of the Pious Predecessors and those from amongst the Companions and those after them... plunging into the disbelieving enemy, attacking them... until they are killed, while they were patient and satisfied, because they believed that Paradise is in front of them. So, what a difference there is between one who kills himself in this method of jihad, and one who escapes from a hard life by committing suicide![448]

The Egyptian scholar, al-Qaraḍāwī, argues that context does apply in identifying legal cause, and that suicide attacks are contextually different to suicide 'proper'. He states:

> A martyr operation is carried out by a person who sacrifices himself, deeming his life of less value than striving in the cause of God, in the cause of restoring the land and preserving dignity. To such a valorous attitude applies the Quranic verse:[449] "*And of the people is he who sells himself, seeking means to the approval of Allah. And Allah is kind to [His] servants*".[450]

He further argues that a clear distinction has to be made between martyrdom and suicide since the latter is an act of taking one's own life intentionally out of despair, and finding no escape

[447] Ibid.
[448] Ibid., pp. 49-50.
[449] Quran 2:207
[450] Yūsuf al-Qaraḍāwī, *Palestinian Women Carrying Out Martyr Operations*, islamonline.net, Web. 22 March 2019, {https://archive.islamonline.net/?p=724}.

except putting an end to one's life, whereas martyrdom is a heroic act of choosing to suffer death in the way of Allah.[451] He also contends that suicide means taking one's own life without any lawful reason or doing so to escape pain or social problems.[452]

Al-ᶜUthaymīn sanctioned suicide attacks that yield 'great benefit for Islam' and argues that Ibn Taymiyyah had sanctioned this using the example of the young boy in the story of "the People of the Ditch".[453]

The antagonists of suicide attacks, however, contend that the mere act of being killed by one's own hand constitutes suicide 'proper', regardless of the intention of the attacker. It would seem that a fundamental legal theory that drives the dispute here is whether the legal cause of law is synonymous to the objective or wisdom (*ḥikmah*) of the law? Also, how does one navigate the problem of the intention of the suicide attacker? This point is made by al-ᶜUyayrī who argues that intention is a prominent quality that is considered across the various branches of the Sharia. In support of his argument, he states that marrying an irrevocably[454] divorced woman is permissible. However, marrying her with the sole purpose of reuniting her with her previous husband is strictly prohibited.[455]

The antagonists use a plethora of evidences for the original case, namely, that suicide is unequivocally prohibited in the Quran and Sunnah and that the new case, suicide attacks, is in fact exactly like the notion of suicide mentioned in the Quran and Sunnah. For example, the Quran states:

> *O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another].*

[451] Ibid.
[452] Yūsuf al-Qaraḍāwī, *Martyr Operations Carried Out by the Palestinians*, islamonline.net, Web. 22 March 2019, {https://archive.islamonline.net/?p=6379}.
[453] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 51.
[454] This is a woman who has been issued three divorce pronouncements (*ṭalāqs*) from her husband and may not marry him again until she remarries and is divorced by her second husband, with the condition it is not done to make her permissible for the first husband.
[455] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 46.

Indeed, Allah is to you ever Merciful.[456] *And whoever does that in aggression and injustice - then We will drive him into a Fire. And that, for Allah, is [always] easy.*[457]

The Quranic exegist, al-Baghawī, in his explanation of the aforementioned verse (Quran 4:29), cites a supporting verse: "*And spend in the way of Allah and do not throw [yourselves] with your [own] hands into destruction [by refraining]*".[458] He appears to connect the statement "*And do not kill yourselves*" in Quran 4:29 to the statement "*and do not throw [yourselves] with your [own] hands into destruction*" (Quran 2:195) and explains that Allah intended the Muslim who kills himself.[459]

Similarly, Tahir-ul-Qadri makes the same argument by citing[460] al-Rāzī's explanation of Quran 4:29 "*And do not kill yourselves*" stating that this verse points to the prohibition of killing another and killing oneself unjustly.[461]

Furthermore, there are several Prophetic hadith reports that support this argument, such as: "Whoever purposely throws himself from a mountain and kills himself, will be in the Hell-Fire falling down into it and abiding therein perpetually, forever"; and "Whoever drinks poison and kills himself with it, he will be carrying his poison in his hand and drinking it in the Hell-Fire wherein he will abide eternally, forever"; and "Whoever kills himself with an iron weapon, will be carrying that weapon in his hand and stabbing his abdomen with it in the Hell-Fire wherein he will abide eternally, forever".[462]

The aforementioned three hadith reports appear to feature the ***sixth type*** of suggestion and allusion (*al-īmāʾ waʾl-tanbīh*). This theory has been extensively discussed in Chapter Two under

[456] Quran 4:29.
[457] Ibid. 4:30.
[458] Ibid. 2:195.
[459] Al-Ḥusayn b. Masᶜūd al-Baghawī, *Tafsīr al-Baghawī*, 1st ed., ᶜAbd al-Razzāq al-Mahdī (ed.), 5 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ᶜArabī, 1999), vol. 1, p. 602.
[460] Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings*, p. 78.
[461] Fakḥr al-Dīn al-Rāzī, *al-Tafsīr al-kabīr*, 3rd ed., 32 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ᶜArabī, 1999), vol. 10, p. 57.
[462] *Saḥīḥ al-Bukhārī: kitāb al-ṭibb, bāb shurb al-summ waʾl-dawāʾ bihī wa bimā yukhāfu minhu waʾl-khabīth*, hadith 5778.

the third method of identifying legal cause that is deemed valid by the majority of jurists, namely suggestion and allusion (*al-īmāʾ waʾl-tanbīh*). The Lawgiver assigns a ruling to a quality that constitutes the legal cause, that is, the text pronounces a condition along with an associated recompense (*jazāʾ*).[463] For instance, the condition 'Whoever kills himself' is associated with the recompense of 'will be ... in the Hell-Fire' and the condition 'Whoever purposely throws himself from a mountain and kills himself' is associated with the recompense of, . . . 'will be in the Hell-Fire'

Furthermore, various accounts are given where the Prophet (*ṣ*) would not even pray on a person who committed suicide.[464] He was also reported to have said: "There was a man who sustained a wound, so he killed himself. So, Allah said: 'My servant hurried to bring death upon himself, so I have declared Paradise unlawful for him'."[465]

It would appear that the text of the latter hadith report has its legal cause clearly stated in the words of the Legislator. The legal cause here is stated by the textual evidence itself and thus falls under the category of the legal cause termed *al-ʿillah al-manṣūṣah* (legal cause that is stated in the textual evidence) as mentioned in the classical works of legal theory.

The former three hadith reports offer no context into the legal cause, beyond the quality of self-inflicted death. However, the latter hadith report mentioning 'My servant hurried to bring death upon himself', provides further context that this self-inflicted death is driven by haste. It is this very type of point that ignites the controversy: is the prohibition of suicide purely constructed on the act of self-inflicted death, that is, death by one's own hand, or does further context weigh in on the process of identifying legal cause?

The majority of scholars require the legal cause to be a constant attribute (*munḍabiṭ*) that remains applicable to all cases, unaffected by varying persons, time, place or circumstances. The legal

[463] *al-Baḥr*, vol. 7, p. 256.
[464] *Saḥīḥ Muslim: kitāb al-janāʾiz, bāb tark al-ṣalāt ʿalāʾl-qātil nafsahu*, hadith 2133; *Sunan al-Nasāʾī: kitāb al-janāʾiz, bāb tark al-ṣalāt ʿalā ʾl-qātil nafsahu,* hadith 1964; *Sunan Abī Dāwūd: kitāb al-janāʾiz, bāb al-imām lā yuṣallī ʿalā man qatala nafsahu*, hadith 3185.
[465] *Ṣaḥīḥ al-Bukhārī: kitāb aḥādīth al-anbiyāʾ, bāb mā dhukira ʿan banī isrāʾīl*, hadith 3463.

cause should thus not be latent and must instead be obviously understood. To them, the *ḥikmah* is precluded from the scope of what constitutes the legal cause since it often varies with circumstantial changes.[466] This seems to support the stance of the antagonists of suicide attacks, since attributes concerning the attacker, like intention and circumstance, is latent and inconstant and thus invalid to them.

The Mālikī and Ḥanbalī Schools, however, maintain that the legal cause need not be a constant attribute as it merely requires an appropriate or reasonable relationship to the ruling (*al-ḥukm*). They also draw no distinction between legal cause and the *ḥikmah* of the ruling. In their view, the *ḥikmah* aims to attract an evident benefit or prevent an evident harm since this is the ultimate objective of the law.[467]

A good example to demonstrate these two opposing views are the rulings pertaining to the traveller who may join and shorten prayers and is not required to observe fasting. The *ḥikmah* of the ruling is to alleviate 'hardship', while the *ᶜillah* is the distance travelled.[468] It is clear that 'hardship' is a latent and subjective attribute that could change from one journey to another, such as the difference between travelling on a camel and travelling in a luxury vehicle. The measure of distance, however, is an obvious and consistent attribute and thus, to the majority, constitutes the legal cause for the rulings pertaining to the traveller.

Kamali agrees with the Mālikī-Ḥanbalī stance on the matter since "the realisation of benefit (*al-maṣlaḥah*) and prevention of harm (*al-mafsadah*) is the basic purpose of all the rulings of the Sharia, it would be correct to base analogy on the *ḥikmah*".[469]

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[466] Mohammed Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 189.
[467] Ibid., p. 190.
[468] Kamali, in his illustration of these two conflicting views, presents the legal ruling of pre-emption (*shufᶜah*) concerning the joint ownership of real estate. Such owners have priority in purchasing the property from the other, whenever a partner intends to sell out of his share in such property. The legal cause in pre-emption is joint ownership itself, whereas the *ḥikmah* of the ruling is the protection of the remaining partner against possible harm arising from such sale to a third party. It is true that the harm which the Lawgiver intends to prevent by the ruling, may or may not materialise. Therefore, the *ḥikmah* is not constant and may thus not constitute the legal cause of pre-emption. But the legal cause of pre-emption is joint ownership itself. Unlike the *ḥikmah*, it is a constant attribute that does not change under varying circumstances. Cf. *Principles of Islamic Jurisprudence*, p. 189.
[469] Mohammed Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 190.

Al-ᶜUyayrī's constructions of *qiyās* that seek to justify the use of suicide attacks in warfare will now be discussed.

Construction 2: Suicide attackers are like the believers from whom God had purchased their lives and property, in exchange for Paradise.

Al-ᶜUyayrī views suicide attacks as a form of battle that is sanctioned by the Quran, and cites the following verse in support thereof:

> *Indeed, Allah has purchased from the believers their lives and their properties [in exchange] for that they will have Paradise. They fight in the cause of Allah, so they kill and are killed. [It is] a true promise [binding] upon Him in the Torah and the Gospel and the Quran. And who is truer to his covenant than Allah? So, rejoice in your transaction which you have contracted. And it is that which is the great attainment*.[470]

He argues that the above verse constitutes a general and unrestricted statement that, in any scenario where a Muslim fighter offers his life to attain Paradise, it is unrestrictedly permissible that he kills and is killed in the process, unless specific evidence prohibits it.[471] He directly associates the idea of killing and being killed in this verse to the act of suicide attacks. Gibrīl Ḥaddād agrees with al-ᶜUyayrī that Quran 9:111 is the basis for all acts of self-sacrifice by the fighter to gain Paradise in return.[472]

One of the methods of identifying the *ᶜillah* that may be applied here is suggestion and allusion (*al-īmāʾ waʾl-tanbīh*). The verse in question comprises the ruling (*ḥukm*) "*they will have Paradise*", and the compound legal cause, proposed by al-ᶜUyayrī is "*They fight in the cause of Allah, so they kill and are killed*" (*fa-yaqtulūn wa yuqtalūn*). It has previously been mentioned that the compound *ᶜillah* is composed of more than one quality such as the qualities of edibility

[470] Quran 9:111.
[471] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 10.
[472] Gibrīl Ḥaddād, *Inghimas in 'Suicide' Warfare*, livingislam.org, Web. 20 March 2019, {https://www.webcitation.org/query?url=http://www.livingislam.org/k/ighm_e.html&date=2011-05-28}.

and measurability in maize and wheat in relation to usury.[473] The first quality mentioned in the verse "*They fight in the cause of Allah*" may again be established by the ***sixth type*** of suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) that occurs when a ruling is assigned to a quality, that constitutes the legal cause, when the text pronounces a condition with an associated recompense (*jazāʾ*).[474] The associated recompense in question here is thus "*they will have Paradise*", and its condition is "*They fight in the cause of Allah*".

The remaining component of the compound *ʿillah* (*fa-yaqtulūn wa yuqtalūn- so they kill and are killed*), appears to be of the ***first type*** of suggestion and allusion (*al-īmāʾ waʾl-tanbīh*), which occurs when there is a connection between the ruling and the legal cause by means of a prefixed *fāʾ* which is prefixed to the legal cause and the ruling precedes it. This has been previously demonstrated with the hadith report concerning the pilgrim in consecration (*iḥrām*): "Do not cover his head, for indeed he (*fa-innahu*) will be resurrected pronouncing the *talbiyyah*".[475] Based upon this, it appears that the qualities that represent the *ʿillah* in this verse may be that, one, the fighting is in fact in the cause of Allah and, two, that the fighters kill and are killed (*fa-yaqtulūn wa yuqtalūn*).

It is important to note that the conveyed meaning of the text (*al-manṭūq*), of specific interest here, is that '*they are killed*' (*yuqtalūn*). This seems to confirm that they are killed in the process of fighting, which does not settle the debate surrounding them killing themselves.

It is also important to note, as previously stated, that suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) is an apparent textual evidence for identifying legal cause, in the form of a probability and 'pointing to it' (the legal cause), that is understood by the language itself or certain Arabic particles that are indicative of cause (*sabab*). The application of suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) to the verse of killing to attain Paradise here, in identifying a complex *ʿillah*, is the 'pointing to' legal cause, by means of both what is understood by the language of the text and by way of the Arabic particle *fāʾ*.

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[473] *Nihāyat al-wuṣūl*, vol. 8, p. 3362.
[474] *al-Baḥr*, vol. 7, p. 256.
[475] *Ṣaḥīḥ al-Bukhārī: kitāb al-janāʾiz, bāb al-kafn fī thawbayn*, hadith 1265. See page 47, footnote 135 of this thesis.

Construction 3: Suicide attacks are like acts of 'war heroism' or 'plunging into the thick of battle'.

Al-ᶜUyayrī then argues that suicide attacks are also a form of war heroism, where fighters plunge into the thick of battle (*inghimās*). He cites numerous hadith reports to describe the permissibility, in fact the virtuousness, of *inghimās*. For the purpose of identifying legal cause only a few of them will be addressed to establish sufficient clarity for the exercise of identifying legal cause. The ruling (*ḥukm*) of the original case will firstly be examined, that being the permissibility of *inghimās*, along with determining its legal cause (*ᶜillah*).

The first quality that al-ᶜUyayrī highlights with regards to *inghimās*, is that the fighter casts himself into a situation with a near impossible or highly improbable chance of survival.

He draws on various incidents of this highly improbable chance of survival, such as the Companion Hishām b. ᶜĀmir who plunged into the thick of battle, to the extent that some onlookers objected to this. ᶜUmar b. al-Khaṭṭāb, Abū Hurayrah and others disagreed with them, instead likening Hishām to "*he who sells himself*" as mentioned in Quran 2:207.[476] To al-ᶜUyayrī, this approval of *inghimās*, by ᶜUmar et al, confirms the permissibility of executing an attack with little or no chance of survival.

He further mentions an incident[477] when the Muslim army laid siege to Constantinople where a huge army of Romans guarded the city with their backs to its walls, and a Muslim soldier single-handedly attacked them. Onlookers exclaimed: "He is casting himself into destruction". The Companion Abū Ayyūb al-Anṣārī responded:

> This verse was revealed about us, the Anṣār, when Allah helped His Prophet (*ṣ*) and gave Islam dominance, we said [i.e., thought]: 'Come on! Let us stay in our property and improve in it'. Thereupon Allah, the Exalted, revealed, '*And spend in the cause of Allah, and do not cast yourselves into destruction'*. To cast oneself into

[476] *Tafsīr Ibn Kathīr*, vol. 1, p. 422; Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 11.
[477] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, pp. 14-15.

> destruction means, that we stay in our property and commit ourselves to its improvement, and abandon fighting [in jihad].[478]

Al-ᶜUyayrī argues that the two aforementioned examples of *inghimās* show the highly unlikelihood of survival for the Muslim attacker. In fact, the demise of the fighter seemed so assured that bystanders considered it casting himself into destruction, a parallel he draws with the suicide attacker. He states: "...It is clear evidence for the virtue of jihad operations in which it is almost certain that one will die..."[479] He also claims that the Companions tacitly approved of the explanation given by Abū Ayyūb.[480] However, the aforementioned hadith reports appear to provide only an apparent construction of legal cause for the ruling that permits high risk of death for the attacker, not his guaranteed demise as in the case of the suicide attacker.

In the same vein Shaykh Ḥasan Ayyūb argued that *inghimās* comprises the 'overwhelming assumption' (*ghalabat al-ẓann*) of being killed, while suicide attacks spell certain death (*al-yaqīn*). While he permits the attacker's death as a result of the place exploding in which he is found, he opposed the exploding of a device attached to his person (*tafjīr al-nafs*).[481] A salient feature of *inghimās* then, is placing one's life at risk, but eventually dying by the hand of the enemy.

The second quality highlighted by al-ᶜUyayrī is that the fighter appears to 'want' to die in the process of *inghimās*. He states: "Muᶜādh b. ᶜAfraᵓ asked the Messenger (ṣ), 'What makes Allah laugh [with happiness] upon His slave?' He replied, 'The slave who immerses himself into the enemy without armour.' Muᶜādh then took off his armour (*fa alqā dirᶜan*) and fought till he was killed."[482] Here the hadith report demonstrates the associated recompense 'What makes Allah laugh [with happiness] upon His slave' and the condition attached to the recompense 'The slave

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[478] *Sunan Abī Dāwūd: kitāb al-jihād, bāb fī qawlihī taᶜālā "wa lā tulqū bi aydīkum ilā ᵓl-tahlukah"*, hadith 2512; *Sunan al-Tirmidhī: kitāb tafsīr al-qurᵓān ᶜan rasūl Allāh* (ṣ), hadith 3236. Al-Tirmidhī provides no specific *bāb* for this hadith.

[479] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 16.

[480] Ibid., p. 15.

[481] Ḥasan Ayyūb, *Al-jihād waᵓl-fidāᵓiyyāt fī ᵓl-Islām*, 2nd ed., 1 vol. (Beirut: Dār al-Nadwat al-Jadīdah, 1983), p. 166.

[482] Abū Bakr b. Abī Shaybah, *al-Muṣannaf fī ᵓl-aḥādīth waᵓl-āthār, kitāb al-jihād, bāb mā dhukira fī faṣl al-jihād waᵓl-ḥaththi ᶜalayhi*, hadith 19499.

immerses himself into the enemy without armour'. The ***sixth type*** along with the ***first type*** of suggestion and allusion (*al-īmāʾ waʾl-tanbīh*) may be applied in its ***first form***, as in ***Construction 2*** of this case study.

Imam al-Shawkānī gives a very similar account of the Companion ʿAwf b. al-Ḥārith who also removed his armour and fought until he was killed, after receiving the same response from the Prophet (ṣ).[483] Another account mentioned by al-ʿUyayrī that he attributes to al-Ṭabarānī, is that on the day of Uḥud, ʿUmar said to his brother Zayd, "Take my armour, O my brother!" So Zayd answered, "I want martyrdom just as you do!" So, they both left all their armour behind.[484]

The third quality highlighted by al-ʿUyayrī is that the fighter is aware of his imminent demise, but goes forth into battle regardless. He cites the hadith report of Ibn Masʿūd who related that the Prophet (ṣ) said:

> Our Lord is amazed by two men: a man who stirs from his bed... to pray, and a man who raids in the Path of Allah, and his Companions are defeated, and he realises his demise awaits in returning to combat, but he returns [nonetheless] until his blood is spilled. Allah says, 'Look at my slave. He went back hopeful and anxious for what is with me, until his blood was spilled'.[485]

Ibn al-Naḥḥās al-Dimashqī (d. 814AH) commented the following on this hadith report: "Even if we had no other hadith, this one by itself is enough to show the immense merit of *inghimās*."[486]

Al-ʿUyayrī also cites the lengthy hadith report, popularly known as the story of the People of the Ditch. The story reads: after numerous failed attempts by the king to kill the pious boy, the boy

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[483] Ibn Ḥajar al-ʿAsqalānī, *al-Iṣābat fī tamyīz al-ṣaḥābah*, 1st ed., ʿĀdil Aḥmad ʿAbd al-Mawjūd (ed.), 8 vols. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995), vol. 4, p. 614.

[484] Yūsuf b. Ṣāliḥ al-ʿUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 16.

[485] *Musnad al-Imām Aḥmad: musnad ʿAbd Allah b. Masʿūd raḍiyallahu ʿanhu*, hadith 4028.

[486] Ibn al-Naḥḥās al-Dimashqī, *Mashāriʿi al-ashwāq ilā maṣāriʿi al-ʿushshāq wa mathīr al-gharām ilā dār al-Islām*, 1st ed., Idrīs Muḥammadʿ Alī and Muḥammad Khālid Isṭanbūlī (eds.), 2 vols. (Beirut: Dār al-Bashāʾir al-Islāmiyyah, 1990), vol. 2, p. 929; Yūsuf b. Ṣāliḥ al-ʿUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 17; Gibrīl Ḥaddād, Inghimas in 'Suicide' Warfare, livingislam.org, Web. 20 March 2019,{https://www.webcitation.org/query?url=http://www.livingislam.org/k/ighm_e.html&date=2011-05-28}.

then reveals to the king exactly how to kill him, namely, to shoot an arrow at him, in plain view of the entire community, but only after proclaiming "In the name of Allah, the Lord of the [pious] boy".[487] After having witnessed the execution of the boy, that was only possible, after numerous failed attempts by the king, by the kings proclamation 'In the name of Allah, the Lord of the [pious] boy', the people, it would appear, unanimously professed their belief in the 'Lord of the boy'.[488]

To this point, the qualities proposed by al-ᶜUyayrī that constitute the compound legal cause of *inghimās* may be summarised as: (a) casting oneself into a situation with near impossible or highly improbable odds of survival, (b) the fighter 'wants to die' in the process of the attack, and (c) the fighter is aware of his imminent demise, but goes forth into battle regardless.

Al-ᶜUthaymīn argues that making *qiyās* on the incident of the boy and the king is impossible, since the boy did not kill himself, but he was killed at the hand of the disbelieving king.[489] He continues that suicide attacks in which a person is certain of death are prohibited, in fact they fall under the heading of major sins".[490] Al-ᶜUyayrī, however, counters that the boy in this hadith report, orchestrated his own death as a sacrifice for his religion, and this indicates that such a deed is legitimate, and not considered suicide. It points out that his actions were praised in various sources of the Sharia, even though he was aware of his imminent demise as a result of directing his own murder.[491]

The dispute here again highlights the contention surrounding 'dying by one's own hand or actions'; 'dying by the hand of another' or 'contributing to one's own death', such as the boy who informed the king on how he should be killed; and the role of intention or motive in either

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[487] *Ṣaḥīḥ Muslim: kitāb al-zuhd waʾl-raqāʾiq, bāb qiṣṣat aṣḥāb al-ukhdūd waᶜl-sāḥir waʾl-rāhib waʾl-ghulām,* hadith 3005; *Sunan al-Tirmidhī, kitāb tafsīr al-qurʾān ᶜan rasūl Allāh* (*ṣ*), hadith 3663. Al-Tirmidhī provides no specific *bāb* for this hadith.

[488] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 13.

[489] Muḥammad b. Ṣāliḥ al-ᶜUthaymīn, *Majmūᶜ fatāwā wa rasāʾil faḍīlat al-shaykh Muḥammad b. Ṣāliḥ al-ᶜUthaymīn*, Fahd b. Nāṣir b. Ibrāhīm al-Sulaymān (ed.), 26 vols. (Unayzah: Dār al-Thurriyyā liʾl-Nashr waʾl-Tawzīᶜ, 2008), vol. 25. p. 358.

[490] ᶜAbd al-ᶜAzīz b. Bāz; Muḥammad b. Sāliḥ al-ᶜUthaymīn, *Ruling on blowing oneself up*, islamqa.info, Web. 21 March 2019, {https://islamqa.info/en/answers/217995/ruling-on-blowing-oneself-up}.

[491] Yūsuf b. Ṣāliḥ al-ᶜUyayrī, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, p. 13.

of these disputes. As previously stated, the legal cause premised upon a constant attribute (*munḍabiṭ*) applies to the former, while the legal cause that considers *ḥikmah* applies to the latter.

The case study in this chapter, exhibits a compound legal cause, where more than one quality constitutes the *ᶜillah*. Subsequently, it has been established that more than one method of identifying legal cause may be required to address each of the qualities that collectively constitute the *ᶜillah*.

The three contrasting case constructions in this chapter, demonstrate the considerable impact that methods of identifying legal cause (*masālik al-ᶜillah*) could have in the outcomes of *qiyās* based rulings. It signals the vast potential that exists, with the systematic application of these methods, in addressing contemporary cases of *qiyās*.

The case constructions in this final chapter are by no means exhaustive in testing all of the methods of identifying legal cause that have been discussed in this study. Numerous contemporary cases would be required to draw upon the extensive theory that exists on the subject. Such an extensive investigation, however, falls beyond the scope of this study. This study merely attempts to ascertain how contemporary cases can be further analysed through the lens of legal theory regarding methods of identifying legal cause. It also attempts to explore the application of these methods to contemporary cases and its resulting impact on their legal verdicts.

Conclusion

In this study I have set out to examine the foundations of the various methods of identifying legal cause (*masālik al-ᶜillah*) in order to study the practical applications of identifying legal cause in contemporary case constructions of *qiyās*.

The study starts with situating *masālik al-ᶜillah* within the broader topic of *qiyās* in Chapter One. In Chapter Two, I have discussed the methods to identify legal cause (*ᶜillah*) that have been accepted by the majority of scholars. The four main methods I discussed are as follows: scholarly consensus (*al-ijmāᶜ*), textual evidence (*al-naṣṣ*), suggestion and allusion (*al-īmāʾ waʾl-tanbīh*), and Prophetic actions (*fiᶜl al-Nabī*). I have further examined the textual evidence (*al-naṣṣ*) under its four main categories, namely, decisive (*al-qaṭᶜī*), probable (*al-ẓannī*), explicit (*al-ṣarīh*) and apparent (*al-ẓāhir*).

Chapter Three deals with the following eight probable methods and their sub sections that have caused greater dispute amongst the scholars, because of their strong reliance on reason: suitability (*al-munāsabah*), elimination of alternatives (*al-sabr waʾl-taqsīm*), resemblance (*al-shabah*), coextensiveness (*al-ṭard),* rotation (*al-dawrān*), refinement of the basis of the ruling (*tanqīḥ al-manāṭ*), verification of the basis of the ruling (*taḥqīq al-manāṭ*), deduction of the basis of the ruling (*takhrīj al-manāṭ*). A comparative summary of Chapters Two and Three, shows that little dispute exists with regards to *al-ijmāᶜ*, *al-naṣṣ* and *al-īmāʾ waʾl-tanbīh*.

In Chapter Four, I have chosen case constructions surrounding the topic of 'suicide attacks', according to the antagonists, or 'martyrdom operations', according to the proponents, where the classical model of *masālik al-ᶜillah* can be employed to arrive at greater certainty pertaining to the resulting ruling of permissibility or prohibition.

In dealing with the case study of suicide or martyrdom operations, I have sensed the need for a more formalised system of *masālik al-ᶜillah* to guide the *mujtahid* towards greater certainty in arriving at legal rulings based on *qiyās*.

To clarify the aforementioned proposition of systematisation, the conceptual framework provided in hadith science that aims to systematically address the phenomenon of conflicting hadith reports (*mukhtalif al-hadith*) could be looked at. The hadith science systematisation comprises an established order of selecting methods of addressing conflicting hadith reports as follows: In the case of two or more conflicting hadith reports, reconciliation (*jamᶜ*) between the hadith reports will first be attempted. If this process succeeds it will result in the use of both hadith reports in their respective contexts. In the event that reconciliation is unattainable the process of abrogation (*naskh*) will be adopted if the dates of both hadith reports can be determined. Should even abrogation fail to yield the necessary results, a more general process of preferring one hadith report over another (*tarjīḥ*) will be sought. The last two processes of abrogation and preference means that one of the conflicting hadith reports will be rendered ineffective. If all of these attempts fail, the hadith scholar has to assume a position of neutrality (*tawaqquf*) until an indication (*qarīnah*) of some sort can be identified to prefer the one hadith report over the other.[492]

The abovementioned process shows that the classical hadith scholars gave clear directives for dealing with conflicting hadith reports and that they had developed an established order of selecting methods of addressing conflicting hadith reports.

From my readings in this study, I have not been able to identify a similar system for legal theorists for selecting and applying the various methods of identifying legal cause. Their exposition of these methods is limited to discussions of theory in relation to case examples, and highlighting salient differences between these methods. Researching a system of selecting and applying the various methods of identifying legal cause, would be an interesting area of further inquiry, an area that fell well beyond the scope of the present study.

[492] Ibn Ḥajar al-ᶜAsqalānī, *Nuzhat al-naẓar fī tawḍīḥ nukhbat al-fikar fī muṣṭalaḥ ahl al-athar*, 1st ed., ᶜAbd Allāh b. Ḍayf Allāh al-Riḥaylī (ed.) (Riyadh: Maṭbaᶜat Safīr, 2001), p. 179.

It is clear that the order in which these methods are discussed in the works of legal theory, does indicate an order in which they are preferred, or an order that indicates the extent or level of agreement that exists with regards to their utility. However, as this study has uncovered, the order and categorisation of these methods have been arranged differently by various legal theorists. This study followed the order presented by Imam al-Shawkānī due to his inclusive selection of methods.

The case constructions discussed, exhibit the example of compound legal cause, where more than one quality constitutes the *ʿillah*. Subsequently it has been established that more than one method of identifying legal cause may be required to address each of the qualities that collectively constitute the *ʿillah*.

Furthermore, it would also appear that one quality, propositioned as the *ʿillah*, may be scrutinised by more than one method of identifying legal cause. This stems from the 'crossing' or 'duplication' of select theoretical concepts found within the various methods, as have been encountered in Chapters Two and Three. This phenomenon of applying more than one method of identifying legal cause, to ascertain a single *ʿillah*, would also be an interesting area of investigation. It may even be incorporated into the aforementioned proposed study of systematised selection and application of methods of identifying legal cause.

The case constructions discussed in Chapter 4 highlighted that a vast selection of contemporary cases would be needed to comprehensively probe the extensive theory that this study has addressed in Chapters Two and Three. While such an extensive investigation fell beyond the objective of this study, it would be an interesting area of further research. Further testing, evaluation and analysis would be an invaluable endeavour to enable the full capacity and potential that this theory has for addressing contemporary cases of *qiyās*.

Bibliography

Arabic sources

al-Abyārī, ᶜAlī b. Ismāᶜīl, *al-Taḥqīq waʾl-bayān fī sharḥ al-burhān fī uṣūl al-fiqh*, 4 vols., ᶜAlī b. ᶜAbd al-Raḥmān Bassām al-Jazāʾirī (ed.), Kuwait: Dār al-Ḍiyāʾ, 2013.

al-Aṣfahānī, Muḥammad b. ᶜAbd al-Raḥmān, *Bayān al-mukhtaṣar sharḥ mukhtaṣar Ibn al-Ḥājib*, 3 vols., Muḥammad Muẓahhir Baqā (ed.), Jeddah: Dār al-Madanī, 1986.

al-ᶜAsqalānī, Ibn Ḥajar, *al-Iṣābat fī tamyīz al-ṣaḥābah*, 8 vols., 1st ed., ᶜĀdil Aḥmad ᶜAbd al-Mawjūd (ed.), Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1995.

----------, *Nuzhāt al-naẓar fī tawḍīḥ nukhbat al-fikr fī muṣṭalaḥ ahl al-athar*, 1st ed., ᶜAbd Allāh b. Ḍayf Allāh al-Riḥaylī (ed.), Riyadh: Maṭbaᶜat Safīr biʾ-l-Riyāḍ, 2001.

al-Āmidī, Sayf al-Dīn, *al-Iḥkām fī uṣūl al-aḥkām*, 4 vols., ᶜAbd al-Razzāq ᶜAfīfī (ed.), Beirut: al-Maktab al-Islāmī, 2004.

Ayyūb, Ḥasan, *Al-jihād waʾl-fidāʾiyyat fīʾl-Islām*, 2nd ed., Beirut: Dār al-Nadwat al-Jadīdah, 1983.

al-Baghawī, *Tafsīr al-Baghawī*, 5 vols., 1st ed., ᶜAbd al-Razzāq al-Mahdī (ed.), Beirut: Dār Iḥyāʾ al-Turāth al-ᶜArabī, 1999.

al-Baghdādī, Ismāᶜīl b. Muḥammad, *Hadiyyat al-ᶜārifīn asmāʾ al-muʾallifīn wa āthār al-muṣannifīn*, 2 vols., Beirut: Dār Iḥyāʾ al-Turāth, n.d.

al-Bāqillānī, al-Qāḍī Abū Bakr, *al-Taqrīb waʾl-irshād*, 3 vols.,ᶜAbdul Ḥamīd b. ᶜAlī (ed.), Jeddah: Muʾassasat al-Risālah, 1998.

al-Bayḍāwī, ᶜAbd Allāh b. ᶜUmar, *Minhāj al-wuṣūl ilā ᶜilm al-uṣūl*, Beirut: Muᵓassasat al-Risālat Nāshirūn, n.d.

Dakūrī, Muḥammad, *al-Qaṭᶜiyyat minaᵓl-adillat al-arbaᶜah*, 1st ed., Medina: ᶜAmādat al-Baḥth al-ᶜIlmī biᵓl-Jāmiᶜat al-Islāmiyyat biᵓl-Madīnat al-Munawwarah, 1999.

al-Dimashqī, Ibn al-Naḥḥās, *Mashāriᶜi al-ashwāq ilā maṣāriᶜi al-ᶜushshāq wa mathīr al-gharām ilā dār al-Islām*, 2 vols., 1st ed., Idrīs Muḥammad ᶜAlī and Muḥammad Khālid Isṭanbūlī (eds.), Beirut: Dār al-Bashāᵓir al-Islāmiyyah, 1990.

al-Ghazālī, Abū Ḥāmid, *al-Mankhūl min taᶜlīqāt al-uṣūl*, 3rd ed., Muḥammad Ḥasan Hītū (ed.), Damascus: Dār al-Fikr, 1998.

----------, *al-Mustaṣfā*, 1st ed., Muḥammad ᶜAbd al-Salām ᶜAbd al-Shāfī (ed.), Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1993.

----------, *Shifāᵓ al-ghalīl fī bayān al-shabah waᵓl-mukhīl wa masālik al-taᶜlīl*, Ḥamd al-Kabīsī (ed.), Baghdad: Maṭbaᶜat al-Irshād, 1971.

al-Hindī, Ṣafī al-Dīn, *Nihāyat al-wuṣūl fī dirāyat al-uṣūl*, 9 vols., Ṣāliḥ b. Sulaymān al-Yūsuf and Saᶜd b. Sālim a-Suwayḥ (eds.), Mecca: al-Maktabat al-Tijāriyyah, 1996.

Ibn Kathīr,ᶜImād al-Dīn, *Tafsīr al-Qurᵓān al-ᶜAẓīm*, 9 vols., Muḥammad Ḥusayn Shams al-Dīn (ed.), Cairo: al-Maktabat al-Tawfīqiyyah, n.d..

Ibn Manẓūr, Abū Faḍl Jamāl al-Dīn, *Lisān al-ᶜarab*, 15 vols.,3rd ed., Beirut: Dār Ṣādir, 1993.

al-Ījī,ᶜAbd al-Raḥmān ᶜAḍud al-Dīn, *Sharḥ mukhtaṣar al-muntahā al-uṣūlī li Ibn al-Ḥājib*, 3 vols., Muḥammad Ḥasan Ismāᶜīl (ed.), Beirut: Dār al-Kutub al-ᶜIlmiyyah, 2008.

al-Isnāwī, ᶜAbd al-Raḥīm b. al-Ḥasan b. ᶜAlī, *Nihāyat al-sūl sharḥ minhāj al-wuṣūl,*1st ed., Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1999.

al-Juwaynī, ᶜAbd al-Malik b. ᶜAbd Allāh b. Yūsuf, *al-Burhān fī uṣūl al-fiqh*, 2 vols., Ṣalāḥ b. Muḥammad al-ᶜUwīḍah (ed.), Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1997.

al-Kalwadhānī, Abū al-Khaṭṭāb, *al-Tamhīd fī uṣūl al-fiqh*, 4 vols., Mufīd Muḥammad and Muḥammad b. ᶜAlī b. Ibrāhīm (eds.), Mecca: Markaz al-Baḥth al-ᶜIlmī wa Iḥyāᵓ al-Turāth al-Islāmī - Jāmiᶜat Umm al-Qurrāᵓ, 1985.

al-Khinn, Muṣṭafā Saᶜīd, *al-Kāfiᵓl-wāfī*, Beirut: Muᵓassasat al-Risālah, 2001.

al-Maqdisī, Ibn Qudāmah, *Rawḍat al-nāẓir wa junnat al-munāẓir fī uṣūl al-fiqh ᶜalā madhhab al-Imām Aḥmad b. Ḥanbal*, 2 vols., 2nd ed., Beirut: Muᵓassasat al-Rayyān liᵓl-Ṭabāᶜat waᵓl-Nashr waᵓl-Tawzīᶜ, 2002.

al-Mardāwī, ᶜAlāᵓuddīn, *al-Taḥbīr sharḥ al-taḥrīr fī uṣūl al-fiqh*, 8 vols., ᶜAbd al-Raḥmān al-Jibrīn, ᶜAwaḍ al-Qarnī and Aḥmad al-Sarrāḥ (eds.), Riyadh: Maktabat al-Rushd, 2000.

al-Qarāfī, Shihāb al-Dīn, *Nafāᵓis al-uṣūl fī sharḥ al-maḥṣūl*, 9 vols. ᶜĀdil Aḥmad ᶜAbd al-Mawjūd and ᶜAlī Muḥammad Muᶜawwiḍ (eds.), 1st ed., Mecca: Maktabat Nizār Muṣṭafā al-Bāz, 1995.

al-Rāzī, Faḥr al-Dīn, *al-Maḥṣūl*, 3rd ed., Ṭāhā Jābir Fayyāḍ al-ᶜAlwānī (ed.), Jeddah: Muᵓassasat al-Risālah, 1997.

al-Rāzī, Faḥr al-Dīn, *al-Tafsīr al-kabīr*, 32 vols., 3rd ed., Beirut: Dār Iḥyāᵓ al-Turāth al-ᶜArabī, 1999.

al-Samarqandī, ᶜAlāᵓ al-Dīn, *Mīzān al-uṣūl fī natāᵓij al-ᶜuqūl*, Muḥammad Zakkī ᶜAbd al-Barr (ed.), Qaṭr: Maṭābiᶜ al-Dawḥat al-Ḥadīthiyyah, 1984.

al-Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl, *Uṣūl al-Sarakhsī*, 2 vols., Beirut: Dār al-Maᶜrifah, n.d.

al-Shāṭibī, Ibrāhīm b. Mūsā, *al-Muwāfaqāt*, 7 vols., 1st ed., Abū ᶜUbaydah b. Ḥasan Ālī Salmān (ed.), al-Khubar: Dār Ibn ᶜAffān, 1997.

al-Shawkānī, Muḥammad b. ᶜAlī, *Irshād al-fuḥūl ilā taḥqīq al-haqq min ᶜilm al-uṣūl*, 2 vols., Riyadh: Dār al-Faḍīlat liʾl-Nashr waʾl-Tawzīᶜ, 2000.

al-Shinqīṭī, ᶜAbd Allāh b. Ibrāhīm al-ᶜAlawī. *Nashr al-bunūd ᶜalā marāqī al-suᶜūd*, 2 vols., city unknown: Matbᶜat Faḍāllat biʾl-Maghrib, n.d

al-Shinqīṭī, Aḥmad b. Maḥmūd b. ᶜAbd al-Wahhāb, *al-Waṣf al-munāsib li sharᶜ al-ḥukm*, 1st ed., Medina: ᶜAmādat al-Baḥth al-ᶜIlmī biʾl-Jāmiᶜat al-Islāmiyyat biʾl-Madīnat al-Munawwarah, 1994.

al-Shinqīṭī, Muḥammad b. Muḥammad al-Mukhtār, *Sharḥ zād al-mustaqniᶜ*, 16 vols. (transcribed from audio lectures), available online: accessed at http://shamela.ws/index.php/book/7696, 2006.

al-Shīrāzī, Ibrāḥīm b. ᶜAlī b. Yūsuf, *al-Lumaᶜ fī uṣūl al-fiqh*, 2nd ed., Beirut: Dār al-Kutub al-ᶜIlmiyyah, 2003.

al-Subkī, Taqiyy al-Dīn, *al-Ibhāj fī sharḥ al-Minhāj* (*Minhāj al-wuṣūl ilā ᶜilm al-uṣūl liʾl-Qāḍī al-Bayḍāwī*), 3 vols., Beirut: Dār al-Kutub al-ᶜIlmiyyah, 1995.

al-Zarkashī, Badr al-Din, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, 8 vols., 1st ed., Cairo: Dār al-Kutubī, 1994.

al-ᶜUthaymīn, Muḥammad b. Ṣāliḥ, *Majmūᶜfatāwā wa rasāʾil faḍīlat al-shaykh Muḥammad b. Ṣāliḥ al-ᶜUthaymīn*, 26 vols., Fahd b. Nāṣir b. Ibrāhīm al-Sulaymān (ed.), Unayzah: Dār al-Thurriyyā liʾl-Nashr waʾl-Tawzīᶜ, 2008.

al-Zarkashī, Badr al-Dīn, *Tashnīf al-masāmiᶜ bijamᶜ al-jawāmiᶜ li Tāj al-Dīn al-Subkī*, 4 vols., Sayyid ᶜAbd al-ᶜAzīz and ᶜAbd Allāh Rabīᶜ (eds.), Cairo: Maktabat Qurṭubah, 1998.

Hadith sources

al-Baghawī, Abū Muḥammad al-Ḥusayn b. Masᶜūd, *Sharḥ al-Sunnah*, 15 vols., 3rd ed., Shuᶜayb al-Arnaʾūṭ and Muḥammad Zuhayr al-Shāwīsh (eds.), Damascus: al-Maktab al-Islāmī, 1983.

al-Bayhaqī, Ẓāhir al-Dīn, *al-Sunan al-Kubrā*, 3rd ed., Muḥammad ᶜAbd al-Qādir ᶜAṭār (ed.), Beirut: Dār al-Kutub al-ᶜIlmiyyah, 2003.

al-Bukhārī, Muḥammad b. Ismāᶜīl, *Ṣaḥīḥ al-Bukhārī*, Beirut: Dār Ṭūq al-Najjāt, 2001.

al-Dāraquṭnī, Abū al-Ḥasan ᶜAlī b. ᶜUmar, *Ṣunan al-Dāraquṭnī*, 5 vols., Shuᶜayb al-Arnaʾūṭ and Ḥasan ᶜAbd al-Munᶜim al-Shalbī and ᶜAbd al-Laṭīf Ḥirz Allāh, Aḥmad Barhūm (eds.), Beirut: Muʾassasat al-Risālah, 2004.

Ibn Abī Shaybah, Abū Bakr, *al-Muṣannaf fīʾl-aḥādīth waʾl-āthār*, 7 vols., 1st ed., Kamāl Yūsuf al-Ḥūt (ed.), Beirut: Dār al-Tāj, 1989.

al-Khurāsānī, Abū ᶜUthmān Saᶜīd b. Manṣūr b. Shuᶜbah, *Sunan Saᶜīd b. Manṣūr*, 2 vols., Ḥabīb al-Raḥmān al-Aᶜẓamī (ed.), Delhi: al-Dār al-Salafiyyah, 1982.

al-Madanī, Mālik b. Anas, *Muwaṭṭaʾ Mālik*, 2 vols., Bashshār ᶜAwwād Maᶜrūf and Maḥmūd Khalīl (eds.) Beirut: Muʾassasat al-Risālah, 1991.

al-Nasāʾī, Abū ᶜAbd al-Raḥmān, *al-Sunan al-ṣughrā liʾl-Nasāʾī*, 2cnd ed., ᶜAbd al-Fattāḥ Abū ᶜIdah (ed.), Aleppo: Maktab al-Maṭbūᶜāt al-Islāmiyyah, 1986.

al-Nawawī, Abū Zakariyyā, *Sharḥ al-Nawawī ᶜalā Muslim*, 9 vols., 3rd ed., Beirut: Dār ʾIḥyāʾ al-Turāth al-ᶜArabī, 1972.

al-Naysābūrī, Muslim Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, 5 vols., Muḥammad Fuʾād ʿAbd al-Bāqī (ed.), Beirut: Dār ʾIḥyāʾ al-Turāth al-ʿArabī, 1991.

al-Qazwīnī, Ibn Mājah, *Sunan Ibn Mājah*, 5 vols., Shuʿayb al-Arnaʾūṭ and ʿĀdil Murshid and Muḥammad Kāmil and ʿAbd al-Laṭīf Ḥirz Allāh (eds.), Damascus: Dār al-Risālat al-ʿĀlamiyyah, 2009.

al-Qurṭubī, Ibn ʿAbd al-Barr, *Jāmiʿ bayān al-ʿilm wa faḍlih*, 2 vols., Abī al-Ashbāl al-Zuhayrī (ed.), Riyadh: Dār Ibn al-Jawzī, 1994.

al-Shaybānī, Aḥmad b. Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 8 vols., Aḥmad Muḥammad Shākir (ed.), Cairo: Dār al-Ḥadīth, 1995.

al-Shawkānī, Muḥammad b. ʿAlī, *Nayl al-Awṭār*, 16 vols., Muḥammad Ṣubḥī b. Ḥasan Ḥallāq (ed.), Riyadh: Dār Ibn al-Jawzī, 2006.

al-Sijistānī, Abū Dāwūd Sulaymān b. al-Ashʿath , *Sunan Abī Dāwūd*, 7 vols., 1st ed., Shuʿayb al-Arnaʾūṭ and Muḥammad Kāmil (eds.), Damascus: Dār al-Risālat al-ʿĀlamiyyah, 2009.

al-Tirmidhī, Abū ʿĪsā, *Sunan al-Tirmidhī*, 5 vols., 3rd ed., Aḥmad Muḥammad Shākir and Muḥammad Fuʾād ʿAbd al-Bāqī, Cairo: Sharikat Maktabat wa Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalbī, 1975.

English sources

Auda, Jasser, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law: A Systems Approach*, London: International Institute of Islamic Thought (IIIT), 2008.

Brown, Jonathan A.C., *Hadith: Muhammad's Legacy in the Medieval and Modern World*, Oxford: Oneworld Publications, 2009.

Hasan, Ahmad, *Analogical Reasoning in Islamic Jurisprudence*, New Delhi: Adam Publishers and Distributors, 2009.

----------, Methods of Finding the Cause of a Legal Injunction in Islamic Jurisprudence, *Islamic Studies*, vol. 25, No. 1 (Spring 1986), pp. 11-44.

----------, Modes of Reasoning in Legal Cause: al-Ijtihād fi°l-ᶜillah, *Islamic Studies*, vol. 22, No. 1 (Spring 1983), pp. 71-90.

----------, The Conditions of Legal Cause in Islamic Jurisprudence, *Islamic Studies*, vol. 20, No. 4 (Winter 1981), pp. 303-342.

Ibn Rushd, *The Distinguished Jurist's Primer* (*Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*), 2 vols., Imran Ahsan Khan Nyazee (translator), Berkshire: Garnet Publishing, n.d.

Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Cambridge: The Islamic Texts Society, 1991.

----------, Methodological Issues in Islamic Jurisprudence, *Arab Law Quarterly*, vol. 11, No. 1 (1996), pp. 3-33.

Khadduri, Majid, *al-Shāfiᶜī's Risāla: Treatise on the Foundations of Islamic Jurisprudence*, 2nd ed., Cambridge: The Islamic Texts Society, 1961.

Meijer, Roel, Yūsuf al-'Uyairī and the Making of a Revolutionary Salafi Praxis, *Die Welt des Islams*, New Series, vol. 47, Issue 3/4, Islam and Societal Norms: Approaches to Modern Muslim Intellectual History, (2007), pp. 422-459.

Moghul, Umar F., Approximating Certainty in Ratiocination: How to ascertain the ᶜillah in the Islamic Legal System and How to Determine the Ratio Decidendi in the Anglo-American Common Law, *The Journal of Islamic Law*, vol. 4, No. 125 (Fall / Winter 1999), pp. 1-64.

Saheeh International Translation, The Qur'an, A.B. al-Mehri (ed.), Birmingham: Maktabah Booksellers and Publishers, 2010.

Tahir-ul-Qadri, Muhammad, *Fatwa on Terrorism and Suicide Bombings*, London: Minhaj-ul-Quran International, 2010.

al-ᶜUyayrī, Yūsuf b. Ṣāliḥ, *The Islamic Ruling on the Permissibility of Self-Sacrificial Operations*, [place of publication not known]: At-Tibyan Publications, n.d.

Weiss, Bernard G., *The search for God's law: Islamic jurisprudence in the writings of Sayf al-Dīn al-Āmidī*, Salt Lake City: University of Utah Press, 1992.

Online sources

Bin Bāz, ᶜAbd al-ᶜAzīz; al-ᶜUthaymīn, Muḥammad b. Sāliḥ, *Ruling on blowing oneself up*, islamqa.info, Web. 21 March 2019 {https://islamqa.info/en/answers/217995/ruling-on-blowing-oneself-up}.

Ḥaddād, Gibrīl, *Inghimas in 'Suicide' Warfare*, livingislam.org, Web. 20 March 2019 {https://www.webcitation.org/query?url=http://www.livingislam.org/k/ighm_e.html&date=2011-05-28}.

al-Qaraḍāwī, Yūsuf, *Martyr Operations Carried Out by the Palestinians*, islamonline.net, Web. 22 March 2019 {https://archive.islamonline.net/?p=6379}.

al-Qaraḍāwī, Yūsuf, *Palestinian Women Carrying Out Martyr Operations*, islamonline.net, Web. 22 March 2019 {https://archive.islamonline.net/?p=724}.

Glossary of terms

Note: The meanings listed here are related to the subject matter discussed in this thesis.

adillah ᶜaqliyyah - rational evidence.

adillah naqliyyah - textual evidence.

aṣl - original case.

al-ᶜayn - substance, essence.

farᶜ - new or parallel case.

fāsidah - void.

al-gharīb - unusual.

ḥikmah - wisdom, rationale.

ḥukm - legal effect, ruling.

iḥrām - pilgrim in consecration.

ijtihād - independent legal reasoning / thinking.

ᶜillah - legal cause, effective cause, occasioning factor.

al-ᶜillah al-manṣūṣah - the legal cause that is stated in the textual evidence.

īmāʾ- suggestion, allusion.

inghimās - fighters plunging into the thick of battle with little or no hope of survival.

istinbāṭ - extrapolation, inference, deducing a somewhat obscure or hidden meaning from a given text.

jamᶜ - reconciliation.

jamāhīr sing. *jumhūr* - majority of scholars almost reaching consensus.

jazāʾ - recompense, payment, reward.

jumhūr al-ᶜulamāʾ - majority of scholars.

al-mafsadah - harm.

al-manṭūq - the conveyed meaning of a text.

masālik (sing. *maslak*) - methods, ways.

masālik al-ᶜillah - methods of identifying legal cause.

al-maṣlaḥah - benefit.

muᶜāmalāt - transacting, dealing.

muʾaththir - effective.

muḥtamalah - probable.

mulāʾim - agreeable.

al-mulghā - invalidated.

munḍabiṭ - a constant attribute.

al-mursal - unsupported by text.

mutawahhamah - probable.

naskh - abrogation.

naṣṣ - sacred text, a clear injunction, an explicit textual ruling.

nawᶜ - type, genus.

qarīnah - indication.

qāṭiᶜah - decisive.

qaṭᶜī - definitive, decisive.

qiyās - analogical reasoning or deduction.

ṣaḥīḥah - valid.

sarīh - explicit.

Sunnah - the Prophet Muhammad's speech, actions and tacit approval.

taᶜabbud - unquestioning adherence.

taḥsīn - refinement.

talbiyyah - remembrance chanted by pilgrims engaged in the rituals of Hajj.

taᶜlīl - ratiocination, search for the effective cause of a ruling, causation, legal causation.

tanbīh - allusion, direction.

tanqīḥ al-manāṭ - clarifying the point on which the ruling is hinged, refinement of the basis of the rule.

tarjīḥ - preference.

tawaqquf - neutrality.

taysīr - beautification, facilitation.

uṣūl al-fiqh - principles of Islamic jurisprudence, legal theory.

ẓāhir - apparent, obvious, manifest.

ẓannī / ẓanniyyah - probable.