THE PLACE OF REASON AMONG THE "ROOTS" OF ISLAMIC JURISPRUDENCE

by

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LIST OF ABBREVIATIONS

Q,	The holy Qur'ān. Tr. of Yousif ʿAli, Lahore, n.d.
A'lām	(Ibn-al-Qayyim), A'lam al-Muwaqqiʿīn, 4 vols., 1st Ed. Cairo: 1955.
Bidāyat	(Ibn-Rushd, al-Ḥafīd), Bidāyat al-Mujtahid, 2 vols., 3rd Ed. Cairo: 1960.
Irshād	(Ash-Shawkānī, Muḥammad Ibn-ʿAli), Irshād al-Fuḥūl, 1 vol. 1st Ed., Cairo: 1349 A.H.
Jamʿ	(Ibn-as-Subkī, Tāj ad-Dīn), Jamʿ al-Jawamiʿ, 2 vols., 2nd Ed. Cairo: 1937.
Maqālāt.	(Al-Ashʿarī, Abū l-Ḥasan), Maqālāt al-Islamiyyīn, 2nd Ed., Wiesbaden: Franz Steiner, 1963.
Miftāḥ	(Ibn-al-Qayyim), Miftāḥ dār as-Saʿāda, 2 vols. Cairo: n.d.
Mus	(Al-Ghazālī, Abū-Hamid), al-Mustaṣfā, 2 vols. (vol. 1 Būlāq 1322 A.H. and vol. 2, Cairo: 1356 A.H.)
Muwā	(Ash-Shātibī Abū-Isḥāq Ibrāhīm Ibn-Musā), al-Muwāfaqāt, 4 vols. Cairo: n.d.
Rawḍat	(Ibn-Qudāma, Abū-Muḥammad ʿAbd-Allāh Ibn-Aḥmad), Rawḍat an-Nāẓir, 1 vol. Cairo: 1385 A.H.

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ABSTRACT

In this thesis the place of human reason and its function in the field of the Sharī'a has been discussed. The question of analysing the function of reason in this field has not been presented for open discussion until the time of the third generation after the Prophet (tābi'ī t-tābi'īn). But general thinking about the question started from the time of the Prophet Himself.

During the time of the third generation it became important and urgent to discuss and clarify the place and limitations of using human reason in the Sharī'a. This was because reasoning in this field widely increased to the point that some people were said to have subjugated the sayings of the Prophet to their rational judgement.

Consideration of reason in this field began by asking, whether the revealed rules of the Sharī'a were based on certain "grounds". If so, what is the nature of these "grounds"? are they rational with the extended application, or are they not rational, but divine with no extended application?

The question of the moral attributes of human actions was discussed first in this thesis, since human actions are the subject of the rules of the Sharī'a. Discussions on the moral attributes of human actions started before the time of the third generation. Theologians discussed it when they dealt with the question, whether man has free will to chose his actions in this life, or whether he is compelled and directed by Allah?

The scholars were divided when they discussed the subject of the moral attributes. The majority of the Sunnīs and all the Ẓāhirīs decided that there are no rational moral attributes in the actions themselves. The Mu'tazila held the opposite opinion.

Regarding the matter of the existence and non-existence of "grounds" in the revealed Sharī'a rules, the large majority of the scholars decided that these rules were based on certain "grounds". This majority includes all the Sunnīs and all the Mu'tazila. They disagreed on the nature of these "grounds", whether they are rational, or divine. There were complex discussions between them on this question. The Ẓāhirīs proclaimed that the revealed Sharī'a rules were not based on "grounds".

Human reason has been used practically in the field of the Sharī'a by all the Muslim scholars in the past. Even those who criticised this use, such as the Ẓāhirīs could not avoid it in practice. Their criticism seems to be ostensible. There were several different methods which were followed by the scholars in using reason in this field.

The fact which is supported by the evidence of the Qur'ān and the Sunna is that, reason has a great importance in the field of the Sharī'a. It is supported also by rational evidence and by the practice of the Muslim men of knowledge all through Islamic history.

Introduction

The element of human reason and its place among the "roots" of Islamic jurisprudence was widely discussed through periods of Islamic history. This took the form of complex arguments, disputes and fierce criticisms between the different groups of scholars. This thesis will explain the complexities of these discussions, and will concern when the question was conceived, when its different aspects were formulated and put forward for discussion, and will conclude the results which may clarify the real position of reason in this field.

It was not easy for a scholar to hold a firm and definite opinion in the course of dealing with this question unless he considered it very carefully in order to avoid the confusion that would certainly occur if any mistaken decision was taken. Therefore, it is difficult to formulate groups of scholars according to their opinions on this matter. A scholar may agree with one group on some points and disagree on other points. He would be supporting a group sometimes and standing critically against it at other times.

Sometimes groups were very severe in their criticisms of their opponents. Some of them accused others of trying to destroy the construction of the Sharī'a. Some of them intentionally misinterpreted their opponents' statements. The Mu'tazila, for example, were victims of this kind of misinterpretation.

However, consideration of using human reason in the

Sharī'a started from the time of the Prophet Himself, but there was no question formulated about its function until the beginning of the second century of the Hijra. At the beginning of that century, reasoning had been widely used in the field of the Sharī'a. Cautious scholars began to resist this wave of reasoning. Thus it became of the utmost importance to clarify the place and limitations of human reason in this field.

Consideration of the function of human reason in the Sharī'a would begin by asking whether the revealed rules were based on certain "grounds". If so, what is the nature of these "grounds"? Are they rational with extended applications or are they not rational, but divine with no extended application?

It is important in this thesis to advance the study of the moral attributes of human actions, since human actions were the subject of the Sharī'a rules which are held to be based on the above-mentioned "grounds". Have human actions rational moral attributes in themselves? and if so, are the Sharī'a "grounds" always in agreement with these moral attributes? This agreement means prescription of that which is rationally good and the prohibition of that which is rationally bad.

Accordingly, the chapters of this thesis will be in the following order: Part one, which will be a historical illustration of the place of human reason in the Sharī'a, will consist of two chapters. The first chapter will deal with the moral attributes of human actions considered by

reason without the assistance of the Sharī'a. The second chapter will deal with the question of the existence of the "ground" in the revealed rules of the Sharī'a, and will include several real illustrations of this use. These practical methods of using reason start with analogy followed by the "interest" (maṣlaḥa) which appeared in different forms. It appeared in the form of "custom" ('urf), "the means of actions" (adh-dharā'i'), the "Legal devices" (ḥiyal) and the "unrevealed interest" (al-maṣlaḥa l-mursala). All these forms and aspects will be dealt with in this thesis.

Regarding the moral attributes of human actions, the following questions will be examined, viz. When this subject occurred and brought into the field of the Sharī'a, who were the first to formulate it, and how the groups were formed around its several aspects? The differences between the scholars will be studied and an attempt will be made to ascertain whether they were real differences.

With respect to the "ground" which is the most important subject, it will be explained how the scholars were more divided towards it than they were towards the question of the moral attributes of actions. It will be made clear whether the majority supported the existence of the "grounds" in the revealed rules, and how the opponents of the existence of the "grounds" defended their opinion?

Deciding the nature of the "ground" in the Sharī'a was more complex. It led to more divisions amongst the scholars. It will be seen whether it caused contradictory opinions to be held by some groups, and to what extent it affected the construction of the Sharī'a and the limitations

of using human reason in this field.

As has been pointed out above, several methods of using human reason in the field of the Sharī'a, by the different juristic schools, arose. Sometimes the most reliable method of reasoning used by some groups, such as analogy, was rejected by other minorities. But in many cases disagreement seemed to be ostensible; nevertheless severe criticisms were exchanged. The attribution of some of these methods to some particular schools was controversial.

It should be pointed out that philosophers and theologians found the subject of the place of reason in the field of the Sharī'a fertile for their particular logical ability, and on it used every argument they had. The jurists absorbed these arguments and dealt with them. In this thesis attempts will be made to deal with the ramifications of this subject.

PART ONE

THEORETICAL ILLUSTRATIONS OF THE PLACE OF HUMAN REASON IN THE SHARĪ'A

Two chapters will be presented in this part. The first chapter will be concerned with the consideration of human actions by reason without the assistance of the Sharī'a. The second chapter will deal with the question of the existence of the "grounds" in the rules of the Sharī'a as was stated in the introduction. These two chapters will show the historical graduation of these questions, the opinions of the various scholars towards each point, the arguments and evidence presented in the course of the discussions and the results which clarify the place of reason in this important field.

CHAPTER ONE

HUMAN ACTIONS CONSIDERED BY REASON WITHOUT THE ASSISTANCE OF THE SHARĪ'A

Muslim scholars have been engaged in discussions on the question of the moral attributes of human actions since a very early period of Islamic history. They disputed, sometimes rigorously, on whether human actions have goodness and badness in themselves. It seems that the Companions themselves were aware of this question, although it had not been formulated during their time. Their judgements of new cases must have taken into account the moral attributes of human actions since those judgements were based on securing

"interests" and preventing harm.[1]

However, the Mu'tazila were the first to actually formulate the question and present it for open discussion. They did so from the time of their emergence.[2] They held from the very beginning that human actions have rational goodness and badness in themselves. They supported this opinion with evidence as will be explained.

Afterwards the Mu'tazila were followed by some of the Sunnīs who held the same opinion. Al-Kullābiyya[3] were among the Sunnīs who adopted the same attitude as the Mu'tazila.[4] They were a group of the Sunnīs who had very slight disagreements with the majority on some points. But they still remained part of the Sunnīs. One of these disagreements was on the name of Allāh. Al-Kullābiyya decided that it is neither Allāh Himself nor different from Him.[5] Ibn-al-Qayyim, who supported the Mu'tazila on the question of the moral attributes of human actions, claimed that all the Ḥanafīs, the Ḥanbalīs, most of the Shāfi'īs, and some of the Mālikīs held the same opinion as the Mu'tazila. He continued that all who accept that there are certain "grounds" for the Sharī'a rules, and accordingly use analogy, must accept also the existence of the rational goodness and badness

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1. See al-Āmidī, al-Iḥkām, vol. 4, pp. 35-38.
2. See al-Ash'arī, Maqālāt, pp. 356-357.
3. Related to 'Abdullahī Ibn-Sa'īd (or Ibn-Muḥammad) Abū-Muḥammad Ibn-Kullāb al-Qaṭṭān. d. after 240 A.H.
4. See al-Qāḍī 'Abd-al-Jabbār, Sharḥ al-uṣūl, p. 89. Al-Bazdawī (Abū-l-Yusr) Uṣūl-ad-Dīn, p. 242.
5. Al-Bazdawī, ibid., pp. 242-246ff.

in the actions. Otherwise, they would be holding contradictory opinions.[1]

But in spite of Ibn-al-Qayyim's claim, most of the Sunnīs he mentioned held the contradictory opinion from the Mu'tazila. They criticised them severely and accepted that some of their Sunnī colleagues had supported the Mu'tazila. They specially mentioned al-Qaffāl[2] aṣ-Ṣayrafī,[3] and al-Ḥalīmī,[4] from the Shāfi'ī school. They also mentioned that some of Ḥanafī scholars supported the Mu'tazila in this respect, but these Ḥanafīs were not named. The Mu'tazila were also supported by some groups other than the Sunnīs such as al-Karrāmiyya and ar-Rāfiḍa.[5] Accordingly, the Mu'tazila were not alone in holding and defending the existence of the rational goodness and badness of human actions in themselves.

The Mu'tazila classified the rational moral attributes in three types in order to make their opinion clearer. The first type is clearly understandable. Some examples are goodness in rescuing people from danger and badness in m hurting the innocents. The second type needs some consideration. Some examples are the goodness of telling the truth which causes harm, and the badness of telling the lie that results in benefit. These attributes need some consideration but still are understandable by human reasoning alone. The

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1. Ibn-al-Qayyim, Miftāḥ, vol. 2, p. 42.
2. Muḥammad Ibn-Alī Ibn-Ismā'īl al-Qaffāl ash-Shāshī, d. 365 A.H.
3. Abū-Bakr Muḥammad Ibn-'Abd-Allāh aṣ-Ṣayrafī, d. 330 A.H.
4. Al-Ḥusayn Ibn-al-Ḥasan Ibn-Muḥammad Ibn-Ḥalīm Abū-'Abd-Allāh, d. 403 A.H.
5. See al-Ghazālī, al-Mankhūl, p. 8.

third type can be known by the help of the Sharī'a. The example is the goodness of the prayers and all other kinds of worship.[1]

The Mu'tazila presented rational evidence to support their opinion. They argued that if human actions have no rational goodness and badness in themselves, then no one would be able to use reason in order to obtain rules for the new cases which were not judged by the texts. To use one's reason means to seek the moral attributes of actions, whether to prescribe or recommend them if they were good or to prohibit if they were bad. This use was permitted and called for by the texts of the Sharī'a itself. Accordingly the existence of the rational moral attributes of human actions in themselves must be accepted.[2]

Another piece of evidence they presented was the question of how the Prophets can be believed and prophecy can be accepted if actions have no rational moral attributes in themselves? The Prophets produced their messages for human reason to accept or reject according to their goodness or badness. If there were no such attributes then the Prophets themselves would have been wrong when they asked people to use their reason.[3] The Mu'tazila added that sensible people (al-'uqalā') agreed on some rational attributes even before the existence of the Sharī'a and this supports the existence of these attributes in the actions themselves.[4]

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1. See al-Ghazālī, Mus., vol.1, pp. 55-56ff.
2. See Ibn-al-Qayyim, Miftāḥ, vol. 2, p. 42.
3. Ibid.
4. Al-Ghazālī, Mus., vol. 1, pp. 61-63.

The Mu'tazila and their supporters ostensibly disagreed on the question arising from the above main question, namely, whether human actions before the existence of the Sharī'a have specific rational rules whose observation or negligence will affect man's situation in the life to come? The Mu'tazila were quoted as saying that actions which have clear goodness are rationally prescribed. Their negligence will affect the situation in the other life, and cause punishment, and their observation will bring about rewards. The actions which have clear badness in themselves are rationally prohibited. Their commitment will cause punishment and their avoidance will result in safety. The actions which are rationally neutral with no clear goodness or badness divided the Mu'tazila into three sections. Some of them preferred not to take any decision on them, some others decided that these types of actions are permitted, a third section decided that they are prohibited. This latter section argued that man is not permitted to act in the possessions of God unless the moral attributes are very clear to him.[1]

This is how it was attributed to the Mu'tazila. But their real intention seems to have been as follows: Those who commit bad actions deserve punishment in the life to come, but not necessarily receive it. The explanation of the Sharī'a to the rules of actions is essential regarding punishment. The section of the Mu'tazila who decided that actions which have no clear goodness or badness are prohibited

1. Ibid., vol. 1, pp. 63-65. Al-Baghdādī, Uṣūl-ad-Dīn, vol. 1, pp. 24-25ff and 149-150.

were not a large number. They seem to be a very small minority. There are no available details as to the exact size of them. But the opinions of the Mu'tazila in other places disagreed almost completely with the prohibition of these types of action.

The Sunnīs who supported the Mu'tazila regarding the existence of the rational moral attributes in actions, disagreed with them ~~ostensibly~~ stet on the point of the rational rules before the existence of the Sharī'a. They decided that actions without assistance from the Sharī'a are either rationally good, and these ought to be done, or bad, and these ought to be avoided, or neutral, and these may either be done or avoided. Those who do the good actions might be rewarded in the other life, and those who do the bad actions will not be punished.[1] This opinion of this section of the Sunnīs would agree with the attitude of the Mu'tazila if the opinion of the latter were understood according to what seems to be their real intention, as has been pointed out above.

The upholders of the existence of the rational moral attributes in human actions decided also that every revealed Sharī'a rule was in accordance with the rational goodness and badness of actions. They said that the texts and the rational evidence supported this fact. The Qur'ān says, "Those who follow the apostle, the unlettered Prophet, whom they find mentioned in their own (scriptures) in the law and Gospel;

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1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 51-59. Al-Baghdādī, ibid., vol. 1, pp. 24-25ff.

for He commands them what is just and forbids them what is evil. He allows them as lawful what is good (and pure) and forbids them from what is bad (and impure)".[1] This verse stated that actions were rationally good or bad in themselves before the existence of the rules of the Sharī'a, and the rules came in accordance with these attributes. The Qur'ān also says, "say: things that my Lord Hath indeed forbidden are shameful deeds, whether open or secret".[2] Accordingly, the sound human reason will never disagree with these rules.

The upholders added that the attitude of the Sharī'a towards food, drink, and sex, is corresponding to the rational judgement. It prohibited every food or drink that would harm the individual or the society, and permitted or prescribed that which secure them. The goodness of the acts of worships can be understood rationally with the help of the Sharī'a, although the act of worship must be accepted without question. Fasting, for instance, consists of training one's self to resist human desires which may destroy humanity if they were set free without control. It also reminds people of suffering poverty, in order to prepare them for the acceptance of equity. Pilgrimage consists of bringing together people of different classes. They are all bound by the same obligations and manners which they must observe, and this is an exercise of practical equality. Prayers consist of awaking the consciousness in order to observe one's past actions, five times a day. The Qur'ān says, "Recite what is sent by

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1. Q. 7. 157.
2. Q. 7. 33. Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 5-6ff.

inspiration to you, and establish regular prayers; for prayers restrains from shameful and unjust deeds".[1] This is how the upholders of the existence of the rational attributes in human actions tried to bring together their decision and the texts of the Sharī'a.[2]

Another question arose before the upholders, namely: is it possible that abrogation may exist in the revealed Sharī'a rules? If it were possible, how can both, the abrogation and the existence of the rational goodness and badness in the actions themselves be accepted together in one field? The rational attributes in human actions themselves demand permanent rules, and abrogation demands changing some of the rules.

The overwhelming majority of the Muslim scholars, including the Mu'tazila and their supporters, held that abrogation existed in the texts and rules of the Sharī'a.[3] All of them also decided that abrogation cannot exist in the rules which are fundamental in the Sharī'a. These are the rules that secure the bases of religion, life, reason, wealth, and progeny.[4] An example of the rules which can be abrogated is the prohibition of preserving the meat of the sacrificed animals in the day of the sacrifice. This rule was abrogated by a Tradition, and instead the preservation was permitted.[5]

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1. Q. 29. 45.
2. See al-Āmidī, al-Iḥkām, vol. 3, pp. 100, 106, 125. Al-Ghazālī, Mus., vol. 1, pp. 119-120.
3. Al-Āmidī, ibid., vol. 3, p. 106.
4. Ash-Shātibī, Muwā., vol. 3, pp. 117-118.
5. See al-Āmidī, op.cit., p. 125.

The Mu'tazila and their supporters claimed that abrogation does not contradict their decision on the attributes of actions. But the argument they presented in support of this claim does not seem convincing. They said, they did not claim that the results of actions should always come in accordance with their rational goodness and badness. They sometimes may have temporary goodness or badness and bring about temporary results, but this would never change their real attributes in themselves. It is the same as medicine, for instance. It is good in itself, but sometimes it might cause more damage to the health if used wrongly. This does not change the reality that medicine is good in itself.[1] This is how they justified their acceptance of both, the abrogation and the existence of the rational goodness and badness in the actions themselves. But this argument seems to have brought them very close to the opinion of those who rejected the existence of the rational moral attributes in human actions themselves. The upholders nearly accepted that circumstances have an effect on these attributes. It might support their decision if they said that abrogation could happen only in the rules of the neutral actions which have no definite moral attribute.

Some of the supporters of the Mu'tazila tried in an obscure argument, to explain the way in which they accepted abrogation in the Sharī'a and at the same time accepted also

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1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 28-29ff.

the existence of the rational moral attributes in human actions themselves. They stated that abrogation is only possible in the rules of the actions which have specific circumstances demanding sometimes moral attributes contradicting the true rational intrinsic ones. For example, telling lies is bad in itself, but when it saves a life of an innocent or a Prophet, then it becomes good. These are the circumstances which are demanding temporary contradicting attributes. The abrogation is not possible in the rules of the actions which have no circumstances demanding a temporary contradicting attribute. For example, thanklessness is bad in itself, and there is no circumstance which makes it good.[1] Again, this argument does not seem satisfactory. It does not harmonize the acceptance of the abrogation and the existence of the intrinsic rational goodness and badness in actions at the same time. This argument also seems to be leading to the acceptance of the effect of the circumstances on the moral attributes of actions.

The Mu'tazila, and some of their supporters, disagreed on the question of whether a rule, which was stated by the texts, can be abrogated immediately after it was stated, and before allowing any time for its application. The Mu'tazila rejected this. They argued, if it were possible, then it would mean that God may regard one single action as good and bad, required and rejected at the same time, and for the same circumstances. And this is impossible for God. Any rule

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1. See Ibn-al-Humām, Taḥrīr, vol. 1, pp. 383-384.

stated by the texts would be given time for application. It is possible for mankind to state a rule and abrogate it before application. People may not be fully aware of the correctness of their decisions or of the real attribute of actions. But God is fully aware of His orders, and will never state a rule which He knows He will abrogate before its application.[1]

Some of the supporters of the Mu'tazila disagreed with them on this point. They decided that God might abrogate some of the rules He stated before application. The objective of stating such rules would then be to train people to obey God, even if merely by intention, and not necessarily to apply a specific rule. When Abraham saw in a vision that He should offer His son in sacrifice, He knew that it was an order of God, accordingly He intended to carry out the order. The order was abrogated before it was carried out. The objective of the order was achieved by the intention of Abraham.[2]

They discussed another point regarding the abrogation, namely, whether the texts of the Sunna can abrogate the texts of the Qur'ān, and whether analogy can abrogate the texts of the Qur'ān or the Sunna? In other words, whether a lower source can abrogate a higher source? The Mu'tazila, the Ḥanafīs, the Mālikīs, and some of the Shafi'īs decided that it is rationally acceptable, that a Tradition could

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1. Al-Āmidī, op.cit., vol. 3, pp. 115-115ff. Al-Ghazālī, Mus., vol. 1, pp. 112-113ff and vol. 2, pp. 6-7ff.
2. See Q. 37. 102-105. Ibn-al-Qayyim, Miftāḥ, vol. 2, p. 40.

abrogate a verse from the Qur'ān, but they disagreed on whether it happened practically. They said that the very strong Traditions (mutawātir) are regarded as being of the same standard as the texts of the Qur'ān. Therefore they can abrogate each other. The weak Traditions are not accepted to abrogate texts from the Qur'ān. To most of the scholars, the weak Traditions are not accepted even to abrogate the strong Traditions. Ash-Shāfi'ī and most of his followers, the Ẓāhirīs, and Aḥmad Ibn-Ḥanbal, decided that it is not possible for a Tradition to abrogate a verse from the Qur'ān. They accepted that the strong Traditions can abrogate each other. The Ẓāhirīs alone took a decision that the weak Traditions can abrogate the strong Traditions. They argued that the Prophet Himself used to send individuals to different towns and countries in order to inform people of the news of the abrogation of some rules, and the substitutes of the abrogated. People used to accept this news transmitted by the individuals. The abrogated rules may have been transmitted by a number of people, which is a strong means, and still they used to accept their abrogation by the news of the individuals. To the Ẓāhirīs this is a satisfactory evidence for their claim.[1]

Regarding the abrogation of the texts by analogy, the overwhelming majority of the scholars rejected it. Only a very small minority of the Shāfi'īs said that it is possible if analogy was based on a very strong "ground" and similarity.

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1. See al-Āmidī, al-Iḥkām, vol. 3, pp. 134-135.

For example, the prohibition of hitting one's parents was stated by analogy to the prohibition of rebelling against them. If any text existed which permits hitting one's parents, this text must be abrogated by this rule stated by analogy.[1] These are the points discussed by the upholders of the existence of the rational goodness and badness of human actions in themselves. It was important to present sometimes some of their opponents' opinions in order to make the point clearer. It may become clear now how they presented their opinions, and how they supported them.

It is time now to discuss in detail the opinion of the opponents who took the contradicting opinion of the Mu'tazila. They rejected completely that actions have goodness and badness in themselves. To them, the moral attributes of human actions are created either by the Sharī'a itself, or by human desires. These attributes are changing according to the circumstances. In the field of the Sharī'a, the good is what was approved of by the Sharī'a, and the bad is what was disapproved of by the Sharī'a. The attributes based on pure human desires are false.

As far as can be ascertained here, this group includes: the Mālikīs, ash-Shāfi'ī and most of his followers, Aḥmad Ibn-Ḥanbal, all the Ẓāhirīs, al-Awzā'ī, ath-Thawrī and Abū-Thawr. Consequently it includes all the Ash'arīs.[2]

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1. Ibid., vol. 3, pp. 149-150. Al-Ghazālī, Mus., vol. 1,
2. See al-Baghdādī, Uṣūl-ad-Dīn, vol. 1, pp. 24-28. Ibn-Ḥazm, al-Iḥkām, vol. 1, pp. 52-53ff. Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 24-27 and 40.

These scholars decided that human actions before the existence of the Sharī'a had no certain rules whose observation and negligence will affect man's situation in the life to come. Therefore, no one will be rewarded or punished in the hereafter according to his actions in this life unless the rules of actions were explained by the Sharī'a itself. All actions before the existence of the Sharī'a were similar. People sometimes might decide that particular actions are good and others are bad. But these decisions affect only the situation in this life. If any one were to receive reward or punishment in the life to come while he had not been taught any Sharī'a in this life, this reward or punishment would be a mere will of God. They can never be regarded as based on his actions.

They stated that, apart from human desires, there are another two misleading factors which cause the belief that actions are good or bad in themselves. The first factor is the appearance of an action in most times as good or bad. Accordingly, people may forget the few times in which a particular action has different moral attributes, and they think that the attribute which occurs most often is in the action itself. For example, telling lies occurs mostly as bad, but sometimes occurs as good, when it saves an innocent life for instance. People thought that telling lies was bad in itself.[1]

The second misleading factor is the false imagination

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1. See al-Ghazālī, Mus., vol. 1, pp. 57-59. Al-Baghdādī, op.cit., vol. 1, pp. 24-28.

(wahm). For example, if one was stung by a striped snake he might imagine that any striped thing is connected with harm, and therefore it is bad in itself. If one's enemy did a good action or suggested a good idea, one might imagine that this action or idea is bad in itself. These are the two factors which make people think wrongly that some actions are good or bad in themselves.[1]

By holding this opinion, the opponents of the existence of the rational moral attributes of human actions in themselves avoided all the problems that faced the upholders. They did not have to hold man responsible for his actions before the existence of the Sharī'a, which responsibility affects his situation in the life to come. To them, no one is responsible in the hereafter for his actions in this life unless the Sharī'a existed. Human reason is unable to understand whether a particular action will bring about reward or punishment in the other life. Reason can only understand the result of an action in this life. Accordingly, it cannot decide moral attributes for actions that will affect life to come.[2]

The opponents also avoided the problem of abrogation. There is no contradiction between their acceptance of the abrogation and their decision on the moral attributes of actions. Both the moral attributes of actions and abrogation are affected by the different circumstances.

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1. Ibid.
2. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 24-27.

But the opponents were faced with a question which did not arise before the upholders, namely, how analogy can be exercised if there were no rational moral attributes in human actions themselves? Analogy is to seek the moral attributes of actions, and accordingly to seek the similarity between them and other actions whose rules were decided by the texts. Whenever a similarity existed, then the action which has not been decided by the texts will have the same rule as that decided by the texts. The only answer they could produce to this question was that, in case of analogy they sought the moral attribute of an action at the particular time in which they judged the case. But this answer would require answering another question, that is, why some actions which have no revealed rules can have changing rules based on reasoning, while similar actions were given permanent rules by the texts? They have answered this by saying that the revealed rules were for the actions which mostly occur according to these rules, such as the prohibition of gambling. Gambling is mostly causing harm all through the times. And the actions judged with analogy to these revealed actions are similar to them from certain aspects, ~~and~~ but may not be mostly similar. But nevertheless, the opponents of the existence of moral attributes of actions in themselves judged some cases by analogy taking into account their moral attributes in the times of the decisions and in future. The above-mentioned main question which faced the opponents, can be easily answered by those who rejected analogy completely, such as the Ja'farī Shī'ites, as will be discussed in another chapter.[1]

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1. See al-Ghazālī, Mus., vol. 2, pp. 66-70.

The opponents raised a number of points and criticisms against the Mu'tazila and their supporters. First, they argued, if it were accepted that human reason is able to understand the real rational moral attributes, which were claimed by the Mu'tazila as being in the actions themselves, then there is no point in explaining rules in the Qur'ān. People can act according to these attributes. God must have prescribed what is rationally good and prohibited what is rationally bad. And this would deny the free will of God, and mankind would be His partners in His disposal of the world, and this is impossible.

The opponents said that the Mu'tazila considered telling lies as bad in itself. According to this decision, if one promised that he will tell a lie tomorrow, then he can never escape doing bad actions. If he kept his promise and told a lie he would commit bad action, which is telling lies. And if he broke his promise and did not tell a lie, then he would commit the same bad action, since he would prove that he was telling a lie when he promised. The decision of the Mu'tazila is suggesting this impossible situation. The opponents also argued that the Mu'tazila regarded killing as bad in itself, while the Sharī'a itself has appointed it as legal punishment for certain crimes.[1]

The opponents presented some hypotheses in order to refute the opinion of the Mu'tazila. They said, if a person were born with perfect reason and human nature, and were not

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1. See Ibn-al-Qayyim, Miftāḥ, pp. 24-57.

taught by parents nor by society, nor received any Sharī'a, and then he was told the reality of telling the truth (sidq) and the reality of telling a lie (kadhib), he will understand these two realities without needing to think about their goodness or badness. As long as these moral attributes are not necessary to the understanding of the realities of actions, then they should not be regarded as parts of these realities. Claiming that the moral attributes are in the actions themselves means that they are parts of their realities.

The opponents claimed that every moral attribute of an action stated by reason could have a contradictory moral attribute at the same time, stated also by reason. For example, killing could have two rational contradictory moral attributes when it was appointed as punishment for murder. It could be regarded as good since it will help to prevent murders, and as bad since it in fact causes loss of more lives.[1]

They quoted some Qur'ānic verses to support their opinion. For example, the Qur'ān says, "Nor would We visit with our wrath until We had sent an apostle (to give warning)".[2] The Qur'ān also says, "Apostle who gave good news as well as warning, that mankind after (the coming of the apostle) should have no plea against God".[3] These verses were presented by them in order to prove that human actions before the existence of the Sharī'a will have no

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1. Ibid.
2. Q. 17. 15.
3. Q. 4. 165.

effect on man's situation in the life to come. People should have been forewarned by apostles. This is the conclusion of the opinion of the opponents of the Mu'tazila.

It is necessary now to present the answers given by the Mu'tazila and their supporters to the above-mentioned criticisms and points raised by their opponents. First they denied that their decision on the moral attributes of actions would deprive God of His free will. They affirmed their decision that God should always prescribe what is rationally good and prohibit what is rationally bad. He is not expected to deny the function of human reason for which it was created. It was created to distinguish between good and bad, right and wrong. If God prescribed what is rationally bad and prohibited what is rationally good, He would deny the function of reason. His approval of rational goodness and badness of actions is not obligatory, but rather by His own free will. They added that man is acting according to his own free will, let alone God. Man is not obliged to act against his will, and his actions will be subjected to his rational judgement. Even after he received the Sharī'a he would not be responsible for his actions in this life unless he had a free will to chose his actions. God Himself willed to provide man with reason and free will, and man can never deprive God of His overall will.[1]

The Mu'tazila and their supporters accepted that sometimes human reason cannot understand some of God's disposals

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1. See al-Qāḍī 'Abd-al-Jabbār, Sharḥ-al-Uṣūl, pp. 564-565ff.

in this world. But they insisted that if the real "grounds" of these rules were disclosed to reason, then definitely they will be in accordance with the rational goodness and badness.[1]

In respect of the example of the man who was born with a perfect reason and human nature, and he could understand the realities of actions without thinking about their moral attributes, the Mu'tazila said that this suggested man does not refute their decision on the moral attributes of actions in any respect. The understanding of this man of the realities of telling the truth and telling a lie would be incomplete if it did not include knowing their moral attributes. He may not think about their moral attributes when he was told, since goodness and badness of some actions are rather obscure.[2]

The Mu'tazila and their supporters considered it impossible that human reason may state two contradictory moral attributes for one action at the same time. This was a point raised by the opponents in order to refute the opinion of the Mu'tazila. The upholders added that one of the moral attributes of an action would secure a more important "public interest". This would ~~mitigate~~ stand firm against contradiction. Both the Sharī'a and reason are always giving preponderance to the "ground" which secures the more important objective. The chosen "ground" will determine the moral attribute of an action, whether it is good in itself or bad

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1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 60-61.
2. See ibid.

in itself.

The foregoing discussions and arguments may be concluded in the following manner; the Mu'tazila and their supporters believed that their decision on the moral attributes of actions as that they are rational and in the actions themselves, is supported by the texts of the Qur'ān and the Sunna. The rational moral attributes of human actions are in fact the "grounds" of the revealed Sharī'a rules. The Sharī'a was not revealed in order to abolish the function of human reason, but rather, to strengthen and support it. Reason is in accordance with the Sharī'a regarding the objectives which are eventually securing the public interests. The Sharī'a prescribed actions considered good by reason and prohibited actions considered bad by reason. The respect of human reason by the texts is essential for the whole Sharī'a. The Prophets needed the judgement of human reason in order to accept or reject their messages. They would have been unable to convince people if reason had no function and respect to judge their messages. People accepted the divine messages because the Prophets ordered them to do that which is rationally good and prohibited them that which is rationally bad. One of the Companions was asked why he accepted Islam. He replied, "Because I never heard the Prophet prescribing an action that reason would wish to be prohibited, nor heard Him prohibiting an action that reason would wish to be prescribed.[1]"

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1. Ibid.

Justice and injustice, pleasing and harming, for instance, are ~~very distinguished~~ wholly distinct. The difference between each two contradictory actions is rationally understandable. One would regard justice and pleasing as rationally good and injustice and harming as rationally bad. This rational judgement is in accordance with the moral rational attributes of these actions in themselves. If an action appeared in most cases as bad, then it should be regarded as bad in itself, irrespective of the few cases in which this action appeared as good. Telling a lie, for instance, is bad in itself even if it secured sometimes innocent lives. Judgements which were based on pure desires or false imagination are not regarded as rational judgements. To dislike a striped string because you have been stung by a striped snake, or to hate an idea or an action because it was suggested or done by your enemy are not rational decisions.

They said that it is impossible for God to do what was regarded as failure by man. We (the Mu'tazila) decided that man is rationally obliged to do good actions and avoid bad actions. It is failure to invert this order. That is to do what is rationally bad and to avoid what is rationally good. Accordingly, God would always prescribe good actions and prohibit bad actions. It is rationally impossible for Him to do the opposite. This does not imply equality between God and man, but it implies that God is far above revealing irrational rules.[1] It was revealed in the Qur'ān that God

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1. Ibid.

never prescribed nor did bad actions. The verse said, "They will find all that they did, placed before them, and not will thy Lord treat you with injustice".[1] Another verse said, "Whoever works righteousness Benefits his own soul; whoever works evil, it is against his own soul; Nor is thy Lord ever unjust (in the least) to His servants".[2] Another verse said, "And it was due from us to aid those who believed".[3]

The Prophet once asked Mu'ādh, Do you know what is due to God by His servants? Mu'ādh replied, No I do not know, but God and His Prophet know. The Prophet said, It is the servants' duty to worship none but God. The Prophet asked him again, And do you know what is due from God to His servants? Mu'ādh replied, No I do not know, but God and His Prophet know. The Prophet said, they deserve to be rewarded by Him and not punished.[4] This Tradition presented by the Mu'tazila in order to prove that God never does bad actions by being unjust towards His servants. Accordingly, He would never prescribe bad actions to be done by His servants.

This is the conclusion of the opinion of the Mu'tazila and their supporters on the question of the moral attributes of human actions. There were some points of weakness in their position. This was because of some of the opinions

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1. Q. 18. 49.
2. Q. 41. 46.
3. Q. 30. 47.
4. See Ibn-al-Qayyim, Miftāh, vol. 2, pp. 60-61ff. Ash-Shawkānī, Irshād, pp. 6-8. Ash-Shātibī, Muwā., p. 2, pp. 5-6ff.

they held. One of these points was the question of the rules of human actions before the existence of the Sharī'a. They proclaimed that actions before the existence of the Sharī'a had certain rational rules whose observance and negligence would affect man's situation in the life to come, as has been explained previously. Another point was their statement that God must always do and prescribe good actions, and must prohibit and not do bad actions.

Regarding the point of the rules of actions before the existence of the Sharī'a, some attempts were made in this thesis to interpret their statement in a way that goes along with their other decisions. This interpretation was that their intention might have been that reason would understand good and bad before the existence of the Sharī'a and accordingly regard good actions as rationally prescribed, and should be done, and bad actions as rationally prohibited, and should be avoided. Those who observe these rational judgements properly deserve rewards in the life to come, and those who neglect them deserve punishment but would not be punished since they were not taught a Sharī'a in this life.

A similar opinion of this interpretation was held by Ibn-al-Qayyim who supported the Mu'tazila on the main question. He understood the statement of the Mu'tazila as it was proclaimed and stated that he took a middle attitude. He said that actions before the existence of the Sharī'a had goodness and badness in themselves, but no one will be punished in the life to come unless he has received a Sharī'a in this life. Ibn-al-Qayyim did not talk about the rules of these actions.[1]

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1. See Ibn-al-Qayyim, ibid., vol. 2, p. 7.

Another point of weakness in the position of the Mu'tazila and their supporters was their acceptance of abrogation in the texts and revealed rules of the Sharī'a. They should have rejected it as long as they held that actions have rational moral attributes in themselves. If it were true that actions have goodness and badness in themselves, then God who created them would be the only one fully aware of them. He would from the beginning reveal rules according to these attributes, and there would be no need for abrogation. He would not reveal rules against these intrinsic attributes since this would be either ignorance or useless, and both are impossible for God. Although the Mu'tazila argued that abrogation did not exist in the fundamental rules, this did not give their position strong support. It remained a point of weakness raised by their opponents against them.

The opponents of the Mu'tazila seem to have held a more convincing opinion. They did not give reason excessive weight which may damage the texts if reason went wrong, since reason may make mistakes. At the same time they did not deprive reason of its function. One of the critical points raised against them by the Mu'tazila when these opponents held that actions have no goodness and badness in themselves, was, how analogy could be exercised then? Analogy is to seek the moral attribute of an action and the similarity between it and a revealed case. The only answer they could produce is that, in the case of analogy, the rational moral attribute of the concerned action at a particular time would be considered.

However, misunderstanding occurred between the Mu'tazila and their supporters on the one hand, and the opponents of the Mu'tazila on the other hand, regarding some points such as the position of human actions before the existence of the Sharī'a. They seem to have interpreted each other according to some possibilities of the statements they made ignoring the real intentions.

CHAPTER TWO

THE "GROUND" IN THE RULES OF THE SHARĪ'A

The "ground" in the rules of the Sharī'a has been a subject of wide arguments and disputes among Muslim scholars in the past as was the subject of the moral attributes of human actions. The first chapter of this thesis concerned the place and respect of human reason, without the assistance of the Sharī'a, regarding the rules and the moral attributes of human actions. This chapter will deal with the place and respect of human reason in the Sharī'a regarding the same aspects. The rules and moral attributes of human actions were the core of both subjects. In order to clarify the questions which will be discussed in this chapter, they could be stated thus: Were the revealed rules of the Sharī'a based on specific "grounds"? If so, were they rational or divine and created by God having no connection with reason? But before dealing with these questions, it should be pointed out that the term "ground" will be used here to represent the Arabic term "'illa".

There were two main groups of scholars holding two different opinions on the subject of the "ground" in the rules of the Sharī'a. The first group, which was the majority, held that the revealed rules of the Sharī'a were based on specific "grounds". This group includes all the Mu'tazila, ~~the existence of "goodness" and "badness" of human actions in themselves~~, and all the Sunnīs, even those who disagreed ostensibly with the Mu'tazila on the question; Whether there are goodness and badness in human actions

themselves.[1] There are some differences between the scholars of this group on the interpretation of the reality of the "ground" in the rules of the Sharī'a. But whether these differences are substantial, it will be discussed in the following pages. As may have been noticed, this group includes all the Mu'tazila; even those who tried to criticize the use of analogy in the Sharī'a, such as an-Naẓẓām could not reject the existence of the "ground" in the Sharī'a rules. And even the Shī'ites are included in this group.[2]

The second group which is the minority, decided that the rules of the Sharī'a were not based on specific "grounds". This group includes only the Ẓāhirīs. It will be explained how they defended their opinion. This is a general picture of the two main groups and their two different opinions. Each of the two groups and opinions will be dealt with in detail and from different aspects.

The upholders of the "ground" generally agreed that the rules of the Sharī'a were revealed in order to secure people's "interests". Every single rule of the Sharī'a has its own particular "ground" which contributes to this aim. The rules of the Sharī'a cannot exist for no reason. They were revealed to secure first, the "interests" which include the largest possible number of people, and then to secure the "interests" of the individuals. All the "interests" were intended by the Sharī'a to be secured, unless two of the

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1. See p. 17 of this thesis.
2. See ash-Shawkānī, Irshād, pp. 174-175; ash-Shahrastānī, al-Milal, vol. 1, pp. 54-57; al-Ghazālī, Mus., vol. 2, p. 56.

"interests" were contradictory. In this case only the more important one should be secured.[1]

This was generally the decision of this majority who held that the Sharī'a rules were based on specific "grounds". They have presented some textual evidence from the Qur'ān and the Sunna supporting their opinion. They said that it is difficult to present all the textual evidence which supports their decision, since these are spread all through the Qur'ān and Sunna.[2] They also presented some rational evidence for their support.

As textual evidence they presented the following verse: "On that account We ordained for the children of Israel that if any one slew a person - unless it be for murder, or for spreading mischief in the land - it would be as if he slew the whole people: And if anyone saved a life, it would be as if he saved the life of the whole people".[3] This verse in the Qur'ān followed the story of Qābīl and Abel, the two sons of Adam, when Qābīl killed his brother Abel unjustly. He was motivated by envy to kill him, in order to get rid of him. He intended to marry his own twin sister, who was chosen by God to be married to Abel. Because of this murder, and to save the lives of the innocent people, God prohibited the children of Israel to commit such crime, and regarded murdering a person as equal to murdering the whole people, regarding the punishment in the life hereafter.[4]

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1. Ibn-al-Qayyim, Miftāḥ., vol. 2, pp. 19-21; Ash-Shāṭibī, Muwā., vol. 2, pp. 8-17.
2. See Ibn-al-Qayyim, Ibid., vol. 2, p. 22.
3. Q. 5. 32.
4. Az-Zamakhsharī, Kashshāf, vol. 1, pp. 623-627.

The upholders of the "grounds" regarded this verse as a very clear evidence that the prohibition of murder, which was to the children of Israel, was based on a specific "ground", and this means that God revealed His rules, basing them on specific "grounds".[1]

They also presented the following verse: "When Zayed had dissolved (his marriage) with her, with the necessary (formality), We joined her in marriage to thee: in order that (in future) there may be no difficulty to the believers in (the matter of) marriage to the divorcees of their adopted sons, when the latter have dissolved with the necessary (formality) (their marriage) with them".[2] The verse stated that the marriage of the Prophet with Zaynab was based on the "ground" that people in future may have no difficulty in the matter of marriage to the above-mentioned divorcees. The upholders regarded this "ground" as a clear textual "ground", since the article of reasoning (al-lām) has been mentioned.[3]

Another verse was presented by the upholders as supporting their opinion, that is: "What God Has bestowed on His Apostle (and taken away) from the people of the township - belongs to God - to His Apostle and to kindred and orphans, The needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you".[4]

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1. See al-Ghazālī, Mus., vol. 2, p. 74; al-Amisi, al-Iḥkām, vol. 3, p. 234; Ash-Shawkānī, Irshād, p. 184.
2. Q. 33.37.
3. Al-Āmidī, al-Iḥkām, vol. 3, pp. 233-234; Ibn-Ḥazm, al-Iḥkām, vol. 8, pp. 84-85.
4. Q. 59.7.

The "ground" on which the fay' was distributed in that particular way was to avoid the circulation of the wealth between the wealthy. The fay' which is taken from the people of the township, includes land. And if it is to be distributed in the same way of ghanīma, it would be merely unjust, since it would keep the wealth in circulation between a few people. The ghanīma is what is taken from the defeated army in the battle-field, and it mostly includes equipment which is necessary for soldiers. Therefore, it has been decided by the Qur'ān that only a fifth share of the ghanīma is assigned to God, and to the Apostle, and to near relatives of the Apostle, orphans, the needy, and the wayfarer. The rest of the ghanīma, which is four fifths, are to be distributed between the soldiers.[1] The upholders held this verse as an evident textual evidence for the existence of the "grounds" in the Sharī'a rules. Avoiding the circulation of the wealth between the wealthy was the "ground" for distributing the fay' in this particular way.[2]

As other textual evidence presented by the upholders was the following verse: "Apostle who gave good news as well as warning, that mankind (after the coming) of the Apostles, should have no plea against God".[3] Apostles were sent to mankind to direct them to the right path, so that they may have the happiness in this life and in the hereafter. They will have no plea against God, since they have not been left

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1. See Zamakhsharī, Kashshāf, vol. 2, p. 222.
2. See al-Ghazālī, Mus., vol. 2, p. 74; Subkī, Jam', vol. 2, p. 263.
3. Q. 4. 165.

alone, but have been directed by the Apostles. Applying the justice of God to mankind was the "ground" of sending the Apostles. And this supports the opinion of the upholders.[1]

They also presented the following verse: "Oh! ye who believe: intoxicants and gambling (dedication) of stones, and (divination by) arrows, are an abomination, - of Satan's handwork, Eschew such (abomination): that ye may prosper. Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer: will you not then abstain?[2] Intoxicants and gambling and the rest of the above-mentioned actions were prohibited in order to avoid these bad results. This avoidance was the "ground" of this prohibition, and this supports the upholders' opinion."[3]

The upholders presented some Traditions to show that their attitude has also been supported by the Sunna. For example: The Prophet once gave an order concerning the meat of the animals slaughtered on the day of sacrifice (Yawm al-aḍḥā). He ordered the Muslims not to preserve the meat of these sacrificed animals more than three days. He instructed them to feed from it and give the rest to those who need it during only the first three days. Later on the Prophet was asked about the skins, wool and the like of these

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1. See Ibn-Ḥazm, Iḥkām, vol. 8, p. 85.
2. Q. 5. 90-91.
3. See al-Ghazālī, Mus., vol. 2, p. 75.

animals which they can benefit from other than meat, whether these are permitted to be preserved. The Prophet then gave them permission to preserve these things, and He abrogated His previous prohibition to preserve the meat and said: you can eat, give alms, and preserve from it. First I prohibited the preservation of the meat, because there was necessity at that time, namely: there were some poor people who were in need of this meat.[1] But after the circumstances had changed, and the "ground" of the prohibition did not exist, He abrogated the prohibition and explained the "ground" of the abrogated rule, which showed that the Sharī'a rules were based on specific "grounds".[2]

The upholders presented a rational evidence supporting their opinion, namely: the wise (ḥakīm) God is not expected to reveal rules for no reason, since this will contradict His wisdom. Therefore, every individual rule revealed by Him, should have been based on a particular "ground".[3]

This was the common evidence presented by the upholders. They agreed on the main decision on the existence of the "grounds" in the Sharī'a rules, and agreed on the evidence they presented. But when they came to discuss the nature of the "grounds" in the Sharī'a rules, whether it was rational or divine and created by God, they disagreed and divided into two sections.

The first section, which was the Mu'tazila and those

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1. See Mālik, al-Muwaṭṭa', vol. 3, pp. 75-76.
2. See al-Ghazālī, Mus., vol. 2, p. 74.
3. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 22, 38.

who supported them on the matter of the goodness and badness of actions in themselves, decided that the "grounds" of the Sharī'a rules are rational. Every Sharī'a rule should have its own rational "ground" in order to convince human reason that these rules are securing the "public interest". If ever human reason could not understand a particular "ground", of a particular rule, then it should be understood that the inability to understand it belongs to the people. And this particular rule is certainly securing a "public interest". The members of this section also decided that the revealed Sharī'a rules should correspond to the rational goodness and badness of actions in themselves. The conclusion of their opinion is that the "ground" of every Sharī'a rule has an effect on the existence of the rule. The "ground" is the reason and the "interest" which demands the existence of the rule.

To this section there is no difference between the terms: 'illa, ḥikma and maṣlaḥa of the rule. They all mean the "ground" and the motive of the rule. A Sharī'a rule would never exist without a particular rational "ground". The rule will follow its "ground" in the different circumstances regarding the existence and non-existence. To them the "ground" of the permission to break the fast during the daylight of the month of Ramaḍān is not travelling in itself, as the others thinks, but the need to avoid difficulty and harm which might be caused by fasting when trav elling. Likewise in the matter of the right of pre-emption (ash-shuf'a) to be given to the neighbour or the partner, the "ground" is to avoid troubles which might befall to the

neighbour or the partner, if the estate was sold to a third person. The "ground" is not neighbourliness or partnership in itself. Although these kinds of "grounds" may appear differently, regarding their degree and effect, from one case to another, this is not enough to refute them according to this group of scholars. Whenever it appears differently, or it appears in one case and not in another, then we should take its stronger and more ~~often~~ frequent case and decide the rule accordingly. For example, the permission to break the fast while travelling is based on the "ground" of avoiding difficulty. But sometimes travelling could be very easy and nevertheless, the permission still exists because of the possibility of its existence.[1] This was generally the point of view of this group regarding the nature of the "grounds" of the rules of the Sharī'a. The points on which they have agreed with the other section of the upholders will be discussed later on.

The point of view of the second section of the upholders regarding the nature of the "ground" in the Sharī'a was, that the "grounds" of the Sharī'a rules are merely signs (amārāt), revealed by God to indicate certain rules. It has no connection with convincing human reason of the relevance of the rule. The scholars who held this opinion formed the majority of the Sunnīs. They were almost all those who rejected the "goodness" and "badness" of human actions, which we have already discussed in our last chapter. They believed that the "grounds" of the Sharī'a rules have no

1. See al-Āmidī, al-Iḥkām, vol. 3, p. 186 and vol. 4, p. 76; Ibn-Rushd, Bidāyat, vol. 2, pp. 256-257ff.

effect, and take no part in the existence of the rules. A single "ground" should always appear in the same degree and size. It should not differ from one case to another. For example; they believed that the "ground" of the right of pre-emption (shuf'a), for the partner or the neighbour, is either the partnership or the neighbourliness. It is not the avoidance of something which might occur and might deprive the partner or the neighbour of his right. They thought that these troubles might not occur if the estate were sold to a good person, nevertheless, the rule exists. Therefore, this should not be regarded as the "ground" of this rule.

The scholars of this section believed that the term 'illa is different from the term ḥikma and the term maṣlaḥa. But the last two refer to the same idea. Ḥikma or maṣlaḥa, is the object which the rule is intended to secure. But 'illa is merely a sign for the rule which secures this ḥikma or maṣlaḥa. People, sometimes, might not be able to understand the ḥikma of a rule, but we should not, therefore, reject this rule. We must apply it, and accept the "ground" appointed by the Sharī'a as it is. The 'illa might clearly indicate the ḥikma, and help us to understand that the rule is intended to secure it. Or it might not indicate it clearly. This means that it is not necessary to understand by human reason the ḥikma or the maṣlaḥa, which is to be secured by a rule. They added that, in the Sharī'a field we should always seek for stable bases and "grounds" on which rules can be based. We should not accept confused and unstable attributes as "grounds". In their opinion, ḥikma is

confused and unstable. It does not always have one standard, and sometimes it completely disappears. Therefore, it should never be regarded as ʿilla for a Sharīʿa rule.

They decided that there is no difference between the rule and its "ground". Both of them were created and dependent on the authority of the Sharīʿa. We have no authority to say whether a "ground" should be a particular attribute. It is possible for the Sharīʿa to create a rule based on a specific "ground", and then to change the rule to a contradicting rule based on the same "ground". This is because the "ground" in the Sharīʿa is not more than a mere sign. To this group, the prohibition of drinking wine was based on the "ground" of the strength of wine. It is very possible in the Sharīʿa that the same strength could have been appointed as a "ground" for the permission of drinking wine.[1] This was their conception of ʿilla in the Sharīʿa. Some of them expressed this same point of view in different words, while holding to the meaning explained above. This will be shown later on.

They could justify and defend this opinion whenever a "ground" is mentioned in the texts. But when they come to a rule which has been deduced, problems arise. They have to use reason in order to find out the "ground", and they cannot appoint a mere meaningless sign as a "ground". They should seek for a relevant "ground" which can be rationally accepted, and this is where their opinion became unclear.

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1. See al-Ghazālī, Mus., vol. 2, p. 72; Ash-Shawkānī, Irshād, p. 181.

They were obliged to distinguish practically between the deduced "ground" and the revealed "ground". They have regarded the revealed one as a mere sign, and the deduced as rational, even if they did not express this distinction explicitly. They tried to adapt the deduced "ground" to the revealed "ground", by seeking, in the case of the deduced ground, for a stable attribute, other than the real ground, to serve in this capacity. For example: the Sharī'a has given travellers permission to break the fast in the daytime during the month of Ramaḍān. The first section of this group of scholars, regarded the "ground" of this rule as the avoidance of difficulty which might be caused by the travel. The second section of them regarded the "ground" as the travel itself, since the reality of travel is always the same. It is the fact of moving from one place to another, not the existence or non-existence of the difficulty. The travel itself is held to comprise some difficulty, and it is in itself not changeable. Because it is held to comprise difficulty, and is stable, it is relevant to stand as "ground" of this rule. It is obvious that their decision led them to follow this complicated path. Sometimes this decision led them to regard unreasonable things as "grounds" for some rules. For instance; the timing of the prayer was regarded by some of them, such as al-Ghazālī himself, as the "ground" on which the prescription of these prayers was based.[1]

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1. See al-Ghazālī, ibid., vol. 2, p. 75.

Some of the scholars of this group tried to avoid the criticisms raised against them. They said that, although the "ground" of the Sharī'a rule is merely a sign, it should be relevant to the rule. They did not want to state explicitly that the "ground" should be rational and convincing to human Reason, since they believed that, if they did so, it might lead to human reason being given preponderance over the texts of the Sharī'a, and might deprive the Sharī'a of its authority. Human reason may make terrible mistakes, in seeking to bring about the "public interest". But the revealed Sharī'a itself is not expected to include such mistakes. It might seem to human reason, that some rules of the Sharī'a have no "grounds" at all, since human reason cannot understand them. But certainly the Sharī'a did not reveal them for no reason. The only thing is that, human reason is unable to comprehend how to secure every "public interest". And if the "ground" of such rules were ever to be disclosed, then human reason would certainly accept them.

Among these scholars, who tried carefully to rationalize the "grounds" of the Sharī'a rules, without separating themselves from the majority of the Sunnīs, is Sayf ad-Dīn al-Āmidī. He said: the decision which I have chosen, is that the "ground" of the Sharī'a rule must comprise of ḥikma, that is to include an attribute which is acceptable rationally, and meant to be secured by the Sharī'a. It cannot be a mere "sign" without meaning.[1]

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1. See al-Āmidī, al-Iḥkām, vol. 3, p. 186.

Some others of this section of scholars who regarded the "grounds" of the Sharī'a rules as merely signs, seemed to have stood firmly with their decision, without making any move towards the rationalization of the "grounds" of the Sharī'a rules. Al-Ghazālī and Ar-Rāzī were among them. But it will be explained how they seemed to have contradicted themselves, when they decided that the deduced "ground" should be relevant to the rule, and when they explained the relevance itself, and decided that the Sharī'a and its rules were revealed to secure the "public interest".

It is time now to deal with the conditions presented by this group, in all their different sections, for the "ground" of the individual Sharī'a rules. These conditions will be examined to see the difference they might make between the rational "ground", and the Sharī'a "ground" as they saw it. And this will show the differences between this group and the first group, regarding the nature of the "grounds" of the Sharī'a rules.

Here follow the conditions presented by them for the Sharī'a "ground" as such, without dividing it into the "ground" of the original rule and of the branch, as they usually do. This was because they mostly discussed the matter of the "ground" in terms of analogy. They might not want to discuss it at all, but they were obliged to do so, since they cannot make analogy without it. When we come to deal with analogy, the conditions they stipulated for the "ground" of analogy will be shown, taking into account the "ground" of the rule of the original case (aṣl), and the "ground" of the

rule of the branch (<u>far'</u>). We shall also see, for what reason they have separated the two "grounds".

The first condition they have presented for the accepted "ground" without connecting it with analogy, was that it must in all cases be of the same degree and size. It should not differ from one case to another. For example: the difficulty caused by travel, should not be regarded as the "ground" for permission to break the fast during daylight in the month of Ramaḍān, since this difficulty does not happen on all occasions of travel, nor always in the same degree. This changing situation of travel should be taken as a proof, that this is not the "ground", since it is not regular in degree and appearance. They regarded the reality of travel itself as the "ground" since it is not changeable in itself. But they added that travel is held to cause some difficulty, and was therefore regarded as the "ground" of this permission. They did not accept the argument of the first group, that, so long as difficulty usually exists in travel, then the Permission should have been based on this difficulty, regardless of a few cases in which the difficulty might not happen. They rejected this by saying that if we accepted the difficulty to be the "ground", then we should never apply the rule where there is no difficulty in travel; but this is not so. Nevertheless, as has been mentioned above, they stated that travel was regarded by them as the "ground" because it is held to comprise some difficulty. It seems that they wanted to establish something connected with the real "ground", which is always present in the particular case. By this means they can avoid the criticism because of

the existence of the rule, and the absence of the "ground" in some cases as shall be pointed out later on.

They believed that human reason cannot understand the ḥikma of every Sharī'a rule. Therefore, we have to avoid seeking for the ḥikma of a rule in order to establish it as a "ground". But we should rather find out another attribute which is connected with ḥikma, and establish this as "ground".[1] They seem to have transferred the name of the 'illa to the attribute they regarded as "ground", and called the real ground ḥikma. But this appears initially to be an important difference between them and the first group. Al-Āmidī, who tried to approach the attitude of the first group, said: if we find a ḥikma which always appears regular, and in the same degree, then we can establish it as the "ground" and cease to look for another stable attribute.

The second condition they have presented for the "ground" was, that the "ground" should be relevant (munāsiba) to the rule, that is, should be convincing to human reason about this prescribed rule. In other words, relevance means that the rule based on this "ground" could secure the "interest" included in the "ground". This securing can sometimes, with certainty, be achieved by this rule, sometimes only with probabilities, and sometimes is more likely to be absent. Whenever the "securing" of the "interest" is certain or probable, then there was relevance between the "ground" and the rule, and no one has rejected this kind of "ground". But if the securing of the "interest" was not as

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1. See al-Āmidī, op.cit., vol. 3, pp. 186-189.

probable as its absence, then there is disagreement about the acceptance of the "ground" as basis for a rule, since relevance is not assured in this case. Some of them decided that relevance is missing in this case, and others decided that relevance does exist here. This last opinion seems to be the more reasonable one, as long as there is some possibility of securing the "interest" by the rule which is based on this "ground". But when securing a particular "interest" could cause people much harm, then it is better, that the harm should be avoided, than the "interest" secured. In this case, the relevance of the "ground" of the rule prescribed to secure the "interest" does not exist at all.[1]

This condition seems at first sight to contradict the general opinion of this group themselves. Since, as has been explained before, they decided that the "ground" of individual Sharī'a rules is a mere "sign", and it is not rational at all. Because of this contradiction, some of them rejected this condition of relevance and held to the opinion which they proclaimed first. The other section of them, who presented this condition, wanted to come closer to the decision of the other group, who decided that the "ground" of the Sharī'a rule should be always rational. But at the same time, they did not want to leave their own first decision, otherwise they will separate themselves from their group. It is obvious that this condition is not relevant to their main decision, that the Sharī'a "ground" is a mere "sign".

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1. See al-Āmidī, al-Iḥkām, vol. 3, p. 241; Ibn-Qudāma, Rawḍat, pp. 163-164.

But rather, it is relevant to the decision of the first group. This indicates some disagreement between the scholars of this group among themselves, regarding the support for their original decision. This disagreement was caused by the different degrees of their conservatism. Some of them tried to reduce, as far as possible, the freedom of human reason, in the field of the Sharī'a rules. To them, this freedom may lead to negligence or disobedience to the Sharī'a itself, since the real ḥikma for which the rules were prescribed, cannot be always understood. But if ever those ḥikma were disclosed to reason, then we will certainly be convinced of their relevance. Whenever those ḥikma are not disclosed, then we must obey the orders of the Sharī'a, and apply these rules. If human reason was left free, then it might reject this sort of rule. These scholars did not say that, the Sharī'a might conflict with human reason, but merely, they feared the inability of human reason to understand the ḥikma of every Sharī'a rule. This was the opinion of some scholars of this group. But some others of them, did not hesitate to give human reason more respect and freedom in this field. They were more confident of reason and its ability to understand the "ground" of every Sharī'a rule. Therefore, they presented the condition of "relevance", which means that the "ground" should be rationally relevant to the rule. And by this, they drew closer to the decision of the first group. To them, it was necessary to stipulate this condition, since the Sharī'a rules were revealed to secure the "public interest". Therefore, every rule of the Sharī'a should contribute to secure an "interest". It is always convincing to human reason,

when a rule is relevant. This is why we said, that this section of scholars appeared to be approaching and drawing closer, to the decision of the first group. They tried to show that they did not hold the same opinion, that the "ground" of the Sharī'a rule is rational. They said: the rules of the Sharī'a intended to secure certain objectives, but securing these objectives is not an obligation that God must fulfil. That is, this securing could be missing in some of the Sharī'a rules. But it seems, however, that they came eventually to an agreement with the first group, the Mu'tazila and their supporters, and they did not want to accept this explicitly.

The above-mentioned argument, to support the condition of relevance, was rejected completely by those who rejected the condition itself. They said: that, if the Sharī'a rules were based on the securing of "public interest" then this securing should occur definitely with any Sharī'a rule, since God is capable of revealing rules which secure them definitely. But the fact is that we find most of the rules of the Sharī'a do not definitely secure the "interests" which are held to be the "grounds" of those rules. For instance: prohibition of drinking wine could not prevent people from drinking wine completely. Some people still drink it in spite of the presence of this rule of the Sharī'a. Therefore, we should not believe that the "public interest" is always the "ground" of the rules of the Sharī'a.[1]

They argued also, that the ḥikma and the objectives of the rules of the Sharī'a, are not fully clear to human

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1. See al-Āmidī, ibid., vol. 3, p. 266.

reason. It is difficult to find out a real hikma or the "interest" intended to be secured by a particular rule. We should avoid this difficulty, and search for another attribute, which is stable and easily available, to stand as a "ground" whenever a "ground" is not revealed.[1]

A third point they argued with, that is, God Himself is omnipotent. He could secure the "public interest" without prescribing any rule. There would be no need to prescribe rules and made medium steps, while He could act directly. Therefore, the "public interest" should not be regarded as the "ground" of the rules of the Sharī'a.[2] This was the sort of point they argued with, but they seem to be weak and not strong. It seems that these scholars wanted to say, that many of the rules of the Sharī'a (aḥkam ta'abbudiyya) reason cannot understand their "grounds" and should be accepted as they were revealed. And this was not accepted by their other colleagues, who believed that the Sharī'a was originally based on the securing of the "public interest" and who believed that the rules whose "grounds" are not clear, were not revealed for no reason. It is merely that we could not understand them.

The section of scholars who stipulated the condition of relevance for the "ground" answered the three points of argument mentioned above which were presented by those who objected to the condition. In respect of the first point,

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1. See ibid.
2. Ibid., p. 267.

they said that it is not necessary that the "interest" should be secured automatically by the rule, if we regarded the Sharī'a rules as based on the public "interest". The securing of the "interest" could be probable, and still the "interest" is the "ground" of the rule. Concerning the second point, which is the difficulty of finding out the ḥikma or the "public interest" on which the rule of the Sharī'a was based, they said: most of these "interests" are very clear, and very easy to find. And even if there is some difficulty in finding out these "interests", that is not a good reason for objecting to them as the real "grounds" of the rules. They answered the third point by saying that, it was the will of God to establish a particular way for securing the "public interest". Yet He is omnipotent and capable of securing these "interests" without revealing any rule. And if this objection was accepted, then it could be applied to many important things making them useless, such as "Creation" itself.[1]

The third condition they presented for the "ground" was that it should be of extended application (muta'addiya), that is whenever the "ground" is present, the same rule should be applied. The "ground" should not be confined to one case (qāṣira). This condition was presented and discussed from different points of view. Some of these scholars said: this condition constitutes a point of disagreement. Some of the scholars of this group said that

1. Ibid., vol. 3, pp. 269-270.

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all scholars are agreed on the validity of the "confined ground", whenever it is revealed in the Qur'ān or the Traditions. And many scholars have accepted the "confined ground" which has been deduced on the basis of independent reasoning. Among those who held the above-mentioned view were: ash-Shāfi'ī, Ibn-Ḥanbal, al-Bāqillānī, and some of the Mu'tazila.[1] Some other scholars of this group said: There was no absolute agreement that there is a revealed "confined ground" in the Qur'ān or Traditions. The whole matter is one of disagreement. There is No difference between the "revealed ground" and the one deduced.[2]

It has been related that the attitude of the Ḥanbalī school, regarding this matter, was different. Some have related that the Ḥanbalīs have accepted the "confined ground" when it is revealed in the texts. Some others have said that the Ḥanbalīs rejected this, and held that the Sharī'a is not expected to consider this sort of "ground". But on careful consideration, we might find that the disagreement was about the "ground" of the Sharī'a as such, no difference between the revealed and the one deduced. And we might realize that all the Ḥanbalīs denied the existence of the "confined ground". Some of them, such as Ibn-Qudāma, discussed this matter without distinguishing between the "deduced ground" and the "ground revealed". He asked what the advantage of the "ground" would be, if it were confined

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1. Ibid., vol. 3, p. 200.
2. See Ibn-Qudāma, Rawḍat-an-Nāẓir, p. 169.

to one case by the text? It cannot be to state the rule for that particular case, since the rule has already been stated in the text. The main advantage of the "ground" is to extend the application to different cases where the "ground" is present. Therefore, it would never be "confined" at all.[1] The Ḥanafīs held the same opinion as the Ḥanbalīs, even though it was attributed to them that they accepted the "confined revealed ground" which does not seem true.

Ash-Shāfi'ī and his followers, al-Qādī Abū-Bakr al-Bāqillānī, al-Qādī 'Abd-al-Jabbār, Abu-al-Ḥusayn al-Baṣrī, and most of the other jurists, other than the Ḥanbalīs and Ḥanafīs, have accepted the "confined ground" in the rules of the Sharī'a. They believed that it could be either revealed or deduced. It has also been attributed to Aḥmad Ibn-Ḥanbal himself, that he supported this opinion, but as we have mentioned, his followers decided the opposite. Those who accepted the "confined ground", supported their opinion by means of certain proofs and arguments. They said, for instance, that the power to extend the application of the rule, is not an essential element of the "ground" in itself, Firstly, we have a complete "ground", and secondly, we decide whether it is a "ground of extended application" or one of "confined application". If we held the "extended application" as a condition for the validity of the "ground", then we would make primary what is in fact secondary element. They also tried to answer the argument of the Ḥanafīs, that the

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1. Ibn-Qudāma, ibid., pp. 169-171.

purpose of having a "ground" for the rule of the Sharī'a, is to extend the application of the rule to other unrevealed cases, where the "ground" exists. They presented other purposes for the "ground". Firstly to convince people of the relevance, rightness, and justice of the rule, since people can be convinced by rational justification. Secondly, the "ground" of "confined application", where there are two different "grounds" possible for one rule, the function of the "ground" in this case, is to keep the rule confined to a single case. Of course, the "specific ground" cannot fulfil this function, unless it has been revealed in the text.[1]

The fourth condition they presented for the "ground" is that it should be accompanied by the same rule wherever it exists. In other words, a rule which is based on a particular "ground", should not be applied to any other case unless the same "ground" is present. They called this al-'aks. It was not agreed on by the scholars of this group. It has been related that the Shāfi'īs and the Mu'tazila, rejected this condition, and decided that the same rule could exist without the particular "ground". It has also been related, that another group of jurists, one of them was al-Āmidī, made a division according to the types of rules and accepted the condition in some of these types: The first type of rule is the general one, which includes several different cases. This sort of rule could exist with

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1. See al-Āmidī, op.cit., pp. 200-201ff.

different "grounds". For example: the rule giving permission to shed a person's blood, was established by the Sharī'a on the basis of several different "grounds", since the rule applies to several cases. It was given for murder, adultery committed by a married person, and brigandage (qaṭ'-at-ṭarīq). The guilty person must be executed, whenever one of these "grounds" exists. Thus the rule is not neglected, even when one of these "grounds" is not present. In the case of this sort of general rule, the condition is not applied.

The second type of rule is one that does not apply to more than one case. This sort of rule should always depend upon the existence of its particular "ground", and should not be applied without it. In this case, the above condition is applied. For example: al-qiṣāṣ, which is execution as a punishment for murder, should never be called qiṣāṣ, when used as a punishment for other crimes. Therefore, they regarded the qiṣāṣ with its particular name, as a rule for murder, and it can never take place as such without this particular "ground". Of course the weakness of this point of view is obvious, since, to divide the rule into two types, is not an acceptable method of accepting a condition which was stipulated to apply to all the types of rules. Whenever you rejected it in one case, then you rejected it completely. Therefore, we regard this section of scholars as having rejected this condition. Accordingly, they have agreed with the Shāfi'īs and the Mu'tazila on rejecting this condition.[1]

1. Ibid., pp. 216-217ff; Al-Ghazālī, Mus., vol. 2, pp. 80-81.

Another question arises here, namely, whether a single Sharī'a rule, relating to a particular case, can have more than one "ground" at the same time? The jurists held three different opinions regarding this point. Al-Bāqillānī and Imām al-Ḥaramayn, followed by some other scholars, rejected this idea completely, and decided that a rule should not have more than a single "ground", in a particular case. With regard to the assumption that there are some single rules which, each having more than one "ground", they said: either that each of these "grounds" is complete, and stands by itself as an independent "ground" for this rule, or that each of them constitutes an element forming with the other elements a complete "ground". If the latter was the case, then it cannot be said that these elements constitute different independent "grounds", but rather, that they are elements of a single "ground".

The second opinion towards this question, held by a number of jurists, among them the Shāfi'īs and the Mu'tazila, is that it is possible to have more than one "ground" for a single Sharī'a rule relating to a single case. For instance: permission to shed the blood of a person who at the same time is guilty of murder, and of adultery while married, and of brigandage. The rule here is to execute this person, and the "grounds" in this instance are three, each distinct from the others.[1] Of course, rationally it seems that the real "ground" of the rule is the first crime which was committed by this person.

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1. See al-Āmidī, ibid., pp. 196-197ff.

The third opinion on this point was adopted by al-Ghazālī, and some other jurists who followed him. Namely that we should never have more than one "ground", if the "ground" were deduced. But if it was revealed that a rule is based on more than one "ground", then we must accept that. They held this opinion, because of their complete submission to God and His Prophet. They said that human reason is not ready to accept more than one "ground" to a single rule. But if God revealed that a particular rule is based on more than one "ground", then human reason should not object, since the knowledge of God is beyond the reach of our reason.[1] It seems that al-Bāqillānī and Imām-al-Ḥaramayn and their followers, held the most reasonable opinion on this point.

The fifth condition laid down for the "ground" of the Sharī'a rule, was that it should never oppose another Sharī'a decision. For example: it was related that a jurist in Spain[2] was once asked by a king to explain for him, what expiation (kaffāra) he should make for having broken the Fast once during the daylight in the month of Ramaḍān. The jurist decided that he should fast for two months in succession, on the grounds that nothing else could prevent the king from committing the same sin again. This "ground" stands against a Sharī'a decision, namely that the expiation of this sin, is made by performing one of three things, according to the order explained in the text: to free a

1. See al-Ghazālī, Mus., vol. 2, pp. 96-97.
2. Ibid., vol. 1, p. 285. The name of this jurist was not mentioned.

muslim slave; if one does not possess a slave, then to fast for two months in succession; if one cannot fast, then to feed sixty poor people a meal, which is of good quality, but not very luxurious. This rule was decided in the text for everyone without exception either for a king or any one else. Therefore, the "ground" regarded by the jurist is rejected, since it is against this textual Sharī'a decision. These were the clearest conditions laid down by this group, who regarded the "ground" of the Sharī'a rule, as merely a "sign", which need not necessarily be accepted rationally, since human reason is not capable of knowing everything conductive to the "public interest" for the securing of which the Sharī'a rules were revealed.

Of course, most of these conditions are not in disagreement with their main decision, that the "ground" of the Sharī'a rule is merely a "sign", and it could be changed by the Sharī'a to the opposite of what had been revealed, to stand as a "ground" for the same rule. It is not subject to discussion by human reason as long as it has been decided by the Sharī'a itself. The only condition, they have stipulated, which seems not to conform to their decision, is the "relevance" of the "ground" to the rule, No difference being made by them between the "deduced ground" and that "revealed". They laid down this condition for every Sharī'a "ground" without exception. This "relevance" means nothing, unless it be to have an effect on the creation of the rule, something which they already objected to when they explained the definition of the Sharī'a "ground" in terms of their point of view. This condition seems to oppose their main

decision, since we cannot accept it while we regard the Sharī'a "ground" as a "mere sign", having no effect at all on the creation of the rule, and could be replaced with by its opposite to stand as a "ground" for the same rule. Therefore, they appear to contradict themselves. Some of them tried to harmonize these inconsistent points of view. The Shāfi'ī scholars said: that the "grounds" revealed were always relevant to the rules, since they were intended to convince people of the justice of the rule, to be applied in a particular case. Nevertheless, these "grounds" have no effect at all upon the creation of the rules. These "revealed grounds" were revealed by God who can alter them to their opposite if He so wishes, since His will is unconstrained. But whenever the "ground" is to be deduced, then it must be relevant to the rule, and cannot be changed to its opposite and still remain the "ground" of the same rule. This explanation generally means the separation of the "deduced ground" from the "revealed" and the condition of relevance operates in the "deduced ground", but not in the "revealed" one. Nevertheless they applied the condition to the revealed "ground".[1] This explanation does not seem satisfactory, since most of those who interpreted the "ground" in the Sharī'a as a "mere sign", intended the literal meaning of this definition. Nevertheless, they have accepted the application of the condition of "relevance".

It seems that the only way in which we reconcile this contradiction is to separate completely the "deduced ground"

1. See Subkī, Jam', vol. 2, p. 232; Ibn-Qudāma, Rawḍat., pp. 170-171.

from the "revealed ground", and to apply the condition only to the "deduced ground", or to dispense with their first decision, that the "ground" is a "mere sign". They should accept that the "ground" has a meaning and is effective upon the creation of the rule, while the will of God is not affected, since He revealed His Sharī'a for the securing of the "public interest". However, they seem to have got into this critical situation, because of their carefulness in discussing this subject. They thought that the stipulation of a condition for a "revealed ground" would mean depriving God Himself of the exercise of His will, and that is why their attitude seems to be inconsistent.

They did not leave the matter of "relevance" without trying to make it more clear. They wanted to be more precise in their manner of expression, by categorizing the "relevance" according to its authority and clarity. The first category of a "relevant ground" in degree of authority, is that revealed in the Qur'ān or Traditions.

The second category is that which is only implied in the texts. The third category is that which is neither revealed nor implied in the texts, nor rejected by them. The fourth category is that which is rejected by the texts, as has been indicated in the course of our discussion of the condition of "relevance". As regards the first category, they have, of course, fully accepted it. For example: the "ground" of the prohibition on drinking wine, was explained in a Tradition, as being the intoxication. The Prophet said: "every intoxicating drink is khamr, and all forms of khamr are prohibited".[1] As another example, it was related in the

1. See Ibn Rushd, Bidāyat, vol. 1. p. 471.

Qur'ān, that "childhood" is the "ground" of the legality of custody of a child's wealth until he reaches his majority. The Qur'ān says: "Make trial of orphans Until they reach the age Of marriage; if then you find Sound judgement in them, Release their property to them; But consume it not wastefully, Nor in haste against their growing up."[1]

The Qur'ān has also made the adhān (call for prayer) of Friday prayer, as a "ground" for the prohibition on the carrying on of business, until the prayer is finished. The verse says: "O ye who believe, When the call is proclaimed To prayer on Friday (The Day of Assembly), Hasten earnestly to the Remembrance of God, and leave off Business (and traffic): That is best for you if ye but knew".[2]

To this group, "relevance" of these "grounds" is merely their being ordained in the texts, and nothing else. As long as these "grounds" are revealed in the Qur'ān, or the Traditions, then human reason should not interfere, in order to seek for a rational "relevance". This category was accepted as the most important by this group.

With respect to the second category of the "relevant ground" which is that implied in the texts, it was explained by them as being similar to a "ground" revealed in the Qur'ān or the Traditions. For example: in the case of permission to perform two prayers of the day at one time (jam'), because of wet weather, the rain was not revealed as "ground" for this

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1. Q. 4.6.
2. Q. 62.9.

permission. However, it was related by Anas Ibn-Mālik, that the Prophet himself used to delay the ẓuhr prayer to perform it along with the ʿaṣr prayer, whenever He began a journey before noon.[1] This practical Sunna, shows that travel was the "ground" for this action, since it is held to cause some degree of difficulty. It was the opinion of the Mālikīs, and some of the other jurists, that rain is also held to cause difficulty. It is, therefore, similar to travel in this respect. They have, accordingly, accepted it as a "ground" for the same rule, and decided that permission to perform two prayers in immediate succession is given because of rain. Many of the other jurists agreed with the Mālikīs on this point, according to the same reasoning. They believed that rain is held to cause the same difficulty as is held to be caused by travel. It seems that the Mālikīs held this opinion after taking into consideration certain circumstances. They took into account particular countries, at different periods, having huts, or houses which could easily be penetrated by rain, and inside which, movement might be difficult.

Taking into consideration the individual circumstances, and customs of every country, is a well-known principle in the Mālikī school, as will be discussed later on in this thesis.[2]

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1. See Ibn-Rushd, op.cit., vol. 1, p. 171.
2. See Ibn-al-Qayyim, Aʿlām, vol. 3, pp. 88-89.

Difficulty is not clear with respect to rain, but we can hold it as a "ground" for other cases, regarding it as a "ground" implied in the Traditions. This sort of "ground", which is implied in the text, was regarded by this group as of secondary importance to the first category. Yet it is almost given the same respect as is given to the first.

Regarding the third category of "relevant ground", they have explained it as that neither recognized nor rejected by the texts. This was referred to in this field of the Sharī'a as "of benefit to the public interest, that is not revealed in the texts" (al-maslaha l-mursala). This is the category of "ground", on which there was disagreement between the members of this group, as to whether they should accept it or not. We shall discuss this matter in another chapter. But we can say here, that those who rejected this category, based their decision on the principle that every "ground" of a particular Sharī'a rule should be either directly or indirectly supported by the evidence of the Qur'ān or the Traditions. And those who accepted it claimed that every "ground", which secures a "public interest" is already indicated in the texts.

However, with the exception of the first condition stipulated by this group, it is possible for those who hold that the "ground" of the Sharī'a rules must be rational, to accept these conditions. But the first condition is certainly rejected by them. This condition was, that the Sharī'a "ground" should not appear in different degrees, from one case to another; that it should never be very clear in

one case and less in another. In other words, it should always be of one size, regarding its effectiveness. To them, the difficulty should not be regarded as the "ground" of permission given to a traveller to break the fast during daylight in Ramaḍān, since this difficulty could be serious for some people, or at certain times, in certain circumstances, but it could be very light for others, or completely absent in certain other circumstances. This difficulty was accepted as being the "ground" for this permission by those who regarded the "ground" of the Sharī'a rules as rational, so long as there was a possibility of encountering such difficulty in travel. But those who held the Sharī'a "ground" to be "mere sign", rejected difficulty as the "ground" of this permission, since it did not meet their condition. They decided that the "ground" of this permission is the travel itself, since travel from one place to another, regardless of the means of transport, is not changeable. They tried to make their decision more rational by saying that they had made travel the "ground", since it is held to cause difficulty. Here again their opinion does not seem to be clear, because they return to the "ground" which they had first rejected. It is obvious that they did not want to reject difficulty as the real "ground" of this permission, but rather, they built their decision, taking it into account. They wanted, as they said, to avoid any confusion which might take place, if there were no difficulty in travel. Therefore, this disagreement seems to be unreal, since some of them decided to declare the real "ground" to be difficulty, whatever the outcome, while the

others wanted to avoid any confusion, and declared as "ground" something stable and connected with difficulty.

Now we come to another point which was raised and discussed by this group, namely, the methods of ascertaining the sound "ground" of any Sharī'a rule (masālik at-ta'līl), (that means the reliable methods or authorities, on which they rely to ascertain the sound "ground" of the Sharī'a rule). We shall present the methods they formulated, and then we shall see whether these were the only methods on which all the jurists depended. In other words, we shall see whether they cover all the correct methods of finding the "ground" of a Sharī'a rule.

The first authority they have recognized, of course, was the texts of the Qur'ān and the Traditions. They believed, as any other one believes, that there is no further need for thought, if the "ground" were revealed in the Qur'ān or the Traditions.

The second authority, to them, was "consensus". But, of course, it was placed as a second authority only by those who recognized "consensus" itself. And even those who recognized it disagreed among themselves, regarding its rank as an authority for the "ground". Some of them, such as al-Ghazālī, regarded it in the second position, after the texts.[1] If there were two separate "grounds", one of them was based on the textual evidence, and the other on the "consensus", then we shall accept the "ground"of the textual

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1. Mus., vol. 2, p. 76.

evidences, rather than the other one of the "consensus". Some others such as Ibn-as-Subkī[1] regarded the consensus as the first authority in ascertaining the "ground" of the Sharī'a rule. If we find a "ground" established by the "consensus", then we should not search for this "ground" in the texts, for "consensus" itself is always based on a textual evidence.

But as for those who completely disregarded "consensus", and looked upon it as a part of the texts, or of independent judgement, these did not give it a separate rank at all. If it were dependent on a textual evidence, then it would be regarded as such. If it were dependent on independent judgement, then they would not agree to call it "consensus", but rather, independent judgement. Among those scholars who held this opinion, was Ibn-Rushd.[2] It shall be explained how we ascertain the "grounds" of the Sharī'a rules from the texts, and also, whether or not, "consensus" can stand as a separate authority for ascertaining the "grounds".

In respect of the first two authorities which are the texts of the Qur'ān and the Sunna, we either find the "ground" revealed clearly, and pointed out without obscurity, or we find some implications in the texts to the "ground", without, however, any definite statement. The example of the first type is the "ground" of the permission for the

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1. Jam', vol. 2, p. 262.
2. Bidāyat, vol. 1, p. 5.

distribution of one-fifth of the booty (fay'), which was revealed in the Qur'ān: "What God has bestowed On His Apostle - belongs to God - to His Apostle And to kindred and orphans, The needy and the wayfarer; In order that it (Merely) makes a circuit Between the wealthy among you".[1] The "ground" here is to avoid the circulation of wealth among the wealthy people. It has appeared clearly in the text.

The example of the second type, which is implied in the texts, is the "ground" of prohibiting the exercising of judgement in court when the judge is angry. It was understood from the Tradition that "The judge should never exercise the judgement while he is angry".[2] The jurists said: that the Tradition did not point out clearly, that anger is the "ground" of this prohibition, but it has connected the prohibition with anger, therefore, it was understood that the "ground" is anger. In fact the difference between this example and the example of the first type is not clear. It seems that both are "revealed grounds". But the jurists seem to have divided the textual evidences into clear and more clear. In the latter you find that the text says that this is the "ground", or you will find a particle (such as lam) ~~letter~~ in the text specified for showing the "ground" (ḥarf ta'līl).

Concerning the "consensus", some scholars presented

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1. Q. 59.7.
2. See al-Bukhārī, al-Jāmi', aḥkām, 13; Muslim, al-Jāmi', aqḍiya, 16.

examples as evidence to support the "consensus" as an independent authority for stating the "ground". For example: the "ground" of the legality of custody of a young girl, regarding her marriage. It was decided, as they claimed, by the "consensus", which was based on rational judgement, to be her youth. This was because youth was regarded by a "consensus" based on textual evidences, as "ground" for the same rule in another case. This was the case of the orphan, regarding his wealth, as has already been pointed out previously.

But what might attract the attention here is that they claimed that the "ground" of the custody of a young girl, was stated by a "consensus" based on a rational judgement, and the "ground" of the custody of the orphan was stated by a "consensus" based on a textual evidence. They did not explain the difference between the textual evidence and the rational judgement on one hand, and the consensus on the other hand. But some of the scholars made it clear that there is no difference between the textual evidence and the "consensus" based on a text.[1] And one cannot say a decision based on independent judgement is based on "consensus", since this sort of decision is not decisive, but rather it is based on probabilities. And it is not likely that all the scholars would agree on an uncertain matter. Also the subject of independent judgement itself is a matter of disputes and disagreements, therefore, it is not possible to find a "consensus" based on it. They also asked, how

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1. See Ibn-Rushd, Bidāyat, vol. 1, p. 5.

could this be possible, while independent judgement itself is liable to mistakes?[1]

However, it should be said that the examples they have presented for the "grounds" based on the "consensus" are actually, either dependent on textual evidence or on independent judgement.

With regard to the rational evidence of the "ground", that is when there is no textual evidence pointing out the "ground" of the rule, this group of jurists accepted it. This is because it is necessary to find out the "ground" of a Sharī'a rule, in order to convince people of the rightness of the rule, and to establish analogy depending on this "ground". The Companions did not confine themselves to the textual evidence, in order to find out a "ground" of any Sharī'a rule. They used the rational method, and deduced the "grounds", and established analogy accordingly.[2] The scholars of this group tried to explain the sound methods, as they believe, of deducing "grounds".

The first method is to collect a number of attributes, connected with the rule, each of these attributes can stand by itself as a "ground", and then to examine these attributes carefully, rejecting those which lack one of the conditions stipulated by them, until one gets the attribute which corresponds with the conditions, then this should be preserved and regarded as "ground". For example: usury (ribâ), in buying and selling wheat, it was prohibited by

1. See al-Ghazālī, Mus., vol. 1, pp. 196-198.
2. Ibid., vol. 2, p. 78.

textual evidence, without a "revealed ground". The jurists examined a number of attributes and rejected all except one, which met their conditions, that was, "avoidance of unjust dealing", since to borrow a quantity of wheat with a demand or a condition to return it with interest, is clearly unjust.

The second method they have explained for deducing a "ground" was that of appointing one attribute, and explaining its "relevance" to the rule, and how it secures the "public interest". It is a shorter and easier method than the former. There could be another attribute which is more relevant than what has been appointed, but what has been appointed is accepted, as long as it is relevant to the rule. That means, some of the conditions stipulated for the Sharī'a "ground" could be neglected. Therefore, it is obvious, that this method was agreed on by the scholars of this group. An example of this method is that one can say: the prohibition of drinking wine was established on the "ground" that it causes loss of reason. The prohibition was for securing human reason, and accordingly preserving all aspects of life. Therefore, it is a relevant "ground" to the rule. To some scholars of this group, showing this relevance is enough to regard the attribute as a "ground". But other scholars of the same group rejected this method. They said that showing the relevance of a "ground" is not enough. It is essential to make sure that this "relevant ground" has been used by the Sharī'a through the textual evidence, or at least, has been implied in the texts.[1]

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1. See ibid., vol. 2, pp. 74-77ff.

These are the main two recognized methods of deducing the "ground" presented by this group. Some scholars presented other methods, which were rejected by the majority. One of these methods is: to notice that an attribute usually appears with a certain rule in a certain case, and disappears when the rule is missing in the same case. Then this attribute should be treated as the "ground" of this rule. An example for this is the strength and fermenting of wine. This attribute appears with the prohibition, but when the wine is not strong, and not fermenting, then it is not prohibited to drink it. Therefore, this attribute could be regarded as the "ground" of this prohibition. Of course this is a very irrational method for deduction. Therefore, it was rejected by the majority, with the argument that: we might find an attribute following a certain rule in the existence and non-existence, but at the same time it would be irrational to regard it as a "ground" of this rule. For instance: wine itself could have a certain colour when it is intoxicating, and another colour when it is not. But we cannot decide on colour as the "ground" of prohibition. We might make serious mistakes, if we recognized this method for finding out a "ground".

However, this and a few other methods were presented by some scholars for deducing the "ground", but it seems that these methods are only parts of the first method we mentioned above. Those who recognized these latter weak methods, seem to have meant that these methods are supporting the first main method, which is: to collect the attributes connected with the rule, and then to examine them carefully,

rejecting those which are not meeting the conditions, and preserving the one which meets the conditions. And those who rejected them, did so because they thought that these methods have been presented as separate independent methods. The two groups might have agreed, if each of them made themselves more clear, and understood each other.

This was the decision of those who accepted the existence of "grounds" in the Sharī'a rules, but objected to calling them rational "grounds", or to make them subject to rational judgement. They claimed first that the "grounds" of the Sharī'a rules are "mere signs" for the rules, and have no effect at all on the existence of the rules. It is not necessarily to be approved by human reason. This was their first decision on this subject, and it made them appear to completely disagree with those who decided that the Sharī'a "ground" should be always rational and convincing to human reason, otherwise, this "ground" would be useless, and there would be an obvious restriction to the human reason. But in the course of our discussions, we noticed that the same group, who rejected to call the Sharī'a "grounds" as rational, and who were mostly Ash'arīs, were talking about the rational relevance as a condition for the sound "ground", since, they said, people can be convinced, that a rule based on such rational "ground" is the right rule which could secure the "public interest".

This was, of course, an obvious recognition that it is necessary for the Sharī'a "grounds" to be rational. Therefore, they seemed to have contradicted themselves. They

tried to limit the extent of the rational "relevance" of the "ground", which "relevance" they have recognized, in order to keep as closely as possible by their main decision. They said that this "relevance" should be supported by the texts, otherwise, they would not accept it. But, as will be shown later, they did in fact accept the "relevant ground", which has no particular textual evidence to support it, apart from the general spirit of the Sharī'a.

They also fully recognized that the Sharī'a was revealed in order to secure the "public interest". This means that no Sharī'a rule was prescribed for no reason, that each was prescribed to secure a particular "public interest", and every rule which secures a "public interest" is based on a rational "relevant ground". This brought them closer to the first group, and as pointed out above, made them appear as contradicting themselves. But as has been pointed out previously, they might have intended by their main decision against the rational "ground", to defend those Sharī'a rules which were revealed but, as they thought, that their real "grounds" human reason is not able to understand. They called these kinds of rules, aḥkām ta'abbudiyya. It means that they should be accepted without questioning their "grounds". And this acceptance is worship and obedience of God. The numbers of rak'āt (bowings) in prayers are examples to this. They thought that if they were to decide that the "grounds" of the Sharī'a should be rational, they might open the door to the rejection of this type of rules. If this was their real reason for making their main decision,

then they might be mistaken. And if they did not want to establish "grounds" for these rules, because they seemed rather obscure to them, then they can say that they are unable to understand these "grounds", and if these "grounds" were disclosed to them, then human reason would certainly be convinced. And this is what was said by the upholders of the rational "ground". But the most obvious reason for their main decision, seems to be that they did not want to give human reason uncontrolled freedom in the field of the Sharī'a rules. And they thought that to say the "ground" should always be rational would mean that the rules of the Sharī'a are subject to the approval or disapproval of human reason. We notice that when they came to deduce some "grounds", they stipulated a condition that these "grounds" should be consistent with "public interest", and with the general spirit of the Sharī'a. However, their attitude is ultimately not far from that of the first group, but the careful method they have followed has made some difference in the way in which they have presented their opinion. This carefulness has also created slight disagreement between them and the first group, on some of the rules they have based on deduction.

It is time now to deal with the Ẓāhirīs, the most severe opponent of the "ground" in the Sharī'a rules, who tried to deny every claim, argument, or evidence presented by the upholders of the "ground". They claimed that Allāh never revealed any rule, nor did any action for a particular "ground". If ever He Himself, or His Prophet, stated that

a particular rule was based on a particular reason, then we should understand that this is only a reason (sabab) and not a "ground" (ʿilla). We should also understand that this reason was created by Allāh, and has no effect at all on the existence of the rule. It also should have no extended application, but rather a restricted application, that is, it should be confined to the case mentioned in the text.[1]

This was the general opinion of the Ẓāhirīs, concerning the "grounds" of the Sharīʿa rules. But it seems that a few of them, such as al-Qāsānī,[2] held a slightly different opinion, namely: if God Himself, or His Prophet, stated that a particular rule was based on a particular reason, then we should believe that this reason is the real "ground" of this rule, and should have an extended application.[3] These few Ẓāhirīs then, agreed with the majority of them, on the rest of their attitude, and decided that the revealed rules which have no revealed "grounds" should never be related to a particular "ground", but should be accepted as they are. However, the majority, which held the former opinion, includes Dāʾūd Ibn-ʿAlī himself, and Ibn-Ḥazm.[4]

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1. See Ibn-Ḥazm, al-Iḥkām, vol. 8, pp. 76-77.
2. He is related to Qāsān, his home town (some people pronounced it Qāshān, see al-Ghazālī, Mus., vol. 2, p. 70.). This man was first a Ẓāhirī, and then he became a Shāfiʿī. He wrote a book criticising Dāʾūd on his denying analogy (see al-Lubāb, vol. 1, p. 235). It seems that he took the above-mentioned different attitude before changing to the Shāfiʿī School. This is because Ibn-Ḥazm talked about him and his different attitude as one of the Ẓāhirīs.
3. Ibn-Ḥazm, al-Iḥkām, vol. 8, p. 77. Al-Ghazālī, Mus., vol. 2, p. 70.
4. See Ibn-Ḥazm, op.cit., vol. 8, p. 77.

It is obvious, that the Ẓāhirīs had distinguished between the two terms sabab and ʿilla, and they also had distinguished between these terms and the terms ʿalāma and gharaḍ. They described the term ʿilla as a factor which brings about inevitably, the creation of another thing. It precedes its object, and always appears with it. For example: the fire is the ʿilla of burning, and ice is the ʿilla of cold. Burning and cold never appear without fire and ice, and never precede them. They explained the sabab as something that motivates a person to do something, but he is able to resist this sabab and forbear doing this thing, if he so wishes. For example: anger is a sabab for victory, it motivates a person to obtain victory, but a person is able to resist anger and forbear obtaining victory. Anger does not bring about victory inevitably. Gharaḍ, to them, is the objective which a person intends to obtain. For example: one of the objectives of a person intending to obtain victory, is to satisfy anger. Anger is a sabab for victory, and victory is also a sabab for satisfying anger, and satisfying anger is the gharaḍ of a person. They described ʿalāma as: a sign agreed on, to indicate something, as flags are sometimes fixed in deserts to direct people to the right path.[1]

The Ẓāhirīs added that they defined these four terms in order to avoid any confusion which might lead to using them in place of each other. They thought that many of the mistakes that occurred in the interpretation of some texts

1. Ibid., pp. 99-100.

of the Qur'ān and Sunna, were due to mixing up the meanings of these four terms. And, to them, this mixing up was also the origin of the mistake made by those scholars who called the asbāb of the Sharī'a rules 'ilal, and accordingly, made a serious mistake when they decided that all the Sharī'a rules were based on certain "grounds", and that God Himself had revealed some "grounds" of rules in the Qur'ān.[1]

The Ẓāhirīs stated that they have accepted that God had revealed some reasons, and not "grounds", for some rules. But, they added, that these reasons were created by God along with the rules which were based on them. That is, these reasons are not effective in creating these rules nor were they motives for God in revealing these rules. They added, that we should not accept any of these reasons unless they are revealed in the Qur'ān or mentioned in the Traditions. And yet, these revealed reasons should have no extended application to other cases. The Ẓāhirīs presented some examples for the kind of reasons which they have accepted. For example: they presented the following Tradition related from the Prophet, "it is a terrible sin in Islam to question about an unprohibited action, ~~until~~ so that it becomes prohibited as a result of your question."[2] To them, questioning about an unprohibited action is the reason on which its being sinful is based. They accepted it because it is mentioned in the

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1. Ibid., pp. 101-102.
2. See al-Bukhārī, al-Jāmi', i'tisām, 3. Muslim, al-Jāmi', faḍā'il, pp. 132-133.

text. And to them, this reason and the rule based on it, were created by God. Questioning, which is the reason for the act being sinful, has not created by itself the rule which seems to be based on it.[1]

Other examples presented by the Ẓāhirīs for these revealed reasons are: that God revealed in the Qur'ān that to die as an unbeliever is a reason for living for ever in hell, and to die as a believer is a reason for living for ever in paradise; "But those who reject Faith and belie our signs (Āāyāt), they shall be companions of the fire, they shall abide eternally therein."[2] "But give glad tidings to those who believe, and work righteousness, that their portion is gardens, beneath which rivers flow. Every time they are fed with fruits therefrom, they say: why this is what we were fed with before, for they are given things in similitude; and they have therein Companions pure (and holy); and they abide eternally therein."[3] The Ẓāhirīs also stated, that God revealed that stealing is a reason for cutting off a hand, defamation of character (qadhf) is a reason for physical punishment, and adultery is a reason for either physical punishment, or execution. The Ẓāhirīs said, that they accepted these revealed reasons, but never called them "grounds", and never believed that these reasons had any function in bringing these rules into existence.[4]

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1. Ibn-Ḥazm, op.cit., vol. 8, p. 102.
2. Q. 2.39.
3. Q.2.25.
4. Ibn-Ḥazm, op.cit., vol. 8, p. 102.

By this decision, the Ẓāhirīs denied completely the existence of the "grounds" in the Sharī'a rules. To them, the objectives of the Sharī'a are not more than what were revealed in the texts of the Qur'ān and Traditions, such as that God will send to paradise whoever He wants to reward and send to hell whoever he wants to punish. In their view also, God creates any reason for any sort of rule, without taking into account human reason. People should never interfere and judge the revealed rules. We should not claim that the Sharī'a rules were intended to secure particular "interests", unless God Himself or His Prophet says that a particular rule was revealed to secure a particular "interest". To examine and reason the revealed rules means to examine God's actions, which is, to them, prohibited by the following verse: "He cannot be questioned for (his) acts, but they will be questioned (for theirs)."[1] The Ẓāhirīs added that were it not for the revealed objectives, then no one would have been permitted to say that any of the Sharī'a rules was for a particular objective. They believed that this is the right Islamic belief, which is supported by the sound human reason as well as by textual evidence.[2]

The Ẓāhirīs presented rational arguments to support their opinion, that the reasons which occur sometimes with the rules of the Sharī'a were created along with the rules. They argued that these reasons must be either eternal, or created by God Himself, or created by someone other than God.

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1. Q. 21.23.
2. See Ibn-Ḥazm, op.cit., vol. 8, pp. 104-105.

It is impossible for them to be eternal, since this would imply other eternal things besides God. Also they cannot be created by someone other than God, since that would imply a partner with God, regarding the creation which is an attribute of God alone. Then there remains only the last possibility, that these reasons were created by God Himself.[1]

But here another question arises, Did God create these reasons and the revealed objectives for other particular reasons and objectives, or did He create them for no reason or objective at all? If it was the former, then we shall have an unending chain of reasons and objectives, which is impossible. Therefore, we can only say that God created these reasons and objectives for no reason or objective at all.[2]

The Ẓāhirīs presented textual evidence in support of their opinion, which is that there is no "ground" at all for the Sharī'a rules, and it is prohibited to search for the "ground" of a Sharī'a rule, or to relate any Sharī'a rule to any sort of "ground". They presented the following verse of the Qur'ān: "And that those in whose hearts is a disease and the unbelievers may say: what symbol doth God intend by this? Thus doth God leave to stray whom He pleaseth, and guide whom He pleaseth."[3] To the Ẓāhirīs this verse shows that searching for "grounds" or objectives for rules and actions of God is an error. Of course this interpretation

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1. See ibid., p. 104.
2. Ibid., pp. 103-104.
3. Q. 74.31.

has been rejected by all other jurists for they think that this verse does not talk about searching for the "grounds" or objectives of the rules and actions of God. This latter group, the overwhelming majority of jurists, believed that this verse talks about the examples revealed in the Qur'ān for consideration by people and as warning for them. It has dealt with the rejection by those unbelievers of those examples and warnings, and their examining of them with evil intentions.[1] The Ẓāhirīs continued presenting some of the Qur'ānic verses: "Lord of the throne of glory, Doer (without let) of all that He intended."[2] And the verse we have already mentioned previously: "He cannot be questioned for His acts, but they will be questioned (for theirs)."[3]

To the Ẓāhirīs these verses are proclaiming the prohibition of reasoning about the Sharī'a rules and God's actions. They presented also: "O! Adam, dwell thou and thy wife in the Garden, And enjoy (its good things) As ye wish: but approach not this tree, or ye run into harm and transgression. Then began Satan to whisper suggestions to them, in order to bring openly before their minds all their shame that was hidden from them (before): he said: your Lord only forbade you this tree, Lest ye should become angel or such beings as live for ever. And he swore to them both, he was their sincere adviser. So by deceit he brought about their fall: when they tasted of the tree, their shame

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1. Az-Zamakhsharī, Tafsīr, vol. 4, pp. 650-653.
2. Q. 85.16.
3. Q. 21.23.

became manifest to them, and they began to sew together the leaves of the Garden over their bodies, And their Lord called Unto them: Did I not forbid you that tree, And tell you that Satan was an avowed enemy unto you?"[1] The Ẓāhirīs claimed that these two verses show that the mistake of Adam was caused by two factors; the first was that he did not understand the order of God, not to approach the tree, as obligatory, but he interpreted it as instruction and direction towards the better action. The second factor which caused Adam's mistake was that he accepted Satan's reasoning about God's order, that this order was based upon a particular "ground". Therefore, the verse came to warn us not to believe in reasoning of God's actions and rules.[2]

As other evidence, the Ẓāhirīs presented the following Qur'ānic verse: "And then they are told; spend ye of (the bounties) with which God Has provided you; the Unbelievers say to those who believe: shall we then feed those Whom, if God so willed, He would have fed them (Himself)? - ye are in nothing But manifest error."[3] They claimed that in this verse God Himself disapproved clearly of reasoning about the rules He revealed, since He disapproved of their questioning why He should ask them to feed those whom, if He so wished He would have fed. But in fact, the verse talked about the unbelievers in Mecca, who proclaimed that they would not feed poor people, since God

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1. Q. 7.19-23.
2. See Ibn-Ḥazm, op.cit., pp. 112-113.
3. Q. 36.47.

is more capable of feeding them. They proclaimed this to mislead people so that they would reject the instructions of God to feed poor people. And also they proclaimed it in order to find a justification for not giving alms. These unbelievers were not questioning the "ground" of this rule.

The Ẓāhirīs also presented the following verse: "For the iniquity of the Jews We made unlawful for them certain (foods) good and wholesome, which had been lawful for them; - in that they hindered many from God's way."[1] The Ẓāhirīs said that the reason for which some foods were made unlawful for Jews was because they had been iniquitous. And despite that we Muslims have been also iniquitous by many actions, those foods were not made unlawful for us. This proves that revealed rules are not always based on rational "grounds". Otherwise, the same rule which applied to Jews would have been applied to us, since the same condition existed.[2]

These verses and some others were presented by the Ẓāhirīs to support their opinion against basing the Sharī'a rule on certain "grounds". We have explained some of the weaknesses in using these verses in order to support the rejecting of the "grounds" of the Sharī'a rules. We shall present later on some other criticisms raised by the upholders of the "grounds".

The Ẓāhirīs claimed that none of the Companions, nor of the two generations following them, mentioned that God had revealed any rule based on a particular 'illa. To the

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1. Q. 4.160.
2. See Ibn-Ḥazm, op.cit., vol. 8, pp. 111-114.

Ẓāhirīs, this opinion is a mere heresy which occurred in the courth century A.H.[1] But it seems that the Ẓāhirīs meant that the Companions did not mention the term ʿilla itself, but only its synonyms such as: maṣlaḥa and sabab, which have been regarded by most other scholars as the same as the term ʿilla in the field of the Sharīʿa rules. Surely these synonymous terms were used by the Companions when they explained the reasons for which the individual verses were revealed. And the Traditions themselves mentioned these terms when they talked about the "public interest".[2]

The Ẓāhirīs tried to deny all the textual and rational evidence presented by the upholders of the "grounds". We shall try to present some of their criticisms of that evidence, and we shall explain whether or not these criticisms are acceptable to refute the evidence of the upholders.

As regards the verse: "On that account We ordained for the children of Israel that if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if anyone saved a life, it would be as if he saved the life of the whole people."[3] To the Ẓāhirīs this verse does not support the opinion of the upholders that all the Sharīʿa rules were based on certain "grounds". It merely states that there are some revealed "grounds" for some rules, and

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1. Ibid., p. 132.
2. See Muslim, al-Jāmiʿ, dhikr, 71.
3. Q. 5.32.

these revealed "grounds" are only of restricted application, that is to be confined to the case mentioned in the text, and for which the "grounds" were revealed.[1] It is obvious that the Ẓāhirīs admitted that this verse did mention a "ground" of a Sharī'a rule, and they called it 'illa and not sabab as they usually insisted. They only repeated here that this "ground" should have no extended application. And this of course is not a refutation of the evidence of the verse for the existence of the "grounds" in the Sharī'a rules, regardless of the extended or restricted application, which is not our original question. The question of the extended and restricted application comes after the decision, about whether or not the Sharī'a rules were based on certain "grounds". We shall discuss this latter question in more detail when we come to deal with the practical aspects of using human reason in the field of the Sharī'a.

The Ẓāhirīs also tried to refute the evidence of the following verse: "Then when Zayd had dissolved (his marriage) with her, with the necessary (formality), We joined her in marriage to thee: In order that (in future) there may be no difficulty to the believers in (the matter of) marriage to the divorced wives of their adopted sons, when the latter have dissolved with the necessary (formality)(their marriage) with them."[2] The Ẓāhirīs claimed that this verse did not prove that permission given to the Prophet to get married to Zaynab, daughter of Jaḥsh, was based on the "ground" that

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1. Ibn-Ḥazm, op.cit., vol. 8, pp. 82-84.
2. Q. 33.37.

people in future can get married to the divorced wives of their adopted sons. But rather, the verse stated this permission on the condition that the adoption should be of the pre-Islamic period. Otherwise people are not permitted to do so. The Ẓāhirīs added that if getting married to the divorced wives of the adopted sons was the "ground" of the Prophet's marriage with Zaynab, then it should have been an obligation on everyone who has an adopted son, to marry the divorced wife of this son, when he dissolved his marriage with her. But the matter is not so, therefore, we should not regard it a "ground" for this Prophet's action."[1]

The weakness in this argument of the Ẓāhirīs about this verse is very obvious. Firstly because it is not mentioned either in the Qur'ān or in the Traditions, that this permission is confined to cases of adoption which happened in the pre-Islamic period. The verse is stating clearly a general rule for all people and all times in future, and the permission given to the Prophet to get married to Zaynab, was based on the "ground" that people in future should face no objection in doing the same thing. We can also ask the Ẓāhirīs: where did they bring the word obligatory from? The verse did not mention any term giving the meaning of obligatory. It only stated the "ground" for the marriage of the Prophet with Zaynab. That is to show people that there is no objection in doing likewise. And this is a mere permission and can never be understood as an obligatory order, as the Ẓāhirīs claimed.

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1. See Ibn-Ḥazm, op.cit., vol. 8, pp. 84-85.

In respect to the verse: "What God Has bestowed on His Apostle (And taken away) from the people of the township - belongs to God - to His Apostle And to kindred and orphans, The needy and the wayfarer; In order that it may not (merely) make a circuit between the wealthy among you."[1] The Ẓāhirīs said: that the avoidance of circulation, which is mentioned in the verse, is not the "ground" of distributing the (fay') in that particular way described, since we find other goods (amwāl) distributed by the Sharī'a in other ways. For example: in the case of ghanīma (booty), only one fifth share is assigned to God, His apostle, the near relatives (of the Prophet), the orphans, the needy, and the wayfarer. The rest of the booty is to be distributed between the soldiers. Regarding the fifth which belongs to God Himself and those who were mentioned with Him, some scholars such as Abū-Ḥanīfa and ash-Shāfi'ī said: that God and His Prophet are to take one portion of the fifth, whereas some other scholars such as Abū-al-'Ālia[2] said: that God has His own portion out of the fifth, which should be spent on the upkeep of al-Ka'ba, and the Prophet has also His own portion. Regarding the two portions of the Prophet and His near relatives, Abū-Ḥanīfa decided that these two portions should be cancelled after the death of the Prophet. Ash-Shāfi'ī said: the two portions should continue even

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1. Q. 59.7.
2. One of the second generation men after the Companions. He transmitted some Traditions. Ar-Rabī' Ibn-Anas and some others transmitted from him. (see Az-Zamakhsharī, Tafsīr, vol. 2, p. 222. As-Sakhāwī, al-I'lān bi t-tawbīkh, p. 295.

after the death of the Prophet, and His own portion should go after His death to securing "public interest". However, Mālik Ibn-Anas, decided that the whole fifth which is assigned to God and those who were mentioned with Him, is subject to the decision of the leader. He can spent it on the affairs that he thinks are suitable.[1] The Ẓāhirīs said: if the avoidance of circulation of wealth was the real "ground" for distributing the fay' in that particular way, then the ghanīma should also be distributed in the same way. But ghanīma was distributed by the Qur'ān in a different way, therefore, we should never believe that avoidance of circulation of wealth was the "ground" of distributing the fay' in that particular way.[2]

This argument of the Ẓāhirīs is not acceptable, since what is mentioned and intended in the verse is a particular kind of property, that is the fay'. It is the property obtained without resistance by the defeated; and it sometimes includes land. This kind of property should not be distributed in the same way as ghanīma. This latter is to be distributed between individuals, mostly the soldiers, since it is booty which is obtained from the battle-field and does not include land, but rather it mostly includes equipment, horses, etc. Since things of this kind are necessary for soldiers, most of the ghanīma is to be distributed among the soldiers. This is to strengthen and encourage

1. See Az-Zamakhsharī, Tafsīr, vol. 2, pp. 219-220. Ibn-Rushd, Bidāyat, vol. 1, pp. 390-391.
2. Ibn-Ḥazm, op.cit., vol. 8, p. 85.

them for more conquests. In the case of fay', which includes land, distribution is different, as mentioned in the verse. This is to avoid concentrating the lands and the other wealth in a few hands such as soldiers. And moreover, avoidance of circulation of wealth was also assigned by the Sharī'a as "ground" for some other rules, for example: the tithe (zakāt), was based on avoiding the circulation of wealth between only wealthy people. According to this, it was decided by many of the Companions and many of the jurists, that the zakāt is an obligation on a child, if he inherited any wealth. It is not just a matter of worship which is always an obligation on the adults. From among the Companions who made this decision were: Alī Ibn-Abī-Tālib, 'Abd-Allāh Ibn-'Umar, Jābir, and 'Ā'isha. And from among the jurists who supported this decision were: Mālik Ibn-Anas, Ash-Shāfi'ī, Ath-Thawrī, Aḥmad Ibn-Ḥanbal, Isḥāq, and Abū-Thawr. These Companions and jurists took this decision because they regarded zakāt as a means of distributing the wealth among people, and a means for avoiding the circulation of wealth among only the wealthy, or of it being accumulated by some individuals.[1]

With regard to the verse: "Apostles who gave good news As well as warning, that mankind (after the coming) of the apostles, should have no plea against God."[2] The Ẓāhirīs rejected that the "grounds" of sending Prophets is that mankind can have no plea against God, since nobody can

1. See Ibn-Rushd, Bidāyat, vol. 1, p. 245.
2. Q. 4.165.

have a plea against Him, regardless whether Prophets were sent or not. The Ẓāhirīs seem to have ignored the fact that God has sent His Prophets according to His justice, to explain to mankind the right path. It would be unjust to leave them without explanation, and still hold them responsible in the hereafter. This is not an action of God.

In respect to the verse: "Oh! ye who believe! intoxicants and gambling (Dedication) of stones, and (divination by) arrows, are an abomination, - of Satan's handiwork, Eschew such (abomination): That ye may prosper. Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer: Will you not then abstain?"[1] The Ẓāhirīs said that what is mentioned in the verse about being hindered from remembrance of God and from prayer, is neither the "grounds" nor part of the "grounds" of these actions. To them, gambling has never been known as a cause of enmity between people, but rather on the contrary, it was always favourable to people. Wine also, to them, sometimes helps to make a person come closer to the fear of God. Many drunk people remember death and cry. They remember the life hereafter, they fear hell, and pray God to forgive them. Sometimes drunk people become generous, merciful (ḥalīm), and less stupid. The Ẓāhirīs added that drinking wine was permitted (mubāḥ) for sixteen years in Islam before being prohibited, and the pious people used to drink it. During those sixteen years, the Prophet never objected

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1. Q. 5.90-91.

to them. If it was originally a cause of the troubles mentioned in the verse, then it would never have been permitted in Islam at all. Therefore, what is mentioned in the verse should never be regarded as "grounds" or a part of the "grounds" of the prohibition of these actions, such as gambling and drinking wine.[1]

It is obvious, that this argument of the Ẓāhirīs to refute the evidence of this last verse is completely unrealistic and contrary to what is known of the troubles caused by gambling, and the worse behaviour of drunk people, and how the gamblers and the drunk are ready to commit any serious crime. It is very obvious of course, that gamblers and drunk people are the most likely to neglect the Sharī'a obligations. Regarding the gamblers, they are always spending their time engaged in trying to win other people's property without earning it. And a lot of crimes are caused by it. And drunk people neglect the Sharī'a obligations because of loss of reason. No sensible person can believe that drunk people are more peaceful and nearer to God than when they are not drunk. It is a very well known fact that the drunk are always dangerous to themselves and to others. If they ever cried (in repentance) while they are drunk, this would be merely a kind of hallucination and not for regretting. Regarding the matter of the permission for drinking wine during the first sixteen years in Islam, this corresponded with the Islamic method of changing people's bad behaviour gradually. Drinking wine itself went through stages until

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1. See Ibn-Ḥazm, op.cit., pp. 87-89.

it has been prohibited completely. The first stage was an explanation that drinking wine consisted of evil and sin on the one hand, and some profit on the other hand. But its evil is greater than its profit. Qur'ān says: "They ask thee concerning wine and gambling, say: In them is great sin, and some profit for men, But the sin is greater than the profit."[1]

The second stage through which drinking wine went, was an order to the people not to approach prayers while they are drunk, until they can understand what they say; "O ye who believe! Approach not prayers with a mind befogged, until ye can understand all what you say."[2]

These were two preliminary stages for the complete prohibition of wine, which inevitably would come, when they would be ready to renounce it completely, and apply harder rules. There was a considerable time between these two stages themselves, and between them and the third and last stage. The last stage was the complete prohibition of drinking wine; "Oh ye who believe! Intoxicants and gambling, (Dedication) of stones, and (divination by) arrows, are an abomination, - of Satan's handwork, Eschew such (abomination): that you may prosper. Satan's plan is (but) to excite enmity etc."[3]

The period mentioned by the Ẓāhirīs, in which wine was permitted in Islam, was the preliminary period. It was

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1. Q. 2.219.
2. Q.4.43.
3. Q. 5.90-91.

followed by the last decision, which is the complete prohibition at all times. The permission which preceded this prohibition was not because drinking wine was good and causes no harm, but rather, it was the period in which people were made ready to accept and apply that last harder rule. We can say now that the Ẓāhirīs argument and criticism on this verse seem very weak.

The Ẓāhirīs objected to the Tradition which permitted people to preserve, for more than three days, some of the meat of the animals sacrificed on the day of the celebration of sacrifice (ʿĪd al-Aḍḥā). They denied that this Tradition showed the "ground" of the abrogated prohibition. They said: that the reason which was mentioned in this Tradition for the abrogated prohibition was not ʿilla, but sabab. They did not support their rejection of the evidence of this Tradition with more than this distinction between "ground" (ʿilla) and reason (sabab).[1] They ignored that these two terms have been used in this respect for one meaning, and this use corresponds with the original Arabic meaning of the two words.

However, this is how the Ẓāhirīs discussed and dealt with the textual evidence presented by the upholders of the "grounds". It is quite clear that the Ẓāhirīs depended many times on quite weak arguments. They seem to have decided to keep on resisting the "grounds" in the Sharīʿa rules with pertinacity, despite the strong textual evidence they have been faced with.

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1. See Ibn-Ḥazm, al-Iḥkām, vol. 8, pp. 90-91.

The Ẓāhirīs went on to try refuting the rational evidence presented by the upholders of the "grounds", namely: the wise (ḥakīm) God is not expected to reveal rules for no reason, since this would stand against His wisdom. Therefore, every one of His rules should have been based on a particular "ground". The Ẓāhirīs argued that this is a wrong conception of the nature of God Himself. It is wrong because it applies to Him what is relevant and applied to mankind. The wise man should always act for certain purposes and reasons. But God is not subject to the application of this rule, since we cannot put Him under our control. They added that the word wise is not said about God as an adjective, but as a pure noun. Therefore, it does not require that He should always base His actions and rules on certain purposes and "grounds" in the same way as mankind does.

The Ẓāhirīs continued to say that the assumption that God has revealed rules to secure "public interest" is not acceptable. They said that God Himself stated in the Qur'ān that He does not act and reveal rules to secure "public interest". They presented the following verse: "We send down (stage by stage) In the Qur'ān that which is a healing and mercy to those who believe: to the unjust, it causes nothing but loss after loss."[1] They claimed that this verse proved that God revealed some Qur'ānic verses which cause loss after loss for some people, and this is not securing "public interest".[2]

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1. Q. 17.82.
2. Ibn-Ḥazm, op.cit., vol. 8, pp. 123-124.

It seems that the Ẓāhirīs either misunderstood the meaning of the verse, or they intentionally ignored its real meaning. The real meaning of this verse is that God revealed some verses which would be accepted by those who believe in God, which belief would bring healing and mercy to them. But those who are unjust and unbelievers would reject those verses and this rejection would bring them loss after loss. The mercy and loss would be according to the acceptance or rejection by the people of the verses, and not because of the verses in themselves.[1]

The Ẓāhirīs added, that we can see many people in the world facing troubles and losing "interests" by some of God's actions. For example: sending Moses as a Prophet was against Pharaoh's "interest", because he disbelieved Moses and accordingly he disobeyed God losing his "interest" in the life hereafter, as well as losing his "interest" in this life by suffering the troubles caused by the coming of Moses. Also sending Muḥammad the Prophet to mankind was against Abū-Jahl's "interest", because he disbelieved Him, and will therefore, be punished in the hereafter. By this the Ẓāhirīs concluded that God did not intend to secure the "public interest" by revealing His Sharī'a.[2]

This argument of the Ẓāhirīs has been answered by saying that God intended to secure public and individual "interest". And the cases of those who gained nothing but loss after loss, such as Pharaoh and Abū-Jahl, those cases

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1. Az-Zamakhsharī, Kashshāf, vol. 2, p. 689.
2. Ibn-Ḥazm, op.cit., vol. 8, pp. 120-126.

do not disprove this fact. God did not force them to suffer loss of "interest", but rather He gave them the ability to chose their actions, and He showed them the difference between good and bad actions. They chose what made them suffer loss.[1]

The Ẓāhirīs continued criticising their opponents by claiming that in a number of cases the practical reasoning of the upholders of the "grounds" was contradictory. For example: the upholders decided that the "ground" of shortening the prayers when travelling, is the expected difficulty which might be caused by travelling. The Ẓāhirīs said that difficulty exists in the case of the sick, who can perform the prayers with difficulty. And yet the sick are not permitted to shorten the prayers. If the difficulty was the "ground" for shortening the prayers, the Ẓāhirīs said, then the same rule would have been applied to the sick, which is not so. The Ẓāhirīs continued saying that on the other hand we find the Sharī'a itself makes no distinction between the traveller and the sick regarding the break of the fast during the daylight of Ramaḍān. This means that the Sharī'a did not take any "ground" into consideration, but prescribed rules for us to follow. Otherwise the traveller and the sick would have been treated equally in the matter of shortening the prayers as long as they are treated equally in the matter of breaking the fast. The Ẓāhirīs added that the upholders of the "grounds" had accepted the above mentioned two different Sharī'a rules,

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1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 77-78ff.

and yet they held to their decision that Sharī'a rules were based on certain "grounds". The upholders, should either make no distinction between the traveller and the sick regarding shortening the prayers, or they should change their decision on the "grounds". If they made no distinction between the above two cases, then they would destroy the revealed Sharī'a rules, since the Sharī'a made a distinction. And if they did keep that distinction and kept holding their decision on the "grounds" then they would contradict themselves, and this is what they did.[1]

This criticism raised by the Ẓāhirīs does not seem acceptable, since the upholders have never claimed that every "ground" they have deduced is necessarily correct. They merely tried to deduce the most satisfactory "ground" for a rule, and they did not deny the possibility of being wrong sometimes. The difficulty might be the real "ground" of shortening the prayers when travelling, and it might not be so. But although the upholders did not treat the traveller and the sick equally, difficulty could still be proved as "ground" for shortening the prayers when travelling. That difficulty might include the fear of losing possessions or missing some means of transport. If the means of transport were private, then difficulty might include making the journey longer, causing perhaps damage to business or loss of "interest". These things which can be caused by travelling are not found in the case of the sick. After all, the assumption of the Ẓāhirīs that the upholders

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1. See Ibn-Ḥazm, op.cit., vol. 8, pp. 116-118.

objected that the sick are not permitted to shorten the prayers, is not refuting that the sick have been treated in a special way regarding the prayer. All the upholders of the "grounds" agreed that a sick man is not asked to perform the prayers if he is very sick. He is asked to perform it according to his condition, standing, sitting, or lying in bed, or may just leave it, intending in his heart that he is performing it. This permission was based on avoiding the difficulty that a sick man might suffer in performing his prayers in the prescribed form.[1] It is not necessary to give him the same rule of the traveller which is to shorten the prayer, but he has been given a rule which suits his case. If he was not very sick, then the prayer in its revealed form might help him by strengthening his morale, and this might help him to be cured.

This, however, is how the Ẓāhirīs criticised the upholders of the "grounds" and tried to deny and refute totally the existence of the "grounds" in the Sharīʿa rules. It is obvious that they sometimes, or almost all the time, had very weak bases for their arguments specially when they tried to refute the textual evidence presented by the upholders. Sometimes they found themselves bound to admit that a Qur'ānic verse or a Tradition stated something on which the rule was based. But they did not like to damage their attitude by this admission. Therefore, they insisted that this thing, on which the rule was based, should never be called "ground" at all, but reason. And this reason should

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1. See Ibn-Rushd, Bidāyat., vol. 1, pp. 166-170, 178.

have only restricted application. They tried, as it has been pointed out previously (pp. 74-75), to make a distinction between the terms ʿilla and sabab, but they do not seem to have made a real distinction. For, although sabab has a number of different meanings, the Ẓāhirīs only applied it as having the same meaning which was intended by the upholders for the term ʿilla. Some of the upholders proclaimed that sabab could be called ʿilla, and they showed how it has been used so.[1] This decision of the upholders, regarding the meaning of these two terms was confirmed in the lexicons.[2]

The upholders of the "grounds" meant by the term "grounds" the objectives, or the "public interests" on which the rules were based, and which were intended to be secured by these rules. They did not mean the logical "grounds" which cause the results automatically, such as light which causes the absence of dark. They intended the "ground" as meaning the reason for which the will of God chose a particular rule. This "ground" has no power in itself to bring into existence any rule, but it could be a motive for mankind to decide on a particular rule, and could be the objective for which God has chosen a particular rule. The justice of God means that He chooses and prescribes rules which secure the "interest" of mankind and drive away harm. This "interest" of mankind is what is meant by "ground" to the upholders.[3] The justice of God

1. See al-Ghazālī, Mus., vol. 2, p. 75.
2. See Riḍa, Matn., vol. 4 (sabab and ʿilla).
3. See Ibn-al-Qayyim, Miftāḥ., vol. 2, p. 38.

is against revealing rules to destroy the "interest" of mankind. And His wisdom is against revealing rules for no reason at all. Therefore, Sharī'a rules should be based on certain "grounds". The upholders made it very clear that the terms 'illa and sabab can have one meaning and they have used 'illa as meaning the same as sabab when they talked about the "grounds" of the Sharī'a rules.[1]

As already explained at the beginning of this chapter, the upholders of the "grounds" decided that to deny the existence of the "grounds" in the Sharī'a rules is not possible. They presented, as already shown, some textual evidence supporting their opinion. They added that the Qur'ān and Sunna are full of statements which prove this fact, by frequently mentioning or implying the "grounds" of rules. They said: they would have presented all this textual evidence, if it was limited to a few texts, but this evidence extends all through the Qur'ān and Traditions.[2]

The "grounds" and reasoning of the rules are expressed many times in these two main sources, so that we may be convinced that the Sharī'a is directing us to the right path and securing our own "interests". In these two main sources the "grounds" of rules are sometimes mentioned clearly and sometimes they are pointed to by means of the particular articles of reasoning. Sometimes these two main sources disprove the assumption that the Sharī'a rules were not based on any "ground" and likewise God's actions. Some-

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1. See al-Ghazālī, Mus., vol. 2, p. 75.
2. Ibn-al-Qayyim, op.cit., vol. 2, p. 22.

times the Qur'ān and the Traditions call on people to think, reason, and consider the goodness of the Sharī'a. The Qur'ān in many places calls on people to think about God's creations and the objectives intended by them, for the "interest" and benefit of mankind. Qur'ān says: "In the laws of equality there is saving of life to you, O ye men of understanding".[1] "And cattle He has created for you (men) from them you derive warmth and numerous benefits, and of their (meat) ye eat."[2] "Behold in the creation of the heavens and the earth, and the alternation of night and day, - there are intended signs for men of understanding. Men who celebrate the praises of God, standing, sitting, and lying down on their sides, and contemplate the (wonders) of creation in the heaven and earth, (with the thought): our Lord! Glory to Thee! give us salvation from the penalty of the fire."[3] "Not without purpose did we create heaven and earth, and all between, That was the thought of unbelievers."[4] The Qur'ān and the Traditions are full of this kind of statement, which shows the "grounds" of rules and of creation. They show the respect of the Qur'ān and the Sunna for human reason. These two main sources tried to encourage human reason towards fulfilling its function, by thinking about the creation and the Sharī'a rules, so that people will be fully convinced of the goodness of the Sharī'a and the rest of

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1. Q. 2.179.
2. Q. 16.5.
3. Q. 3.190-191.
4. Q. 38.27.

His creatures. People will be convinced that the Sharī'a and the creation are devoted to securing the "interest" of mankind. If we studied carefully every part of the Sharī'a, we would find it satisfactory proof of the fact that its rules were based on "public interest", justice, and mercy. It is not acceptable rationally that God, the most just of the justs, reveals for mankind rules which are against justice, mercy, and securing of their "interest". He is above being unjust and merciless.[1]

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1. See Ibn-al-Qayyim, Miftāh, vol. 2, pp. 22-23.

PART TWO

THE PRACTICAL METHODS OF USING HUMAN REASON IN THE FIELD OF THE SHARĪ'A

This part will consist of two chapters dealing with the practical methods and the limitations of using human reason in the Sharī'a. These methods and limitations have been thought about by the Muslim scholars in order to clarify the permitted uses of reason as they understood them. They had of course, points of disagreement over this subject which will be dealt with along with their points of agreement.

In the first part of this thesis the views of the scholars towards the "ground" in the revealed rules of the Sharī'a were explained. It was clear that most of them decided that the revealed rules of the Sharī'a were based on specific "grounds". They disagreed on the question, whether these "grounds" are rational and intended to secure people's "interests". It was explained in the previous part also how the Ẓāhirīs expressed their fierce criticism of this opinion held by the majority. The groupings and disagreements on the questions dealt with in the first part affected very clearly the groupings of the scholars on the present points. The number of groups increase even more here.

During the first century of Hijra, right from the time of the Prophet Himself, all the methods of using human reason had one term, that was ra'y.[1] In the second century A.H. another term took the place of the first one, this was qiyās.

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1. See al-Ghazālī, Mus., vol. 2, pp. 58-59; Ibn-Rushd, al-Muqaddimāt, pp. 19-20.

Ash-Shāfi'ī himself included most of the rational methods under this term.[1]

Aḥmad Ibn-Ḥanbal and some of his later students held the same opinion as ash-Shāfi'ī. They used qiyās in its wider sense.[2] This term with this wider sense was equivalent of the term ijtihād. Some other words concerning the use of human reason in this field appeared during the time of the Companions, but were not used as technical terms until the third century of Hijra, when these words began to have their technical meanings. Some examples of such words are, maṣlaḥa, istiḥsān etc.[3] The term qiyās later on had its particular confined technical meaning. Each of these technical terms represents a particular method of using human reason in the Sharī'a. Here the latest development of these terms will be followed in order to present the different opinions of the scholars towards them.

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1. See ash-Shāfi'ī, ar-Risāla, p. 71.
2. See Ibn-al-Qayyim, A'lām, vol. 1, pp. 29-32.
3. Al-Baghdādī, Tarīkh Baghdād, vol. 13, p. 216.

CHAPTER THREE

ANALOGY

Analogy with its confined and technical meaning had been given a particular importance by the jurists in the past. They used to place it first when they discussed reasoning. It will also be discussed first in this part of the thesis, since it is mostly the nearest rational method to the texts. Analogy is applied by taking individual rules from the Qur'ān and the Traditions, and sometimes from previous decisions based on reasoning, as standard. This is in order to apply these rules to new cases which had not been judged before. Analogy was not agreed on by the Muslim scholars as a correct method for finding rules and regarding them as approved of by the Sharī'a. Those who accepted it as a correct method disagreed also on whether previous decisions based on reasoning could be regarded as standard for new cases.

When the upholders of analogy tried to find a precise definition for it, they presented several definitions intending to be more precise. Some of them hesitated to give it a specific definition. Imām-al-Ḥaramayn, for example, believed that it was very difficult to give it a precise and satisfactory definition. He said that analogy consists of several different elements which are difficult to join in one definition. These elements are: the rule which is eternal (qadīm), the action for which a particular rule was revealed originally and this is created (ḥādith), the branch which is the new case for which a rule is sought, and the

connection between the original action and the new case which is the "ground" (_'illa_) of the revealed rule.[1] Those who defined it presented different definitions, either because of the same difficulty as Imām-al-Ḥaramayn found, or because of the different senses in which they understood analogy.

Many of the scholars presented several definitions corresponding with the definition presented by ash-Shāfi'ī.[2] He, as has been pointed out above, applied the term analogy to most ways of using human reason. He defined it as seeking the indications which lead to finding rules by honest use of human reason to reach the truth.[3] As obvious, this is a very general and non-specific definition. It includes almost all the aspects of _ijtihād_.

Al-Āmidī presented his own definition describing it as the most satisfactory one. He said, analogy is the equality between a new case (branch) and an original case judged by the texts, considering the "ground" of the rule.[4] It seems that al-Āmidī meant to say that analogy is seeking the equality etc. The word seeking will bring in the action of the jurist which is important to include in such a definition. Otherwise, this definition would not be satisfactory.

Al-Ghazālī followed al-Bāqillānī[5] in presenting the same

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1. See ash-Shawkānī, _Irshād_, p. 174.
2. For these definitions see al-Āmidī, _al-Iḥkām_, vol. 3, pp. 167-169.
3. Ash-Shāfi'ī, _Ar-Risāla_, p. 66.
4. Al-Āmidī, _op.cit._, vol. 3, p. 174.
5. _Ibid._, vol. 3, p. 170.

definition. It was that analogy is to join a known case (ma'lūm) with another known case by means of a "ground" in order to establish or deny a rule for both cases.[1] This definition seems to be unsatisfactory. It suggested that the rule of the "original case" itself is to be established by analogy. But in fact analogy is intended to state a rule for a branch only.[2] The rule of the "original" should have been already stated by the texts before the establishment of analogy. This definition could be accepted if the word "both" was changed into "branch". The objective of analogy then will be to establish or deny a rule for a "branch". Ibn-as-Subkī was among those who adopted this latter modified definition.[3] Al-Āmidī related that most of the Shāfi'īs adopted it as well.[4]

This was the definition of analogy which is to be studied in this chapter. The essential elements emerging from this definition are to be considered separately. This will require the study of the original case, the rule of the "original", the "branch" which is the new case, and the "ground" on which the rule was based. We have already studied in a separate chapter the element of the "ground". We might add some points later on regarding its connection with analogy. Every analogy must consist of these four elements. The main objective of analogy is establishing rules for new cases. Accordingly the "branch" which is the new case is

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1. Al-Ghazālī, Mus., vol. 2, p. 54.
2. See al-Āmidī, op.cit., vol. 3, p. 173.
3. Subkī, Jam'., vol. 2, pp. 202-203.
4. Al-Āmidī, op.cit., vol. 3, p. 170.

the first element to drive a jurist towards establishing analogy.[1]

The presentation of this subject will be classified according to these elements. Every point we discuss will be joined with the relevant element and each element will be connected with the others. Thus a clear picture may result for the subject. We shall begin with the "original case" and its rule since these are the first to seek when a new case which has no revealed rule arises.

The first and second elements;
the "original case" (al-aṣl) and its rule (ḥukm):

When dealing with the "original case" in analogy one cannot separate it from its rule which was stated by the texts. Many of the scholars discussed these two elements as one. The "original case" by itself has no importance without its rule.[2] Here these two elements will be regarded as one element. We shall call them either "the original" or "the original rule" or the "original case".

The first point regarding this element, on which the scholars argued and disputed, was the authority of this element. Should it be only the texts of the Qur'ān and Traditions or could it be reasoning as well? Most of the Shāfi'ite scholars supported by the great Ḥanafī scholar al-Karkhī[3] decided that the "original rule" should always be stated by the texts. Cases judged by reasoning are not acceptable as "originals" for analogy. They argued that

1. See ibid., vol. 3, pp. 176-177.
2. See ibid., vol. 3, p. 178.
3. He lived between 260-340 A.H. (See al-Marāghī, al-Fatḥ., vol. 1, pp. 197-198).

cases which were judged by reasoning either were judged according to their similarity to some other revealed cases or according to "interest". If it were the first then the revealed cases and not the previous cases judged by reasoning, are considered to be the "originals" for new cases. If it were accepted that previous cases judged by reasoning can be "originals" for analogy then a judgement on a new case might be based on a chain of analogies. If the last case of this chain was compared with the first revealed case, they might become very different from each other regarding the "ground" and the rule. This should be avoided by considering the similarity between a new case and a revealed one, and not previous cases judged by reasoning.[1]

The above mentioned Shāfi'ī scholars supported by al-Karkhī decided that "consensus" is the same as the texts regarding the authority of the "original" in analogy. Cases judged by consensus can be considered as "originals" for establishing analogy.[2] This needs a short explanation of the meaning of "consensus" to understand what kind of "consensus" these scholars meant. It was defined as a decision taken by all the Muslim scholars at a particular time on a specific case. This decision may be based on the texts of the Qur'ān and Traditions or on reasoning.[3] One might ask about the use of "consensus" on a case while there is a text judging the same case. Some scholars justified this

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1. See al-Ghazālī, Mus., vol. 2, p. 87; Ibn-al-Humām, Taḥrīr, vol. 3, p. 287; al-Āmidī, al-Iḥkām, vol. 3, pp. 178-179; Ibn-Qudāma, Rawḍat, pp. 166-167.
2. Ibn-al-Humām, ibid., vol. 3, p. 287.
3. See ibid., vol. 3, p. 256; ash-Shāfi'ī, ar-Risāla, p. 65; al-Ghazālī, Mus., vol. 1, p. 196; Ibn-Qudāma, Rawḍat, pp. 77-78.

by saying that if a rule was stated by a text a "consensus" can be held on the same case to support the text and strengthen the rule. If this rule was contradicted by another text then the text with "consensus" will be given preponderance.[1]

The Ẓāhirīs decided that "consensus" can never be based on reasoning but only on the texts.[2] This was in accordance with their criticism to reasoning as a whole. Aṭ-Ṭabarī agreed with the Ẓāhirīs on this point, arguing that a large number of scholars are not conceivable to agree, at the same time, on a specific decision based on reasoning.[3] The upholders of the "consensus" based on reasoning supported their decision by a Tradition which says that Muslims will never agree on an error.[4]

It may be useful to mention briefly the attitude of the Ja'farī Shī'ites, the Khārijites, and some of the Mu'tazila towards "consensus". They rejected it completely as an acceptable method for finding Sharī'a rules.[5] The Ja'farī Shī'ites and their supporters from the Mu'tazila justified their opinion by saying that, if a "consensus" were based

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1. See al-Bunānī, Comments on Jam', of As-Subkī, vol. 2, p. 214.
2. See Ibn-Ḥazm, al-Iḥkām, vol. 4, p. 129.
3. Al-Ghazālī, Mus., vol. 1, p. 196; Ibn-al-Humām, op.cit., vol. 3, p. 256.
4. See al-Ghazālī, ibid., vol. 1, pp. 196-198.
5. See al-Baghdādī, Uṣūl-ad-Dīn, vol. 1, pp. 19-20; ash-Shawkānī, Irshād, p. 175; Ibn-Qudāma, Rawḍat, p. 67; al-Āmidī, al-Iḥkām, vol. 1, p. 183; Ibn-al-Humām, Taḥrīr, vol. 3, p. 227.

on a text then this particular text must be made public and there will be no need for "consensus". Whenever this text had not been made public then the particular "consensus" should be rejected since it would have no basis.[1] They went on to say that "consensus" can never be based on reasoning. This is because scholars are different in their understanding, ability, and motives to make decisions. Also it is not normal that such a large number of scholars agree all of them on making one decision on a matter of reasoning.[2] It should be mentioned here that the Zaydī Shī'ites accepted "consensus" as a reliable source for the Sharī'a rules, but they limited it to the Shi'ites themselves. To them a "consensus" of the Shī'ites alone is accepted. They did not include Sunnī scholars.[3]

It is important to explain that a section of scholars from among those who accepted "consensus" based on reasoning, rejected it as an "original" of analogy. Ash-Shawkānī mentioned from this section 'Abd-al-Wahhāb, Ibn-Fūrak, Salīm ar-Rāzī, and some of their colleagues from the Shāfi'ī school.[4] These scholars decided that "consensus" based on reasoning is subjected to abrogation whenever the circumstances demand. The Door for reasoning is open and any decision based on it could be changed by another decision based on it as well. If a "consensus" based on reasoning should not be abrogated, this

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1. Al-Āmidī, op.cit., vol. 1, p. 181.
2. Ibid.
3. Ibid., vol. 1, pp. 223-225.
4. See Ash-Shawkānī, Irshād, p. 71.

will mean that the door for reasoning is closed and this will bring about an obvious contradiction.[1]

With respect to individuals' decisions based on reasoning, some of the Mālikīs, some of the Ḥanbalīs, and Abū-'Abd-Allāh al-Baṣrī from the Shāfi'ī school decided that these decisions can be regarded as "originals" for analogy. Jurists can establish analogies basing them on previous decisions based on reasoning by individuals.[2] Accordingly one can say for instance, the intoxicant made from apple (if any) is prohibited by analogy to the intoxicant made from dry grapes (nabīdh). It is known that nabīdh was prohibited by analogy to khamr which is made from fresh grapes and khamr was prohibited by the Qur'ān. It is mentioned previously in this chapter that the majority of the jurists did not accept establishing analogy based on another previous analogy unless there is no case in the Qur'ān or the Traditions similar to the new case.[3] The difference between the decision of the minority and the decision of the majority on this point is that the minority accepted establishing analogy basing it on previous analogy even if there was a text judging the concerned case. The majority conditioned this exercise by the non-existence of the texts.[4]

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1. Ibid., and al-Ghazālī, Mus., vol. 1, p. 197.
2. See al-Āmidī, op.cit., vol. 3, p. 179; Ibn-Rushd (the father), al-Muqaddimāt, vol. 1, pp. 22-23; Ibn-al-Humām, Taḥrīr, vol. 3, p. 288.
3. See Ibn-Rushd, ibid., vol. 1. pp. 22-23.
4. Al-Ghazālī, Mus., vol. 2, p. 87.

The upholders of establishing analogy based on a previous analogy supported their decision by saying that, in the debates (munāẓarāt) people were used to basing their arguments and results on mere hypotheses. This proved that it is rationally accepted that decisions may be based on branches (furū') which themselves were based on some other branches. Accordingly, analogy can be based on another previous analogy. This argument was refuted by the opponents who said, in debates there is no limitation to using logic, even if it were destructive. Therefore, people can base their arguments and decisions on hypotheses. But in the Sharī'a logic is always controlled by securing the objectives of the Sharī'a explained in the texts.[1]

Concerning the rule of the "original case" which is to be applied to a new case, it should never be exceptional. That is the kind of rules which are specified for particular cases. It cannot be applied to another case. An example for this is the sufficiency of giving evidence of the Companion Khuzayma alone. It was accepted by the Prophets, that the sufficient evidence explained by the Sharī'a should be given by either two men or four women or one man and two women. This was the rule before and after the Prophet accepted Khuzayma's giving evidence. The case of Khuzayma and the acceptance of his evidence should never be extended. It cannot be regarded as an "original" since it is exceptional and specified for this man alone.

The "original" also should not be a case of ta'abbud

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1. Ibid.

whose
~~which its~~ "ground" is not clear to human reason. An example is the number of the rak'āt in prayer. This kind of rule cannot be regarded as an "original" for analogy since the "ground" which is a most essential element in analogy is not clear. Analogy cannot be established without a "ground".[1]

The third element of analogy,
the branch (far'):

The branch is the new case that might arise and it has no revealed rule in the texts. It demands seeking the connection between it and the individual cases in the Qur'ān and Traditions in order to apply to it the rule of the most similar case. The most fundamental condition in this required similarity is the existence of a specific "ground" in both the "original" and the "branch".[2]

The "ground" of the original's rule may appear in the "branch" in different degrees. It may be very clear and convincing, or not so clear, or in some cases very obscure. According to these degrees analogy would be strong or weak. This shall be discussed when dealing with the different classes of analogy. One should be certain that a "branch" for which a rule is sought was not already judged by the texts. Being so there will be no place for analogy. Applying analogy where there is a text deciding a rule for the new case concerned, means abrogation of the texts by reasoning, which is not accepted.[3] These texts, which must

1. See al-Āmidī, al-Iḥkām, vol. 3, p. 180.
2. See Subkī, Jam', vol. 2, pp. 222-224.
3. See Ibn-al-Humām, Taḥrīr, vol. 3, p. 297.

not be abrogated by analogy, are the decisive ones, which were stated by the Qur'ān or strong Traditions. This was the decision of the majority of the jurists. There was a very small minority mentioned by al-Ghazālī who decided that analogy can abrogate a decisive (qaṭ'ī) text. This minority argued that as long as the restriction (takhṣīṣ) of the decisive texts by analogy was accepted by all of the jurists it can be accepted also that analogy may abrogate decisive texts.[1] This argument of this minority was refuted by the majority who said that there is a great difference between takhṣīṣ and abrogation. The first is only an explanation for the texts, and the latter is changing completely a previous rule stated by the texts. Analogy is not in a position to abrogate a decisive text. This was confirmed by Traditions and "consensus". When Mu'ādh Ibn-Jabal was sent to Yaman as a judge he was asked by the Prophet how would he judge cases? Mu'ādh said, that he would consult the Qur'ān then the Traditions. If there is no rule for a case in these two sources then he would use his own reason. This was approved of by the Prophet. In this order mentioned by Mu'ādh analogy comes in the third place and should never precede the Qur'ān or the Traditions. A "consensus" also was formed by the Companions that analogy must be ignored whenever a decisive text existed judging a concerned case. It was attributed to some of the Companions that analogy must be ignored even for the indecisive texts.[2]

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1. Al-Ghazālī, Mus., vol. 1. p. 126.
2. For this argument see ibid., vol. 1, p. 127.

The indecisive (zanniyya) texts which are the general statements of the Qur'ān and Traditions, and all weak Traditions which were transmitted through individuals or weak chain of men, scholars were divided into three groups regarding their abrogation by analogy. The majority which includes Abū-Ḥanīfa decided that analogy cannot abrogate an indecisive text and should never be applied to any case which has already been judged by this kind of text. Any analogy contradicting such texts must be rejected in the places of these texts. The only area in which the application of analogy is permitted is where there is no text at all judging the concerned case.[1]

The second group which includes Ibn-Taymiya and Ibn-al-Qayyim decided that whenever an analogy seems to contradict any kind of text then it should be understood that this particular analogy is incorrect. It should never be applied to any other case even if there is no text judging this case. There is no text in the Qur'ān or the Traditions contradicting a sound analogy but they certainly contradicts incorrect ones and sometimes jurists cannot understand defects of analogies.[2] It is clear that Ibn-Taymiya and his group rejected completely any analogy which seems to contradict any kind of text from the Qur'ān and Traditions. They did not apply this kind of analogy even to another case which was not judged by the texts. Contradiction between texts and analogy means to them that this particular analogy

1. See Ibn-al-Humām, Taḥrīr, vol. 3, p. 116.
2. Ibn-Taymiya, al-Qiyās, p. 6.

can never be correct. This is the difference between this group's attitude and the first group's one. The first group rejected this kind of analogy in the places of the texts and applied it in the other places.

The third group of scholars, regarding the abrogation of the indecisive texts by analogy, were the Mālikīs. They decided that analogy can contradict the indecisive texts from the Qur'ān and Traditions and restrict (yukhaṣṣiṣ) these general statements. This means that one may apply both an indecisive text and an analogy to one case. That is to give each of them an aspect of this particular case to which it could be applied. To the Mālikīs analogy can abrogate a weak Tradition.[1]

These are three groups with their three different decisions regarding the question whether analogy can abrogate or specify an indecisive text. It seems that the opinion held by Ibn-Taymiya and Ibn-al-Qayyim brings about harmony between the texts and human reason. The Sharī'a and the sound human reason cannot contradict each other and analogy is based on reasoning.

The fourth and last element of analogy,
the "ground" ('illa):

The "ground" is the most important element in analogy. It has already been dealt with in a previous chapter devoted to it. Its reality, its existence in the Sharī'a rules, and the different opinions of the scholars towards it were

1. See Ibn-al-Humām, Taḥrīr, vol. 3, p. 116; al-Qarāfī, Tanqīḥ, p. 90.

all explained. No need to present here much detail on it. It can only be emphasised here that the "ground" of the "original" is the basis on which jurists depend to establish analogy. One "ground" should exist in both the "original" and the "branch". Accordingly the rule of the "original" may be applied to the "branch".[1] It will be discussed later in this chapter how and why some scholars called some of their judgements analogy while these judgements were not based on any "ground". In the previous chapter held on the "ground", the sound ground which is accepted in the Sharī'a field was explained and this is the "ground" required in analogy.

The grades (marātib) of analogy

The grades of analogy were presented by the jurists in different ways and forms. But it seems that all these different forms can be combined into four. These are: analogy of al-ma'nā (meaning), analogy of ash-shabah (similarity), analogy of ad-dawarān (circulation), and analogy of aṭ-ṭarad (following).[2]

The first type, analogy of al-ma'nā:

Analogy of al-ma'nā was defined as the analogy in which

1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, p. 22; ash-Shawkānī, Irshād, p. 181.
2. See ash-Shāfi'ī, ar-Risālā, p. 66; Ibn-al-Humām, Taḥrīr, vol. 4, pp. 76-78.

there is no important difference between the original case and the new case regarding the suitability of the rule which was stated for the original.[1]

This is how jurists defined it generally, but when they presented it in detail they produced different views. Many of the Shāfi'īs, among them al-Āmidī, stated that this type of analogy includes four kinds: analogy in which the "branch" is more appropriate to the application of the rule than the "original" itself, analogy in which the branch is equal to the "original", analogy in which the "branch" is less appropriate to the application of the rule than the "original", and this is two types; the first is that whose "ground" was revealed, and the other is that whose "ground" was deduced.[2]

An example of the first type is, the prohibition of hitting one's own parents. This rule was stated by analogy to the prohibition of saying a word of contempt to parents which was stated by the Qur'ān. The verse says, "Thy Lord hath decreed ye worship none but Him, And that ye be kind to parents. Whether one or both of them attain old age in thy life, say not to them a word of contempt nor rebel them, but address them in terms of honour".[3] Saying a word of contempt to one's own parents is less in importance than hitting them. Nevertheless, hitting was not mentioned in the verse, but was regarded by jurists as appropriate to

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1. Al-Āmidī, op.cit., vol. 4, p. 3.
2. Ibid.
3. Q. 17.23.

this rule more than saying a word of contempt which was mentioned in the verse. Accordingly hitting was prohibited by analogy.[1]

An example of the second type of analogy of al-ma'nā, in which the "original case" and the "branch" are equal, is the following: A Tradition stated a specific rule for a male slave owned by two people and one of them intended to set free his share of this slave. This partner will be obliged by the Sharī'a, if he is prosperous, to pay his partner's share and to set the whole slave free. His partner also will be obliged to accept the price of his share. This rule was applied by analogy to a female slave since they are equal regarding being appropriate to the application of the rule.[2]

With regard to analogy whose "ground" was revealed and whose "branch" is less appropriate to the application of the rule than the "original", the following example can be presented; It was decided by analogy that intoxicants other than khamr, which was made from fresh grapes, are prohibited. This analogy was based on the prohibition of khamr which was stated by the texts. The "ground" on which the prohibition of khamr was based is the intoxication which was mentioned in the Qur'ān. The verse says, "O ye who believe, approach not prayers with a mind befogged (wa-antum sukārā) until ye understand what ye say".[3] The same "ground" exists

1. See al-Ghazālī, al-Mankhūl, p. 333.
2. See Ibn-al-Humām, Taḥrīr, vol. 4, p. 76.
3. Q. 4.43.

in the other intoxicants therefore, they prohibited them by analogy to khamr. These other intoxicants are less appropriate to the application of this rule than khamr.[1]

The last example to be presented is for the fourth type of analogy of al-ma'nā, which is based on a deduced "ground" and the "branch" is less appropriate to the application of the rule than the "original". The difference between this and the third type is that the "ground" in the third is revealed. The example is, that some of the scholars decided that breaking the fast by eating or drinking during the daylight of Ramaḍān without a legal reason causes the obligation of fulfilling the expiation explained in the Traditions for breaking the fast by committing sexual intercourse deliberately with wives during the daylight of Ramaḍān and without a legal reason. It was related that a man once came to the Prophet and told him that he (the man) deliberately committed sexual intercourse with his wife during the daylight of Ramaḍān without a legal reason. The Prophet ordered him to do one of three things in certain order as an expiation for his action. The first is to set free one slave if he owned one. The man said that he had no slave. The Prophet ordered him then to fast for two months in succession. The man said he was not able to fast. The Prophet ordered him to feed sixty poor people, one meal. The man also declared his inability to do this. The Prophet then offered him food with which to feed this number of men. The man said that there was no one

1. See al-Āmidī, al-Iḥkām, vol. 4, p.3.

poorer than him. The Prophet then smiled and allowed him to keep the food for himself.[1] Some of the scholars regarded that the "ground" of prescribing this expiation was only the commitment of sexual intercourse during the daylight of Ramaḍān. Some other scholars regarded that the "ground" was the commitment of any action prohibited during the daylight of this particular month. This latter group, according to their decision, prescribed the expiation on a person who breaks fast by eating or drinking during the prohibited time, since it has the same meaning as committing sexual intercourse.[2]

Another interpretation of analogy of al-ma'nā is to be presented here. That is the interpretation of al-Ghazālī and a group of scholars who followed him. They stated that cases in which the "branch" is more appropriate to deserve the application of the rule than the "original", and cases in which the "original" and the "branch" are equal are not regarded as cases of analogy. They are regarded as judged by the texts. Al-Ghazālī and his group disagreed on the cases in which the "branch" is less appropriate to the application of the rule than the "original", and the "ground" is revealed. Al-Ghazālī regarded it as analogy, but the rest of his group regarded it as judged by the texts.[3] The only area for analogy to them is where the "ground" of the "original rule" is deduced and the "branch" is less appropriate

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1. See Ibn-Rushd, Bidāyat, vol. 1. pp. 302-303.
2. Ibid.
3. See al-Ghazālī, al-Mankhūl, p. 335.

to the application of the rule than the "original".[1] To them, analogy of al-ma'nā is confined only in one of the four types mentioned by the first group as types of analogy of al-ma'nā. Al-Ghazālī accepted two types as explained above.[2]

The opinion of al-Ghazālī and his group does not seem to be clear. They regarded some of the cases which had not been mentioned in the texts as cases judged by the texts. Their attitude here seems to come closer to the attitude of the Ẓāhirīs who decided that every case in life has already been judged by the texts as shall be explained. Al-Āmidī and his group were clearer when they decided that every case which was not mentioned in the texts cannot be regarded as being judged by the texts. They will be judged by reasoning.[3] Perhaps al-Ghazālī and his group took this decision since rules of some cases can be understood from the texts without mentioning them specifically. This understanding was called (mafhūm an-naṣṣ). They might have thought that analogy should always be accompanied by some effort.[4]

The term al-Qiyās al-khafī appeared while jurists were discussing analogy of al-ma'nā. Some scholars meant by this term every analogy whose "ground" was deduced.

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1. Ibid., p. 333.
2. Ibid.
3. See Ibn-Ḥazm, al-Iḥkām, vol. 8, pp. 13-15; Ibn-al-Qayyim, A'lām, vol. 1, p. 335; ash-Shawkānī, Irshād, p. 175.
4. Al-Ghazālī, al-Mankhūl, pp. 334-336.

This means that a jurist would never be certain on which "ground" God revealed His rules unless the "grounds" were revealed. Some other scholars described this term as analogy in which jurists are not certain whether the "branch" consists of the same "ground" as the "original". Accordingly jurists will not be fully satisfied that analogy of this kind is correct. An example for this is the prohibition of drinking a little quantity of intoxicants other than khamr. This was decided by analogy even if this quantity does not cause intoxication. Drinking of a little quantity of khamr was decided by the Qur'ān itself. Analogy of prohibiting drinking a little quantity of intoxicants other than khamr was based on a deduced "ground". It was thought that a little of khamr was prohibited since it may lead to drinking a lot. The same "ground" exists in the other intoxicants. It was the Ḥanafī scholars who presented the above mentioned example for al-qiyās al-khafī since they could not see a convincing "ground" for this decision.[1] The above mentioned interpretation of al-khafī was produced by the minority of the jurists.[2] The majority stated that this term could be applied only to analogy whose "ground" is not clear. Analogy whose "ground" is clear and convincing is called al-qiyās al-jalī.[3]

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1. See Ibn-al-Humām, Taḥrīr, vol. 4, pp. 76-77.
2. Al-Āmidī, al-Iḥkām, vol. 4, p.4.
3. Subkī, Jam', vol. 2, p. 308.

The second type of analogy,

analogy of ash-shabah:

Analogy of ash-shabah was classified as the second type. The use of the term ash-shabah for this type of analogy had embarrassed many of the great scholars. It means literally the "similarity" which shall be used instead of the Arabic term. "Similarity" should exist in any type of analogy and this is why embarrassment occurred when the term was confined to one type and classified as second.[1] The term was given the following different interpretations.

Al-Bāqillānī[2] defined this type of analogy as the analogy which is based on an attribute which is not suitable to be a real "ground" of a rule.[3]

Imām al-Ḥaramayn stated that analogy of "similarity" is not easy to define. It is less than an analogy of al-ma'nā since the "ground" on which analogy of "similarity" is to be based is not fully accepted. But its acceptance has the preponderance. For example, the decision taken by Abū-Ḥanīfa on the touching of one's head in the ablution (wuḍū'). He decided that it is required only once and not repeatedly. He took this decision by analogy to touching one's face and hands in tayammum which is required only once. The "ground" shown by Abū-Ḥanīfa for this decision was that both actions are touchings (masḥ). The Sharī'a prescribed this masḥ in tayammum once for each explained part. Abū-Ḥanīfa

1. See Subkī, Jam', vol. 2, p. 286.
2. Al-Qaḍī Abū-Bakr, d.403A.H.
3. See ash-Shawkānī, Irshād, p. 192.

understood this as an indication that mash is the reason for this rule, to touching of head in ablution, but washing should be repeated for each part. Abū-Ḥanīfa himself did not consider the mash as a real "ground" for this decision. And this is why this analogy was regarded as of second class.[1]

Al-Ghazālī defined analogy of "similarity" as joining a new case with a revealed case, regarding the application of the rule, with a jurist's acknowledgement that the attribute on which he had based his judgement is not the real "ground". Al-Ghazālī then said that if this was not what was meant by the term analogy of "similarity" then he did not know what it meant exactly. He thought that most of the judgements made by the jurists on new cases were based on this type of analogy since it is very difficult to be certain of a particular attribute as a real "ground" for a particular rule stated by the texts.[2]

Az-Zarkashī[3] followed al-Bāqillānī in his definition mentioned above. He said that he understood the meaning of analogy of "similarity" from al-Bāqillānī's book Mukhtaṣar at-Taqrīb.[4]

Regarding the acceptance of analogy of "similarity" as a legal method for obtaining Sharī'a rules, , scholars were divided among themselves to hold different opinions. It was attributed to most of the Ḥanafīs that they had rejected

1. Ibid., and al-Ghazālī, Mus., vol. 2, p. 82.
2. Al-Ghazālī, ibid.
3. The great Shāfi'ī scholar died in Egypt in 794 A.H. (see al-Marrāghī al-Fatḥ, vol. 1, p. 217).
4. See ash-Shawkānī, op.cit., p. 192.

it. This rejection was also attributed to al-Bāqillānī. A number of the Shāfi'ī scholars were said to have rejected it as well.[1]

Ar-Rāzī and Ibn-Surayj stated that analogy of ash-shabah is acceptable when the attribute on which analogy was established is connected with the real "ground" of the rule.[2]

The majority of the jurists from the different schools accepted analogy of "similarity" and regarded it as a legal method for finding rules for new cases.[3] Al-Ghazālī was among this majority and he went beyond this to say that if a mujtahid was in debate and needed to establish analogy of "similarity" then he should not be asked to produce any attribute as basis for his judgement. But a non-mujtahid should be asked to produce such attribute. Regarding the mujtahid, his feeling alone is enough to establish this analogy. This is because in debates arguments would not be accepted unless they are supported by convincing "grounds". And the attribute which is required for analogy of "similarity" ~~are~~ is not supposed to be convincing. Therefore, a mujtahid in debates should not be asked to produce these kinds of attributes. He depends on his feeling alone and this is very similar to the istiḥsān in its criticized meaning as shall be discussed.[4] When a mujtahid is not in debate, al-Ghazālī stipulated on him a condition to establish

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1. Ibid., p. 193.
2. Ibid.
3. Ibid.
4. Al-Ghazālī, Mus., vol. 2, p. 83.

analogy of "similarity". It was the same condition presented by ar-Rāzī that he must produce an attribute which is connected with the real "ground" of the rule concerned. Accordingly his decision may be accepted.[1]

It seems that al-Ghazālī was trying to bring together the two opinions of the upholders and the opponents of analogy of "similarity". But finally he agreed with the majority and accepted it. Ar-Rāzī and Ibn-Surayj tried the same approach as al-Ghazālī. Accordingly they were nearer to the majority but they did not accept any decision based on analogy of "similarity" unless it was based on an attribute which is connected with the real "ground". Al-Ghazālī was different from them when he accepted it from the debater who depends on his feeling alone. However, these three scholars, al-Ghazālī, ar-Rāzī, and Ibn-Surayj will be classified with the upholders. There will be two groups of scholars towards this type of analogy, those who accepted it and those who rejected it.

The upholders supported their decision by saying that the attribute on which this type of analogy is to be based signifies that the decision is more likely to be correct. The opponents argued that as long as it is not based on a convincing "ground" it must be rejected and treated as the same as analogy of aṭ-ṭarad which shall be dealt with as the last type of analogy.[2]

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1. Ibid.
2. Ash-Shawkānī, Irshād, p. 193.

In conclusion it must be stated that analogy of this type is not based on any relevant "ground" to the rule. It seems that those who rejected it took the more suitable decision. If a jurist cannot find a convincing "ground" on which he may base his decision then he must not insist on establishing analogy. He can merely use his reason along to judge a case, taking into account the general direction of the Sharī'a which secures the "public interest" and the "interest" of individuals.

Perhaps those who accepted analogy of "similarity" took into account the rigorous disputes which took place on the legality of judging cases depending on "public interest". This made the upholders of analogy of "similarity" restrict consideration of "public interest" by human reason as far as possible. In order to accept analogy of "similarity" a jurist must endeavour to keep as close as possible to the texts of the Qur'ān and Traditions.

The third type of analogy,
analogy of ad-dawarān:

Analogy of ad-dawarān means that a specific attribute appears with a particular rule and disappears with this rule's disappearance, with the Jurists' acknowledgement that this attribute is neither the real "ground" nor connected with the "ground" of the concerned rule.[1] In this type of analogy the appearance and disappearance of a particular attribute is what should be considered. The reality of the attribute is not important.

1. See ibid.

Some scholars considered that the term ad-dawarān means the same as the term aṭ-ṭarad which shall be discussed as the fourth and last type of analogy. But actually aṭ-ṭarad means the following of an attribute to a specific rule regarding the appearance only. If ever the rule were abolished the particular rule will remain.[1] This will be dealt with later on. These scholars who regarded the two terms as one, did not see the difference between the following in appearance only, and following in appearance and disappearance, as long as the attribute in both cases is not relevant to the rule.[2]

The example presented for analogy of ad-dawarān was, the prohibition of nabīdh (a kind of drink made from raisins) as based on the particular smell which follows its fermentation in appearance and disappearance. Nabīdh is prohibited when this particular smell exists and not prohibited when the smell is absent. In other words, when it is prohibited this particular smell exists and when it is not prohibited the smell does not exist. Some jurists thought that this particular smell was the "ground" of the prohibition. The only reason that made them believe so, was that this smell followed the prohibition in its appearance and disappearance.[3] This example was mentioned by the opponents of analogy of ad-dawarān. It is known that the "ground" of the prohibition of nabīdh was decided as the intoxication itself.

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1. Ibid.
2. See al-Ghazālī, Mus., vol. 2, pp. 80-81.
3. See al-Āmidī, al-Iḥkām, vol. 3, pp. 275-276.

Perhaps the opponents of analogy of ad-dawarān regarded the smell as the "ground" in order to make this type of analogy unreasonable.

The upholders of analogy of ad-dawarān presented the same above mentioned example and stated that the intoxication was the attribute which follows the prohibition in appearance and disappearance. They produced also the same example for analogy of al-ma'nā which is the first class of analogy. This means that they did not consider any difference between al-ma'nā and ad-dawarān. It seems that they regarded the latter as one of the aspects of the former. It is probable also that this example was presented by some of them who did not like to stand on weak grounds. The example presented by the opponents may have been suggested first by some of the upholders.[1]

However, the example presented by the opponents seems to be the suitable one for ad-dawarān. It was the same case they presented for analogy of al-ma'nā to show the difference between the attribute accepted as a "ground" of the prohibition which was the intoxication and the attribute which is not accepted which was the particular smell.

The groupings of the scholars towards analogy of ad-dawarān is to be described here. It was attributed in many books to some of the Mu'tazila, without mentioning specific names, that they accepted it as a legal method for finding rules. They justified their opinion by saying that the following of an attribute to a certain rule in its

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1. See Ibid.

appearance and disappearance signify that this attribute is the real "ground" and analogy can be based on it. The Mu'tazila may have considered it as one of the stronger aspects of analogy of al-ma'nā in which the attribute is fully convincing and not a meaningless attribute.[1]

Al-Bāqillānī, Imām al-Ḥaramayn, and most of the scholars from the different schools except the Shāfi'īs also accepted the analogy of ad-dawarān. They acknowledged that the following of an attribute to a particular rule is not a satisfactory evidence that it is a real "ground" but it provides a strong feeling that it might be the "ground" or connected with it.[2]

Al-Ghazālī, Ibn-as-Sam'ānī, ash-Shīrāzī, al-Āmidī, and most of the Shāfi'īs decided that analogy must not be established according to the method of ad-dawarān. To them ad-dawarān neither provides decisive evidence nor indicates that an attribute which follows a rule is a real "ground". Any "ground" must be rationally convincing or stated by the texts.[3]

Each of these two latter opposite groups presented their own arguments to support their opinion. Al-Bāqillānī and his group argued that it is not conceivable that a particular attribute follows a certain rule in its appearance and disappearance and still has no connection with the "ground" of this rule. They believed also that the "grounds" of the

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1. Ibid., vol. 3, p. 275; ash-Shawkānī, Irshād, p. 194.
2. Ibid.
3. Ibid.

Sharī'a rules are "mere signs" for the rules, and ad-dawarān is a very clear sign.[1] Although al-Bāqillānī and his group agreed with the Mu'tazila on accepting ad-dawarān in general, this latter argument of al-Bāqillānī's group does not go along with the opinion of the Mu'tazila. The Mu'tazila did not believe that the "grounds" of the Sharī'a are "mere signs" but rather that they are rational and convincing.

Al-Ghazālī and his group argued that as long as a "ground" was not mentioned in the texts then there must be a careful analysis of any attribute that may appear with a rule until a jurist is fully convinced. Some attributes appear with some rules and still have no connection with the real "grounds".[2]

The fourth type of analogy,
aṭ-ṭarad:

Analogy of aṭ-ṭarad is the fourth and last type of analogy. It has already been pointed out generally what this term means. That was when the difference between analogy of ad-dawarān and the analogy of aṭ-ṭarad was discussed. Here the exact definition of this type, the attitudes of the scholars towards it, and their arguments will be presented. In his book al-Maḥṣūl, ar-Rāzī defined it as analogy which is based on an attribute that follows a rule in appearance only. If this particular rule disappeared the attribute may still remain. A jurist will be

1. Ash-Shawkānī, Irshād, p. 194.
2. See al-Āmidī, al-Iḥkām, vol. 3, p. 277.

fully convinced that this attribute is neither the real "ground" nor connected with it.[1] This definition was adopted by most of the jurists. The difference between this type of analogy and the analogy of ad-dawarān is that in the case of ad-dawarān the attribute follows the rule in both the appearance and disappearance.

Analogy of aṭ-ṭarad was rejected by most of those who accepted ad-dawarān. The Mu'tazila were from among those who rejected it. Al-Bāqillānī related that the majority of the jurists and theologians rejected it. Al-Ghazālī and his group also rejected it.[2]

Aṣ-Ṣayrafī[3] al-Bayḍāwī[4] and ar-Rāzī were said to have accepted analogy of aṭ-ṭarad.[5] Al-Karkhī, the famous Ḥanafī scholar took an uncertain attitude towards this type of analogy. He said, it is logically acceptable but not fully justifiable. One ought not to base any analogy on this type of attribute and ought not to give any legal decision based on it.[6]

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1. See ash-Shawkānī, op.cit., p. 193.
2. Ibid., p. 194; al-Ghazālī, Mus., vol. 2, p. 84.
3. Muḥammad Ibn-'Abd-Allāh aṣ-Ṣayrafī ash-Shāfi'ī, d.330 A.H. He was said to have been the best in the field of the "roots" of Islamic jurisprudence after ash-Shāfi'ī himself. (See Ṭabaqāt ash-Shāfi'iyya, 3/186).
4. He seems to be al-Qāḍī, Abū-l-Ḥasan Muḥammad al-Bayḍāwī ash-Shāfi'ī, d. 468 A.H. (see Ibn-al-Athīr, al-Lubāb, 1/161-162).
5. See ash-Shawkānī, op.cit., p. 194.
6. Ibid.

Abū-ṭ-Ṭayyib aṭ-Ṭabarī[1] related that some of his colleagues from the Shāfi'ī school decided that aṭ-ṭarad is an acceptable method for finding rules. According to him, some of the Ḥanafīs in Irāq followed these Shāfi'īs in this respect. The example attributed to this group of the Ḥanafīs was the decision that walking between the two mountains aṣ-Ṣafā and al-Marwa in Mecca is not an essential element in pilgrimage. This decision was based on the analogy that walking between these two mountains is similar to any other walking between any other mountains, which is usually not essential. Accordingly walking in Mecca should be unessential.[2] This was the example attributed to these Ḥanafīs by their opponents who rejected analogy of aṭ-ṭarad. But there is a doubt that this example was really presented by the upholders. They certainly did not accept aṭ-ṭarad in this meaningless interpretation. They accepted it in the sense that the attribute on which this analogy should be established must be connected with the real "ground. Aṭ-ṭarad in this sense might be accepted by the opponents themselves.[3]

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1. Al-Qādī Abū-ṭ-Ṭayyib Tāhir Ibn-'Abd-Allāh the Shāfi'ī scholar. He was born in Ṭubrustān and lived in Baghdād. He died in 450 A.H. Al-Khatīb al-Baghdādi and Abū-Isḥāq ash-Shīrāzī were from among his students. (See Ibn-al-Athīr, al-Lubāb, 2/81).
2. See ash-Shawkānī, op.cit., p. 194.
3. See al-Ghazālī, Mus., vol. 2, p. 81.

Ibn-as-Sam'ānī[1] related that Abū-Zayd ad-Dabbūsī[2] called those who accepted analogy of aṭ-ṭarad (ḥashawiyyat ahl-al-qiyās). He did not regard them as reliable jurists.[3]

The opponents of aṭ-ṭarad continued supporting their opinion by saying that we know that God Himself and His attributes are inseparable. Nevertheless these attributes are not regarded as "grounds" for the existence of God. This proves that this kind of connection between an attribute and a rule is not necessarily to be only between a rule and its "ground". This argument of the opponents was refuted by the upholders. They argued that cloud, for instance, is a sign for rain but sometimes rain does not fall. This does not disprove that cloud is still a sign of rain. We may find some attributes following some actions and objects and these attributes are not "grounds" but this does not nullify the whole rule.[4]

It is clear now that the majority of the jurists rejected the analogy of aṭ-ṭarad. It seems that aṭ-ṭarad with its interpretation as mentioned by most of the jurists is not a legal method for finding rules. It might be legal and acceptable if the attribute on which this type of analogy is to be based provides strong feeling that it is in fact

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1. He seems to be Abū-l-Muẓẓaffar Manṣūr Ibn-Muḥammad, d. 489 A.H. He was a Ḥanafī and later became a Shāfi'ī. (See Ibn-al-Athīr, op.cit., 1/563).
2. He is the famous Ḥanafī scholar, d. 430 A.H. (See al-Marrāghī, al-Fath, 1/248-249).
3. See ash-Shawkānī, op.cit., p. 194.
4. Ibid., p. 193.

connected with the real "ground". At the same time there should be no other attribute closer to the "ground". These are the four types of analogy which were classified according to the strength of the "ground" and its existence in both the "original rule", and the "branch".

Are there some kinds of rules
with which analogy should never be established?

Scholars had discussed the question, whether there are some kinds of rules mentioned in the texts with which analogy should never be established. The disputes were clearer between the Ḥanafīs and the Shāfi'īs. The Ḥanafīs supported the existence of these kinds of rules. They named them as the rules of fixed numbers or amounts (muqaddarāt); the specific punishments named for particular crimes (ḥudūd); the expiations (kaffārāt); and the permissions given by the Sharī'a for certain circumstances (rukhaṣ).[1] They believed that the "grounds" of these kinds of rules are not understandable. God willed to keep their "grounds" for Himself and not to disclose them. Therefore, analogy should not be established to them. They confirmed their decision by saying that even if a "ground" of one of these rules was understood, such as cutting off a thief's hand, analogy must not be established with it, since a Tradition says, parry the ḥudūd if you were uncertain of guilt. Analogy is always subjected to uncertainty.[2] The

1. See al-Ghazālī, al-Mankhūl, p. 385.
2. See Ibn-Qudāma, Rawḍat., p. 181.

permissions given by the Sharī'a should be confined to the places mentioned in the texts even if their "grounds" were understandable. It was noticed that the "grounds" on which the permissions were based were disregarded in some other places by the Sharī'a, therefore we should not depend on them. For example, the permission given to a traveller to break the fast and shorten the prayers was regarded as based on avoiding the difficulty that a traveller might suffer if he fulfilled these obligations. This difficulty was not considered by the Sharī'a in some other cases such as the obligation of the holy war (jihād). Accordingly the permission given to travellers to delay prayer and fasting should not be applied by analogy to any other Sharī'a obligation. This permission should be confined to these particular circumstances. Regarding the expiations, it was not understood for which reason these particular kinds of actions were determined by the Sharī'a as expiations. Therefore, they should never be applied to another case which was not mentioned in the texts.[1]

This decision of the Ḥanafīs was met by the decision of the Shāfi'īs who held an opposite opinion. They stated that analogy can be established to the ḥudūd, expiations, permissions and the rules of specific named numbers or amounts. Whenever a "ground" of one of these kinds of rules was rationally understood then analogy can be established. The definition of analogy includes these rules and no good reason exists to exclude them. Analogy provides in the

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1. See ash-Shāṭibī, Muwā., vol. 2, pp. 300-303.

new cases similar to these above mentioned kinds of rules, the same probability (ẓann) which it provides in the new cases similar to the other kinds of rules. Therefore, we should consider all the revealed rules as equal and apply analogy to them without differentiation. The Companions themselves established analogy to ḥudūd. When ʿUmar Ibn-al-Khaṭṭāb noticed that drinking of the khamr increased, he consulted the Companions about the punishment which should be applied to this offence since it was not explained in the texts. Alī Ibn-Abī-Ṭālib suggested that the punishment of defamation (qadhf), which was mentioned in the texts, should be applied here. The similarity between the two cases is that a drunk man is in a similar position to a person who defames another. The latter says nonsense and lies against another by motives of anger or ill-will, and a drunk man also may defame another by motives of drunkenness.[1] This was a clear evidence that the Companions applied ḥudūd to new cases by analogy when they understood the "ground".

The Shāfiʿīs criticised the Ḥanafīs that they held contradictory opinions. They said that, while the Ḥanafīs rejected theoretically the application of these kinds of rules by analogy, they in fact applied them practically, not only by analogy, but even by weaker methods of reasoning then analogy. Regarding ḥudūd they applied the punishment of committing adultery to a person against whom the evidence explained by the texts was not proved. They decided that if four people bore witness against a person that he

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1. Ash-Shawkānī, Irshād, p. 196; Ibn-Rushd, Bidāyat, vol. 2, p. 444.

committed adultery and these four people mentioned different places in which the offence happened, this person should be punished according to the Ḥanafīs. To the Shāfi'īs this person should not be punished since the place of committing this offence must be one to all the four witnesses. The Ḥanafīs applied this rule to this case by means of istiḥsān which is a weaker method than analogy.[1]

The Ḥanafīs also applied the expiation of breaking the fast deliberately in the daylight of Ramaḍān by adultery to breaking the fast by eating or drinking. The first was stated by the Traditions and the latter was stated by analogy which was established by the Ḥanafīs. They also applied the permissions by analogy. They permitted a person who travelled illegally ('āṣī) during Ramaḍān to break the fast. This was decided by analogy to the legal travel.[2] These were the criticisms produced by the Shāfi'īs against the Ḥanafīs. It seems that the Ḥanafīs themselves were not agreeing with each other. Perhaps a section of them made the decision against establishing analogy to these above mentioned rules, and another section of the Ḥanafīs established analogy to them. Or perhaps all of the Ḥanafīs objected to establishing analogy to these kinds of rules whenever their "grounds" are not clear.[3]

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1. Ibn-Rushd, ibid., vol. 2, p. 439.
2. See al-Ghazālī, al-Mankhūl, p. 386,
3. See ash-Shāṭibī, Muwā., vol. 2, p. 302.

The opponents of analogy

It is time now to deal with the opponents of analogy who rejected it completely. They were groups from different schools and sects. They based their rejection on different reasons, but agreed on the final result. These groups were the Ja'farī Shī'ites, some of the Zaydī Shī'ites[1] an-Naẓẓām and his followers from the Mu'tazila,[2] and the Ẓāhirīs who were the most severe opponents to analogy.[3]

An-Naẓẓām was said to be the first to reject analogy. He was followed then by some of his colleagues from the Mu'tazila such as Ja'far Ibn-Ḥarb,[4] Ja'far Ibn-Ḥabash, and Muḥammad Ibn-'Abd-Allāh al-Iskāfī.[5] These and some others of the Mu'tazila followed an-Naẓẓām and rejected analogy.[6] But in fact an-Naẓẓām and his colleagues who followed him were first influenced by Ja'far aṣ-Ṣādiq[7] and then they themselves became influential among the Ja'farīs.[8]

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1. Al-Ash'arī, Muqālāt, pp. 17, 53, 74; al-Baghdādī, Uṣūl, pp. 19-20.
2. See al-Baghdādī, ibid.
3. Ibn-Ḥazm, al-Iḥkām, vol. 7, pp. 55-56.
4. Ja'far Ibn-Ḥarb was one of the two Ja'fars who formed a distinct Mu'tazila sect inside the general Mu'tazila school. The other Ja'far was Ja'far Ibn-Mubashshir, (See al-Lubāb, 1/230).
5. Al-Iskāfī also formed another sect. His sect was called al-Iskāfiyya (see al-Lubāb, 1/45).
6. Ash-Shawkānī, Irshād, p. 175; al-Ghazālī, Mus., vol. 2, p. 56.
7. Ash-Shahrastānī, al-Milal, vol. 1, pp. 54-57.
8. See al-Ghazālī, Mus., vol. 2, p. 56.

Dā'ūd aẓ-Ẓāhirī himself was said to have followed an-Naẓẓām in rejecting analogy. Whether Dā'ūd was influenced by an-Naẓẓām or not, the historical fact was that the Ẓāhirīs took their decision after an-Naẓẓām.[1] The Ẓāhirīs presented their own reason for which they rejected analogy. It was different from the reasons of an-Naẓẓām and the Ja'farīs.

An-Naẓẓām and his followers from the Mu'tazila and the Ja'farīs argued in support of their decision by saying that it is rationally impossible to consider analogy as a part of the Sharī'a. The construction of the Sharī'a seems to be based on applying different rules to similar actions and similar rules for different actions. This construction means to accept these rules without establishing analogy to them.[2] One of the examples presented by them to prove this claim was the situation of a woman who did not fast or pray during the month of Ramaḍān because of menses. The Sharī'a prescribed on her to fast what she missed in another time, and need not pray. Fasting and prayer are very similar and both are prescribed worship. Nevertheless the Sharī'a distinguished between them and required a woman to re-fulfil only fasting.[3] This proves that the construction of the Sharī'a is not always subjected to human understanding. Accordingly one must not decide any similarity between a new case and a revealed one. Deciding such similarity requires

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1. Ash-Shawkānī, Irshād, p. 175.
2. Al-Āmidī, op.cit., vol. 4, pp. 7-8.
3. Ibn-al-Qayyim, al-Qiyās, p. 62.

the knowledge of the real purpose meant by God by prescribing a specific rule, and this is not possible. To avoid attributing to God what He did not mean, analogy must be rejected and human reason alone should be used where there is no text judging a case, without making comparison with the texts.[1]

It was related that al-Imām Ja'far aṣ-Ṣādiq himself said to Abū-Ḥanīfa when they first met in Medīna, "my father (Muḥammad al-Bāqir) told me that my grandfather ('Ali Zayn al-'Ābidīn) transmitted a Tradition attributed to the Prophet himself in which He said, the first who used analogy in religion was Iblīs. When God ordered him to bow for Ādam he refused arguing that he (Iblīs) was better than Ādam since Ādam was created from mud and he was created from fire. Accordingly, Ādam should bow for him. The lower should always bow to the higher. God Himself does not bow to mankind, but mankind bow to Him. This was the analogy used by Iblīs. Therefore, he was expelled from paradise. This proved that using analogy in religion would be illegal, and he who uses it will be joined with Iblīs.[2]

Jurisprudence in Medīna during the time of al-Imām Ja'far was based on the Qur'ān, the Sunna, and after these two sources came the public interest and the "interests" of individuals. Analogy was not given attention since it might stand sometimes against "public interest" when analogy is incorrect.[3] Ja'far aṣ-Ṣādiq followed this method and used

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1. See al-Ghazālī, Mus., vol. 2, p. 67.
2. See Abū-Zahra, Tarīkh al-Madhāhib, vol. 2, p. 583.
3. See Ibn-al-Humām, Taḥrīr, vol. 3, p. 314.

the three sources and rejected analogy to the individual texts. To him, after the Qur'ān and the Sunna, the "public interest" should be secured by using human reason alone taking into account the general direction of the Sharī'a. The judgements of human reason will not be regarded as judgements of God, therefore, they can be changed according to the circumstances. In the case of analogy the judgements will be regarded as the judgements of God, since we apply the same revealed rules to new cases, which means that these new cases were meant by God to have these revealed rules, even if it were not mentioned in the texts. According to this, the judgements of analogy should not be changed in future. This must be avoided by rejecting analogy and using human reason alone.[1]

Another piece of argument produced by these opponents of analogy was that if analogy was regarded as a part of the Sharī'a then a new case might be prescribed and prohibited at the same time, and these contradictory judgements could be regarded as God's judgements. To make this more clear they said, they may be faced with a new case which has no revealed rule and this new case may have two different aspects each of which make it similar to a revealed case. One of these two revealed cases may be prescribed and the other prohibited. If analogy were applied, then this new case would be prescribed and prohibited at the same time, and this would be regarded as God's judgements which is impossible.[2]

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1. See al-Ghazālī, Mus., vol. 2, p. 57.
2. Al-Āmidī, al-Iḥkām, vol. 4, p. 12.

The Mu'tazila and the Ja'farī Shī'ites presented some other points of criticism to analogy similar to the above mentioned ones in order to deny analogy in the Sharī'a.[1]

The criticisms, as described above, presented by the opponents of analogy were refuted by the upholders. With respect to the point that the construction of the Sharī'a is against analogy since it was based on at-ta'abbud, this was answered by the different juridical schools.

Al-Āmidī representing the Shāfi'ī school said, it is not true that the whole construction of the Sharī'a was based on at-ta'abbud. When we meet two similar cases which seemed to be judged by the texts with two different rules, or two different cases judged with one rule, we must understand that this similarity or this difference between the two cases are not true. Reason may see similarity or difference between two cases while there may be another attribute not realized by reason which denies this similarity or difference. The Sharī'a which was revealed by God considered all the factors and aspects of cases and accordingly rules were revealed. If ever all the aspects and factors of the cases judged by the Sharī'a were disclosed to human reason then it will be realized that the construction of the Sharī'a was not contradictory.[2]

Ar-Rāzī aj-Jaṣṣāṣ representing the Ḥanafī school said that, the arguments of the Mu'tazila and the Ja'farīs were

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1. Ibid., vol. 4, pp. 5-12; al-Ghazālī, op.cit., vol. 2, pp. 56-69.
2. Al-Āmidī, al-Iḥkām, vol. 4, pp. 13-14.

meaningless. The upholders of analogy did not state that analogy could be based on any similarity between two cases whether this similarity is important or unimportant. Analogy may be established on reasonable and meaningful similarity which has an effect on the existence of the rule. The superficial similarity which is not important is not taken into account. Following this method, one can never find a new case which is similar to two fundamentally different revealed cases.[1]

Al-Qāḍī ʿAbd-al-Wahhāb representing the Mālikī school said that this argument of the Muʿtazila and the Jaʿfarīs has no support from the Sharīʿa texts. The example of the menstruant who missed fasting and prayers does not prove that the Sharīʿa applied different rules to similar cases with no reason when it prescribed fasting in another time and not the prayers. We should acknowledge that the Sharīʿa applied one rule to these two kinds of worship when it ordered the menstruant not to fulfil them during the menstrual period. But when it distinguished between them regarding the refulfilment a good and convincing reason might have existed and caused the prescribing of different rules. We must not believe that the Sharīʿa may prescribe one rule for two different cases, or two rules for two similar cases unless there is a good reason for this.[2]

Al-Qāḍī Abū-Yaʿlā and Ibn-al-Qayyim representing the Ḥanbalī school each of them presented his own refutation to this criticism of the Muʿtazila and the Jaʿfarīs. Abū-

1. Ibn-al-Qayyim, al-Qiyās, pp. 65-66.
2. Ibid., p. 67.

Ya'lā said, it is rationally possible to find two different cases with one rule or two similar cases with different rules. This is when the similarity of these cases is not in themselves. For example, blackness and whiteness are both different from redness. They shared the attribute of being different from this particular colour, and this attribute is not in themselves. But when we consider their attributes in themselves, they are certainly fundamentally different. Establishing analogy is always affected by circumstances which affect the attributes of actions which are not in the actions themselves.[1] Abū-Ya'lā seems to have been trying to bring together the idea of the rational attributes of actions in themselves and the effect of the circumstances on the rules found by analogy. And this is very difficult, as discussed in the first chapter.

Ibn-al-Qayyim who was also representing the Ḥanbalī school considered the example produced by these opponents of analogy, and he justified the decision of the Sharī'a. He said that prayers are prescribed throughout the year five times a day and fasting is only prescribed once a year which is the month of Ramaḍān. A menstruant who missed prayers during a menstrual period will have immediate substitutes every day. But she will not have another prescribed fasting during the same year. Therefore, the Sharī'a required a menstruant to fulfil a missed fasting in another time during the same year and not the prayers.[2]

1. Ibid., p. 66.
2. Ibid., p. 69.

With respect to the other point presented by the Mu'tazila and the Ja'farīs which was that analogy may lead to giving one new case two different rules, prescription and prohibition at the same time, this was also refuted by the upholders. Al-Āmidī said, that whenever a new case seemed to be similar to two different revealed cases, then we should consider the clearer and stronger similarity. If a jurist could not reach this result then he may chose one rule by his reason alone and apply it. There is no way in the Sharī'a to consider two contradictory rules for one action.[1]

These were the arguments of the Ja'farīs and an-Naẓẓām and his followers from the Mu'tazila school, in order to deny analogy in the Sharī'a. They rejected analogy to the individual texts and provided human reason with more authority to judge new cases. Rejection of analogy usually indicates rejection of reasoning as a whole. But here they meant to avoid regarding human judgements as God's judgements.

The Ẓāhirīs attitude towards analogy.

Here the arguments of the Ẓāhirīs will be presented. Their criticisms of analogy were extremely severe. The points on which they based their decisions were different from those of the Ja'farīs and the Mu'tazila.

First the Ẓāhirīs claimed that it is not permitted to consider analogy as a part of the Sharī'a, and not permitted

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1. Al-Āmidī, al-Iḥkām, vol. 4, p. 20.

also to judge any case in life except by the Qur'ān or the Sunna or the consensus of all the Muslim jurists at the time of judgement.[1]

The Ẓāhirīs tried to refute every evidence presented by the upholders, whether this evidence was rational or textual. Even the evidence of the consensus of the Companions, which was the most reliable one for the upholders, they tried to refute. Many of the great scholars from the upholders depended heavily on this consensus.[2] The Ẓāhirīs claimed that no consensus was formed by the Companions on using analogy. Many of the Companions criticised it and rejected it evidently.[3]

The upholders of analogy rejected this claim and stated that all the statementswwhich were attributed to the Companions criticising analogy were not reliable. The more authentic statements attributed to the Companions supported analogy.[4]

The Ẓāhirīs also claimed that the texts of the Qur'ān and the Traditions cover all the cases of life, whether in the past or in the present time or in the future.[5] This was a counter decision to the decision made by the upholders that the texts of the Qur'ān and the Traditions do not cover all the cases of life since the texts are limited and the cases are not limited and it is not possible that a limited

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1. Ibn-Ḥazm, al-Iḥkām, vol. 7, pp. 55-56.
2. See al-Ghazālī, Mus., vol. 2, p. 58.
3. Ibid., vol. 2, pp. 60-61.
4. Ibid.
5. Ibn-Ḥazm, al-Muḥallā, vol. 1, pp. 50-51; al-Iḥkām, vol. 8, pp. 2-3ff.

matter covers an unlimited one. Accordingly the upholders considered analogy as essential for judging new cases. And this was the strongest rational evidence on which the upholders depended.[1]

The Ẓāhirīs continued in support of their decision by saying that God Himself has explained in the Qur'ān that He has perfected for mankind their religion and completed His grace upon them. And this means that no case in life will need to be judged by analogy. Every case has already been judged by the texts of these two sources. The Qur'ān says, "This day I have perfected your religion for you and have chosen for you Islām as your religion".[2]

In the interpretation of this the Ẓāhirīs said, that God revealed His Sharī'a prescribing some actions, prohibiting some others and leaving some without rules. These last kinds of actions are permitted. No one is allowed to prescribe or prohibit them. They must be left permitted as they were left by God Himself.[3] To the Ẓāhirīs actions are not divided into "originals" and "branches". All cases are "originals" and accordingly, they must have already been judged by the texts.[4]

This decision of the Ẓāhirīs against analogy was understood by many of the scholars as a complete rejection of any type of analogy.[5] But on the other hand, some of

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1. Ash-Shawkānī, Irshād, pp. 178-179.
2. Q. 5.4.
3. Ibn-Ḥazm, op.cit., vol. 8, p. 3.
4. Ibid., p. 13.
5. Ibn-al-Qayyim, A'lām, vol. 1, p. 335.

the upholders of analogy interpreted the decision of the Ẓāhirīs as a rejection of some types of analogy and acceptance of some other types. They actually accepted the analogy whose "ground" was mentioned in the texts, and the analogy in which there is no difference between the revealed case and the new case regarding being appropriate to the application of the rule. Only they did not call these types analogy but regarded them as judged by the wider meaning of the texts.[1] This means that the Ẓāhirīs did not reject every type of analogy and this seems to be the real attitude of the Ẓāhirīs when one examines carefully their arguments and judgements. But if one took their statements and criticisms ostensibly, he might agree immediately with those who interpreted the Ẓāhirīs' opinion as a complete rejection of every type of analogy.

They rejected to use any term that might open the door for reasoning. They denied the "public interest" as a basis for the rules of the Sharī'a. They did not acknowledge the implications of many of the texts other than the direct meanings. For example, when the Qur'ān forbade rebelling against parents when one or both of them attained old age in their children's lives, the Ẓāhirīs confined this prohibition to only rebelling against them and they rejected to use analogy to forbid hitting them.[2] These and some other mistakes made by the Ẓāhirīs were caused by their first proclamation to a general statement against analogy and

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1. See ash-Shawkānī, op.cit., pp. 178-179.
2. See the Qur'ān, 17.23. Ibn-al-Qayyim, A'lām, p. 338; al-Ghazālī, Mus., vol. 2, pp. 60-61.

reasoning as a whole. This was the position of the Ẓāhirīs in the eyes of the majority of the scholars and will be their position in the eyes of anyone who reads their criticisms against analogy if one does not take into account some of their individual judgements which showed their real acceptance of some types of analogy.

Ash-Shawkānī for example said, while referring to the Ẓāhirīs, the opponents of analogy did not reject it completely. They accepted it when its "ground" is mentioned in the texts and when there is no difference between a revealed case and a new case regarding being appropriate to the application of a rule. Ash-Shawkānī continued saying that we must acknowledge that the Ẓāhirīs never declared this as acceptance of any type of analogy but rather they called it an interpretation of the texts in their wider senses.[1]

This could mean that the Ẓāhirīs fundamentally agreed with the upholders to judge some cases which have no revealed rules but they did not like to call this judgement analogy or reasoning. They liked to call it an extension of the meanings of the texts. Their severe criticisms of analogy and its upholders may be meant to lessen the freedom of using human reason in the field of the Sharī'a. To them, this use might lead to ignoring the texts or make them less important. The Ẓāhirīs may have intended to keep people as close as possible to the texts.

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1. Ash-Shawkānī, Irshād, pp. 178-179.

CHAPTER FOUR

"INTEREST"

"Interest" was the widest rational method used by the Muslim scholars in the field of the Sharī'a in order to obtain rules for new cases. The English term "interest" will be used here as the equivalent of the Arabic term maṣlaḥa. As has already been explained in the previous chapter dealing with the "ground", the public and individuals' "interests" were regarded by most of the Muslim scholars as bases of the whole Sharī'a rules. These "interests" were intended to be secured by the texts of the Qur'ān and the Sunna. When dealing with new cases, the texts are consulted first, analogy consulted next, then comes the consideration of "interest" in order to show human reason how to deal with these new cases.

The use of human reason directed by "interest" depends entirely on recognizing the existence of the rational "grounds" in the rules of the Sharī'a. Accordingly, all those who denied the existence of the "grounds" in these rules, and all those who acknowledged their existence but considered them as irrational should have rejected the use of reason based on "interest". But as will be explained, the objection to this kind of reasoning came only from those who denied entirely the existence of the "ground".[1]

The securing of "interest" by reason in the field of the Sharī'a appeared in different forms and terms. It came

1. See Ibn-Ḥazm, al-Iḥkām, vol. 6, pp. 16-17ff.

sometimes in the form of considering the customs, and to this was applied the term ʿurf.[1] Sometimes it came in the form of considering the means of actions and these actions would have already been judged by the texts with certain rules. To this was applied the term adh-dharāʾiʿ.[2] It appeared at other times in considering "interest" without the help of ʿurf or adh-dharāʾiʿ, but only by taking into account the general spirit and direction of the Sharīʿa. To this was applied the term al-maṣlaḥa l-mursala "the unrevealed interest".[3] There was another term which appeared among these terms, that is the term al-ḥiyal. It was mentioned that some scholars used this term and exercised reason through it.[4] It will be studied in this chapter with the rest of the terms mentioned above.

Before starting to discuss these terms, it is important to present brief explanatory remarks about the term maṣlaḥa "interest". It was interpreted in this field as securing the objectives of the Sharīʿa; the essential objectives (ḍarūriyya) or those less important than essential, but necessary, (ḥājiyya), or those even less essential which are for embellishment (tazyīniyya).[5]

There are five essential objectives intended to be secured by the Sharīʿa for mankind; religion (dīn), life

1. Ibid., vol. 2, pp. 287-288ff.
2. See al-Qurṭubī, Tafsīr, vol. 2, pp. 51-53.
3. See ash-Shāṭibī, al-Iʿtiṣām, vol. 2, pp. 292-298.
4. Ibn-al-Qayyim, Aʿlām, vol. 3, pp. 243-244.
5. See al-Ghazālī, Mus., vol. 1, pp. 286-287ff.

(nafs), reason (ʿaql), progeny (nasl), and wealth (māl). These five objectives were said to have been considered by all the other cults (milal).[1] Religion here means the religion of Islam. The Qur'ān says, "The religion before God is the Islam".[2]

The securing by the Sharīʿa of these five essential objectives means to stabilize them by observing what may preserve their existence and what may prevent them from harm. If these objectives were not secured, then life would never be straightforward. But rather it would be confused and disordered. Moreover, happiness in the life to come would be lost. Faith and the bases of the acts of worship were intended to stabilize religion. The essential customary practices (ʿādāt) such as eating, drinking, finding homes and wearing clothes were intended to stabilize life and reason. The bases of transactions (muʿāmalāt) such as selling and buying were intended also to stabilize life and reason through customary practices. Criminal legislation in Islam was intended to secure and prevent these five objectives from destruction. For example, the punishment of murder was to secure life. The rules against drinking wine, defamation (qadhf) and most of the specific punishments (ḥudūd) were intended to secure reason. The punishment of adultery was to secure progeny and health.[3]

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1. Ash-Shātibī, Muwā, vol. 2, p. 8.
2. Q. 3.19.
3. See ash-Shātibī, op.cit., vol. 2, p. 8.

The "interests" which are necessary (ḥājiyya) but not essential were intended to be secured in order to prevent the difficulties that people may suffer if these "interests" were not secured. Life would continue without securing them, but with suffering of difficulties. They are unlike the essential objectives without which life cannot continue. These necessary objectives exist in the acts of worship, customary practices, transactions, and the field of torts (jināyāt). An example of securing these kinds of objectives in the acts of worship is the permission given to travellers and sick people to postpone the obligatory fast until the circumstances change. An example in the field of customary practices is the permission to enjoy material things over and above that which is essential. If people were confined to their essential requirements there would be difficulties to suffer. An example in the field of transactions for the necessary "interests" is the permission of exchanging financial loans (qirāḍ) between individuals in order that the profits would be shared between the lender and the borrower, and the original sum would return to the lender. In the field of torts an example of the necessary "interests" would be holding all the kinds of repairers as responsible for the property of customers.[1] These are the kinds of necessary "interests" which are not essential, but by securing them difficulties would be prevented.

The "interests" which are merely for embellishment (tazyīn) were also intended to be secured by the Sharī'a.

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1. Ibid., pp. 5-6.

These kinds of "interests" exist in the different fields mentioned above. These are the fields of the acts of worship, transactions, customary practices and the field of torts. An example in the field of the acts of worship is giving to charities. An example in transactions is preventing people from selling drinking water even for those who are able to pay. Examples in customary practices are such as calling for observing table manners and avoiding being extravagant (musrif) or parsimonious (muqtir) regarding food, drink and the like. An example in the field of torts is that in war time people are not permitted to kill the children of the enemy or the religious people unless they were fighting.[1]

These are the examples which explain the securing of the Sharī'a to its objectives in their three different degrees; the essential (ḍarūriyya), the necessary (ḥājiyya), and those of embellishment (tazyīniyya). And this is what is meant by the term maṣlaḥa in the Sharī'a. It has its particular characteristics which distinguish it from the general Arabic meaning and from the philosophical meaning.

The first characteristic is that "interest" in the Sharī'a is not confined within the limitations of this life. The life to come is taken into account. Both lives are regarded as one field for "interest". The present life is regarded as a road for the life hereafter. "Interests" may be obtained before or after death. The Qur'ān says,

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1. Ibid., p. 6.

"But seek with the wealth which God has bestowed on thee the Home of the hereafter, nor forget thy portion in this world".[1] Man's future in the sight of Islam continues after death. The above mentioned verse can produce another characteristic, namely, "interest" in this life is merely subordinate compared with "interest" in the life to come. The latter is always given preponderance over the former. Hence the securing of religion comes as the most important of the five objectives of the Sharī'a.[2]

Another characteristic of "interest" in Islam is that it is not motivated only by materialistic demands. It is also motivated by spiritual demands. Man by nature is prepared to think about the great power behind the creations and to pay this great power full submission and obedience. The Qur'ān says, "so set your face steadily and truly to the Faith: (Established) God's handwork, according to the pattern on which He has made mankind: No change (let there be) in the work (wrought) By God: that is the standard Religion: But most among mankind understand not".[3] This is why securing of religion was the most important of the essential objectives of the Sharī'a.

Another characteristic of "interest" in Islam is that it is not always affected by the desires of individuals. This is because the desires of individuals are sometimes conflicting. Following them would lead eventually to the

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1. Q. 28.77.
2. Ash-Shāṭibī, Muwā., vol. 2, p. 37.
3. Q. 30.30.

destruction of all or most "interests".[1] This characteristic would distinguish "interest" in Islam from the general Arabic meaning and from the pure philosophical interpretation. It may not distinguish it from the meanings, held by some human legislators, which tried to prevent individuals from following their pure desires.

The temporal criteria by which the philosophers measured "interest" are limited within this life. Life to come has no place in their concept and consideration. These criteria were unbalanced. They were always affected by individuals' experiences, emotions, and tendencies. Philosophers had no ideal by which they might correct their judgements except the above mentioned unstable motives. To them "interest" is valued by bodily pleasure. Even when they talk about immaterial "interests" such as intelligence, they would be taking into account only materialistic benefits which might be gained through these kinds of "interests".[2]

This meaning of "interest" attributed to the philosophers can be understood from the ideas and examples they presented. It is known that Bentham[3] and Mill[4] criticised the upholders of Epicurism because it concentrated on promoting bodily pleasure and individualism. Bentham and Mill and the rest of the utilitarians proclaimed

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1. Ash-Shāṭibī, op.cit., vol. 2, pp. 38, 170-171.
2. See Aḥmad Amīn, al-Akhlāq, pp. 107-108.
3. See his book Introduction to principles of morals and legislation.
4. See his book Utilitarianism.

their recognition of intellectual pleasure and they recognized also the idea of giving preponderance to the greater "interest" for a larger number of people in an effort to reduce individualism. But despite that their effort was intended to bring about as much bodily pleasure as possible. They intended to do this in a way which is more secured than the way of the Epicureans who set free the individuals' desires. This matter of course engaged the philosophers from a very early period in history, and they remained in disagreement.[1] The Sharī'a gave the spiritual "interest" a great deal of consideration.

These were brief explanatory remarks on "interest" in Islam in order to have a clear concept of it. They were important to precede dealing with the forms and terms which appeared in the field of securing "interests" through reasoning in the Sharī'a. It is time now to deal with these terms in detail.

Custom ('urf)

Considering people's customs in order to obtain rules that secure "interests" was discussed by the Muslim scholars. As to whether it is a legal method; it was related that acceptance of consideration of people's customs as a legal method was a point of consensus. No school rejected it.[2] Ibn-as-Subkī quoted al-Qāḍī al-Ḥusayn to

1. Ibid., p. 1.
2. See Ibn-al-Qayyim, A'lām, vol. 3, p. 99.

have said that the bases of Islamic jurisprudence are four: The first basis is that certainty (yaqīn) should never be removed by uncertainty (shakk). For example, if one made ablution (wuḍū') and then had a doubt whether he broke this ablution, he should resist this uncertainty and hold that his ablution is still sound. The second basis is that harm should be prevented. For example, extorted (maghṣūb) property must be returned to ~~their~~ its owners and extorters must pay restitution for any damage they may cause. The third basis is that difficulty brings about easiness (taysīr). For example, travellers were given permission to delay fasting until they reached their destination, and were permitted to shorten the prayers. The fourth basis is that customs are to be considered as a legal method for judging new cases (al-'āda muḥakkama). For example, people used to borrowing things from each other and use these borrowed things. The Sharī'a gave them permission to continue using this custom and to use what they borrowed. Aṣ-Ṣafiyy al-Hindī added a fifth basis, that is, man's actions are to be judged according to his intentions.[1] This statement would show the importance of the consideration of customs in the Sharī'a. This consideration is rational and directed by the method shown by the texts and the general direction of the Sharī'a as will be explained.

As long as the Sharī'a was considered as intended to secure public and individuals' "interests", a decisive recognition of consideration of customs as a legal method

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1. See Subkī, Jam'., vol. 2, p. 356.

for securing these "interests" would be inevitable. As has been pointed out, securing the support of this life and gaining happiness in the other life is what was intended by "interest" in Islam. Regarding the first part of "interest" which might be obtained in this life, it cannot be obtained if customs were disregarded. Man was created with regular customs (ʿādāt muṭṭarida). His rational and bodily "interests" in this life are connected with these regular customs. Accordingly, it is not possible to secure his "interests" by prescribing for him rules which are separated from his natural regular customs. The bases of the Sharīʿa are not temporal, but rather they are continuing to the end of this life. They are accompanied by "interests" of man which are actually his customs. Therefore, it is not possible that the Sharīʿa disregarded these customs.[1]

Islamic Sharīʿa and the other legislations were based on the fact that continuation or regularity (iṭṭirād) of some of the general customs is decisively known. The obligations of Islamic Sharīʿa were based on considering the regularity of the customary practices. They were prescribed equally on all the individuals. No difference exists between one and another all through the times. Human actions are their customary practices. Many of these actions are continuing regularly since the whole world is following a regular system. Otherwise, the obligations of the Sharīʿa would never have been revealed for all the individuals and times.[2]

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1. See ash-Shāṭibī, Muwā., vol. 2, pp. 287-288.
2. Ibid., vol. 2, pp. 279-280.

It is true that there are some incidents in which customary practices were exceeded by some individual actions. For example, the miracles were mere exceeding of regular customary practices. But such incidents do not destroy the whole system. These kinds of extraordinary events were intended to occur against the system of the world in order to support believing in Prophecy. And this itself supports the regularity of the system of the world which controls man's actions. These temporal incidents might occur within a steady general system and they do not alter it.[1]

It should be pointed out here, as shall be explained in detail, that the ordinary customary practices are either stable and unchangeable or they are changeable. The first are such as eating, drinking, happiness, sadness, sleeping, waking and the like. The changeable ones are divided into two kinds; either general kinds which are known to all countries, or kinds particular to certain countries and groups. These changeable customary practices are our concern here.[2]

All human customs whether they are stable and unchangeable ones or changeable, are either judged by the texts or left without definite judgement. Whenever they were judged by the texts then these judgements must be accepted and never be changed. The customary practices which were judged by the texts mostly were from the stable and unchangeable ones. At the emergence of Islam many

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1. Ibid., vol. 2, pp. 279-280 & 282.
2. See ibid., vol. 2, pp. 297-298.

customs which were practiced before were approved of by Islam and these were prescribed or permitted. Many others were disapproved of by Islam and these were prohibited or reprehensible(makrūh). This was in accordance with the Qur'ānic proclamation that Islam is the religion which was revealed according to the pattern on which God had created mankind (dīn al-fiṭra). Any good customary practice would have been supported by the true and good human nature and would be approved of by Islam, and any bad customary practice would not be supported by the good human nature and be rejected by Islam. A holy Tradition (ḥadīth qudsī) said, "All my servants were created upright (ḥunafā') but devils (human or inhuman) misdirected them and ordered them to believe in idols other than God".[1] This means that the true human nature might be affected by devils, and accordingly some of the human customary practices would be bad. An example of the good customary practices practised before Islam and approved of by the texts of the Sharī'a is the cleaning of impurities (najāsāt) which was prescribed by the texts. An example of the bad customary practices which were practised before Islam and disapproved of by Islam is walking naked around the Ka'ba, which was prohibited by Islam.[2]

Regarding the customary practices which were not judged by the texts, and they were unchangeable, such as working and walking, they usually remain permitted (mubāḥ).

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1. See az-Zamakhsharī, Tafsīr, vol. 3, p. 479.
2. See ash-Shāṭibī, op.cit., vol. 2, p. 283.

If they were from the changeable kinds then they might change from good to bad or the reverse. For example, wearing head-covering is good for some people and bad for some others. Sometimes change happens in the use of some terms according to the different countries or different times. Sometimes change happens in the methods of transactions such as change of the method of purchase from cash to credit. In these cases the judgement should be according to the present circumstances and present customary practice, and the suitable rule at the time would be applied.[1]

Reason would consider these customary practices in order to secure "public interests". They would be accepted if they secure these "interests" and rejected if they are harmful. These are the customary practices about which the Mālikīs said, that judgements and legal decisions should always come in accordance with them. Whenever a customary practice changes, then this change should be taken into account regarding its rule. A jurist should never stay all his life using the decisions already written in the books by the previous jurists. If a person from a different country asked a jurist to give him a legal decision on a matter, then this jurist should not prescribe for him a decision based on a customary practice of the jurist's country. The jurist should ask him first about the custom of his country and then decide accordingly. This is the right method which every jurist must follow. To adhere always to what was written in the books is a mere ignorance

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1. Ibid., vol. 2, pp. 284-285.

and deviation. It means that what was said and intended by the previous Muslim scholars, such as the four leaders of the Sunnī schools was misunderstood.[1]

The customary practices among the sources of Islamic jurisprudence are generally accepted. They were considered according to their types. If they were particular then their place is after the texts of the Qur'ān and the Traditions and analogy. A jurist is not permitted to apply a customary practice as a rule unless he consults the above mentioned three sources. If any of these three contradicted the concerned customary practice, then this latter should be ignored.[2] If the customary practices were general, then the views of the scholars towards them were different regarding their place among the sources of jurisprudence. The jurists other than the Ḥanafīs put them at the same place as the particular customary practices. That is after the Qur'ān, the Traditions and analogy. The Ḥanafīs decided that the general customary practices could be applied as rules in spite of the existence of general texts of the Qur'ān and the Traditions (nuṣūṣ ʿāmma) and in spite of the existence of clear analogy contradicting these customary practices. Analogy in this case could be ignored, and the general texts could be restricted (mukhaṣṣaṣa) by these customary practices. An example of a general customary practice which is restricting a general text is that the Prophet prohibited generally selling with condition (sharṭ).

1. See Ibn-al-Qayyim, Aʿlām, vol. 3, p. 99.
2. See Abū-Zahra, Uṣūl-al-Fiqh, p. 274.

This general text was restricted by the customary practice of particular kinds of selling with condition which used to be practised before the prohibition in different countries. And the prohibition was confined to selling with condition which causes injustice.[1]

For every mujtahid the knowledge of the customary practices in the country in which he is making decisions is very important. Most of the decisions taken by the jurists based on reasoning were affected fundamentally by the customary practices of their times. If these decisions were made at some other different times they might have been different. Many of these rational decisions affected by the customary practices cannot be applied to the other generations of the other times unless at the risk of losing "interests" and causing great difficulties. And this of course is against the Sharī'a which was revealed in order to facilitate life and prevent difficulties and harm. Therefore, late jurists of the different schools changed many of the legal decisions made previously by their predecessors at their own schools. These changes were according to the changes of the customary practices.[2] Some of them changed their own personal judgements according to this principle. Ash-Shāfi'ī, for example, changed many of his own decisions which were based on the customary practices. Accordingly he had two different madhhabs (collections of decisions), the old and the new. The first were his decisions and judgements

1. See al-Āmidī, al-Iḥkām, vol. 2, p. 310; Subkī, Jam'., vol. 2, pp. 34-35; Abū-Zahra, ibid.
2. See Ibn-'Abdīn, Rasā'il, vol. 2, p. 126.

in Baghdad, and the latter consisted of his decisions in Egypt.[1]

An example of the judgements changed by the successors is that it was decided in the Ḥanafī school that the one responsible for an offence should be the person actually performing the act even if he did it under pressure or persuasion. If there was a person behind it and he was the real offender he would not be responsible even if he was known. Later on this rule was changed by the late scholars of the same Ḥanafī school, so that the real offender would be responsible whether he actually performed it or was behind it. This was because of the change of the customary practices in the later time. The number of calumniators widely increased and people used to cause harm to their enemies indirectly in order to escape the responsibility. This was not so in the earlier time when the first decision was taken.[2] The principle of the customary practices (ʿurf) was declared by Abū-Ḥanīfa as a recognized rational method for securing public "interests" as will be made clear later on. The other method used by Abū-Ḥanīfa was al-istiḥsān. These two methods were followed by him when there was no text or analogy deciding a new case.[3]

There may be a question about the difference between the customary practice (ʿurf) and consensus (ijmāʿ). Both seem to be based on the agreement of the community, but in

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1. See Khallāf, Uṣūl fī mā lā naṣṣa fī-hi, p. 148.
2. See Ibn-ʿĀbdīn, op.cit., p. 143.
3. See Khallāf, op.cit., pp. 74-75.

fact there is a difference between them. "Consensus" is not based on the agreement of the public, as some jurists thought.[1] But rather it is a decision of the qualified jurists at one particular time on a certain case.[2] Customary practices are actions followed by a community irrespective of the knowledge and qualifications of the individuals. "Consensus" also cannot be formed unless by the agreement of all the living Muslim jurists at the time of decision. A customary practice can exist by the practice of either all the community or by most of them. Disagreement of a minority would not prevent it from being regarded as ʿurf. "Consensus" is held to have a strong basis which may continue for generations. A customary practice is usually based on public practising which may change from one generation to another. The basis of "consensus" is stronger.[3]

It is obvious now that "customary practices" as basis or source for rules was recognized and used by all the Sunnī schools in order to secure "interests" and prevent harm and difficulties. The Mālikī school was known as using this principle more than the rest of the schools. This does not mean that the rest of the schools did not use it. It was a point of consensus that all the schools had accepted and used it as has been explained above. The accepted customary practices are those which do not disagree with the objectives of the Sharīʿa, nor conflict with the decisive texts of the

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1. See al-Āmidī, al-Iḥkām, vol. 1, p. 180.
2. Ash-Shawkānī, Irshād, p. 63.
3. See Khallāf, op.cit., pp. 145-146.

Qur'ān and the Traditions. They should not prohibit what was permitted by the texts nor should they permit what was prohibited by the texts.[1] Every mujtahid must attain the knowledge of the general rules mentioned in the texts and the knowledge of the customary practices and the present circumstances of the people. Then he should adapt his decisions to these circumstances. He must also understand whether a customary practice is general and practised by the people of the different countries or particular and practised by the people of one country. These are the essential qualifications of every mujtahid. Ibn-al-Qayyim said, he who issues legal decisions against good customary practices, and disregards the differences between countries, times, and circumstances, is actually misleading people. The harm that such a jurist may cause to religion is worse than the harm that may be caused by ignorant medical doctors to bodies. The ignorant mujtahids and ignorant doctors are the most harmful for religion and bodies.[2]

The importance of the knowledge of a jurist of the customary practices as an essential qualification was acknowledged by the great jurists in the past. They used to declare their knowledge of the customary practices as a pass for being appointed as judges or Muftīs. Ibn-'Arafa[3] related that when Ibn-'Abd-as-Salām[4] was to be appointed as

1. See al-Murīr, al-Abḥāth, vol. 1, pp. 61-63.
2. Ibn-al-Qayyim, A'lām, vol. 3, p. 100.
3. He is the Tunisian famous Mālikī jurist (717-803 A.H.).
4. He is the Tunisian Mālikī jurist who lived in the eighth century A.H.

judge, he learnt that some of his contemporaries decried him to the ruler as a severe man. He defended himself by saying that he had full knowledge of the customary practices. And this qualification supported him and he was appointed as judge.[1]

This is what was intended here to be said about the principle of the "customary practices" (ʿurf) and its importance in the Sharīʿa in order to secure "public interests". It is time now to deal with another term representing another method of securing "interests" by reasoning. That is the term of adh-dharāʾiʿ.

Adh-dharāʾiʿ

Adh-dharāʾiʿ are the "means" which lead to actions. And as it is known that most of the rules for the actions were decided by the texts, the question here is whether the means for these actions should, on the basis of reasoning, have the same rules as the actions themselves. This was a point of dispute between the scholars. The Mālikīs and the Ḥanbalīs approved of this principle and used it. They presented it and discussed it in their books in independent chapters and under an independent term.[2] The Ḥanafīs and the Shāfiʿīs used it practically in many cases but they did not declare it as an independent principle and did not discuss it under this title.[3] The Ẓāhirīs criticised this

1. See al-Murīr, op.cit., vol. 1. pp. 62-63.
2. See ash-Shāṭibī, Muwā., vol. 4, p. 189; Ibn-al-Qayyim, Aʿlām, vol. 3, p. 175.
3. Ash-Shawkānī, Irshād, p. 217.

principle and criticised those who applied it. Their decision came in accordance with their known attitude against reasoning.[1] It will be explained how they defended their opinion and how they refuted the textual evidence presented by the upholders.

The upholders of adh-dharā'i' argued that, the Sharī'a is perfect and in the highest degree of wisdom and securing people's "interests". Therefore, the Sharī'a should have considered the means which lead to the actions in order to prescribe or permit the "means" which lead to good action and prohibit those which lead to bad action. The Sharī'a should also have taught us to consider these "means". If these "means" were not considered, then the objectives of the Sharī'a will not be achieved and a clear contradiction will exist. This is similar to what a medical doctor should do if he were to treat a patient. He should prevent him from the "means" which may increase the illness, otherwise, it would be useless to try to cure him.[2]

The upholders proclaimed that the acceptance of the principle of adh-dharā'i' were unanimous. That means a "consensus" of the jurists was formed to accept it. Al-Qurṭubī said, that the principle of adh-dharā'i' was accepted and used by Mālik and his followers as an independent principle. Most of the jurists of the other schools used it in practice, but their statements may show that they did not regard it as

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1. See Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 13.
2. Ibn-al-Qayyim, A'lām, vol. 3, p. 175.

an independent principle.[1]

The title under which this subject used to be discussed was, "the closing of adh-dharā'i'". The jurists were more anxious about the "means" that lead to the prohibited actions. But, as has been pointed out the "means" may need to be opened when they lead to good actions. Al-Qarāfī[2] said, it should be understood that adh-dharā'i' sometimes need to be opened and sometimes need to be closed. They could be prescribed or prohibited or reprehended (makrūh) or recommended (mandūb) or permitted (muhāḥ).[3]

Disagreement occurred on one kind of adh-dharā'i', and this made some jurists think that the Ḥanafīs and the Shāfi'īs rejected using this principle completely. Therefore, al-Qarāfī and some other scholars tried to make clear the point of disagreement and to ascertain the "consensus" formed on the acceptance of this principle.

Al-Qarāfī explained this point by considering the prohibited actions. He said, adh-dharā'i' have three divisions regarding the attitude of the jurists towards them; the first division is that which leads definitely to prohibited actions. And this was decided to be closed and prohibited. For example, it was prohibited to sink wells which lead to killing innocent people. This was because this killing itself is prohibited, therefore, the "means" leading to it was also prohibited by all the scholars.

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1. See ash-Shawkānī, Irshād, p. 217.
2. He is the Mālikī scholar who died in 684 A.H.
3. Al-Qarāfī, Tanqīḥ al-Fuṣūl, p. 200.

The second division is that which does not lead definitely to committing prohibited actions. And this was decided unanimously to be kept open and permitted. For example, growing grapes should be permitted though it leads sometimes to making wine which is prohibited. But it does not lead inevitably to this prohibited action.

The third division of adh-dharā'i' is that which more probably leads to prohibited actions. And this was the kind on which disagreement occurred. For example, if one sold an article for ten pounds on credit for one month and then bought the same article back before the end of the month for only five pounds in cash, he would receive at the end of the month ten pounds from this person with whom he is dealing. Accordingly, he would make profit of five pounds with nothing in return. The last part of this action was prohibited by Mālik on the grounds that it leads to making the profit of this sum, which is a kind of usury. It is in fact giving a sum of money and getting it back increased after a certain period. Ash-Shāfi'ī permitted the whole action on the grounds that the legal form of the correct selling was attained. And this to ash-Shāfi'ī was all that was necessary for a legal selling.[1] This disagreement was not on the legality of the consideration of adh-dharā'i', but rather, it was on analysing the ends and results of actions. Otherwise, all the jurists unanimously agreed on the legality of the consideration of the "means" of actions in the Sharī'a.[2]

1. See ash-Shawkānī, Irshād, p. 217.
2. See ash-Shāṭibī, Muwā., vol. 4, p. 201.

The upholders of adh-dharā'i' produced their rational and textual evidence in order to support the legality of the consideration of this principle. The rational evidence which has already been pointed out above, was, securing the objectives of the Sharī'a which are the "interests" of people. Thie securing requires taking into consideration the "means" which lead to actions. It would be a mere contradiction if the rules of actions and the rules of their "means" were different from each other. And this contradiction has no place in the Sharī'a.[1]

Regarding the textual evidence, the upholders presented the following verse, "O ye of Faith say not (to the apostle) rā'inā, which is a word of ambiguous import. But say anẓurnā (consider our ability of understanding) which is a word of respect and an evident import".[2] The Muslims used to say to the Prophet rā'inā which means when you teach us please consider our ability of understanding and give us time to understand and absorb your teaching. The same word was used by the Jews to the Prophet. It was a Hebrew or a Syriac word for insulting, and coincidently it came in the same form of the Arabic word. When the Jews heard the Muslims saying it to the Prophet in its Arabic meaning, they began also to say it to Him in its Hebrew meaning in order to insult Him indirectly. Therefore, the Qur'ān ordered the Muslims not to use this word to the

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1. Ibn-al-Qayyim, A'lām, vol. 3, p. 175.
2. Q. 2.104.

Prophet, but to use instead the word anẓurnā in order to close the "means" against the Jews.[1]

Another piece of textual evidence presented by the upholders was from the Sunna. The Prophet said, the permitted actions (ḥalāl) are very clear and the prohibited actions (ḥarām) are very clear also. Between these groups of actions there are some ambiguous ones. Those who keep themselves from committing these ambiguous actions would preserve their religion and their honour. And those who commit them would certainly be led by them to committing the clearly prohibited actions. It is like a shepherd who allows his sheep to stray very close to the other people's farms, when they may easily enter them. It is known that every king would have a protected area (ḥimā) which should not be approached and the protected area of God is the actions which He prohibited.[2] This confirmed that every way leading to a prohibited action should be avoided.

It would be helpful to present here an example for adh-dharā'i‘ which was opened for achieving a good purpose, though this particular "means" seems to be bad. For example, to pay a ransom to the enemy in order to free Muslim captives was permitted, though paying money to the enemy would strengthen them against the Muslims. But since there is a good purpose and greater "interest" would be achieved, it was permitted.[3] Ibn-al-Qayyim presented ninety-nine

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1. See az-Zamakhsharī, Tafsīr, vol. 1, p. 174; Ibn-al-Qayyim, A‘lām, vol. 3, p. 178.
2. See al-Bukhārī, (kitāb al-'īmān), Bāb 29; Muslim, (kitāb al-musāqāt), Traditions No. 107, 108. Ash-Shawkānī, Irshād, p. 217. Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 2.
3. Ibn-Qudāma, al-Mughnī, vol. 8, pp. 445-446.

examples as textual evidence in order to support the legality of the principle of adh-dharā'i'.[1]

The Ẓāhirīs opinion on
the principle of adh-dharā'i'.

The Ẓāhirīs' opinion on adh-dharā'i' was completely different from the above discussed opinion which was held by the four great Sunnī schools. Although it was mentioned that a "consensus" was formed on the acceptance of this principle, the Ẓāhirīs proclaimed their complete objection to it and criticised bitterly those who accepted it. The Ẓāhirīs were not considered by the Sunnīs as an important group. Accordingly, their objection had no weight and "consensus" was formed without them. Ibn-Ḥazm said that some jurists prohibited some actions as a precaution. They were fearing that these actions might lead to prohibited actions.[2] But, he added, that no one is permitted to prohibit an action which was not prohibited by God Himself. Any decision of this kind would be regarded as a fabrication of lies against religion. God is more careful of our "interests" than we are. Any prohibited action should have been revealed namely by God in the texts. The actions which were left without texts deciding their rules should be left permitted. People should not add to the religion what was not a part of it. Otherwise, it would be a mere disobedience of God and His Prophet.[3] Reason cannot be so

1. Ibn-al-Qayyim, A'lām, vol. 3, pp. 177-205.
2. Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 2.
3. Ibid., p. 10.

perfect as to claim that some things were left by God incorrect and reason would correct them. All the Muslims agreed on the fact that at the time of the Prophet, and with His presence in Medina, people used to buy everything, clothes, food, and the like, without asking whether these things were acquired unjustly. The Prophet did not prohibit buying them because their origins were not known, although buying them might lead to possessing stolen goods. The Prophet was once told by some of His Companions that some of the Arabs who entered Islam recently were selling meat, and it was not known whether they had mentioned the name of Allah when they slaughtered the animals. These Companions asked whether this meat was prohibited? The Prophet answers that it was sufficient to say the name of Allah when you start eating. He did not prohibit it in order to avoid the possibility of eating a non-permitted meat. The Ẓāhirīs added that they exhorted people for piety, as the Prophet Himself did, and called on them to avoid the uncertain actions. But they did not regard this as obligation, nor did they proclaim this as a legal decision. To the Ẓāhirīs, this was the method followed by the Prophet.[1]

The Ẓāhirīs presented textual evidence to support their opinion. For example they presented the Tradition which was related by Ibn-ʿUmar that the Prophet said, God loves that His permissions and facilities in life be attained, the same as He loves that His obligations be performed. To

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1. Ibid., p. 7.

the Ẓāhirīs this Tradition means that it is not permitted to investigate the permitted actions in order to prohibit them.[1]

The Ẓāhirīs tried to refute all the textual evidence presented by the upholders of adh-dharā'i'. Regarding the verse which ordered the Muslims not to say the word rā'inā to the Prophet for it is an ambiguous word, Ibn-Ḥazm said, that this verse does not support the legality of adh-dharā'i'. The word rā'inā in itself was prohibited and not because it was "means" for Jews to insult the Prophet. There was no textual evidence stating that the prohibition was based on this "ground". It was only the Companions who accounted it for this reason.[2]

Regarding the Tradition presented by the upholders which talked about avoiding the uncertain actions, Ibn-Ḥazm said, that this Tradition was intended to direct people towards piety, as has been pointed out above. Uncertain actions are not the same as definitely bad actions. As long as they are not clearly described as bad then they are permitted. It is only recommended to avoid the uncertain actions, but not obligatory.[3]

It is very clear that the criticism of Ibn-Ḥazm to the verse was rather weak. He tried to ignore the reason for which the verse was revealed. He also tried to make the interpretation of the Companions unimportant. In fact the reasons for revealing the verses of the Qur'ān (asbāb an-

1. Ibid., p. 15.
2. Ibid., pp. 7-8.
3. Ibid., pp. 2-4.

nuzūl) were mostly told by the Companions, and were accepted unanimously. They did not deduce these reasons, but either heard them from the Prophet Himself or they attended the events for which some Qur'ānic verses were revealed. All the interpreters of the Qur'ān agreed on the fact that the reason for revealing the above mentioned verse was the evil use made by the Jews of this particular word. The arguments put forward on the question, whether to accept the Companions' sayings, were put forward regarding their rational and deduced decisions.[1] Even these rational decisions of the Companions were accepted by Mālik, ash-Shāfi'ī, Ibn-Ḥanbal, ar-Rāzī, and al-Bardha'ī. The two latter represented the Ḥanafī school. These five great scholars decided that the Companions' rational sayings should be accepted and even given precedence to analogy. Every Companion's rational decision is expected to be based on hearing from the Prophet or attending the events. If ever two of the rational sayings of the Companions were contradicting each other, then one of them should be dropped after analyzing and comparing them.[2]

With respect to the criticism by the Ẓāhirīs on the Tradition presented by the upholders of adh-dharā'i', the Ẓāhirīs did not seem to have been able to refute the Tradition as evidence. The upholders did not say that every uncertain action is prohibited. But rather they made it clear that unless a "means" of an action is most likely

1. See Subkī, Jam', vol. 2, p. 354.
2. Al-Āmidī, al-Iḥkām, vol. 4, pp. 130-131ff.

to lead to committing a prohibited action, then this "means" should not be prohibited. This explained that a "means" which is to be prohibited must be in fact very clear as a bad action, since it would lead certainly to committing a definite bad action. The upholders also made it clear that using the principle of adh-dharā'i' should not be exaggerated, since exaggeration may lead to prohibiting very permitted actions. Al-Qurṭubī, the Mālikī scholar, said in his Tafsīr and during his comment on the Qur'ānic verse; "They ask thee concerning orphans, say: The best thing to do Is what is for good; if ye mix their affairs with yours",[1] that not every "means" of a prohibited action should be inevitably prohibited. The "means" which should be prohibited are those which lead to prohibited actions known by revelation.[2] This means, that the "means" which lead to actions prohibited by analogy may not be prohibited.

This condition in fact was presented by al-Qurṭubī alone. His colleagues from the Mālikī school did not consider this condition. They also did not go, in using the principle of adh-dharā'i', as far as to prohibit a very permitted action. Sometimes the Mālikīs and the Ḥanbalīs took some rational decisions by which they gave rules for some particular "means" of action. The Ḥanafīs and the Shāfi'īs disagreed with them on these particular decisions, thinking that there were exaggeration and excess in them.[3] It may have been clear now that the upholders of adh-dharā'i'

1. Q. 2.220.
2. Al-Qurṭubī, Tafsīr, vol. 3, p. 65.
3. See ash-Shawkānī, Irshād, p. 217.

did not intend to prohibit what was permitted by the texts. But rather they intended to prevent people from following the "means" which would lead to committing definite prohibited actions, even if these "means" seem to be permitted. They intended also to encourage people to follow the "means" which lead to good actions, even if these "means" seem to be prohibited. This is what was intended to be said about the principle of adh-dharā'i' in this chapter. Studying this principle requires studying another subject closely connected with it. That is the subject of legal devices (al-ḥiyal). And this will be our following subject.

Al-ḥiyal.

The term ḥiyal, clearly, is the plural of ḥīla which has several meanings. It could mean evasion (murāwagha), or the "means" (wasīla or dharī'a), or expedient (tadbīr), or trick (khid'a), or stratagem or policy or strength.[1] But the term was used more in the first two meanings, and mostly in the meaning of evasion. Evasion actually is an aspect of adh-dharā'i'. That is when they are not justified and not permitted.

It is clear that this subject is closely connected with the subject of adh-dharā'i'. It is in fact a kind of opening "means" of some actions. If a ḥīla were a kind of evasion, then it would be destructive to the objectives of the Sharī'a. And this kind was rejected by all the schools.

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1. See Q. 4.98. Ibn-Manẓūr, al-Lisān, vol. 13, (ḥayal), p. 208. Luis, al-Munjid, pp. 164-165.

But when it is a justified ḥīla, then it was accepted and this will be explained more fully later on.[1] There would be no contradiction in the attitude of those who accepted the principle of the closing of adh-dharā'i' and at the same time accepted the principle of al-ḥiyal. This is because in their acceptance of the principle of the closing of adh-dharā'i' they were trying to close the "means" that may lead to destroying the Sharī'a objectives, and in their acceptance of the principle of al-ḥiyal they were opening the "means" that may lead to securing the people's "interests".

It was widely known that the Ḥanafī school adopted the principle of al-ḥiyal and applied it to the point that it became one of its characteristics. It was known that, Abū-Ḥanīfa himself applied this principle in order to solve some complex problems, and to assist some individuals with their difficulties. As it is known that Abū-Ḥanīfa himself did not write any book. His ideas and decisions were collected and written by his companion Muḥammad Ibn-al-Ḥasan ash-Shaybānī. There is a book on al-ḥiyal ascribed to Muḥammad Ibn-al-Ḥasan. The manuscript of this book was first published in 1930 by J. Schacht, with another copy of the same book found within al-Mabsūṭ, the famous book written by as-Sarkhasī.[2] This latter copy is shorter than the separate

1. See ash-Shāṭibī, Muwā, vol. 2, pp. 390-391.
2. As-Sarkhasī, is Muḥammad Ibn-Aḥmad Ibn-Sahl, the great Ḥanafī scholar, d. 483 A.H. His book al-Mabsūṭ is published. It consists of 30 vols. In this book he was said to have collected all the books of Muḥammad Ibn-al-Ḥasan (See al-Marāghi, al-Fatḥ, vol. 1, pp. 277-278).

one, but it included most of the important subjects which existed in the separate copy.

As-Sarkhasī introduced his book by analysing its authenticity. He said, that people disagreed on the authenticity of this book, whether it was really written by Muḥammad Ibn-al-Ḥasan. Abū-Sulayman al-Jawzajānī[1] denied the attribution of this book to Muḥammad. Abū-Sulayman used to say, that if any one attributed this book to Muḥammad, then he should be denied. He added that, the existing book on al-ḥiyal was in fact a collection of writings by the scribes (al-warraqūn) of Baghdād related to Muḥammad. He continued, that the ignorant people attributed the exercising of al-ḥiyal to the Imāms. Also those who were dishonest attributed it to them in order to discredit them. It is not likely that Muḥammad Ibn-al-Ḥasan wrote a book and gave this discreditable title which may encourage the ignorant people and the dishonest to continue reproaching the Imāms.[2] As-Sarkhasī then said, but on the other hand, we found Abū-Ḥafṣ[3] supporting the claim that this book was written by Muḥammad Ibn-al-Ḥasan himself. Abū-Ḥafṣ also mentioned some decisions based on al-ḥiyal and attributed them to Muḥammad. As-Sarkhasī supported Abū-Ḥafṣ by saying that the attribution of the book to Muḥammad is correct.[4] These are two contradictory views by two students of Muḥammad Ibn-al-Ḥasan himself. In order to reconcile

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1. He was a student of Muḥammad Ibn-al-Ḥasan.
2. See as-Sarkhasī, the supplementary copy of al-Ḥiyal, p.87.
3. He was also a student of Muḥammad Ibn-al-Ḥasan.
4. As-Sarkhasī, op.cit.

them, it must be said, that Muḥammad may have taught people these decisions verbally. Then these teachings were collected and written down by those who were present at the time. And then Abū-Ḥafṣ agreed that the collection was actually the teachings of Muḥammad. This is what some of the contemporary scholars tended to believe.[1]

It seems that this was what actually happened since it is not acceptable that two of Muḥammad's students held two entirely contradictory views regarding this book except in this way. They both were fully aware of the books of Muḥammad. The statements said by both were related and accepted by as-Sarkhasī, one of the most reliable authorities in the Ḥanafī school. Accordingly, neither of the two statements should be regarded as wrong. Al-Jawzajānī had a right to reject the attribution of the book to Muḥammad since, to him, Muḥammad did not write it, nor did he give it this suspect title. Abū-Ḥafṣ had a right also to accept and support the attribution of the book to Muḥammad since, to him, the subjects in this book are the real teachings of Muḥammad Ibn-al-Ḥasan according to that which he learned from him directly.

Regarding the title of this book (al-Ḥiyal), it may not have been suggested by Muḥammad. This is because al-Jawzajānī established his rejection to the attribution of the book to Muḥammad entirely on criticising this title. He thought that, writing a book with such a title would

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1. See Abū-Zahra, Abū-Ḥanīfa, p. 419.

encourage the ignorants to discredit the Imāms. The idea that this book may not be named by Muḥammad is supported by the last statement ending the text of the separate copy of this book. It says, "And this is the end of the book of al-ḥiyal which used to be called al-Makhārij (the ways-out), and these ways-out were learned from Abū-Yūsuf".[1] This statement suggested that the book or the decisions included in it had a different title before it was called al-Ḥiyal, and this former title was al-Makhārij. This confirms several points; Firstly, it confirms that the word ḥiyal was not the original title of the book. Secondly, it indicates that this book may have been written at the time of Muḥammad and his colleague Abū-Yūsuf, accordingly, it was referred to another former title with which the book used to be called. The above mentioned statement also suggests that the book was called al-ḥiyal by another person different from Muḥammad Ibn-al-Ḥasan. The book may have been collected by another person or other people after the death of Muḥammad and called al-Ḥiyal. And at the same time the collectors referred to the title with which Muḥammad and Abū-Yūsuf used to call these kinds of decisions.

Those who suggested the title of al-Ḥiyal must have been Ḥanafīs themselves. This is because Abū-Ḥafṣ himself accepted the book with this particular title. Those Ḥanafīs who suggested this title might have intended to prove that the news spread about Abū-Ḥanīfa and his two companions

1. Al-Ḥiyal, p. 86.

that they have been using the principle of al-ḥiyal, cannot damage their sincerity, and cannot discredit them. They intended to show that the kinds of al-ḥiyal which the three great scholars were using were not in order to escape from the obligations of the Sharī'a. But rather, they were for preventing people from the difficulties that they might suffer, and to facilitate life according to the direction of the Sharī'a. Facilitating life is one of the objectives of the Sharī'a. The Ḥanafīs were contented that the decisions included in this book would prove this fact.[1]

As has been mentioned above, the Ḥanafī school, including its leader Abū-Ḥanīfa, was known by using the principle of al-ḥiyal. The other juristic schools were not well known for this, but in practice all of the Sunnī schools used this principle; The Mālikī, the Shāfi'ī, and the Ḥanbalī schools.[2] It will be explained hereafter, what kinds of al-ḥiyal were those accepted by all the schools, whether accepting this principle would contradict the acceptance of the principle of the closing of a section of adh-dharā'i', and why some of the great scholars, such as Ibn-al-Qayyim, generalized their criticisms on the principle of al-ḥiyal. There will be some other points connected with the above mentioned ones which will also be dealt with.

It is important now to explain exactly the kinds of

1. See Subkī, Jam', vol. 2, p. 356.
2. See ash-Shāṭibī, Muwā., vol. 2, pp. 387-391.

al-ḥiyal according to the attitudes of the jurists towards them. There were three kinds. The first kind is that which every jurist would regard as prohibited. That is the kind by which one is trying to permit a prohibited action or escape some of the obligations. This is merely a kind of evasion intended to abolish the rules of the Sharī'a by some "means" which ostensibly seem legal and sound, but actually they are not legal, since they lead to prohibited actions. It is known that some actions were prohibited by the texts of the Qur'ān and the Traditions and some of them were permitted by the texts of these two sources. Some of these revealed rules were based on clear reasons, and some others seemed to be based on no reason. The kind of al-ḥiyal which we are explaining now is what was intended to change the clear reasons and "grounds" of these revealed rules in order to change the rules themselves.[1] If any of these revealed rules was changed by this kind of al-ḥiyal, this change will have no effect on the situation in the life hereafter. People will be judged according to their application of the revealed rule. For example, if a man hired a woman for working in his house and for committing adultery with her, claiming that he thought hiring includes every benefit that could be obtained from the hired person, this would be a ḥīla which would not help to escape the punishment neither in this life nor in the life to come.[2] Hence, all the ḥiyal which are intended to lead to injustice or the destruction of the objectives of the Sharī'a are

1. Ibid., pp. 379-380.
2. See Ibn-al-Qayyim, A'lām, vol. 3, pp. 377, 402.

prohibited.

The second kind of al-ḥiyal is what was followed in order to obtain a right or to prevent injustice. It could be a permitted ḥīla and used for reaching a permitted purpose, or it could be originally a prohibited ḥīla but using it in a particular case would achieve a permitted legal and noble purpose, and at the same time would cause no harm to people. The objective which is to be secured by this kind of al-ḥiyal should agree with the objectives of the Sharī'a and not contradict them in any respect. This kind of al-ḥiyal was accepted by all the jurists. For example, if a Muslim were forced to say a word of disbelief, then he is permitted to say it in order to save his life, though it is originally prohibited. Saying it is a ḥīla by which he may reach a permitted, or in fact a prescribed action, that is saving his life in order to get readiness and strength to support Islam. At the same time he would not cause any harm to any other person.[1]

The third kind of al-ḥiyal is that which is not clear as to whether it will lead to securing "interests", or it will lead to hindering the objectives of the Sharī'a. One can find no decisive evidence which may classify this kind of al-ḥiyal with either the first or the second kinds. On this kind of al-ḥiyal disputes between the jurists occurred. They decided on them according to their own strong feelings and convictions. If a jurist was content that a particular ḥīla of this kind did not contradict any objective of the

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1. See ash-Shāṭibī, Muwā., vol. 3, p. 387.

Sharī'a, then he could apply it. And if another jurist was content that the same particular ḥīla did contradict an objective of the Sharī'a, then he should abandon it. Those who applied these kinds of al-ḥiyal should not be accused of acting against the Sharī'a, since they are basing their judgement on the same basis as those who rejected it. That is the personal conviction, since there is no other way of judging it.[1] Some examples may be presented in order to cast more light on this kind of al-ḥiyal. The arguments and disagreements of the jurists on them will also be presented.

The first example is the marriage of al-muḥallil. The form of this marriage is as follows: A man divorced his wife for the third time. He cannot take her back, if he wished, unless she gets married and divorced by another man. Another man decided to marry this divorced wife in order to make it possible for the first husband to remarry her. This was the sole purpose of this second marriage. It is a ḥīla in order to find a permission for a certain action. The second husband was called al-muḥallil. If he did not have this intention, then his marriage and divorce are definitely legal. But if he had this intention, then disagreement occurred between the jurists on the legality of his action.

Mālik decided that the marriage of al-muḥallil is not legal. It should be regarded as a dissolved marriage from the beginning. No further actions should be based

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1. Ibid., p. 388.

on it. The first husband should not return to his divorced wife on the basis of this illegal marriage. The Mālikīs argued that, the marriage required for bringing about permission for a separated couple to be reunited should be a real marriage supported by the intention of living together as husband and wife. Marriage is a means of respectful ties and should not be trifled with. The respect for marriage was intended and made clear by the Sharī'a. Any action which may discredit it must be rejected. This ḥīla may encourage evil motives which create non-stable marriages. The Mālikīs also presented for their support the Tradition which said, "God curses al-muḥallil'. They understood it as a clear prohibition and invalidity of this kind of marriage. Accordingly, they regarded this ḥīla as against the "interest" of people and the Sharī'a objectives.[1]

The Ḥanafīs and the Shāfi'īs disagreed with the Mālikīs on this. They believed that the marriage of al-muḥallil is sound and legal. It is a ḥīla which secures a very important "interest". That is to make it possible for a separated couple who wanted each other to be reunited in a new marriage. This is a good objective for which the Sharī'a itself called. It is not a condition for a legal marriage to be intended as a lasting marriage. To regard this intention as a condition, would be a clear stipulation of a difficulty which is not agreeing with the Sharī'a objectives. The Qur'ān says, "So if a husband divorced his wife (irrevocably) he can not after that marry her until

1. See Ibn-Rushd, Bidāyat, vol. 2, p. 58.

after she has married another husband and he has divorced her."[1] The Prophet described the marriage which could permit the first husband to remarry his divorced wife by saying that, she could not go back to him until she had tasted the ʿusayla (honey-drop) of the second husband and he had tasted hers. Both, the Qur'ān and the Sunna did not mention that it is a condition for a legal marriage to be intended as lasting marriage. Neither did they mention that if the marriage was intended to prepare the way and make it possible for a separated couple to be reunited, then it is illegal. If this were a condition, then these two main sources would certainly have mentioned it. Accordingly, this ḥīla of the marriage of al-muḥallil is legal and permitted. A separated couple by three times divorce could be reunited after the marriage of al-muḥallil is dissolved.[2]

Another example of the third kind of al-ḥiyal is that which happens in some forms of bayʿ al-ajal (selling goods at delayed payment). For example, a wealthy person wanted to lend money and get it back increased in a way by which he can avoid being accused of committing usury. He therefore, sold an article on credit to a borrower in order to pay the price after a certain period. And then at the same time the wealthy bought the same article with a less price in cash. By this ḥīla the borrower had some money

1. Q. 2.230.
2. See ash-Shāṭibī, Muwā., vol. 2, pp. 388-389; Ibn-Rushd, Bidāyat, vol. 2, p. 58.

which he needed, and the wealthy lent his money with profit which is the difference of the two prices that he will receive after a certain period.[1] This ḥīla was approved of by the Mālikīs on the grounds that it would profit both, the borrower and the lender through a permitted method, which is the sale.[2] The Ḥanafīs rejected this ḥīla and regarded it as an evident usury. They argued that the same reason for which the usury was prohibited existed in this case. Moreover, it is accompanied by an evasion which made it even worse.[3]

The Mālikīs were accused of holding contradictory opinions, namely, the view of closing the door of adh-dharā'i' that lead to prohibited actions, and on the other hand the principle of al-ḥiyal. The Mālikīs answered that there are three types of adh-dharā'i'. The first type was unanimously agreed by the jurists that its door be closed. For example, blaspheming the idols (aṣnām) in front of their worshippers could be a dharī'a for the worshippers of these idols which lead them to blaspheme against God in return. Therefore, it was agreed to be closed. The second type was unanimously agreed that its door be open. For example, it is not permitted to barter bad food for good food. It was regarded as usury. But one can sell the poor quality food, and with the money thus obtained buy the better quality. This is a "means" by which one can avoid usury without committing a prohibited action. The third type of adh-dharā'i'

1. See Ibn-al-Qayyim, A'lām, vol. 3, p. 147.
2. See ash-Shāṭibī, Muwā., vol. 2, p. 389.
3. See Ibn-al-Qayyim, op.cit., vol. 3, pp. 147-148.

was controversial. They disagreed whether its door be closed or be kept open. Ḥiyal belongs to this last type. Accordingly, there would be no contradiction in the attitude of the Mālikī school holding and applying the two principles, the principle of closing of the door of the first type of adh-dharā'i' which was agreed that its door should be closed, and the principle of al-ḥiyal which belongs to the third type of adh-dharā'i' which is the controversial type.[1]

This answer by the Mālikīs shows very clearly the close links between the two principles, adh-dharā'i' and al-ḥiyal. Both of which are "means" for some actions. But when they are followed in order to avoid difficulties or facilitate life, then they were called ḥiyal or makhārij. The early leaders of the Ḥanafī school used the latter name. It may have become clear now, what were the types of al-ḥiyal used by the Muslim jurists in the past. It may have become clear also that it was not only the Ḥanafīs who used the principle of al-ḥiyal, but also all the Sunnī schools used it including the Mālikī school,[2] the Shāfi'ī school,[3] and the Ḥanbalī school.[4]

The types of al-ḥiyal which were used by the Imāms never permitted a definite prohibited action nor prohibited a definite permitted action. They were never intended to destroy the objectives of the Sharī'a. But rather, they

1. Ash-Shāṭibī, op.cit., vol. 2, p. 390.
2. See ibid.; Ibn-al-Qayyim, A'lām, vol. 3, p. 256.
3. Ibn-al-Qayyim, Ibid., p. 255.
4. Ibid., pp. 256-257ff. and pp. 412-413ff.

were followed in order to secure these objectives which are the people's "interests". Whenever a destructive ḥīla existed, it would either have been based on ignorance, misleading intention, or was decided mistakenly. And these are the types of the wrong ḥiyal.[1]

Ibn-al-Qayyim, who poured his severe criticisms on the term ḥiyal, without exception of any type, himself accepted generally the same types which were accepted by the other scholars. He disagreed with them only on some individual cases which belong to the third type. Disagreement on this third type is usually caused by the judgements of jurists, which judgements are based on their own feelings. It is the only way by which they could judge cases of this type.[2]

All or most of the collection of the ḥiyal which were found in the book attributed to Moḥammad Ibn-al-Ḥasan, had either been decided by Abū-Ḥanīfa himself or almost certainly approved by him. This is because Muḥammad was collecting and writing down the decisions of Abū-Ḥanīfa. Muḥammad's books were the main sources of this great school. Of course Muḥammad had his own decisions, but they were clearly distinguished from those which he heard from Abū-Ḥanīfa. These latter ones were called, ẓāhir-ar-riwāya, which means, the decisions heard from Abū-Ḥanīfa.

These ḥiyal which were found in this book were of the third type which agree with the objectives and purposes of the Sharī'a. They were used in the field of transactions

1. Ibid., pp. 206-207ff.
2. Ibid., pp. 413-414ff.

(mu'āmalāt) and not in the field of worship. This may explain that these ḥiyal were not intended to escape the Sharī'a obligations nor to destroy its objectives. They were sometimes ways-out from oaths which were caused by anger in order to release people from such critical situations. Sometimes they were for precaution in the matters of sale or contracts in order to secure rights. At other times these ḥiyal were followed to obtain definite rights which were prevented from being obtained by ostensible meanings of some rules of the Sharī'a.

In this last case a jurist is trying to do two things; first to preserve the ostensible meanings of the rules which have prevented the rights, and second he is trying to secure these rights from loss. For example, a wife was divorced by a husband who was indebted to her for a certain sum. He denied this debt in order to escape paying it. The legal ḥīla here which she could follow is to lengthen the waiting-period after termination of the marriage ('idda) in order to get as much maintenance (nafaqa) as possible. He is obliged to maintain her as long as she is in her waiting period. This period was limited by three menstrual periods, and this would be according to her custom.[1]

This above mentioned limitation of the waiting period is if she were still young and having menstrual periods, and were not pregnant. If she were old and has no menses, then her waiting period is three months. When she is pregnant, then her waiting period would continue until she

1. Ash-Shaybānī, al-Ḥiyal (the separate copy), p. 44.

gives birth.[1]

These were the types of al-ḥiyal which were collected in the book which was attributed to Muḥammad Ibn-al-Ḥasan and which he heard from Abū-Ḥanīfa himself. These ḥiyal were intended to support the objectives of the Sharī'a. It was accepted that some of the jurists other than the four Imāms and other than the great men of knowledge, revealed some ḥiyal which were intended to escape the obligations of the Sharī'a. But such ḥiyal were based on ill-will or ignorance of the Sharī'a, as has been pointed out. They had no support either from the general direction of the Sharī'a or from the judgements of the Imāms of the Sunnī schools.

As-Sarkhasī, in his book al-Mabsūṭ, presented some textual evidence in order to support the legality of using al-ḥiyal. The Qur'ān says, "And take in thy hand a little grass, and strike herewith, and break not (thy oath)".[2] This was an order to the Prophet Ayyūb as a way out of an oath which he made. It was related that during his long illness he made an oath that if he were cured then he would inflict on his wife a hundred lashes. Several reasons were given for the cause of his oath. It was said of his wife that she was very slow sometimes to minister to his needs. Or because she was deceived by the evil into trying to cure her husband by prohibited means, such as drinking wine etc. He was angered by such conduct, and accordingly

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1. Ibn-Rushd, Bidāyat, vol. 2, p. 89.
2. Q. 38.44. As-Sarkhasī, the introduction of the book of al-ḥiyal, p. 87.

he made his oath. After he was cured, he found it difficult to carry out his oath. God wanted to release him from his difficulty. He revealed for him a way out by which he would neither break his oath nor harm his sincere wife. This way was merely to take a handful of grass and strike her with it only once.[1]

Ibn-al-Qayyim tried to refute the evidence of this verse and prove that it cannot support the legality of al-ḥiyal. He said that this permission was given to Ayyūb in particular and no one else should use it. The same Qur'ānic verse explained why the permission was given to him in particular. It says "Truly We found Him full of patience and constancy". This was the reason for which Ayyūb was given the permission. Secondly, there was no expiation of oaths in the Sharī'a of Ayyūb, otherwise the expiation would have been the way out. In Islam there is an expiation of oath. Thirdly, the wife of Ayyūb was very weak. She could not tolerate a hundred lashes. Therefore, God lightened for her the punishment.[2] This was what Ibn-al-Qayyim had to say in his criticism of the presentation of this verse as evidence of the legality of exercising al-ḥiyal. But nevertheless, it must be mentioned again, that Ibn-al-Qayyim himself accepted and used the justified types of al-ḥiyal. His criticism was on the use of this particular verse as evidence for the legality of using this principle. It was not against the principle itself. Other-

1. Zamakhsharī, Tafsīr, vol. 4, pp. 97-98.
2. Ibn-al-Qayyim, A'lām, vol. 3, pp. 267-268.

wise he would be contradicting himself.

As-Sarkhasī presented from the Sunna the story of a man who came to the Prophet and told him that he made an oath to divorce his wife three times if he (the man) talked to his own brother, and he wanted a way out of this oath. The Prophet ordered him to divorce his wife once and wait until her waiting-period ended. Then he could talk to his brother and afterwards remarry his divorced wife, and continue talking to his brother whenever he wished.[1] As-Sarkhasī added that if any one examined the field of transactions (mu'āmalāt) in the Sharī'a, he would find that all of them were kinds of ḥiyal by which people could attain their permitted purposes. Every ḥīla through which one may get rid of a difficulty and reach a permitted aim should be a permitted ḥīla. Al-ḥiyal could be prohibited only when they are intended to deprive people of their rights unjustly, or to destroy the objectives of the Sharī'a, or to escape the obligations. Those who prohibited all the kinds of ḥiyal or permitted them would have based their opinion on ignorance or on ill-will.[2]

The "unrevealed interest"

It is time now to deal with the last rational method through which people's "interests" could be secured, that is the principle of the "unrevealed interest". This term

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1. As-Sarkhasī, op.cit., p. 88.
2. Ibid.

will be used here as equivalent to the Arabic term, "al-maṣlaḥa al-mursala". It is a subject over which a great deal of discussion and dispute took place. The word mursala literally means "set free". One may say, arsaltu al-lisāna (I set the tongue free) to talk without restrictions. Or may say, arsaltu al-ba'īra (I set the camel free).[1] The first impression one might take from this term is that this is a type of reasoning which is based on pure human desires. But actually, reasoning based on human desires would never be regarded as a legal method of obtaining rules, and would never be accepted in the Sharī'a. The accepted reasoning would always be confined within the meaning of "interest" in the Sharī'a which was explained at the beginning of this chapter.[2]

The unrevealed here means that no text or analogy, nor any of the three principles mentioned previously in this chapter, exists to decide a rule for a new case. Here, the rule could be decided and the "interest" could be secured through a rational way taking into account only the general direction of the Sharī'a.

It should be pointed out here that the Mālikī school was known more than any other school for using the principle of the "unrevealed interest". The Mālikīs also acknowledged it as an independent principle. Some of the other schools, jurists, such as the Ḥanbalīs, held the same opinion as the Mālikīs. Some others, such as the Ḥanafīs, and the

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1. See Lane's Dictionary, book one, part 3 (rasl).
2. See pp. 153-154ff. of this thesis.

Shāfi'īs, used it either included under other titles of reasoning such a qiyās and 'urf, or under other different independent titles such as istiḥsān. All these points will be explained hereafter. Each school will be studied separately. The Mālikī school will be presented first, since it was the most well known school which adopted this principle as independent.

The Mālikī school and
the "unrevealed interest"

As has been pointed out above that Mālik Ibn-Anas himself used this principle and regarded it as separate from the other principles. He and his students and followers used the term maṣlaḥa when they used their reason on cases which had no textual evidence nor any of the other rational means mentioned above with which to judge them. Whenever "interests" of people existed, Mālik used to act rationally in order to secure them, taking into account the general spirit of the Sharī'a. He would have no problem if an "interest" was secured or rejected by the texts, since he would simply act according to the texts. But if an "interest" was not clearly dealt with by the texts, then he would use his own reason to secure it.[1] The Mālikīs used this principle under the titles of, al-maṣlaḥa l-mursala or al-istiṣlaḥ or al-istiḥsān. Mālik himself said, al-istiḥsān is nine parts out of ten of all knowledge.[2]

1. See ash-Shāṭibī, Muwā., vol. 2, pp. 306-307.
2. See Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 16; Ibn-al-Humām, Taḥrīr, vol. 4, p. 206.

Mālik and his students took into consideration certain conditions while using the principle of the "unrevealed interest". The first condition was that the "interest" should agree with the objectives of the Sharī'a. It should never contradict any of the Sharī'a principles nor any of its decisive texts (nuṣuṣ qaṭ'iyya). The second condition was that, the "interest" should be rational. The third condition was that, it should be an "interest" whose securing is necessary. That is, if it were neglected, people would suffer great difficulty, which is against the objectives of the Sharī'a.[1]

The field in which the principle of the "unrevealed interest" is to be considered is the field of transactions (mu'āmalāt). It could be in trading, industry, house rent, different kinds of labours, torts, marriage, divorce, maintenance of divorcees, financial institutions, governmental affairs and the like.[2] Regarding the acts of worship, they are not subjected to this type of reasoning. They were revealed in their particular forms and specific times, and should be performed as such. All the cases in which the Mālikīs used this principle were in general the customary practices within the field of mu'āmalāt. Mālik himself, who was well known for considering the principle of the "unrevealed interest" was very restricted regarding the field of worship. He issued no permission in order to change any aspect or method of performing the acts of worship. He

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1. See ash-Shāṭibī, al-I'tiṣām, vol. 2, p. 307.
2. Ibid., p. 311; al-Murīr, al-Abḥāth, vol. 1, pp. 40-41.

used the principle of "closing the means of prohibited actions" (sadd-adh-dharā'i') mostly in order to prevent worship from being neglected or ignored.[1] The field of transactions is the field in which the "unrevealed interest" can be secured, and the individual reasoning can be used.

Mālik secured "interests" even if they were contradicting some Traditions attributed to the Prophet. This was when "interests" comply with the general direction of the Sharī'a. He regarded the Traditions which contradicted these types of "interests" as either fabricated and as such to be rejected, or general and to be restricted (yukhaṣṣaṣu). A general Tradition could be applied to cases which do not contradict the securing of the "public interest". Mālik also applied the same principle of takhṣīṣ when a general Qur'ānic verse seemed to be contradicting a definite legal "interest". Because of this, Mālik was accused of opening the door of pure reasoning, disregarding the texts and the Sharī'a commandments. But by examining carefully his judgements, which were based on the principle of the "unrevealed interest", it would be very clear that he understood the texts of the Qur'ān and the Traditions perfectly and understood the objectives of the Sharī'a. Accordingly, he used reasoning which never contradicted a decisive text or an objective of the Sharī'a. The texts were his first and most respectful source. He cannot be accused of contradicting them.[2]

1. Ash-Shāṭibī, Muwā., vol. 2, pp. 300-340.
2. See ash-Shātibī, al-I'tiṣām, vol. 3, p. 311; al-Murīr, op.cit., vol. 1, p. 41.

The greater "interest" for the larger number of people was considered of primary importance by the Mālikīs. The "interests" of the individuals were fully respected and secured by them, unless they were contradicting the "public interest". The essential (ḍaruriyya) "interest" was given preponderance over the necessary (ḥājiyya) "interest" and over the "interest" of embellishment (tazyīn). This is because life is dependent essentially on the essential types of "interests", and happiness in the life to come is due to the securing of them. The necessary "interests" were considered second to the essential ones. They may be neglected in order to secure the essential ones. If securing the essential ones does not require neglecting the necessary ones, then the necessary ones must be secured. In the third place come the "interests" of embellishment. They may be considered whenever they are not contradicting an essential or a necessary "interest".[1]

Mālik ignored human desires in his judgements based on the principle of the "unrevealed interest". He took into account the well known objective of the Sharī'a, that is preventing man from following his pure human desires, since following them would lead to destroying life. The students and followers of Mālik followed him in this respect.[2]

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1. See ash-Shāṭibī, Muwā., vol. 2, pp. 16-17, 39; see also pp. 153-154 of this thesis for detail.
2. Ibid., vol. 2, pp. 37-39.

Al-Āmidī, the Shāfi'ī scholar, mentioned in his book al-Iḥkām that the followers of Mālik denied that Mālik used the principle of the "unrevealed interest". Al-Āmidī also declared his doubts whether Mālik used this principle.[1] But actually he meant to deny that Mālik followed his human desires. Al-Āmidī was referring to one particular case on which disputes occurred about the possibility that Mālik judged it according to this principle. This case was the killing of a third of a Muslim community in order to save the other two thirds, if this were the only solution. It was attributed to Mālik to have permitted this action. The man who attributed this to Mālik was Imām-al-Ḥaramayn, the famous Shāfi'ī scholar, during his criticism of this principle.[2] Al-Qārafī[3] the Mālikī scholar, answered Imām-al-Ḥaramayn by saying that the Mālikīs denied completely the attribution of this decision to Mālik. None of the Mālikī books attributed this decision to Mālik. It was the jurists of the other schools who did so.[4]

Az-Zurqānī[5] accepted the attribution of this decision to Mālik. But he explained this by saying that, Mālik was considering the case where a third of a Muslim community are absolutely corrupt and destructive. The remaining two

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1. Al-Āmidī, al-Iḥkām, vol. 4, p. 140.
2. See al-Murīr, al-Abḥāth, vol. 1, p. 38.
3. D. 684 A.H.
4. Al-Murīr, op.cit.
5. He is the Mālikī scholar d. 1122 A.H.

thirds of the community would not be safe and secure except by the elimination of the corrupt third. And there is no other way to contain their evil. In this case the corrupt third should be killed in order to secure the rest. Some scholars rejected this decision even with the interpretation of az-Zurqānī. They argued that certain kinds of punishments other than death were appointed by the Sharī'a to apply to corrupt and evil people.[1] However, all these disputes and arguments were on this specific case. They were not on Mālik's acceptance of the principle of the "unrevealed interest". This principle was definitely accepted by him and his students.

The Mālikīs presented some cases judged by the Companions themselves, and these judgements were based on this principle. The first case they presented was the collection and writing down of the Qur'ān. This happened at the time of Abū-Bakr after the battle of al-Yamāma. In that battle a considerable number of those who had learnt the Qur'ān by heart died. 'Umar Ibn-al-Khaṭṭāb suggested to Abū-Bakr to issue an order by which the Qur'ān could be collected and written down. This was because 'Umar was afraid of losing some of the Qur'ān if all those who had learnt it died. Abū-Bakr first objected to this idea on the grounds that, the Prophet was able to issue such order but He did not. Accordingly, this should not be done after His death. 'Umar continued his persuasion of Abū-Bakr reminding him that this action was for the "public interest",

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1. Al-Murīr, op.cit., vol. 1, p. 39.

and if the Prophet was alive He would not object to it. At last Abū-Bakr agreed to issue the order, and accordingly, the Qur'ān was collected and written down.[1]

A similar action was done at the time of the Caliph 'Uthmān. They "collected" the Qur'ān in a single text in order to eliminate any kind of disunity. And this would save the Qur'ān even more.

The four Caliphs also held the makers and repairers and the like responsible for any item or article left with them by people. They would replace the item or pay compensation if they lost it. This was in order to prevent makers and repairers from deceiving their customers. This was a decision based on the principle of the "unrevealed interest".[2]

As an example of Mālik's use of this principle, the matter of taxation may be presented here. Originally there was no financial obligations prescribed on people except Zakāt. People should not be forced to pay out of their wealth more than that. But if a country went through a true financial difficulty, and zakāt were not enough, then a just ruler may assess certain taxes on the wealthy.[3] This is a decision made by Mālik and was based on the principle of the "unrevealed interest".

Later on this decision was disagreed by the Mālikī jurists of al-Andalus. Some of them such as Ibn-al-Barra, rejected it and confined the obligatory taxes to zakāt.

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1. Ash-Shāṭibī, al-I'tiṣām, vol. 2, pp. 287-288ff.
2. Ibid.
3. Ibid., and al-Murīr, al-Abḥāth, vol. 1, pp. 44-45.

Some others, such as Ibn-Manẓūr, the judge, accepted this decision and supported it by textual evidence. He said, it is true that no obligatory taxes should be assessed except by the texts. But people were obliged by the Qur'ān to support their country financially when it is necessary. This is to prevent the country from attacks, to support the sources of payments of soldiers, and finance everything in the "interest" of the Islam and Muslims when the government is unable to do so. The Qur'ānic verse presented by Ibn-Manẓūr to support this decision was the following, "They said: "O Dhul-Qarnayn! The Gog and Magog (people) Do great mischief on earth, Shall we then render thee tribute on condition that those set up a barrier between us and them?"[1] This verse was talking about the story of Dhul-Qarnayn who was said to have been a faithful man or a Prophet or an Angel.[2] Ibn-Manẓūr tried to regard what had been done by Dhul-Qarnayn as a legal rule on the ground that the holy Sharā'i' which preceded Islam should be followed by the Muslims whenever a rule could not be found in Islamic sources, as some jurists decided so.[3]

But it does not seem that this verse could support the decision of Mālik on taxes. Otherwise Ibn-Manẓūr would not need to stipulate five conditions for the permission of assessing taxes other than zakāt. These conditions were the following: The first was that the necessity of these

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1. Q. 18.94.
2. See az-Zamakhsharī, Tafsīr, vol. 2, p. 743.
3. See al-Ghazālī, Mus., vol. 1, pp. 245-260.

taxes should be definite. The second condition was that these taxes should be spent justly on the Islamic affairs. Thirdly it should be spent within the limitations of the necessity, and not according to the desires. Fourthly this type of taxes should be prescribed only on those who are able to pay them. The fifth and last condition was that these taxes should be reconsidered from time to time in order to lift it as soon as the necessity ended. These were the five conditions stipulated by Ibn-Manẓūr for the permission of assessing taxes other than zakāt.[1] Obviously he accepted Mālik's decision which was based on the principle of the "unrevealed interest". He tried to support this decision by textual evidence. The Qur'ānic verse which he presented does not seem to give this support.

Another example which proves that Mālik used this principle, was the matter of monetary punishment. Jurists disagreed on it whether it was stated in the texts. Some of the jurists believed that this kind of punishment was stated by the practical Sunna. The Prophet once ordered His Companions to destroy every container of wine they found. And this was a kind of monetary punishment. The Companions after the death of the Prophet followed Him and applied this kind of punishment. Al-Lakhmī[2] the Mālikī scholar, preceded

1. See al-Murīr, op.cit., vol. 1, pp. 45-46.
2. Zayd Ibn-'Abd-ar-Raḥmān al-Lakhmī, known as Shabṭūn d. 193 A.H. After he left al-Andalus he met Mālik and learned Kitāb al-Muwaṭṭa' from him. Then he returned to Andalus and spread the teachings of Mālik. People in Andalus before that were following the school of al-Awzā'ī. Then they followed the Mālikī school. (See al-Murīr, al-Abḥāth, vol. 2, pp. 277-278).

Ibn-al-Qayyim by deciding that monetary punishment was stated by the Sunna. He presented the same example presented by Ibn-al-Qayyim, which is mentioned above. But however, Mālik himself and ash-Shāfi'ī after him declared that there was no evidence from the Sunna stating the monetary punishment. Mālik decided that monetary punishment could be stated based on the principle of the "unrevealed interest" whenever an offence affected properties. But regarding the certain torts (jināyāt) which had their specific punishments (ḥudūd) stated by the texts, their rules should not be changed into monetary punishment. For example, if one adulterated a commodity and intended to sell it but was caught before doing so, then he should be ordered to give it as charity. This is a clear monetary punishment. To Mālik, it was based on considering the "interest" which was not considered in particular by the texts.[1]

This was the attitude of the Mālikī school towards the principle of al-maṣlaḥa l-mursala. It might have become clear now that it was not a kind of following one's desires or abandoning the texts and the direction of the Sharī'a. On the contrary, it was a deep understanding of the objectives of the Sharī'a. This principle was applied in order to secure the "interests" which agree with these objectives. These "interests" should never contradict any of the texts or the principles of the Sharī'a. The

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1. See al-Murīr, Ibid., pp. 46-48.

principle of the "unrevealed interest" has not been and should not be applied to worship. It should be confined to the field of transactions (mu'āmalāt). Using this principle was meant to prevent difficulties, and bring about benefits for mankind. It is in fact a very important principle in the Sharī'a.

The Ḥanafī school and
the "unrevealed interest"

Abū-Ḥanīfa and his students did not use the term al-maṣlaḥa when they judged cases which were not judged by the texts or analogy or one of the rational methods which were restricted by particular characteristics. Because the Ḥanafī school's leaders did not use this term, a large number of scholars from different schools declared that the Ḥanafī school did not use the principle of the "unrevealed interest". Some other scholars believed that the Ḥanafīs even criticised this principle.[1]

It cannot be accepted that the Ḥanafīs did not use this principle, since they were the most known for using reason in the Sharī'a. Therefore, they were called the people of opinion (ahl ar-ra'y). The Ḥanafīs were well known as using the principle of al-ḥiyal more than any other school, as has been explained previously in this chapter. And this confirms that they were the group who strived most to bring about benefits and to secure the public "interests" and the individuals' "interests".

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1. See al-Āmidī, al-Iḥkām, vol. 4, p. 140.

By examining the rational decisions made by Abū-Ḥanīfa and his students, it would be clear that they based a large number of their decisions on the principle of the "unrevealed interest" under some other titles. Using different terms as synonymous with the term maṣlaḥa mursala was not a characteristic of the Ḥanafī school. The leaders of the other Sunnī schools did the same. Mālik for example, used the term istiḥsān and maṣlaḥa mursala as synonymous terms. He judged a large number of cases under the principle of the "unrevealed interest", and then he issued his famous statement, "al-istiḥsān is nine parts out of ten of all knowledge". He meant by al-istiḥsān here al-maṣlaḥa l-mursala, which means securing the "interests" which agree with the objectives of the Sharī'a by reasoning whenever there is no text or analogy or one of the specific rational methods mentioned previously deciding a case.[1]

According to the result of the investigation of the rational decisions made by Abū-Ḥanīfa and his students, it became obvious that the Ḥanafī school used and approved of using the principle of the "unrevealed interest". They did so under two terms, istiḥsān and 'urf. Abū-Ḥanīfa himself was well known for using the principle of istiḥsān. He used to judge some cases which have no revealed rules according to his personal thinking basing it on his deep knowledge of the Sharī'a. He used to say in these cases, astaḥsinu - which means I prefer - such and such rule when he could not find any clear evidence for judging a case. It

1. See Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 16.

was related that Muḥammad Ibn-al-Ḥasan said, "Abū-Ḥanīfa used to discuss the matters of reasoning with his companions. They used to dispute with him sometimes until he said, "astaḥsinu", then every one would cease dispute and accept the decision given by Abū-Ḥanīfa".[1]

This statement attributed to Abū-Ḥanīfa may give an impression that he put his personal views before those views presented by a number of his companions. But another stated ment about Abū-Ḥanīfa existed which contradicted this. It was related that when Abū-Ḥanīfa judged any case rationally, he used to consult all available contemporary men of knowledge. If they accepted his decision, then he asked Abū-Yūsuf to write it down. Otherwise, he would change his decision. He based his method (madhhab) on consultation (shūrā) and never was he obstinate. Sometimes he used to call all his companions and then present before them rational problems. They used to give their opinions and he used to give his. Then debates continued until they settled by approving one of these opinions, and then Abū-Yūsuf would write it down. This was his method until he established all his principles.[2] This second statement seems to have represented the real attitude of Abū-Ḥanīfa towards his companions and the men of knowledge of his time. But the first statement which showed that he used to say astaḥsinu and then nobody would continue disputing with him, was also related by trusted scholars. In order to reconcile the two statements, it

1. See Abū-Zahra, Usūl., p. 262.
2. Ash-Sha'rānī, al-Mīzān al-Kubrā, vol. 1, pp. 58-59.

should be said that, Abū-Ḥanīfa used to present the cases which needed rules through reasoning before his companions and the men of knowledge. He used to listen to their opinions and produce his own opinion. Then they discussed these opinions together. When they were all convinced that one of these decisions was closer to the objectives of the Sharī'a, they accepted it and ignored the others. If they could not reach an agreement, and it was difficult to support any of these opinions with evidence, then they returned to Abū-Ḥanīfa in order to select one of them. He then used to precede his selection by saying, astaḥsinu and then he mentioned his selected decision. It could be the opinion he produced first for discussion or could be one of the other opinions presented by the other scholars. After he had decided, there would be no point in disagreeing with him again. They used to stop arguments and accept his final decision. By this reconciliation the two statements would explain Abū-Ḥanīfa as a consultative man and not an obstinate man. At the same time it explained how he was trusted by his contemporaries as a reliable authority.

However, the word astaḥsinu which was used by Abū-Ḥanīfa was misinterpreted by his opponents in order to provee that he followed his own desires in his rational decisions which were based on istiḥsān. But this interpretation was rejected by all the trusted scholars even those from different schools. They accepted the reasonable interpretation presented by some leaders of the Ḥanafī school.[1]

1. See al-Ghazālī, Mus., vol. 1, pp. 274-275; Subkī, Jam'., vol. 2, p. 353.

One of the interpretations produced by the Ḥanafīs for istiḥsān "preference", was the interpretation of al-Karkhī. He said istiḥsān means, giving preponderance to one of two analogies relevant to one case, or giving preponderance to one Qur'ānic verse over another Qur'ānic verse since one of them is clearer in judging the given case, or doing the same thing in the field of Traditions or the sayings of the Companions. This interpretation of istiḥsān by al-Karkhī was criticised by a number of great scholars such as al-Ghazālī. Their criticism was that al-Karkhī was trying to give istiḥsān the characteristics of analogy or the characteristics of the texts in order to make it easily defendable. They added, that whenever a case was judged by a text or analogy or the sayings of the Companions, then these sources must be mentioned as the authorities of the rules and there would be no place for applying the principle of istiḥsān. Accordingly, the interpretation of al-Karkhī was not accepted since it did not apply to the real meaning of this principle.[1]

The meaning which was explained by the attitude of Abū-Ḥanīfa towards the new cases which had no clear evidence to judge them, was the real meaning of istiḥsān. It was to judge these cases rationally taking into account the general direction of the Sharī'a in order to secure "interests". And this brings the term istiḥsān to be synonymous to the term al-maṣlaḥa l-mursala. Accordingly, it was declared by many of the scholars that Abū-Ḥanīfa

1. See al-Ghazālī, ibid., vol. 1. pp. 282-283.

judged under the title of istiḥsān many cases which were judged by the other schools under the title of al-maṣlaḥa al-mursala.[1]

The following examples nay be presented for istiḥsān in the opinion of the Ḥanafīs. The general rule is that impure water (najis) should not be used for ablution. But it was decided by the Ḥanafī jurists and some others that the water in wells and large tanks is always regarded as pure (ṭāhir) for ablution. It can be made with the water of these places even if an unclean element were dropped into them. This was excluded from the above mentioned general rule. And this exclusion was justified by the impossibility of the water of these places being pure according to the religious meaning of purity of water. This decision was taken under the principle of istiḥsān since there was no other evidence supporting it. Another example for istiḥsān is that it was decided also that committing a very small dishonest act in the field of transactions such as trading, is forgiven. This is because it would be very difficult to avoid always such action in this field. Another example also, is that it was decided that if a partner in business lost the money with which he was working, and this sum included his partner's share, then he would be held responsible to pay his partner. This is in order to prevent untrue claims of losing shared money. All these decisions were based on the principle of istiḥsān.[2]

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1. See ash-Shāṭibī, al-I'tiṣām, vol. 2, p. 324; Khallāf, Uṣūl fī mā., pp. 74-75.
2. See Khallāf, ibid.; al-Murīr, al-Abḥāth, vol. 1, pp. 32-33.

The Ḥanafīs sometimes used to abandon analogy for istiḥsān. This was when istiḥsān seemed to be securing "interests" more than analogy. Neither analogy nor any other factor should be allowed to go against the fact that securing "interests" is the main objective of the Sharī'a. If analogy did not achieve this objective then it should be regarded as incorrect and accordingly, istiḥsān should be applied instead.[1]

There wasanother term under which the Ḥanafīs used the principle of the "unrevealed interest", that was the term custom ('urf). They called it, istiḥsān al-'urf. It means eventually, approving of some of the good customary practices which secure the people's "interests" where there are no texts or correct analogy judging new cases. The Ḥanafīs presented as an example for this the contract of manufacture ('aqd al-istiṣnā'). This was permitted in spite of the fact that the legal contract should be based on an existing article. The contract of manufacture is based on an article which is to be made. Nevertheless, it was permitted since it was a customary practice which facilitated life. Another example they presented was that of a person who made an oath that he would never eat any meat (laḥm), and then he ate fish, he would not be regarded as having broken his oath since the custom was not to call fish (samak) meat (laḥm). By this latter example they were alluding to the idea that customary practices may

1. See ash-Shāṭibī, Muwā., vol. 4, pp. 208-209.

restrict (tukhaṣṣiṣu) some general statements from the Qur'ān and the Sunna.[1] These were the two titles under which the Ḥanafīs used the principle of the "unrevealed interest".

The Shāfi'ī school and
the "unrevealed interest"

When reading generally the general statements of the scholars of the Shāfi'ī school, such as al-Ghazālī and al-Āmidī, one might first get the impression that ash-Shāfi'ī himself and all his followers rejected the principle of the "unrevealed interest". They criticised openly those who used this principle. Al-Āmidī, for example, stated in his book al-Iḥkām that the Shāfi'īs agreed on rejecting the principle of al-maṣlaḥa l-mursala.[2] Al-Ghazālī in his book al-Mustaṣfā regarded it as an untrue principle and discussed it under the title of al-uṣūl al-mawhūma.[3]

But by analysing and studying carefully the decisions and some statements made by the Shāfi'īs including ash-Shāfi'ī himself, it would become clear that they used this principle in practice. Al-Āmidī, for instance, after criticising some judgements attributed to Mālik based on this principle said, that Mālik would never judge a case according to the principle of istiṣlāḥ unless under three conditions. The first

1. See Khallāf, op.cit., pp. 74 and 145; Ibn-al-Humām, Taḥrīr, vol. 1, pp. 317-319; al-Āmidī, al-Iḥkām, vol.2, p. 310.
2. Al-Āmidī, ibid., vol. 4, p. 140.
3. Al-Ghazālī, Mus., vol. 1, p. 284.

condition is that the "interest" which is to be secured should be essential (darūriyya). The second is it should be for the public (kulliyya). The third condition is that it should be decisively secured by taking this type of rational decision (qat'iyya). Al-Āmidī defended the attitude of Mālik by saying that Mālik would certainly have taken into account these three conditions.[1] This statement which was made by al-Āmidī is actually a clear acceptance of using the principle of the "unrevealed interest" under these three conditions.

The ambiguity of the attitude of al-Āmidī seems to be drawn from al-Ghazālī's attitude towards this principle. The same process followed by al-Ghazālī occurred in the arguments of al-Āmidī. Al-Ghazālī himself after he put istiṣlāḥ under the title of "the untrue principles" and criticised it, presented the same above mentioned three conditions by which a correct istiṣlāḥ could be used. Accordingly, he accepted the decision that in war the Muslims can shoot at their enemy who are shielded by a number of Muslim captives, although this would mean killing their own Muslim people. This is because if they did not shoot then the whole community would face a definite danger. This decision was not based on the texts or analogy. It was based on the principle of the "unrevealed interest". Al-Ghazālī stated that the "interest" which would be secured by this decision is essential, for the whole community, and

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1. Al-Āmidī, op.cit., vol. 4, p. 140.

it would be decisively secured by this decision.[1]

The rational decisions of ash-Shāfi'ī and some of his statements proved that he definitely used this principle under the term of qiyās. He interpreted analogy either as giving a new case a rule of a revealed case, or judging it according to the general direction and spirit of the Sharī'a. This latter meaning is what was meant by the "unrevealed interest" in the other schools. Ash-Shāfi'ī stated in his Risāla that every action in life had already its rule in the texts or there are some indications and implications in the texts directing to its rule. In the latter case, rule should be obtained through ijtihād, which means analogy.[2] This wider sense of analogy was known at the time of ash-Shāfi'ī and Aḥmad Ibn-Ḥanbal as will be explained. It was known also before that, from the time of the Companions and from the time of the Prophet Himself, when the term ijtihād was used as synonymous with the term qiyās with wider sense. When the Prophet sent Mu'ādh to Yaman as a judge, He asked him how would he judge cases? Mu'ādh said that he would apply the texts of the Qur'ān and the Sunna. The Prophet then asked him, what would he do if he could not find a rule in these two sources? Mu'ādh answered that he would use his own reason (ajtahidu ra'yī) with honesty. The Prophet then approved of this process thanking God who guided Mu'ādh to the way which would

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1. See al-Ghazālī, Mus., vol. 1, pp. 294-296.
2. See ash-Shāfi'ī, ar-Risāla, p. 66.

satisfy God and His Prophet.[1] Mu'ādh included in the term ijtihād every aspect of reasoning. Certainly if he could not find a clear analogy, then he would judge new cases according to the general direction of the Sharī'a. And this is the meaning of al-maṣlaḥa l-mursala.

There is a statement attributed to Aḥmad Ibn-Ḥanbal which may be presented here as evidence that ash-Shāfi'ī used the term qiyās to include every way of reasoning. He said, "I asked ash-Shāfi'ī about using analogy. He told me to use it only if necessary". This was related by Ibn-al-Qayyim while talking about ra'y which was synonymous with ijtihād and qiyās. Ibn-al-Qayyim added that, in the early period of Islam they used ra'y only when it was necessary. They did not widen its use or make branches. This continued unchanged until some later scholars widened its use and put it into several forms. This confirms that ash-Shāfi'ī used the term qiyās which was known as synonymous with the term ra'y, and included in this term all methods of reasoning expressed by the later scholars in different terms. Accordingly he used the principle of the "unrevealed interest" under the term qiyās.[2]

The following example may show that ash-Shāfi'ī used the principle of the "unrevealed interest" under the title of analogy. Two witnesses gave evidence that a man divorced his wife three times. A judge accepted their evidence and

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1. See al-Ghazālī, op.cit., vol. 2, p. 59.
2. See Ibn-al-Qayyim, A'lām, vol. 1, pp. 33 and 70; Ibn-al-Humām, Taḥrīr, vol. 3, pp. 314-315.

separated the couple by order. If the two witnesses reversed their evidence and proclaimed that the man actually did not divorce his wife three times, then they should pay to the divorced woman a nuptial gift (ṣidāq) which is usually paid to one of equal standing. If the couple were separated before having any sexual intercourse, then the witnesses should pay half of that nuptial gift.[1] This decision was made by ash-Shāfi'ī and he called it qiyās. But in fact it was a decision based on the consideration of an "interest" which had no textual evidence or a clear analogy securing it. Such a decision could be changed by another decision according to the circumstances.

The Ḥanbalī school and
the "unrevealed interest".

The Ḥanbalī school was well known as using the principle of the "unrevealed interest" as was the Mālikī school. It was always connected with the Mālikī school by the scholars when talking about the use of this principle. Aḥmad Ibn-Ḥanbal himself included istiṣlāḥ in the term qiyās as it has already been pointed out. He acknowledged five legal sources for obtaining rules and he put them in a certain descending order. The first source he acknowledged was the texts of the Qur'ān and the very authentic Traditions. The second source was the decisions (fatāwā) of the Companions on which all of them agreed. The third source was the decisions of the Companions on which they disagreed. He

1. Ash-Shāfi'ī, al-Umm, vol. 7, p. 50.

used to chose the closest of their decisions to the Qur'ān and the Sunna. If not one of their decisions appeared to be closer to the texts than the rest, then he would only mention their disagreement without choosing any of their opinions. The fourth legal source acknowledged by Ibn-Ḥanbal was the weak Traditions. The fifth source was analogy. And he meant by analogy every way or reasoning including the "unrevealed interest".[1] These were the five sources mentioned as having been acknowledge by Ibn-Ḥanbal. But in fact they can be limited to four sources, the Qur'ān, the Traditions, the sayings and decisions of the Companions and analogy. He chose to advance the sayings of the Companions to the weak Traditions, therefore, he divided the Traditions into two sources. One division was joined with the Qur'ān and the other division was placed after the decisions of the Companions.

The rest of the Ḥanbalī scholars who followed Ibn-Ḥanbal in proclaiming their full acknowledgement and support to the principle of the "unrevealed interest" separated it from analogy. They issued many decisions based on it, to the point that the Mālikīs themselves needed sometimes to quote some of the Ḥanbalī decisions based on this principle.[2]

At-Ṭūfī (656-716 A.H.), the famous Ḥanbalī scholar, used the principle of the "unrevealed interest" and supported it strongly until he was accused of exceeding the

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1. See Ibn-al-Qayyim, A'lām, vol. 1, pp. 29-34 and 70.
2. See al-Murīr, al-Abḥāth, vol. 1, p. 40.

legal limitations in this respect. It is true that he was charged of being an extremist Shī'ite[1] but however, even those who accused him of being a Shī'ite acknowledged that he was first a Ḥanbalī.[2] He wrote a Risāla in support of this principle. He started his Risāla by interpreting the Tradition which says, "it is prohibited to start causing harm to others or to counter them by causing the same harm they caused to you" (lā ḍarara wa lā ḍirāra). Aṭ-Ṭūfī understood this Tradition as prescribing preventing harm and securing "interests" by any means. If these cannot be done by the texts then they should be achieved by reasoning. The charge of exaggeration which was attributed to him was based on the statement in which he made it clear that if the texts of the Qur'ān and the Traditions seemed to be contradicting the "public interest" then the "interests" should be secured and the particular texts should be restricted (yukhaṣṣaṣu).[3]

But it must be mentioned here that aṭ-Ṭūfī did not mean to abandon the definite texts (nuṣūṣ khaṣṣa), but rather he meant to restrict the general texts which seemed to reason to be contradicting the "public interest". He made this point clear later on in his Risāla.

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1. See Ibn-Hujr, ad-Durar, vol. 2, p. 154; Ibn-Rajab, Dhayl Ṭabaqāt al-Ḥanābila, vol. 2, pp. 366-377.
2. See the introduction to aṭ-Ṭūfī's Risāla published with Khallāf's book Uṣūl fī mā, 1970.
3. Ibid., pp. 110-111.

However, if aṭ-Ṭūfī was not accepted by some scholars as representing the Ḥanbalī school, the two profound Ḥanbalī scholars, Ibn-Taymiyya and his student Ibn-al-Qayyim would be very satisfactory representatives of this school. They accepted the principle of the "unrevealed interest" and they were well known as using it.[1] They started their support of this principle from the point of explaining that the Sharī'a was established on the basis of securing the public and individuals' "interests" as far as possible. If it were not possible to secure all of them unless by abandoning some of them, then the less important "interest" should be abandoned. The greater "interest" for the largest number of people must be secured. If two equal "interests" seemed to contradict each other then one of them should be secured and we should not abandon both.[2] Ibn-al-Qayyim added that, according to these facts, no jurist could talk about any kind of reasoning unless he first recognized that the Sharī'a was based on securing the "interests". Once this fact was recognized, then this basis of the Sharī'a should be secured by reasoning if it were not secured by the texts. The general direction of the Sharī'a should be taken into account. This idea was expressed by Ibn-al-Qayyim in many places of his different books.[3]

Ibn-al-Qayyim and his teacher Ibn-Taymiyya stated

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1. See al-Murīr, op.cit., vol. 1, p. 40.
2. Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 19-20.
3. See for example, ibid., vol. 2, pp. 32-33ff; A'lām, vol. 1, pp. 391 and 431.

that every revealed rule is definitely agreeing with the people's "interests". If ever a revealed rule seemed to be contradicting people's "interests" then it must be understood that the rational consideration of the "interest" was not correct. Since every revealed rule is agreeing with the "interests", then human reason should be used whenever a case were left without a text judging it. This is in order to secure these "interests" which were known by reason.[1]

A number of examples presented by Ibn-Taymiyya and Ibn-al-Qayyim regarding reasoning were based on the principle of "the unrevealed interest". The decision they took on the matter of shooting at the enemy shielded by a number of Muslim captives was based on this principle. They stipulated two conditions for permitting this shooting. The first condition was that there must be an inevitable danger facing the whole Muslim Army if they did not shoot. The second condition is the "interest" which is to be obtained by this shooting must be greater than that of securing the lives of the Muslim captives. The rest of the examples of using this principle were spread all through the books of Ibn-al-Qayyim and Ibn-Taymiyya.[2]

Thus all the Sunnī schools actually used the principle of the "unrevealed interest" in order to secure people's "interests". The jurists meant by the word "mursala" that the "interest" was not judged by the texts or analogy or by

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1. Ibid., p. 431; Ibn-Taymiyya, al-Qiyās, pp. 6-7.
2. See for example, Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 16-24.

any other method of reasoning which had certain characteristics. But certainly, every secured "interest" in the Sharī'a should always be judged by the general direction of the Sharī'a and its known five objectives. Securing of these objectives might be essential in some cases and might be less than essential in the second place, and in other cases. This latter degree was expressed in Arabic by ḥājī (necessary). The securing could be in a third degree which was even less important, which was expressed in Arabic by tazyīnī (embellishment). All these three types of objectives should be secured by istiṣlāḥ which is the application of securing the "unrevealed interest" whenever these objectives were not secured by the texts or the characterised rational methods mentioned previously.

There was no disagreement between the Muslim scholars on using this principle. The Prophet Himself approved of using it and the Companions followed Him and took many decisions based on it after His death. One of these decisions was writing down the Qur'ān. Then later on, at the time of the Caliph 'Uthmān they took another decision which was to "collect" the Qur'ān in a single text. Abū-Bakr also based his appointment of 'Umar as his successor on this principle.

Some of the people's "interests" are changing from time to time, and unknown necessary "interests" may occur. It would be necessary to consider these cases in order to find rules for them. Criticisms on this principle which occurred in the books of this field were not against the

principle itself, but rather they were against the incorrect use of it. Some dishonest jurists subjected this principle to their own desires and some others took decisions in order to secure some "interests" of individuals at the expense of "public interest". These criticisms were against these kinds of abuse. Apart from this, there was a unanimous practical use of this principle by all the juristic schools.

GENERAL CONCLUSION

In this thesis the function and application of human reason in the field of the Sharī'a have been discussed. The points of view of the scholars in the past were presented along with the evidence they produced. The question about the function of reason in the Sharī'a was not presented for open discussions until the time of the third generation after the Prophet (tābi'ī t-tābi'īn). But it should be mentioned that general thinking about using human reason in this field started from the time of the Prophet Himself according to a number of Traditions attributed to Him.[1]

After the death of the Prophet, the Companions followed Him in this respect. They did not put forward this question for open discussion. But their judgements on new cases which were not judged by the texts showed that they were aware of it. It might not have been important for them to discuss such a question.[2]

The only point connected with this matter, which was mentioned and disapproved of by the Prophet, was the use of human reason which is based on pure desires in the field of the Sharī'a. A number of Traditions mentioned the order of avoiding this, and avoiding reasoning which makes things complex.[3] The Companions followed the Prophet and produced

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1. See al-Āmidī, al-Iḥkām, vol. 4, pp. 28-30.
2. Ibid., pp. 35-38.
3. See Ibn-al-Qayyim, A'lām., vol. 1, pp. 73-74.

a number of precautions criticising this type of reasoning. The scholars of the next generation who followed the Companions (at-tābi'īn), such as ash-Sha'bī, Ibn-Dinār, and 'Umar Ibn-'Abd-al-'Azīz followed the same method.[1]

During the time of the third generation (tābi'ī t-tābi'īn), which was the time of Abū-Ḥanīfa, Mālik and ash-Shāfi'ī, reasoning had widely increased in this field. It was mentioned that some of the scholars at that time were excessive in this respect. These scholars were said to have subjugated the sayings of the Prophet Himself to their own reasoning. Whenever a Tradition disagreed with their rational judgements then they would reject the Tradition and follow their reasoning. They accepted every Tradition which agreed with their reasoning irrespective of its weakness.[2] These scholars were said to have extended and deepened the use of human reason.

The fear of losing the real meaning and bases of the Sharī'a started then. Going very far in reasoning may lead to abandoning the texts of the Qur'ān and the Traditions. The cautious scholars began to accuse those who went very far in using reasoning of intending to abandon or neglect the very strong and authentic Sunna. They accused them also of treating the texts of the Sunna as meaningless, and depriving these texts from their function. This means that they gave preponderance to human reason over the texts of the Sunna.

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1. Ibid., pp. 57-64 and pp. 77-78.
2. Ibid., p. 80.

Accordingly, the final decision should always be for reason.[1] This atmosphere of charging each other developed later on to the point that the Muslim scholars were divided into two groups; the people of reasoning (ahl ar-ra'y) and the people of Traditions (ahl al-Ḥadīth). The first group were the Irāqīs. They were accused wrongly of lack of knowledge in the field of Ḥadīth. The Ḥijāzīs were called the people of Ḥadīth. This is because they lived in a place in which the Prophet lived. They were expected to have more knowledge of Ḥadīth. These names which were suggested for these two groups might have been suggested by the followers of the people of Ḥijāz.

During this time of the third generation, it became important and urgent to discuss and make clear the place and limitations of using human reason in the field of the Sharī'a. This required dealing with the question, whether the revealed rules of the Sharī'a were based on specific "grounds", and if they were, what type of "grounds" they were? But the matter of the moral attributes of human actions was discussed first in this thesis since human actions are the subject of the rules of the Sharī'a. This was in order to clarify the connection between the Sharī'a and human reason in this regard. Discussions on the matter of the moral attributes of human actions started before the time of the third generation. The theologians dealt with it from another aspect. That is whether man has free will to chose his actions in this life, or whether he is compelled

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1. Ibid., p. 273.

and directed by Allah? The Mu'tazila were the first to discuss this.[1] These discussions were presented and extended by the jurists later on in order to establish bases for their subject, which is the place of reason among the "roots" of Islamic jurisprudence.

The question regarding the rational moral attributes of human actions was formulated as follows, have human actions rational moral attributes? and if they have, are these attributes in the actions themselves or are they additional and changing according to the circumstances?

The Mu'tazila held from the start that human actions have rational moral attributes in themselves. They classified these rational moral attributes into three types. The first type is clearly understandable. An example is goodness in rescuing people from danger and badness in hurting the innocents. These attributes do not need any consideration or help of the Sharī'a in order to understand. The second type needs consideration. An example is the goodness of telling the truth which causes harm and the badness of telling lies that results in benefits. These attributes need some consideration but still are understandable by human reason alone. The third type of attributes can be understood by the help of the Sharī'a. An example is the goodness of prayers, fasting and the rest of the acts of worship. Their goodness was known by the help of the Sharī'a.[2]

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1. See al-Ash'arī, Maqālāt, pp. 356-357.
2. See al-Ghazālī, Mus., vol. 1, pp. 55-56ff.

The Mu'tazila then were followed by some of the Sunnīs from the different schools who held the same opinion. Al-Kullābiyya, who were a group of the Sunnīs, were from those who followed the Mu'tazila.[1] It was related by Ibn-al-Qayyim who supported the Mu'tazila in this respect, that all the Ḥanafīs, all the Ḥanbalīs, most of the Shāfi'īs and some of the Mālikīs held the same opinion as the Mu'tazila. He added that all those who accepted that there are specific "grounds" for the Sharī'a rules, and accordingly used analogy, must accept also the existence of the rational goodness and badness in human actions. Otherwise, they would be holding contradictory opinions.[2]

But it seems that the claim of Ibn-al-Qayyim was slightly exaggerated. Most of the Sunnīs he mentioned had actually criticised the Mu'tazila for holding this opinion. But they acknowledged that some of their Sunnī colleagues supported the Mu'tazila.[3] And this confirmed that some of the Sunnīs from the four famous juristic schools held that human actions have goodness and badness in themselves.

The decision on the moral attributes of human actions affected a number of decisions on several other points. It affected the decision on the question of the rules of actions before the existence of the Sharī'a. The Mu'tazila and their supporters from the Sunnīs disagreed among themselves on this. The Mu'tazila were quoted as saying that actions

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1. See al-Qaḍī 'Abd-aj-Jabbār, Sharḥ al-Uṣūl., p. 89; al-Hazdawī, Usūl., p. 242.
2. Ibn-al-Qayyim, Miftāḥ, vol. 2, p. 42.
3. See al-Ghazālī, al-Mankhūl, p. 8.

which have clear goodness or clear badness are rationally judged. The first are prescribed and the latter are prohibited. Man's situation will be affected in the life to come by his observance or neglect of these rational rules. One will be either rewarded or punished according to his actions in this life. The Mu'tazila disagreed among themselves regarding the actions which are rationally neutral, having no clear goodness or badness. Some of them preferred not to take any decision on them. Another section decided that these actions are permitted. And a third section said these actions are prohibited.[1]

It seems that the Mu'tazila in fact meant that man rationally deserves reward or punishment in the life to come according to his actions in this world, but it might not definitely happen. The explanation of the Sharī'a to the rules of actions is fundamental regarding punishment in the other life. Those who decided that the neutral actions are rationally prohibited were a very small minority. There are no available details as to the exact size of this minority. But however, the opinions held by the Mu'tazila on some other matters disagreed almost completely with the prohibition of the neutral actions.

The Sunnīs who supported the Mu'tazila on the main question, ostensibly disagreed with them on the question of the rules of actions before the existence of the Sharī'a. These Sunnīs decided that actions known by reason as good

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1. Al-Ghazālī, Mus., vol. 1, pp. 63-65; Al-Baghdādī, Uṣūl, vol. 1, pp. 24-25ff. and pp. 149-150.

ought to be done, and actions which are known by reason as bad ought to be avoided. Man might be rewarded in the hereafter according to his doing of actions in this life which are described by reason alone as good. But man definitely will not be punished because of his doing of the rational bad actions. It is a condition for punishment that badness of actions should be explained by the Sharī'a. They added that this is the perfect justice of Allah.[1] This could be reconciled to the Mu'tazila's opinion if the latter was interpreted as the meaning mentioned above which seemed to be intended by them.

The upholders of the idea of the existence of the rational moral attributes in the actions themselves were confronted by a problem when they accepted the existence of abrogation in the revealed rules.[2] They appeared as contradicting themselves. Abrogation means to change a revealed rule to something which change may be to the opposite. This is not possible to happen while the moral attributes are in the actions themselves. These cannot be affected by the circumstances which are important for abrogation. They tried to show that their two decisions were not contradictory. But the arguments they produced for this brought them very close to those who regarded the moral attributes as always subjected to the changing circumstances. They might have avoided appearing to hold contradictory opinions

1. See Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 52-59; al-Baghdādī, ibid., vol. 1, pp. 24-25ff.
2. Al-Āmidī, al-Iḥkām, vol. 3, pp. 100-106, 125; al-Ghazālī, Mus., vol. 1, pp. 119-120.

if they had proclaimed that abrogation could happen only in the rules revealed for some neutral actions which have no definite moral attributes. However, the Mu'tazila and their supporters from the Sunnīs agreed on the point that abrogation should never happen in the rules which are fundamental in the Sharī'a. These are the rules that secure the bases of religion, life, reason, wealth and progeny.

As has been pointed out above, many of the Sunnīs held an opposite opinion to the Mu'tazila regarding the main question of the existence and non-existence of the moral attributes in human actions themselves. They rejected any existence of such attributes in actions. To them, actions have their moral attributes according to the circumstances. They decided also that actions before the existence of the Sharī'a had no specific rules whose results may appear in the life to come. This group includes, the Mālikīs, ash-Shāfi'ī and most of his followers, Aḥmad Ibn-Ḥanbal, all the Ẓāhirīs, and some other great scholars.[1]

The discussions made on the moral attributes of actions affected the opinions held on the matter of the "grounds" of the rules of the Sharī'a, the subject which caused rigorous and complex arguments and disputes among the Muslim scholars. The question put forward was as follows: Were the revealed rules of the Sharī'a based on specific "grounds"?

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1. See al-Baghdādī, Uṣūl., vol. 1, pp. 24-28; Ibn-Ḥazm, al-Iḥkām, vol. 1, pp. 52-53ff; Ibn-al-Qayyim, Miftāḥ, vol. 2, pp. 24-25, 40.

and if so, were these "grounds" rational? It was explained in this thesis how the scholars were divided into more groups each holding different views in order to answer this question. It was clear that the majority of those who objected to the idea of the existence of goodness and badness in human actions themselves accepted the existence of the "ground" in the Sharī'a rules, only the minority of them rejected this.

However, there were two main groups holding two different opinions on this matter. The first, which were the large majority, proclaimed their decision that the rules of the Sharī'a were based on specific "grounds". This group includes the Mu'tazila and their supporters from the Sunnīs on the matter of the existence of the rational moral attributes in human actions themselves. It also includes the rest of the Sunnīs who ostensibly joined the Ẓāhirīs and rejected the above mentioned idea.[1] Accordingly, this group in fact includes all the Sunnīs and all the Mu'tazila. Even those who tried to criticise the use of analogy in the field of the Sharī'a such as an-Naẓẓām and the Shī'ites accepted this decision.[2] The members of this group have some differences among themselves regarding the nature of these "grounds", whether they are rational or merely revealed irrespective of the rational justification.

The second group includes only the Ẓāhirīs. They

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1. See pp. 31-32 of this thesis.
2. See p. 32 of this thesis.

proclaimed that the rules of the Sharī'a were not based on specific "grounds", but rather they were based on revealed "grounds". Each of the two main groups presented arguments and evidence in order to support their decision. Each of them also criticised and blamed the other for disagreeing with the truth. The Ẓāhirīs raised more severe criticisms against the upholders of the "grounds".

The upholders argued that the rules of the Sharī'a existed to secure the "interests" of public and individuals. Every single rule of the Sharī'a has its own "ground" which contributes to this aim. These rules were to secure, first the more important "interests" which includes the larger number of people, and then to secure the "interests" of the individuals as long as the latter would not cause the negligence of the more important ones. They presented examples and evidence to support this.[1]

These upholders of the "grounds" were divided into two sections when they discussed the nature of these "grounds", whether they are rational. The first section was the Mu'tazila and those who supported them on the question of the existence of the goodness and badness in human actions themselves. They decided that the "grounds" of the rules of the Sharī'a are rational. And thus human reason would be convinced that these rules are actually securing the public "interest". If ever reason was not able to understand a "ground" of a particular rule, then this inability

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1. See pp. 32-33ff. of this thesis.

should not be regarded as a defect in the rule, but rather it is in the reason itself. This particular rule is definitely securing an "interest" even if this securing were not known to reason. To this section of the upholders, the revealed rules should always correspond to the rational goodness and badness of actions in themselves. The "ground" of every Sharī'a rule has an effect on the existence of the rule. To them 'illa (ground) and maṣlaḥa (interest) are synonymous.

The other section includes most of the Sunnīs. They decided that the "grounds" of the Sharī'a rules are merely signs (amārāt) created in order to indicate certain rules. They have no connection with convincing human reason of the relevance of the rules, and have no effect on the existence of them. In their opinion the term 'illa and maṣlaḥa are different. 'illa in the Sharī'a is merely a sign which might or might not indicate the maṣlaḥa secured by a rule. To them it is not necessary to understand the maṣlaḥa of every Sharī'a rule. And maṣlaḥa should not be regarded as a "ground" of a rule since it is not stable. It has not a single standard. It is sometimes very clear, sometimes less clear, and sometimes completely disappears. For example, when travelling a permission was given to break the fast in order to avoid difficulty. Difficulty does not always exist in travel. Therefore, its avoidance should never be regarded as the basis of the rule. The "ground" should always be a stable sign. To them there is no difference between a rule and its "ground". Both of which

were created by the Sharī'a. The Sharī'a can base a rule and its contrary on the same "ground". For example, the prohibition of wine was based on the "ground" of the strength of wine which causes the disturbance or loss of reason. The Sharī'a can regard the same strength of wine as a "ground" for permitting drinking it.[1]

This section of scholars faced some problems when they came to deal with the deduced "ground". Their decision on the nature of the "ground" of the Sharī'a rule as a "mere sign" can be acceptable only if the "ground" was revealed. But if it was deduced then it would not be acceptable to produce a mere irrational sign. They should seek a rational "ground" which could be rationally acceptable. This is where their opinion became obscure. They were obliged to make a distinction between the deduced "ground" and the revealed one. They regarded the deduced as rational and, as has been pointed out, the revealed as a "mere sign". They tried to adapt the deduced "ground" to the revealed. In the case of deduction they sought stable attributes (_'ilal_) which are connected with the real "grounds" (_ḥikam_) and appointed them to serve in the capacity of the "grounds". For example, the "ground" of the permission given to travellers to break the fast in the daylight of Ramaḍān was not explained in the texts. When these scholars came to deduce a "ground" they realized that the actual "ground" was the difficulty which a traveller might suffer. But since

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1. See al-Ghazālī, _Mus._, vol. 2, p. 72; ash-Shawkānī, _Irshād_, p. 181.

this difficulty might not occur in some easy journeys, they appointed the travel itself as a "ground" of this permission. They supported this by saying that the fact of travel is always the same and it is held to comprise of some difficulty.

This was generally the opinion of those who decided that the "ground" in the Sharī'a is not subject to rational judgement. This made them completely disagree with the Mu'tazila and their Sunnī supporters who decided that all the "grounds" of the Sharī'a rules should be rational. But in the course of the discussions presented in this thesis it was explained that this group who rejected to call the Sharī'a "ground" rational, have stipulated the rational relevance of the "ground" to a Sharī'a rule as a condition for the sound "ground". They acknowledged that people would be convinced of a rule which was based on a rational "ground", as actually the rule which could secure the "public interest".

This was of course, an obvious recognition that it is necessary for the "ground" of the Sharī'a to be rational. Therefore, they seemed to have contradicted themselves. They tried to avoid this contradiction by saying that the relevance of the "ground" to the rule should be supported by the texts. They seem to have meant by this condition that relevance should be supported by the general spirit of the Sharī'a, which is of course, supported by the texts. This is because they accepted in fact the relevant "ground" which has no particular textual evidence to support it

except the general spirit of the Sharī'a. They also fully recognized that the whole Sharī'a was revealed in order to secure public "interest". Each of the individual rules of the Sharī'a was prescribed for securing a particular public "interest", and every rule which secures a public "interest" is based on a rational relevant "ground". This brought them closer to the opinion of the first group who upheld the idea of the rational "ground". But, as has been explained previously, they may have intended, by proclaiming their criticism to the rational "ground", to defend some of the Sharī'a rules which were revealed, but, as these scholars think, human reason is not able to understand their real "grounds". An example of these kinds of rules is the prescription of specific numbers of bows (rak'āt) in the prayers. They called these types of rules, aḥkām ta'abbudiyya, which means that they should be accepted and applied merely for obedience to Allah and without questioning them. But the main reason for their main decision seems to be that they did not want to give humans an uncontrolled freedom in the field of the Sharī'a. They believed that deciding that the "grounds" of the rules of the Sharī'a should always be rational would mean that the rules of the Sharī'a are subjected to the approval and disapproval of human reason. But, however, their opinion ultimately is not far from that of the Mu'tazila and their supporters from the Sunnīs. It was only the careful method they followed which brought about some differences in the way they presented their opinion.

The Ẓāhirīs appeared as the most severe opponents of the existence of "grounds" in the Sharī'a rules. They claimed that Allah never revealed any rule nor did any action for a particular "ground". If ever He Himself or His Prophet stated that a particular rule was based on a particular reason, we should understand that this is only a reason created by Allah, and has no effect at all on the existence of the rule. This particular rule should have no extended application. It should be restricted to the case mentioned in the text.[1] They tried also to refute every piece of evidence presented by the upholders of the "ground".

Sometimes, or almost most of the times, the Ẓāhirīs had very weak bases for their arguments, especially when they tried to refute the textual evidence presented by the upholders. Sometimes they found themselves compelled to accept that a particular Qur'ānic verse or a particular Ḥadīth stated a basis for a rule. But they did not like to damage their opinion by proclaiming clearly such acceptance. Therefore, they insisted that such a basis should not be called 'illa "ground", but it should be called a created sabab "reason". Their attempt to make a distinction between 'illa and sabab did not seem to have succeeded. It may be said generally that they have exceeded in putting restrictions for using human reason in the field of the Sharī'a, but they could not avoid using it in practice.

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1. See Ibn-Ḥazm, al-Iḥkām, vol. 8, pp. 76-77.

Human reason has been used in practice in the field of the Sharī'a by all the Muslim scholars in the past. It was criticised ostensibly by the Ẓāhirīs. During the first century of the Hijra, right from the time of the Prophet Himself, all the methods of using human reason in this field had one term, that was ra'y (opinion).[1] In the second century, another term took the place of the first term. This was qiyās (analogy). This term with this wider sense, was also equivalent to the term ijtihād. Some other terms regarding the use of reason appeared during the time of the Companions, but they were not used as technical terms until the third century of the Hijra when these terms began to have their technical meanings. Some examples of such terms are maṣlaḥa istiḥsān etc.[2] The term qiyās later on had its own particular confined technical meaning. Each of the terms which appeared in this field also represented a particular method of using reason in the Sharī'a.

The first and most authentic practical method of using reason was analogy. It was practised by taking individual texts of the Qur'ān, the Sunna, and the previous decisions based on reasoning as standard. Nevertheless, the Muslim scholars disagreed as to whether it is a correct and reliable method which is permitted by the Sharī'a to be followed. Those who rejected it as a correct method of obtaining Sharī'a rules were groups from different schools

1. See al-Ghazālī, Mus., vol. 2, pp. 58-59; Ibn-Rushd, al-Muqaddimāt, pp. 19-20.
2. See ash-Shāfi'ī, ar-Risāla, p. 71.

and sects. They based their decision on different reasons, but agreed on the final result. These groups were: all the Ja'farī Shī'ites, some of the Zaydī Shī'ites,[1] an-Naẓẓām and his followers from the Mu'tazila,[2] and the Ẓāhirīs who were the strongest opponents to analogy.[3] All the rest of the schools upheld analogy as a correct method and tried to give it a precise definition.[4]

Some of the opponents of analogy, such as an-Naẓẓāmiyya of the Mu'tazila and the Ja'farī Shī'ites, claimed that it is rationally impossible to consider analogy as a part of the Sharī'a. But their claim and arguments were refuted by the upholders.[5] But on the other hand, as has been explained previously, these opponents gave human reason an unlimited freedom to judge new cases without following the method of analogy which they rejected.

The Ẓāhirīs' opinion against analogy was interpreted by some of the upholders as a rejection of some types of analogy and not all the types. Ash-Shawkānī, for example, while referring to the Ẓāhirīs, said that they did not reject analogy completely. They accepted it when its "ground" is mentioned in the texts.[6]

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1. See al-Ash'arī, Maqālāt, pp. 17, 53, 74; al-Baghdādī, Uṣūl., pp. 19-20.
2. See al-Baghdādī, ibid.
3. Ibn-Ḥazm, al-Iḥkām, vol. 7, pp. 55-56.
4. See ash-Shawkānī, Irshād, p. 174; al-Āmidī, al-Iḥkām, vol. 3, pp. 167-169; ash-Shāfi'ī, ar-Risāla, p. 66.
5. See pp. 145-146ff. of this thesis.
6. Ash-Shawkānī, Irshād, pp. 178-179.

Another rational method of using human reason in the Sharī'a was "interest", maṣlaḥa. It was the widest rational method used by the Muslim scholars in the field of the Sharī'a. Using human reason based on this method depends entirely on the recognition of the existence of the rational "grounds" in the revealed Sharī'a rules, in order that the aims of the Sharī'a can be rationally understood and be secured in the cases which have no revealed rules. According to this fact, all those who denied the existence of the "ground" in the rules of the Sharī'a, and those who acknowledged its existence but considered it irrational, should have rejected the use of reason based on "interest". But the matter was not so. The only group who rejected its use were those who denied entirely the existence of the "ground" in the rules of the Sharī'a.[1]

The securing of "interest" by reason in the field of the Sharī'a appeared in different forms and had different terms. It appeared sometimes in the form of considering customs of people, and was given the term of 'urf.[2] Sometimes it appeared in the form of considering means of actions, and this was given the term of dharā'i'.[3] Other times it appeared in considering "interest" without the help of 'urf or dharā'i', but only by taking into account the general spirit and direction of the Sharī'a, and this was given the term of maṣlaḥa mursala (unrevealed interest).[4]

1. See Ibn-Ḥazm, al-Iḥkām, vol. 6, pp. 16-17ff.
2. Ibid., vol. 2, pp. 287-288ff.
3. See al-Qurṭubī, Tafsīr, vol. 2, pp. 51-53.
4. See ash-Shāṭibī, al-I'tiṣām, vol. 2, pp. 292-298.

There was another term which appeared in this field and was said to have been used by some scholars. That is the term of ḥiyal (legal device).[1]

"Interest" (maṣlaḥa) was interpreted in this field as securing the objectives of the Sharī'a; the essential objectives (ḍarūriyya), the objectives which are less important than essential but necessary (ḥājiyya), and the even least important, those which are for embellishment (tazyīniyya).[2] This "interest" in Islam is not confined within the limitations of this life, but rather, the life to come is taken into account. It is neither motivated by the materialistic demands nor is it always affected by desires of individuals. By these characteristics it was different from "interest" in its general Arabic meaning, or as it was understood by some philosophers.[3]

Regarding the first rational form in which the use of the principle of "interest" appeared, the customary practices, it was related that all the juristic schools accepted it.[4] These customary practices are two types. They are the particular ones which exist in one country or town or among a certain group of people such as the shoe-repairers, and the general ones which exist in all countries.

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1. Ibn-al-Qayyim, A'lām, vol. 3, pp. 243-244.
2. See al-Ghazālī, Mus., vol. 1, pp. 286-287ff.
3. See ash-Shāṭibī, Muwā., vol. 2, pp. 37-38 and 170-171; Aḥmad Amīn, al-Akhlāq, pp. 107-108.
4. Ibn-al-Qayyim, A'lām, vol. 3, p. 99.

The place of the particular ones among the "roots" of jurisprudence is after the Qur'ān, the Sunna and analogy. And the place of the general customary practices was a matter of disagreement between the scholars. The jurists other than the Ḥanafīs put them in the same place as the particular ones, after the above mentioned three sources. The Ḥanafīs decided that the general ones may be advanced sometimes over a general text of the Qur'ān and the Sunna or over previous analogy held on the concerned case. Analogy in this case would be abandoned, and the general texts can be restricted (mukhaṣṣaṣa) by the general customary practice.[1]

The second form of using the principle "interest" in this field, which is the consideration of the means of actions (dharā'i'), was a point of dispute between the scholars. The Mālikīs and the Ḥanbalīs proclaimed clearly their acceptance of it and used it in practice as an independent principle.[2] The Ḥanafīs and the Shāfi'īs did not declare it as an independent principle or discuss it under this particular title. But they used it in practice in many cases.[3] The Ẓāhirīs rejected it and criticised severely those who accepted it.[4]

The consideration of the means of actions means that they should be given the same rules which were given to actions by the texts of the Sharī'a. The means which lead

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1. See al-Āmidī, al-Iḥkām, vol. 2, p. 310; Abū-Zahra, Uṣūl, p. 274.
2. See ash-Shāṭibī, Muwā., vol. 4, p. 198; Ibn-al-Qayyim, A'lām, vol. 3, p. 175.
3. Ash-Shawkānī, Irshād., p. 217.
4. See Ibn-Ḥazm, al-Iḥkām, vol. 6, p. 13.

to good actions should be prescribed or recommended (mandūb) and the means which lead to bad actions should be prohibited or reprehensible(makrūh). This is, the upholders argued, because the Sharī'a is perfect and in the highest degree of wisdom and in securing the public "interest". Accordingly, it should have considered the means of actions and applied to them the same rules of actions. This consideration would be either by the texts or by permitting reason to consider and judge them. If the means of actions were not considered, then the whole construction of the Sharī'a would be confused and the objectives of the Sharī'a will not be secured.

The title under which considering "means" was discussed by the jurists was "the closing of adh-dharā'i'". They were more anxious about the means which lead to bad actions. But they dealt with the opening of the "means" which lead to good actions under the same title and sometimes under the title of ḥiyal.[1]

The subject of ḥiyal (legal devices) is very closely connected with the subject of dharā'i'. Ḥīla originally had several meanings. It could mean evasion or "means" or one of the other meanings mentioned previously.[2] This term occurred in the field of the Sharī'a and it was said that the Ḥanafī school used it in some rational judgements. The opponents of the Ḥanafī school said, that the Ḥanafīs used

1. See al-Qarāfī, Tanqīḥ al-Fuṣūl, p. 200.
2. See Q. 4.98; See this thesis, p. 182.

reason basing their use sometimes on evasion. But the Ḥanafīs and those who seem to be just, from the other schools, proclaimed that the Ḥanafīs never based any of their rational judgements on evasion.[1] There was disagreement even on the term ḥiyal itself as to whether it was used by the leaders of the Ḥanafī schools? In this thesis it was explained that ḥiyal which were used by the Ḥanafīs were types of searching for "means" which lead, either definitely or probably to the opening of the doors to good actions. These doors might have been closed by some conditions of other rational judgements made by jurists. Sometimes opening these doors could mean fulfilling a Sharī'a order in an easier way for certain reasons.

These types of ḥiyal were accepted and used by all the juristic Sunnī schools, and not only by the Ḥanafīs. It is true that the Ḥanafī school was more well known for using this principle than the other schools. But in practice, all of them actually used it.[2]

The fourth form of using the principle of "interest" in the Sharī'a was represented by the al-maṣlaḥa al-mursala, which has been interpreted in this thesis as "the unrevealed interest". This is the form of the practical use of reason on which a great deal of disputes and discussions were held. The first impression which might be taken from this term is that this type of reasoning is based on pure human desires.

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1. See ash-Shāṭibī, Muwā., vol. 2, pp. 379-380; Ibn-al-Qayyim, A'lām, vol. 3, pp. 377-402.
2. See ash-Shāṭibī, ibid., vol. 2, pp. 387-391.

But reasoning based on pure human desires would never be accepted in the Sharī'a, and would never be regarded as a legal method of obtaining rules. The "interest" which is meant to be secured here is always confined to the Islamic meaning of the term. That is the securing of the objectives of the Sharī'a. The most important of these objectives are the five essential ones, which are: religion, life, reason, progeny, and wealth.[1]

The word mursala (unrevealed), is a technical term intended to imply that there is no text or analogy or any of the forms of using the principle of "interest" and connected with 'urf, dharā'i', or ḥiyal judging the concerned case. When applying the principle of the "unrevealed interest", the general direction of the Sharī'a should always be taken into account.

The Mālikī school was more known for using this principle. They accepted it as an independent principle. The Ḥanbalīs adopted the same opinion. The other juristic schools, which are the Ḥanafīs and the Shāfi'īs, used this principle, but under different titles and terms, such as, analogy and customs. The Ḥanafīs sometimes gave it an independent title, that was, the term of istiḥsān.

There was no disagreement between the Muslim scholars on using this principle. The Prophet Himself approved of using it and then the Companions followed Him taking many decisions based on it. One of such decisions taken by the Companions was writing down the Qur'ān which was learnt by

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1. Ash-Shāṭibī, Muwā., vol. 2, p. 8.

heart. Later on, during the time of the Caliph ʿUthman, they took another decision based on this principle. It was writing down the Qur'ān in a single copy. Abū-Bakr also based his appointment of ʿUmar as his successor on this principle.[1]

Some of the people's "interests" are changing from time to time, and unknown necessary "interests" may occur. It would be necessary to consider these cases in order to find rules for them according to the circumstances. The criticisms which occurred in the books accompanying this subject were not against the principle, but rather they were against the abuse of it.

Some scholars in the past subjected this principle to their own desires, and some others took decisions in order to secure some individuals' "interests" at the expense of the public interest. The criticisms were against these types of abuses of this principle. Apart from this, there had been a unanimous practical use of it by all the different juristic schools.[2]

The field in which the "unrevealed interest" is to be considered is the field of transactions (mu'āmalāt). It could be considered, for example, in trading, industry, the different types of labours, torts, marriage, divorce, financial institutions, house rent and the like.[3] The acts

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1. See ash-Shāṭibī, al-I'tiṣām, vol. 2, pp. 287-288ff.
2. See this thesis, p. 228.
3. See ash-Shāṭibī, op.cit., vol. 2., p. 311; al-Murīr, al-Abḥāth, vol. 1, pp. 40-41.

of worship are not subjected to this type of reasoning. The forms and times of worship were revealed and should be performed as such.

Human reason has a great importance in the field of the Sharī'a. This is a fact which is supported by the evidence of the Qur'ān and the Sunna. It is supported also by rational evidence and by the practice of the honest Muslim men of knowledge, all through Islamic history. The function of human reason in the Sharī'a is fundamental to the purpose for which reason was created.

GLOSSARY OF ARABIC TERMS

‘ādāt, customary practices, 155, 162.

ad-dawarān, "circulation", 118, 129, 130, 131, 132, 133, 134.

adhān, calling for prayer, 16.

aḥkām ta‘abbudiyya, the revealed rules whose "grounds" are not clear to reason, and they should be accepted as they are for the obedience of God, 50, 73, 242.

ahl al-ḥadīth, people of Tradition, 231.

ahl ar-ra’y, people of opinion, 211, 231.

al-‘aks, a rule which is based on a particular "ground" should not be applied to any other case unless the same "ground" is present, 54.

‘alāma, a sign, 76.

al-ma‘nā, the meaning, 118, 120, 121, 122, 123, 125, 131, 132.

al-maṣlaḥa l-mursala, "unrevealed interest", 3, 63, 154, 200, 201, 210, 212, 215, 216, 218, 221, 246, 250.

al-muḥallil, a husband whose marriage was intended to make it possible for a separated couple to be reunited, 190, 191, 192, 201, 210, 212, 215.

al-qiṣāṣ, execution as punishment for murder, 55.

al-qiyās al-khafī, the unclear analogy, 123, 124.

al-‘uqalā’, sensible people, 8.

al-Uṣūl al-mawhūma, the untrue principles, 218.

amārāt, signs, 39, 239.

amwāl, "goods", 87.

‘aqd al-istiṣnā‘, the contract of manufactor, 217.

‘aql, reason, 155.

ash-shabah, similarity, 118, 125, 127.

‘āsī, rebel, 139.

aṣl, the "original case" in analogy, whose "ground" is to be applied to a new case, 44, 108.

asnām, idols, 193.

'asr, afternoon, 62.

astaḥsinu, I prefer, 212, 213, 214.

at-ta'abbud, full submission and obedience to God and applying His revealed rules without condition of being rational, 145.

at-tābi'īn, the second generation after the Prophet, 230.

aṭ-ṭarad, "following", 118, 128, 130, 133, 134, 135, 136.

bay' al-ajal, selling goods on credit, 192.

ḍarar, harm, 224.

darūriyya, essential, 154, 157, 204, 219, 247.

dharā'i', means, 154, 171, 172, 173, 174, 175, 176, 177, 179, 180, 181, 182, 183, 193, 194, 195, 246, 248, 249, 251.

dīn, religion, 154, 163.

ḍirār, causing the same harm to others which has been caused by them, 224.

far', the new case for which a rule is to be established by analogy, 45, 114.

fatāwā, legal decisions, 222.

fay', property taken away from the people of township without resistance, 35, 67, 87, 88, 89.

fiṭra, man's nature, 164.

furū', "branches", new cases, 113.

ghanīma, property taken away from the enemy in the battle-field, 35, 87, 88.

gharaḍ, purpose, 76.

ḥādith, created, 105, 164.

ḥajiyya, necessary, 154, 156, 157, 204.

ḥakīm, wise, 37, 94.

ḥalāl, permitted, 176.

ḥalīm, forgiving, 90.

ḥarf ta'līl, a particular letter for showing the "grounds" of rules and actions, 67.

ḥashawiyya, those who believe that God has a body and figures like man, 136.

ḥikma objective (in the Sharī'a rules), 38, 40, 46, 48, 49, 50, 51, 240.

ḥimā, protected area, prohibited area, 176.

ḥiyal (sing. ḥīla) legal devices, 3, 154, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 211, 247, 249, 250, 251.

ḥudūd, specific types of punishment named for particular crimes, 137, 138, 139, 155, 210.

ḥukm, rule, 108.

ḥunafā', upright men, 164.

'Īd al-aḍḥā, celebration of sacrifice, 93.

'idda, waiting period after termination of the marriage, 196.

ijmā', consensus, 168.

ijtihād, independent judgement, 104, 106, 220, 221, 224.

'illa, "ground", 31, 38, 40, 41, 75, 76, 77, 84, 85, 93, 99, 100, 106, 117, 239, 240, 243.

istiḥsān, preference, 104, 140, 168, 201, 212, 214, 215, 216, 217, 244, 251.

istiṣlāḥ, taking public interest into account, 104, 127, 201, 212, 219, 222, 227.

iṭṭirād, regularity, 162.

jam', performing two prayers of a day at one time, 61.

jihād, holy war, struggle, 138.

jināyāt, torts, 156, 210.

kadhib, telling lie, 22.

kaffara (p. kaffārāt), religious expiation, 57, 137.

ḵamr, wine, 60, 112, 120, 124, 139.

khid'a, trick, 182.

kulliyya, for all public, 219.

laḥm, meat, 217.
madhhab, collection of legal decisions, school, 167, 213.
mafhūm an-naṣṣ, implications of texts, 123.
maghṣūb, extorted, 161.
makhārij, ways out, 186.
makrūh, reprehensible, 164, 249.
māl, wealth, 155.
mandūb, recommended, 173, 249.
marātib, grades, 118.
masālik at-ta'līl, methods of ascertaining sound "grounds", 65.
maṣḥ, touching, 125, 126.
maṣlaḥa, "interest", 3, 38, 40, 84, 104, 153, 154, 157, 201, 211, 239, 244, 246, 247.
milal, cults, 155.
mu'āmalāt, transactions, 155, 196, 199, 202, 211, 252.
mubāḥ, neither obligatory/recommended nor reprehensible/prohibited, 90, 164, 173.
mujtahid, highly qualified jurist who uses ijtihād, 166, 170.
mukhaṣṣaṣa, restricted, particularized, 166, 248.
munāsiba, relevant, 46.
munāẓarāt, debates, 113.
muqaddarāt, rules of fixed numbers or amounts, 137.
muqtir, parsimonious, 157.
murāwagha, evasion, 182.
musrif, extravagant 157.
muta'addiya, with extended application, 51.
mutawātir, transmitted through groups, 16.
muṭṭarida, regular, 162.

nabīdh, an intoxicant made from dry grapes, 112, 130.

nafaqa, maintenance of divorced wives during the waiting period, 196.

nafs, life, 155.

najāsāt, impurities, 164.

najis impure, 216.

nasl, progeny, 155.

nuṣūṣ ʻāmma, general texts, 166.

nuṣūṣ khāssa, definite texts, 224.

nuṣūṣ qatʻiyya, decisive texts, 202.

qadhf, defamation of character, 78, 139, 155.

qadīm, eternal, 105.

qāṣira, with restricted application, 51.

qaṭʻ aṭ-ṭarīq, brigandage, 55.

qatʻī, decisive, 115, 119.

qirāḍ, financial loans, 156.

qiyās, analogy, 103, 104, 136, 220, 221, 222, 244.

qudsī, holy, 164.

rakʻāt, bowings in prayers, 73, 114, 242.

raʼy, opinion, 103, 221, 244.

riba, usury, 69.

rukhaṣ, permissions given by the Sharīʻa for certain circumstance, 137.

sabab, reason, 75, 76, 77, 84, 85, 93, 99, 100, 179, 243.

sadd adh-dharāʼiʻ, closing of the means which lead to prohibited actions, 203.

samak, fish, 217.

shakk, uncertainty, 161.

shart, condition, 166.

shuf'a, pre-emption, 38, 40.

shūrā, consultation, 213.

sidāq, nuptial gift, 222.

sidq, telling the truth, 22.

sukārā, drunk, 120.

tābi'ī t-tābi'īn, the third generation after the Prophet, 229, 230.

tadbīr, expedient, 182.

ṭāhir, pure, 216.

takhṣīṣ, restriction, particularization, 115, 203.

tayammum, touching of one's own hands and face, after putting his hands on pure dust or stone, in order to fulfil prayer. This is when washing may cause harm, 125.

taysīr, easiness, 161.

tazyīniyya, for embellishment, 154, 157, 204, 247.

'urf, custom, 3, 154, 160, 168, 169, 171, 212, 217, 246, 251.

wasīla, means, 182.

wuḍū', ablution, 125, 161.

yaqīn, certainty, 161.

yawm al-aḍhā, the day of sacrifice, 36.

yukhaṣṣaṣu, to be restricted or particularized, 203.

yukhaṣṣiṣu, to restrict or particularize, 117.

ẓanniyya, indecisive, probable, 116.

ẓuhr, noon, 62.

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