*Legal Reasoning (*Ijtihad*) and Judicial Analogy (*Qiyas*) in Jewish and Islamic Jurisprudential Thought*

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Legal reasoning and judicial analogy in medieval rabbinic thought may be examined on three axes of discussion. The first pertains to the relationship between the Talmudic and the post-Talmudic legal thought. Along this axis indispensable gaps between Talmudic and post-Talmudic conceptions are observed. Hence a major effort is being paid to reconcile them and to preserve the continuity between the two worlds. The second axis expresses the complex relationships between a rationalistic approach, which highlights human reason as essential element of any legal activity, and the traditionalist approach, that takes the existing law as an outcome of the revelation. Against this background, in the Jewish as well as the Islamic intellectual arena, various attempts were made to resolve this tension. According to some historians of Islamic legal thought, this tension itself, which reached its peak during the course of the eighth century, led to the flourishing of jurisprudence as an autonomous discipline of knowledge and to the emergence of the *usul al-fiqh* literature. Notwithstanding signs of similar tensions in the Jewish world during this same period, it did not reach the same intensity as it did on the Islamic side, nor did it even serve as a stimulus for extensive intellectual ventures of formulating theoretical and methodological schemes. Nevertheless, as we shall see below, the epistemological and theological issues discussed in Islamic legal scholars filtered down to the rabbinic world, and following that a reflective thought vis-à-vis the halakhah was formulated. Thus not only did Geonic legal thought borrow its technical terminology from the Islamic world, but even the basic patterns of thought developed by Islamic legal thinkers were adjustably applied to the Jewish law. The third axis relevant to the issue of judicial analogy in tenth century Jewish legal thought is the Rabbinate-Karaite polemic, which reached its peak during the first half of that same century. Legal reasoning and judicial analogy in particular, have been mentioned by scholars as one of the central topics that lay at the heart of the ideological dispute between the Rabbinates and the Karaites.

Judicial Analogy (Qiyas) in Islamic Jurisprudence

The meaning of the Arabic term *qiyas* (قياس)[1] in the legal context denotes several meanings – judicial analogy, general deduction or syllogism. The word evidently originated in ancient Arabic,[2] but its assimilation within the Arabic language already began at a very early period, so that its general meaning is much earlier than its legal one. Legal *qiyas*, in the history of Islamic jurisprudential thought, is at times considered as the archetype of all of the forms of legal argumentation,[3] and more specifically it indicates the different types of argumentations in which a legal scholar makes use of his independent reasoning – *ijtihad*.[4] For that reason, many legal thinkers engaged in it, and it occupied a central place in the *usul al-fiqh* literature that was created over the course of generations.[5]

The Structure and Foundations of Legal Qiyas

Following the botanic metaphor of the law, legal *qiyas* is composed of four elements:

1) the original case – root (*asl*; اصل)[6] – given in the primary sources of the law, the *Quran* and the *sunnah*; 2) the new case to which the original law is compared—the branch (*far'* ; علّة); 3) the underlying cause for the law, common to both root and branch (*'illa;* علّة); 4) the law or the legal norm that applies to the root and which, thanks to the similarity between the two cases, is transferred from the root to the branch (*hukm*; حكم[7]).[8]

The paradigmatic example for the use of *qiyas,* appearing frequently in the discussions of the *usul al-fiqh* literature, is that of the prohibition against drinking wine. The Quran prohibits drinking the wine of grapes.[9] What then is the law regarding fig wine? The reason for the prohibition against drinking grape wine is because it is intoxicating, a quality that exists in fig wine as well. Hence, once the relevant feature (the cause) is found in both cases, the law (the prohibition) is transferred from the original case (grape wine) to the new case (fig wine). The basic assumption of the *qiyas* is thus the limited nature of the original law and the need to expand it. In this sense, the *qiyas* serves as a cognitive tool by which, thanks to the common cause underlying the different cases, the law is expanded, enabling one to deal with changes in reality.

Hence, the identification of the cause serves a central function in determining the application of the law, its expansion or its limitation.[10]

The root (*asl*): this term has two basic meanings in Arabic in respect of the legal context: 1) the source: for example, the *Quran* or *sunna*; 2) the subject matter of the ruling.[11] There is broad agreement among Muslim legal scholars that the norms of the *Quran* or the *sunna* are roots that serve as a basis for applying the *qiyas* and, according to many, those norms whose origins are in the *ijma'* (= consensus) may also serve as a basis for *qiyas*.[12] According to most Islamic legal scholars, the result of one *qiyas* cannot serve as the basis for another, because the underlying cause for the original case (i.e. that which served as root for the first *qiyas*) may in itself justify the application of the rule to the new, additional case (i.e., the "branch" of the second *qiyas*), even without the intermediacy of the first *qiyas*. However, according to many of the Malakis [13], and some of the Hanafis, one *qiyas* can serve as a root for a second *qiyas*, the branches of the first serving as roots for the second *qiyas,* a process that can continue indefinitely.[14]

The underlying cause (*'illa*): The term *'illa* is usually translated into English as "effective cause" or "operative cause."[15] Other Latin terms used in English, such as *ratio legis, ratio decidendi,*[16] and *ratio essendi,*[17] may be confusing, because they bear the teleological significance connected to a *rationale,* and thereby miss the causal significance of the term. The term *'illa* is derived from ancient Syriac, where it means a "fault" or "blame" constituting the cause for returning articles or property. The term penetrated from Syriac into the lexicon of rational thought even before Aristotelianism penetrated Arabic culture. For that reason, the use of the term *'illa* within the framework of *usul al-fiqh* is not necessarily evidence for the influence of Aristotelian doctrine upon legal thought. The literature of the *usul al-fiqh* dealt extensively with the definition of the *'illa* and its conditions.[18] The following are the conditions which it needs to meet: 1) It must be clear and known (*zahir*) and not hidden (*hafi*). For this reason, one cannot draw an analogy between the root and a branch on the basis of an individual's intentional state, i.e. such things as intentions, good faith, agreement and the like; 2) It must be consistent (*munasib*) with the law as it is known through revelation (*al-nass*), and not contradict it or deviate from it; 3) It must be transitive (*muta'addi)*, and not limited to the primary law alone.[19]

The branch (*far'*): The branch refers to the new case, to which the original law is applied by means of analogy. The branch thus indicates a new case, one not explicitly mentioned in the law known by revelation (*al-nass)*, nor by conventional law (*ijma')*.[20] The underlying cause for the original law must be applicable to the branch in the same manner that it was applicable to the root.

The law (***hukm***): In relation to *qiyas, hukm* indicates the known or established law, applied by way of analogy to the branch. Law derived by analogy has several possible characteristics: prohibited or obligatory, contemptible, advisable, or permitted,[21] and it must be derived from the *Quran*, the *sunna*, or the *ijma'* (*huqum shari'a*) alone. The derived law must be one that is in effect (as opposed to one that has become abrogated by virtue of *neskh*),[22] and may not be one subject to dispute.[23] Similarly, the cause for the law must be clear and logical; laws whose causes are not known[24] cannot be applied to new cases. Moreover, the law inferred by analogy must be a general law, not one restricted to specific, exceptional cases, or that deviates from the basic law.[25]

Legal Qiyas and Syllogistic Qiyas

In the later contexts of Arabic philosophy, the term *qiyas* also served as a synonym for philosophical syllogism,[26] but in earlier legal contexts it signified legal analogy alone.[27] According to contemporary scholars, on occasion there was some confusion between these two uses of the term, albeit not in the primary text, in which the relevant use is clear and understood from the context.[28] Nevertheless, one needs to draw a functional distinction between the analogic meaning of *qiyas* and its syllogistic meaning. Legal *qiyas* is a technique for indefinite expansion of the law known through revelation—a finite body of knowledge—to new circumstances, whereas in the syllogistic sense *qiyas* validates the logic of this technique without deriving any new conclusion. The two types of *qiyas* therefore exclude one another. Syllogistic *qiyas*, as opposed to legal *qiyas*, does not create a new proposition, whereas legal *qiyas*, as opposed to the syllogistic type, does not prove its own logic. The legal *qiyas* is operative and creates law, while the syllogistic *qiyas* is methodological, justifying the procedure of the argument that has been placed forward.

Varieties of Legal Qiyas

Discussions of legal *qiyas* within the *usul al-fiqh* literature generally revolve around two kinds—cause-based *qiyas* and analogy-based *qiyas*.

Cause-based qiyas: Cause-based *qiyas* appears in two variations—the 'meaning-based analogy'[29] and the 'causal analogy' (*qiyas al-'illa,*[30] *qiyas al- ma'ani*[31])—and it reflects an approach that sees the *qiyas* as a mean for extending the existing norm thanks to the existence of a causal element (cause, reason or meaning) shared by both, the root and the branch.[32] According to Al-Shafi'i, this type of *qiyas* is defined as follows:[33]

> …when God or His Messenger forbids a thing by means of an explicit text [*mansusan*], or makes it licit, for a particular policy reason [*ma'na*]. If we find something which is covered by that reason in a matter for which neither a passage from the Book nor a Sunna has provided an explicit rule for precisely that thing, then we could make it licit or forbid it, because it is covered by the reason for making [the earlier thing] licit or forbidden

Cause-based *qiyas* is thus an expansion of the existing law, in a manner that encompasses various situations concerning which there is no explicit instruction or precedent in the revealed law. The legal authority must therefore identify the common cause or root appearing in the revealed sources and the new situation, and based on that to expand, or to apply, the law found in the root to the branch— given that it is not contradicting an explicit instruction of the existing law. Hence, the essential requirement for expanding the law is consistency with the existing law.[34]

Analogy-based qiyas: An additional type of *qiyas*, distinguished from the cause-based *qiyas*, is based upon the resemblance of the root and the branch (*qiyas al shabah*[35]). According to Al-Shafi'i, this type of *qiyas* is defined as follows:[36]

> Or [the other is when] we find one thing to resemble something [which has been forbidden or made licit] or some other thing, and we can find nothing which resembles it more than one of those two things. Then, we would bring it into a certain relation with one of the [two] things which best resemble it.

Al-Shafi'i's definitions exemplify the basic difference between two typs of *qiyas*, representing different relationships between root and branch: in cause-based *qiyas* the relationship derives from a common external causal element shared by both; whereas, by contrast, in analogy-based *qiyas*, the relationship derives from the similarity of the branch to the case at hand. That is, cause-based *qiyas* connects the branch to its root by means of a third factor—the underlying cause, while analogy-based *qiyas* connects the two to one another in an intrinsic manner.[37] According to another explanation offered by Islamic jurists, cause-based *qiyas* differs from analogy-based *qiyas* by the very fact of its being based upon a single cause, whereas analogy-based *qiyas* is based upon several different causes. That is, whereas in cause-based *qiyas* the derivation of the branch from the root is a reflection of simple causal relationships of cause-and-effect, in analogy-based *qiyas* this relation of branch to root derives from an exegetical choice of the jurist, who prefer to find the resemblance of one root as opposed to another possible one.[38]

Epistemology and Theology

The perspective of comparative jurisprudence emphasizes the uniqueness of each and every legal method and sharpens the substantive components of each system. In some pre-modern legal systems, such as the Jewish and Islamic cases, the law was understood in a religious manner, and there was a great degree of correspondence between the contents of the law and the theological world-views underlying the religious believes. Nevertheless this complex relationship between faith and religious law is not always recognized. At times—thanks to the intermediacy of religious institutions and authorities—this relationship seems weak, or at least indicates the absence of explicit dependence between law and religious belief.

From the very outset, Islamic law emphasized the close and transparent relationship between the positive contents of the law and the perception of God as the source of law or as the legislator.[39] The legal norms, in their essence, were perceived as the contents of the direct revelation of God through the Quran and the prophet Mohammed. Hence, conceiving the law is equivalent and identical to comprehending the Divine revelation. This relationship subordinate the epistemology of Islamic law to its theological assumptions, in such a way that the prepositions of the epistemology are interwoven with theological claims regarding the nature of God and His relation to the

believers. This aspect indeed makes Islamic law unique as opposed to other legal systems, indicating that the source of legitimacy of Islamic law is epistemological rather than institutional.[40] It also explains the large number of epistemological discussions in this tradition and the extraordinary degree of reflective efforts and self-awareness of the Islamic legal scholars regarding their activity.[41]

On the basis of the relationship between the theology of law and its epistemology, we find that the various approaches regarding the place of legal reasoning are to a large extent derived from the status of human reasoning in general: does legal reasoning express the human effort to grasp the contents of revelation, or does it express the autonomous power of reason? In other words: is legal reasoning essentially no more than the interpretation of the revelation, or is it, alternatively, an autonomous source of knowledge? The distinction between the various sources of legitimacy of legal reasoning had far-reaching historical implications for the map of theological and legal streams during the formative period of Islamic law, and in practice it divided the Islamic intellectual milieus into two camps—the traditionalists (*ahl al-hadith*), on the one hand, and the rationalists (*ahl al-ra'y*), on the other. As for Jewish law during the corresponding period: it is difficult to identify such a close relationship between the epistemological aspect of halakhah and its theological one, and it is highly doubtful whether such a distinction lay in the background of the discussions on the use of legal reasoning in the rabbinic legal thought. It would nevertheless appear that the conceptual language and patterns of thought that took shape in the field of Islamic jurisprudence underlay rabbinic discussions about the legitimization and limits of legal reasoning vis-à-vis the rabbinic legal tradition.

Further on, we shall present the rabbinic discussion on the question of the legitimacy of legal reasoning and the use of judicial analogy, but first we must take note of the theory of law that relates to the deep structure of Islamic law, which serves as justification for the use of *ijtihad* and *qiyas* within Islamic law. This theory, as we shall see, relies upon certain theological assumptions, some of which were adopted by the rabbinic positions. In order to describe the theory of justification of *ijtihad* and *qiyas* in Islamic law, we will turn to the words of Al-Shafi'i in his pioneering work in Islamic jurisprudence – *Al-Risala*.[42]

The Direction of Prayer as a Metaphor

The basic example[43] brought by Al-Shafi'i to concretize the epistemological problem of law is the problem of the direction of prayer—*qibla* (القبلة)—for people who are beyond sight of the city of Mecca. This example appears several times in *Al-Risala,* where Al-Shafi'i utilizes it to formulate the problem of legal epistemology, and to derive from it the value of legal reasoning, multiplicity of opinions and answers, and judicial error. As is known, on the basis of the Jewish custom of the worshiper facing the site of the Temple in Jerusalem, the prophet Mohammed instructed his followers to turn their faces at prayer-time in the direction of Mecca.[44] The verse in the Quran pertaining to this obligation refers primarily to those outside of the city and who find themselves in remote places – *And wherever you may go out, you shall turn your face towards the holy mosque, and wherever you may be, turn your faces towards it.*[45]

The conventional interpretation of this verse sees it as an obligation incumbent upon every person, not limited to any particular time or place—every Muslim believer is obligated to direct his face to the geographical direction of Mecca.[46] However, the execution of this duty involves a certain practical difficulty when Mecca is beyond the believer's vision. In that case, the worshipper must make a special effort and utilize his judgment and all means available to him in order to estimate the correct direction. The expectation that the believer will make this effort and locate the correct direction for prayer exemplifies, according to Al-Shafi'i, simultaneously both the epistemological problem and its solution. Determining the correct direction of Mecca is compared to ascertaining the right answer or identifying the will of God; while the doubt and confusion that may exist in relation to this are analogous to the doubts and confusions that may beset the believer upon undertaking to fulfill his religious duties and to turn his face towards the holy mosque, in the absence of accurate knowledge as to the direction of Mecca. Finding the right answer, or discovering the legal norm in general, according to this metaphor, is thus tantamount to revealing objective facts, and the jurist's attempt to identify the obligatory norm in our case is analogous to the believer's efforts to find the correct direction for prayer.

In this way, a parallel is drawn between the means used by the believer to assist in finding the direction for prayer, and those used by the jurists in seeking legal solutions.

Moreover, just as the primary means available to the worshipper are the heavenly signs given by God to help the worshipper orienting himself towards the proper direction, so too does the jurist rely upon proofs—understood as signs and hints from God—in order to arrive at the correct solution.[47] Hence, this metaphor concretizes the idea that, as the objective law is not always known to the believers, the place at which certainty comes to an end is the starting point for the jurist's independent legal reasoning. Legal reasoning in that sense is not necessarily the jurist's privilege, but rather a mandatory religious duty under conditions of insufficient knowledge.[48]

Basic Assumptions

Al-Shafi'i's metaphor itself entails certain explicit theological components. As he emphasizes that the traveler seeking the direction of Mecca needs the available signs with whose help he can find the proper direction. These signs, according to Al-Shafi'i, are hints placed by God in order to assist His faithful; the heavenly bodies help travelers to find their way through the deserts.[49] From this, as well as from other expressions in the *Risala*, one gains the impression that legal activity in general, and legal reasoning in particular, are not discussed merely in methodological terms, but rather as part of a far broader religious project; a project in which the jurists dig the implicit meanings of the revealed knowledge by using the traces, hints and landmarks placed by God for that purpose. This is, of course, an additional aspect of the epistemological reliance of law upon theology.[50] The following are the basic assumptions upon which the theory of Islamic law is based, and which at the same time justify legal reasoning – the *ijtihad* and the *qiyas*. These assumptions are not entirely epistemological principles or theological principle postulations; their epistemological aspect is deeply interwoven with the theological one. [51]

1. **Metaphysical realism:** The first fundamental assumption relates to the metaphysical dimension of the legal norms, or the legal solutions. In wake of Joseph Lowry's discussion, [52] one might describe this element as representing "metaphysical realism," that assumes "strong objectivity" of the legal solution.[53] This perspective asserts that the metaphysical existence of a legal solution is independent of the human ability to know it. According to this principle, every question has definite legal solution; that is, there exists a relevant answer for every possible normative state-of-

affairs.[54] A specific case for which there is seemingly no existing law is merely one of bounded knowledge of the revealed law.[55]

> There is, for everything which befalls a Muslim, a binding rule, or, by means of pursuing the correct answer in regard thereto, some extant indication. He [= the Muslim] must, if there is a rule concerning that specific thing, follow it. If there is no such rule, then one seeks the indication, by pursuing the correct answer in regard thereto by means of *ijtihad*. *Ijtihad* is, in turn, *qiyas*.
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> [56] [57]

The incorporation of this realistic metaphysics within the context of revealed law implies that religious law is reflecting God's relation to every possible state-of-affairs in earthly reality. For that reason, the religious value of the law is not exhausted in the subordination to the word of God, but primarily to the fact that through the law God revealed his intentions regarding the concrete world. This being the case, the legal knowledge that uncovers God's will is of no lesser value than the theological knowledge that expose God's nature and his guiding principles. Or, in Calder's words, '[For Shafii] all events have the resolution in God's law; all knowledge is therefore knowledge of God's law (hence *'ilm* is defined as relating only to knowledge of the law).'[58]

2. **The incompleteness of revelation and the bounded legal knowledge**: Even though there is one correct legal answer to every possible state-of-affairs, the law known through revelation does not include the rules that encompass all possible circumstance.[59] Hence, the second basic assumption is rooted in the distinction between the law known by revelation (namely: the law that id found in the Quran and the Sunna; henceforth: the revealed law) and the law derived from it (henceforth: the derivative law). The significance of this principle lies in its acknowledgment of the structured limitation of legal knowledge. Hence, that part of the law that is not known by revelation is concealed and hidden from human eyes, just as the holy mosque and the city of Mecca are hidden from the eyes of the individual who is remote from it. Knowing the law is therefore obtained, first and foremost, by means of revelation, and thereafter derived from it by legal reasoning (*ijtihad*), interpretation (*tawil*), and analogy (*qiyas*). Again, one must note that, for Al-Shafi'i, that form of legal reasoning does not extend the law itself, but rather extends the human legal knowledge.

Indeed, this assumption seems extremely important for Al-Shafi'i' that there are contemporary scholars who hold that this was the major axiom underlying his theory of *ijtihad*[60] and *qiyas*, and the *usul al-fiqh* literature during the generations that followed him.[61] Despite the fact that Al-Shaf'i developed a theory that justifies the jurist's independent legal reasoning his position should not be taken as implying recognition of the primacy of reason, as taken by the rationalists (*ahl al-ra'y*) or the Kalam. Defining legal reasoning as the deduction of legal norms from the revealed parts of the law is for him a recognition of revelation as the exclusive and primary source of knowledge, whereas legal reasoning is the attempt to interpret and to apply it. Similarly, the assumption of the bounded legal knowledge makes it clear that legal reasoning express the religious value of human efforts in seeking the word of God that is not explicit in the content of revelation.

3. **The Gnostic Assumption**[62]

The third basic assumption is related to the second. It asserts that notwithstanding the incompleteness of revelation and the bounded legal knowledge, God in His goodness does not leave his believers in doubt and confusion. To this end, He conceal within the revealed law hints and traces by whose means the believers may be guided to find the correct legal solutions which were not known otherwise.[63] This theological principle reemphasizes the tight relationship between epistemology and theology in the Islamic law. Al-Shafi'i highlights this principle basing it on a verse from the Quran – *Does man think that he will be left uncontrolled, (without purpose)?*[64][65]

This example concretizes the manner in which the idea of God's beneficence and concern is interpreted as an epistemological-methodological principle of law. According to Al Shafi'i, the practical meaning of this with regard to legal norms is that God's guidance of his believers to find the proper legal solution comes about through two distinct channels, parallel to the revealed – derivative distinction – *[God] guided them [= people] to the truth by means of plain texts and by means of inferential indications.*[66][67] Al-Shafi'i even states that God's guidance, whether by means of the revealed law or by means of proofs and signs hidden therein, pertains to every possible state-of-affairs, and that hence God's guidance encompasses all of human behavior and dictates all of God's commandments relating to it.[68]

Summary – The Dual-Layered Model of Law

The basis of the theoretical justification of legal reasoning in Islamic law (*ijtihad* and *qiyas*) is a combination between skeptical epistemology and gnostic theology, which assumes that the beneficent deity assists the faithful to find the proper path of behavior. We have also seen that this theoretical justification is not necessarily based upon rationalistic assumptions. The granting of a place for legal reasoning—even if it be a central place—does not necessarily imply acknowledgment of the primacy of human reason, but rather the necessity to discover the God's word embedded in the revealed law. Judicial analogy is therefore no more than a structured component of the Divine law, part of which is known through explicit revelation and the other part of which remains to be uncovered by means of the jurists' legal deduction. One may therefore speak of a double-layered structure theory.

The picture which emerges from the three basic assumptions described above is that the law is fundamentally divided into two levels: the former, that of law known through explicit revelation, by means of the *Quran* and the *Sunna* of the prophet; the latter, based upon those things derivative from the first.[69] This dual-layered structure has profound implications, relating both to the nature of legal knowledge, the degree of certainty that can be attained, the social understanding derived from it, and other aspects. Legal norms of the first category rely upon revealed knowledge that appeared in the Quran or expressed in the acts of the prophet, are transparent and known to the entire community of believers, and are defined as clear, unequivocal, and accessible to all. The legal statements made based on this part of the law are certain, and therefore it is impossible that there be any dispute regarding them.[70] Those laws belonging to the second category, by contrast, are not explicitly stated in the contents of revelation known to all, but are derived by legal experts. This part of the law is determined by means of *ijtihad* and *qiyas*; it is subject to broad and varied interpretation, and its degree of certainty is only probable. Again, unlike laws of the first type, which obligate the entire community of believers, those of the second type obligate only part of them.[71] This dual-layered paradigm follows from the analyses of a number of leading scholars in the field of *usul al-fiqh*,[72] emphasizing the centrality of the assumption of the incompleteness of revelation and the bounded legal knowledge, as described above.

The following is a schematic diagram of this two-leveled understanding of the structure of Muslim law:

	Level I	**Level II**
Source of knowledge	Known through revelation	Known as the result of intellectual effort
Nature of the law	Explicit knowledge	Derivative knowledge
Accessibility	Accessible to all	Accessible only to legal experts
Degree of certainty	Certain	Probable
Multiplicity of opinions	Dispute impossible	Dispute possible

This dual-layered structure emphasizes two aspects derived from the status of legal activity. First and foremost, there stand out the far-reaching sociological implications of this structure. To refer back to our earlier discussion: this structure in practice represents the decisive argument on behalf of the preferred status of legal experts. In terms of the sociological theory of law, one might say that this structure creates circumstances in which expertise in general, and legal expertise in particular, is a necessary competent of any society. In other words: this structure is part of an attempt to preserve legal exegesis in the hands of a limited group of experts.[73] Similarly, this structure is part of the attempt to convey status and legitimacy to legal individualism—that is, to the personal reasoning of the legal scholar, as part of legal reasoning and the legal exegetical project.[74]

Legal Analogy and Judicial Error

The two-layered structure of the law, and the distinction between the revealed and the derivative law, raises new questions regarding the issue of judicial error. Regarding the revealed law, since the law itself is known and explicit any judicial error is in effect a deviation from the existing law. However, regarding law known by means of *ijtihad* it is difficult to determine criteria as to what precisely is truth and what is error. The difficulty involved in defining error with regard to a legal norms achieved by means of

ijtihad may therefore be formulated as follows: as *ijtihad* itself appears as a consequence of the limited nature of legal knowledge, how can we identify and distinguish between correct rulings based on *ijtihad* and erroneous ones?

The formulation of the problem of judicial error in terms of the criteria for ascertaining the truth of the legal rulings derived by *ijtihad* also indicates one of the points of split between the streams of Orthodoxy Sunnism and those of Shi'itism. On the one hand, there were those who sought to grant a certain epistemic standing, like that given to laws known through revelation, even to laws derived by means of *ijtihad*. These approaches gave *ijtihad* a status close to infallibility,[75] claiming that the *ijtihad* of the Imam is free of error; therefore his legal rulings enjoy a status of certainty, similar to that of the revealed law.[76] On the other hand, in the Sunnite legal tradition *ijtihad* was not regarded as definitively identified with the word of God, but rather as an attempt to draw close to those aspects of the word of God that were not known by revelation. For this reason, *ijtihad* was understood as an act that by its very nature was subject to failures and to errors and whose results may be evaluated using the criteria of probability and of approximation of certainty.

Thus, notwithstanding the realistic metaphysics that assumes a single correct solution to every legal problem,[77] the determination of law by *ijtihad* is not measured in terms of its deviation from the 'correct' legal solution. Consequently, the understanding of the *ijtihad* as a structured component within the Divine law, one may identify a certain transfer of the focus of legitimacy from the legal norm itself to the procedure used in arriving at it. This may explain the centrality of the methodological discourse in Sunni legal theory. It also explains the reduction of the problem of religious guilt involved in error[78] and in disputation regarding legal issues.[79] Since *ijtihad* is no more than an expression of the efforts made to approximate the proper law, a mistaken identification of God's intention is not seen as a religious failure, but at most as a necessarily failure in understanding the word of God.[80]

The perception of *ijtihad* as a structural component of the Divine law places a very different religious evaluation on the phenomenon of judicial error. Indeed, in the Sunni legal tradition special religious value is given to the very process of legal reasoning of the jurist. It follows from this that the very attempt of the legal scholar to

uncover the word of God by means of *ijtihad* is valued, without necessary connection to the results of these efforts:[81]

> [It is] that in respect of which God has imposed on His creation the obligation to perform *ijtihad* in order to seek it out. He tests their obedience in regard to *ijtihad* just as He tests their obedience in regard to the other things He has imposed on them.

According to that, the value of *ijtihad* as a religious act is also valued as a religious effort in which the obedience of the believer is tested.[82] The value of *ijtihad* is thus not exhausted in its being an attempt to discover God's intention, but rather in its being an attempt to determine the obedience of the believers. On this matter, one should note the well-known tradition regarding the religious value even of mistaken ruling – *He who is mistaken in his personal judgment deserves reward, while he who judges correctly deserves a double reward*.[8384] [85]

Concerning these things, as well, another aspect of the close relationship between the epistemology and theology of Islamic law is reflected: judicial error derived by means of *ijtihad* is not only forgiven, but also enjoys a positive reward since the very quest for the word of God itself reflects a desirable norm, alongside the desirable legal answer. In practice, one might say that the dual-layered paradigm of the law recognizes the ubiquity of judicial error and it being a non-marginal aspect of the religious obedience test. Further expression of this may be found in the following words of Abu Hamd al-Ghazali (n. 1111), who explains the problem of error in relation to this two-level model, by means of a metaphor taken from the commandment of alms-giving:[86]

> … With limited texts they cannot make decisions on an infinite number of cases. Nor can they travel to consult their Imam, and then travel back to the person who consulted them. The person surely would have died in the meantime, so that the return would be useless.
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> For a person who is not sure of the direction of the Kibla, all he can do is trust his own judgment. If he took the time to go to consult the Imam, he would miss the hour of prayer. Thus, it is permitted to pray in the direction one estimates to

> be true, though it may not be the real direction of Mecca. Indeed, it has been said, "He who is mistaken in his personal judgment deserves reward, while he who judges correctly deserves a double reward." Everything that depends on an effort of personal interpretation is of this sort. For example, for legal almsgiving the recipient may be poor in the personal judgment of the donor, whereas secretly he is wealthy. This mistake is not sinful because it was based on conjecture.
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> …
>
> In this way the prophet and religious leaders were forced to refer the faithful to personal interpretation, despite the risk of error. The prophet -- peace be upon him -- said, "I judge by appearances, it is God who looks after what is hidden." This means, "I judge according to general opinion taken from fallible witnesses, though they may be mistaken." If the prophets themselves were not immune to error in matters of personal judgement, how much more so ourselves? [87]

Here, al-Ghazali' argues against the possibility of seeing the instructions of the Imams as a solution to the problem of the structural limitation of the law, advocating in its stead *ijtihad*. For him, *ijtihad* is a structured part of the law, derived from the principle of bounded legal knowledge. Hence, being fallible is a substantive and constructed feature of the religious law. In this sense, alms-giving as a religious duty is an example for the application of *ijtihad*. It reflects the shift of the focus from the result of the ruling to the preceding intention—"*since he is not punished, except in accordance with what he thought*."

R. Saadya Gaon's statements against the implementation of judicial analogy appear in several different places in his writings, as well as in quotations from him on the part of his opponents.[88] In order to understand his position, which negates in principle the legitimacy of judicial legal analogy (*qiyas*), one must take into account the variety of the statements he expressed on this issue and to examine them against the background of his broader world-view. The scholars who dealt with Sa'adya's objection to judicial analogy tended to see his position as deriving from the sharp debates with the Karaite sages of that period, as well as being rooted in his efforts to protect the tradition as a valid source of knowledge and of a highest order of importance. This understanding of Sa'adya's position is supported by contemporary sources as well, in which his opposition to judicial analogy is depicted as being derived from the struggle over the validity of the tradition.

Sa'adya describes the Karaite position in support of the use of judicial analogy, arguing that it derives from secondary rather than from substantive considerations. He adds that judicial analogy enables them to ignore or shake off the binding nature of the tradition: "*Therefore they adopted the belief in analogy, out of the desire to pull themselves out of the difficulty and the [need to?] acknowledge the truth of the tradition, saying: it is sufficient for us to use analogy, and there is no tradition that has been carried by the Prophet.*" Accordingly, analogy serves as a kind of a substitute for tradition, thereby providing theoretical justification for freeing oneself from the tradition. It is an interesting fact that, in discussions regarding justification or negation of the *qiyas* in the Islamic *usul al-fiqh* literature, it is in no way presented as an alternative to the tradition. For example, the impression created by the words of al-Shafi'i in *al-Risala* is that *qiyas* is perfectly consistent with absolute commitment to the Islamic tradition.[89]

As against this reading, the first part of Saadya's position as expressed in this quotation emphasizes those basic assumptions that are common to Sa'adya's and to the Karaites who support judicial analogy, assumptions identical to the theological assumptions of the *qiyas* in Islamic law. The first of these is the assumption of the partial nature of revelation and our bounded legal knowledge. Sa'adya's words leave no doubt as to the possibility that revelation of the law is insufficient, so that

knowledge of the law based upon the known contents of revelation alone is clearly incomplete: "*For they found things which required explication in order to know whether something is permitted or forbidden, and which are not written in the Torah, and also matters of quantities and qualities which are unclear.*"

Sa'adya likewise notes the gnostic assumption: "*They nevertheless know that it is impossible to say of the Creator, may He be exalted and praised, that he left the people confused and uncertain. On the contrary, there is no doubt that He placed before them that which could answer their quest.*" The dispute between Sa'adya and the Karaites is thus presented as a dispute regarding the identity and nature of the gnostic assumption that God implanted within religious reality per se. Sa'adya sees the *Mishnah* and the *Talmud* as the guiding hints, while the Karaites, according to him, hold fast to analogy as "*the guide that God established to guide his servants in [understanding] that which is not found in the book.*"

But even though there is no reason to doubt the authenticity of these quotations from Sa'adya, it is doubtful whether they reflect his principled objection to legal analogy. Unlike the polemic context from which these things are quoted, in *Kitab Tahsil* Sa'adya expands the discussion of judicial legal, from which there emerges a deeper and richer picture that bases his objection upon other claims. According to our reading, his objection to *qiays* as it emerges from *Kitab Tahsil* derives from his rationalistic theology and not necessarily from his debate with Karaite ideology. Examination of Sa'adya's arguments for rejecting the use of judicial analogy reveals an unexpected aspect of the rationalistic legal theory, indicating the limitations of rational methods, specifically out of respect for the independent validity of reason and reasoning. One may therefore say that his objection to the use of judicial analogy derives from the rationalistic paradox; *the gist of this paradox is that recognition of reason as a source of religious knowledge in itself establishes a sharp boundary between the rational aspect of the law and its non-rational aspect*. One significant result of this paradox is the restrictions imposed on implementing rational tools on the non-rational parts of the law – i.e. the revealed parts of the law. Consequently, the rejection of judicial analogy stems from a sincere evaluation of reason as a valid source of religious knowledge. This being so, Sa'adya's legal theory presents, according to our analysis, a new angle on the concept

of judicial analogy—namely, the relationship between the metaphysics of the Divine laws and their epistemology.[90]

The Organistic Approach to the Law

Sa'adya Gaon's legal theory is first and foremost an organistic one.[91] Under this world view, in which "*no things have existence except by way of combination,*" the internal relations among the various components of the divine law are not contingent, and in practice they determine the possible manipulations within the law. Sa'adya's legal theory as presented in *Kitab Tahsil* begins with a description of the internal relations among the various components of the law by turning to the ontological categories—substance and accident—and through their means attempting to characterize the relationship between the generic laws and their particular cases. The use of these categories not only places Sa'adya's legal theory an explicit philosophical context,[92] but also points towards his attempt to base his theory in Aristotelian ontological terms.

In fact Sa'adya is using the Aristotelian notion of the substance as it previously was formulated by al-Farabi (870 – 950). This notion emphasizes two aspects in respect to its implementations in a legal theory: one aspect, pertaining to the epistemological implications which involve a stress upon the correlation between the attributes of the laws and their knowledge. The other aspect pertains to the implications of the ontology of the substance on the legal theory, or the transition, to use Sa'adya's language, from the "*natural-state-of-things* (*halo*[93] *al-asia* [94]*al-tibya)* to the "*legal-state-ofthings*" (*hal al-amor*[95] *al-sharriya*).[96]

Therefore, knowing the particulars, according to that, is achieved through the knowledge of the totality, since the totality itself is defined by the particulars that compose it. In this sense, Sa'adya is seen as one who adopts holistic metaphysics such as this of al-Farabi. In Saadya's eyes, the organistic metaphysics of the law derives directly from his understanding of the substance as a totality, and it is that which dictates the possibility of apprehension of accidents or particulars.[97]

From this approach, which sees the relationship between the whole and its particulars as an essential one Sa'adya derives the principle of "unity of knowledge" or, in his words: "*that the source of wisdom is one*" (*ma'dan al-hikma wahad*)"[98] or "*the root*

of knowledge is one" (*asl al-i'lam wahad*).[99] The significance of this principle may be seen on two different levels: on the ontological level (in terms of the relation between the whole and its particulars), and on the cognitive level (in terms of relationship between the subject of knowledge and the modes of its cognition). On the ontological level, knowing the substance as a whole means a knowledge that encompasses all the substance's appearances or accidents. For that reason, the acknowledging that a physical object has the quality of three-dimensionality also includes the knowledge that all the appearances of the physical substance will carry this quality. As we have said, this implication of the notion of the substance as a totality is already mentioned by al-Farabi. However, Sa'adya expands it to the cognitive plane as well. Hence, the same essential relationship that exists between the whole and its particulars also exists between the subject of knowledge and the modes of its cognition: *"And that which we said regarding essence and accident also applies to the things that are apprehended by the senses. Each one of them is apprehended by the same sense by which is apprehended the thing in its totality. There is no sound which is not apprehended by the sense of hearing, nor any color that is not apprehended through the sense of sight."*[100] This being so, organistic metaphysics sees the relationship between substance and accidents as a essential relation between the whole and its parts, and therefore poses the demand for a three-fold correspondence between the *subjects* of knowledge, the *states* of knowledge and the *modes* of cognition.

Sa'adya does not elaborate on this point in his *Kitab Tahsil* and does not detail the theological framework of the organistic outlook which he advocates. But in the Introduction to his *Commentary on the Torah*, he explains this approach more extensively, even articulating the underlying theological explanations. He describes his organistic approach as follows: *"no things have existence except by way of combination."* (*kulha la tithabt*[101] *ile beta'lif*[102]). His remarks there do not deal with the metaphysical framework for the law, but rather with the modes of their cognition (in the course of mentioning the three sources of knowledge: intellect, scripture and tradition—*al-ma'aqul, al-mansus, al-manqul*), and the relationship between sensory knowledge and rational knowledge. The relationship between primary knowledge (i.e., via the senses) and the secondary knowledge (i.e., through reason) is explained there by means of the organistic structure of the objects subject to apprehension. According to him, after an object is known through sensory knowledge as a compound object, the intellect

analyzes the components of sensory knowledge and in wake of this apprehends the essence of the object. The function of reason as analytical facility is thus explained as a power that analyzes the organistic structure of the objects:[103]

The interesting point in this perception is the theological emphasis that Sa'adya attributes to organistic metaphysics. According to the first reason, which he calls "the engagement of the thought" (*aita'mal al-a'ql*),[104] the organistic structure is created to facilitate the function of reason. "*In order to give the intellect this function, that is, in order to separate between those things that the senses unite, He who created all, may He be blessed and praised, created things combined and compound.*"

According to the second reason, referred to by Sa'adya as "*recognition of the activity of the Creator by the created being" (altathir*[105] *ali al-mathur),*[106] the organistic structure is a local version of the proof for the existence of God—"*so that the connected things that compound will prove that there is an Author and One Who compounds and connects them.*"

According to the third reason, referred to by Sa'adya as "*the dependence of one thing upon the second*" (*faqh kul mujud bia's*[107] *ali-bia's*),[108] the existence of objects derives from the relationship or dependence of the particulars on the whole. This statement is not sufficiently clear even though he repeats it further on: "*Concerning the dependence of things upon the composite for their existence, there is no difference between the dependence of the small part upon the larger, and the dependence of the large part on that which is smaller than it, since all is connected in a one combination.*"And indeed, from the examples given further on (animals, plants, and the structure of the cosmos), one understands clearly that he means to imply that the whole expresses an organic relationship, in which the existence of each individual part complements or completes the other parts.

Sa'adya's claims concerning the epistemological implications of organistic metaphysics thus prepare the ground for the next phase of his discussion, in which he seeks to examine the justification for judicial analogy on the basis of the relation existing between the metaphysical core of the law and the mode of their cognition. This relation is of course revealed against the background of Sa'adya's famous distinction between the rational laws, and the non-rational or the revealed ones.

The Generic Distinction between Rational laws and Revealed laws

As is well known, Sa'adya attempted to establish his legal theory on the basis of the distinction between rational legal norms and those which are revealed. The basis of this distinction lies on the question of the possibility of knowing these norms: the rational laws are knowable even without revelation, whereas knowledge of the revealed laws is depends upon revelation. This distinction seemed to some scholars an original idea of Sa'adya Gaon, by which he wished to bridge between the rationalism of the *Mu'tazilah* and the authoritarian approach of the *Ashari'a*.[109] To others, this position seemed like a synthetic-religious reading of the Aristotelian concept of "belief" and the Stoic concept of "convention."[110] However, with the discovery over the course of the years of the writings of the *Mu'tazilites*, it became clear that this distinction was already to be found in the *Mu'tazilites* thought that preceded Sa'adya.[111] From *Kitab Tahsil,* it seems clear that the division into rational laws and revealed laws touches upon the very heart of the Sa'adianic approach to legal reasoning and his opposition to judicial analogy.[112] Sa'adya's opposition to judicial analogy is presented in the *Kitab Tahsil* as part of his general theory of law, while his arguments against judicial analogy are an attempt to make full use of the epistemological implications of the distinction between rational and revealed laws.

Sa'adya's reflections upon the rational—revealed distinction suggest that its source lies in the fact that legal knowledge applies in practice to different kinds of laws. That is to say, the distinction is not the result of the limitations of human ability to comprehend the laws, but rather of the substantive distinctiveness of the rational laws from those that are revealed. This generic approach to the rational—revealed distinction joins the organistic metaphysics, and from the two of them one arrives at the conclusion that the use of rational means in order to know the law is not relevant in relationship to laws of the revealed kind. The rational activities of jurists, such as exegesis (*tawil*) and analogy (*qiyas*), as well as their personal preferences (*istihsan*[113]) are thus presented as an ignoring of the metaphysical framework of the rational – revealed distinction as representing two separate complexes. For that reason, the attempt to derive the details of the revealed laws by means of rational tools is portrayed here as separating the particular from the whole.

The derivation of legal solutions through exegesis of the revealed laws or by drawing analogies, are represented here as arbitrary methods that substitute the original study, relying upon the inner connections among the particulars and their generic class. For this reason, the multiplicity of opinions and methods do not enjoy the same legitimacy as is granted them in the dual-layered model as mentioned above. In fact, Sa'adya's objection to the use of judicial analogy with regard to revealed laws, on the basis of the generic division of the laws, strengthens the metaphysical weight of the rational – revealed distinction.

The Arguments against the Dual-Layered Paradigm and the Justification of Judicial Analogy

From what Sa'adya states in *Kitab Tahsil,* we know that this work contains ten arguments against judicial analogy.[114] Not all of the ten arguments made by Sa'adya in his work have survived in the manuscript we have,[115] but only the final three arguments. However, these arguments reflect the transition from negation of analogy on the basis of the accurate legal theory, to the identification of the weaknesses of the theory that justifies the use of judicial analogy. In the following, we shall briefly note these three weaknesses as against the background of the dual-layered paradigm.

The Normative Implications: As we have seen earlier, the distinction of revealed – derivative laws involves numerous aspects pertaining to questions of accessibility to the law, its extension and the degree of legitimacy to dispute about it. However, as Sa'adya claims, from this distinction one also needs to derive the implications regarding the decisiveness and forcefulness of the different laws. Sa'adya argues that the revealed – derivative distinction should entail a different levels of severity vis-à-vis cases of breaking the laws. That is, since derivative laws attained by analogies are no more than efforts to discover the correct answer, it would be inappropriate to treat cases that fall under this kind of law in the same manner as it would have been treated under the category of revealed laws. Consequently, there is no justification to sentence a person who violates a derivative law prohibition with the same punishment of the one who violates a revealed law prohibition. Particularly, Sa'adya claims that being consistent with the dual-layered paradigm, there is no justification to impose severe penalties, such as capital punishment, on violations of derivative laws which are only probable in their degree.

The Justification of Controversy: A further weakness of the dual-layered paradigm attacked by Sa'adya is what might be referred to as 'the ease of justification of controversy.' Returning to the example in Islamic law of the quest for the correct direction of prayer, we see how it is possible and expectable to have multiplicity of opinions with regard to the proper answer. However, according to Sa'adya's argument, this explanation ought not to be used as justification in advance for controversies between legal scholars. A priory justification of controversy with regard to derivative law confuses between *ante factum* justification and a *post factum* acceptance of the multiplicity of opinions. Since the derivative law is none other than an attempt to identify the appropriate law, one must absorb the differences of opinion as a necessary evil, but not as something justified *ab initio.*

Master–Disciple Relations. Another argument of Sa'adya against the use of the dual-layered paradigm pertains to the social structure, which is liable to be upset in its wake. Justifying judicial analogy in practice implies acceptance of the spersonal legal reasoning of each legal scholar in its own right. Consequently, the hierarchical status of master in relation to disciple is likely to be harmed.

Sa'adya refers in that respect to the botanic image of roots and branches in order to reflect the didactic relationships between mentor and student,[116] thereby pointing out that a legal theory which justifies judicial analogy unravels the established relationships between mentor and disciple. In other words, it harms the traditional hierarchy and empties disciples' commitment to their mentors of all content.

Summary of the Sa'adianic Objection According to Kitab Tahsil

Unlike the dominant impression in modern research, supported by Karaite sources, Sa'adya's position as reflected in *Kitab Tahsil* derives from his legal theory and is based upon elements of organistic metaphysics and upon the generic distinction between rational and revealed laws. As we have attempted to demonstrate, analysis of his words at the beginning of *Kitab Tahsil* indicates that his objection to the use of judicial analogy as a rational tool derives specifically from his rationalistic stance and from his evaluation of reason as a independent source of religious knowledge. Against that, that a theory which justifies judicial analogy is rooted in a traditionalist outlook[117] which does not recognize any possible source of religious knowledge apart from revelation.

In that sense, another component is added to the tension between the rationalistic outlook and the traditionalistic outlook, and the paradox which we noted regarding Sa'adya's rationalistic stance applies in a similar way to the opposite position as well. Hence, judicial analogy is justified as a rational means specifically by the traditionalistic position, which does not recognize reason as an independent source of religious knowledge, while its negation derives from a specifically rationalistic position, as we have stated.

It follows from this that there is room to reevaluate the position of the rationalistic viewpoint in legal contexts. The conclusion that follows from our analysis is that one cannot connect the justification of the use of judicial analogy with the rationalistic positions which sought to strengthen the power of reason. To the contrary: there would seem to be an inverse correlation between the use of reason as a possible source of religious knowledge and the justification of judicial analogy. Likewise, as may be seen from the final arguments in the work, Sa'adya displays principled opposition to the legal theory that justifies judicial analogy as formulated in al-Shafi'i, and in his wake in the later *usul al-fiqh* literature. Hence, his stance must be seen as a critique of the dual-layered structure of law.

In that sense, one may perhaps speak of two basic models—vertical versus horizontal—on whose basis the different legal theories are formulated, and which express the place and value of legal reasoning with regard to divine law. According to the horizontal model, and consistent with the synthetic approach to the sources of religious knowledge, the basic division of religious law is into rational norms and revealed norms.[118] This approach, as we said, places reason and intellectual activity on an equal status to that of revelation. The vertical model, on the other hand, is the dual-layered model in which legal reasoning occupies a secondary place *vis-à-vis* that knowledge known through revelation.[119] [120][121]