4

Classic Theories of Islamic Law

Overview

The purpose of this chapter is to provide a wide-ranging survey and analysis of the juridical theories of the nine classic schools of law under consideration, namely, Mālikīs, Ḥanafīs, Shāfiʿīs, Ḥanbalīs, Jaʿfarīs, Zaydīs, Ẓāhirīs, Ibāḍīs, and Muʿtazilīs. The presented analysis will focus on the hierarchical classifications of the various methods, in a comparative style. Some *fiqhī* examples are given, only for the sake of illustration. The language of this chapter is rather abstract, due to the specific nature of *uṣūl al-fiqh*, or the juridical theories of the Islamic law. References in the endnotes are meant to enable interested readers to refer to more detailed explanations.

The first section introduces the fundamental sources of Islamic jurisprudence, namely, the Qur'an and the Prophet's traditions. The second section surveys the script-based linguistic evidences that various schools have applied. Section Three surveys rational evidences, which were also 'script-based,' as will be argued. Finally, the fourth section presents a critical analysis of the different types and levels of 'rulings' and 'legal capacities.'

4.1. FUNDAMENTAL SOURCES/SCRIPTS

'Evidences' are the sources and procedures that a school of law endorses in order to derive rulings. They include two sources that are agreed upon (in principle) by all the schools of Islamic law, despite many

differences over details of interpretation. These are the Qur'an and the Sunnah (prophetic tradition), which are considered by all traditional schools of law as the primary sources of jurisprudence. 'Evidences' also include other sources of normative judgements, such as customs and 'previous legislations,' as well as other juridical procedures that are traditionally called secondary sources of legislation, such as reasoning by analogy, consensus, or blocking the means. Differences of opinion amongst schools of law are due to their differences over evidences and/or their legitimacy.
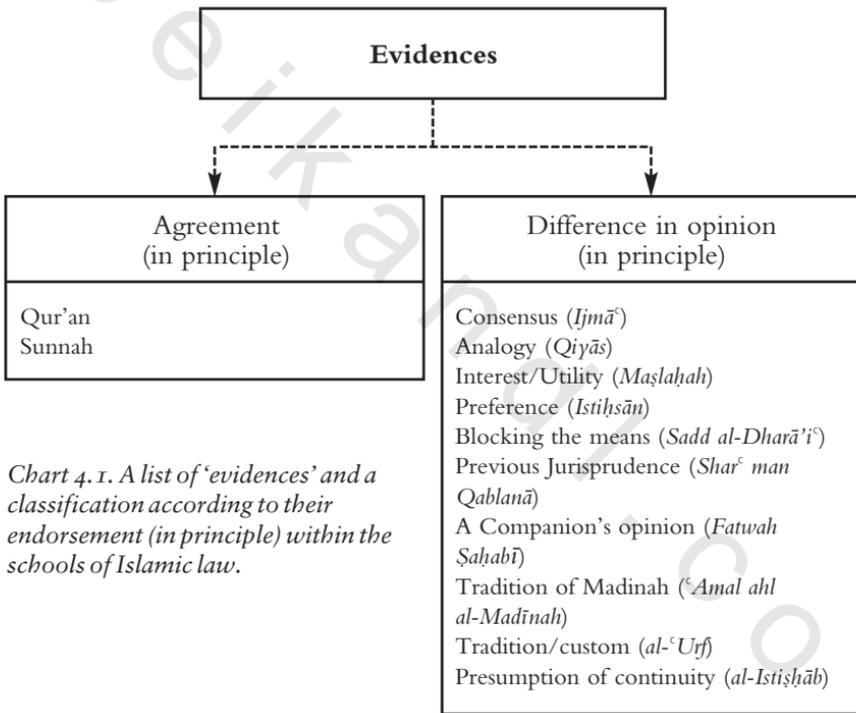
Evidences	
Agreement (in principle)	**Difference in opinion** (in principle)
Qur'an Sunnah	Consensus (*Ijmāʿ*) Analogy (*Qiyās*) Interest/Utility (*Maṣlaḥah*) Preference (*Istiḥsān*) Blocking the means (*Sadd al-Dharā'iʿ*) Previous Jurisprudence (*Sharʿ man Qablanā*) A Companion's opinion (*Fatwah Ṣaḥabī*) Tradition of Madinah (*ʿAmal ahl al-Madīnah*) Tradition/custom (*al-ʿUrf*) Presumption of continuity (*al-Istiṣḥāb*)

Chart 4.1. A list of 'evidences' and a classification according to their endorsement (in principle) within the schools of Islamic law.

Qur'an

The Qur'an that we know today is an exact copy (except for the dots and vocalisation marks) of the copies that were endorsed by the third Caliph, ʿUthmān, after the 'collection committee,' which he had formed, endorsed it. The idea of collecting the whole Qur'an in one

book started to gain popularity amongst the companions shortly after the death of the Prophet. However, at the time of ʿUthmān, Muslims' disputes over various versions/readings of the Qur'an had reached a level that necessitated ʿUthmān's decision to collect and endorse one version of the Qur'an and order all others to be destroyed. In the endorsed version, ʿUthmān gave Quraish's dialect priority over other dialects, since it was the mother dialect of the Prophet. The popular 'ten readings' (al-qirā'āt al-ʿashr) of the Qur'an are all written according to the ʿUthmānī script. Their differences are all differences in dots and vocalisations added (at later stages) to the ʿUthmānī script.[1] Thus, there is an agreement over what is called 'ʿUthmān's copy' in all schools of Islamic law.

There is one exception to this agreement, which is the opinion held by a handful of Shia Jaʿfarī jurists during the 'declination era.' They asserted that there is a number of missing Qur'anic verses, all related to the succession of ʿAlī ibn Abī-Ṭālib. These jurists hold some of the companions responsible for hiding these verses, for political reasons. According to all of the sunni and shia historical sources known today, none of the Shia Imams had made such allegations. Nor did any Shia Reference (marjiʿ taqlīd) of today, from Imams al-Khomeini and al-Sadir to Shams al-Din and Fadhlallah, endorse that opinion and, in fact, they all spoke strongly against it.[2] Furthermore, I have not come across any fiqhī opinion in various Shia schools of law that is based on 'verses' or 'chapters' outside the Qur'an, as we know it today. Therefore, it is accurate to say that the ʿUthmānī version, according to all schools of law, is the only version that is approved as the 'Holy Qur'an' and as authentic. Ibn al-Jazrī, for example, accounted for more than eighty narrations for each 'reading' (qirā'ah) of the ten known readings of the Qur'an.[3] Therefore, the 'most famous' (mutawātir) status that all schools of law give to the verses of the Qur'an is a result of a wide consensus over the level of authenticity of their narrations.

As far as fiqh is concerned, all schools refer to the current verses of the Qur'an for rulings, except for the Ḥanafī's referral to Ibn Masʿūd's version of some verses, and referrals by various schools to single-chained variations of some other verses (such as ʿAlī's, Ubay's,

ʿĀʾishah's, and Sālim's versions). These versions of a handful of verses (whose narrators chose to keep after ʿUthmān's endorsement of the official copy) do not introduce any significant change in the verses' meanings. In terms of schools of law, these verses are treated as *āḥād* (hadith) sources, rather than Qurʾanic verses.[4] ʿAbdullāh ibn Masʿūd's version is endorsed by the Ḥanafī School, only for the purposes of the law and not as recitable Qurʾan, based on its famous (*mashhūr*) authenticity level. However, the Ḥanafī opinions that were based on them are not radically different from the rest of the opinions.[5]
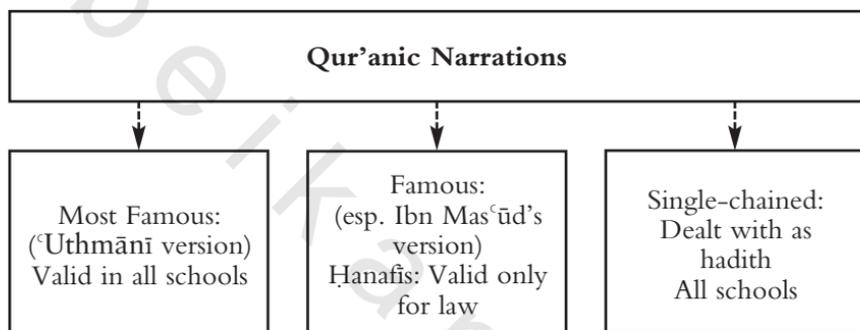

Chart 4.2. A classification of the Qurʾanic narrations according to their 'level of authenticity.'

On the other hand, the Muʿtazilī school and a few scholars of fundamentals (*uṣūlī*s) gave 'reason' (*al-ʿaql*) the status of 'the most fundamental' source of legislation, even relative to the verses of the Qurʾan.[6] Muʿtazilīs argued that reason is more fundamental than the scripts because it leads us to belief in the scripts themselves. However, after a Muslim believes in the Qurʾan, Muʿtazilīs asserted that the Qurʾan becomes 'a judging criterion over reason itself.' Therefore, the Muʿtazilī school of law is, practically, very similar to all other schools, especially the Shāfiʿī school (as will be explained later). 'Giving priority to reason over scripts' is, thus, a Muʿtazilī philosophical idea rather than a theory of juridical reasoning.

Sunnah

Sunnah (literally, tradition) is what is narrated at the authority of the companions about the Prophet's sayings, actions, or approvals. The

Prophet's witnessing of certain actions without objection is considered an approval from him, by definition. The Sunnah, in relation to the Qur'an (refer to Chart 4.3), implies a meaning that is (1) identical to the Qur'an's, (2) an explanation or elaboration on a general meaning mentioned in the Qur'an, (3) a specification of certain conditions for rulings implied in the Qur'an, (4) an addition of certain constraints to the general expressions of the Qur'an, or finally, (5) an initiation of independent legislation. Schools of law approve the first three of the above five relations and differ over the last two, as follows.

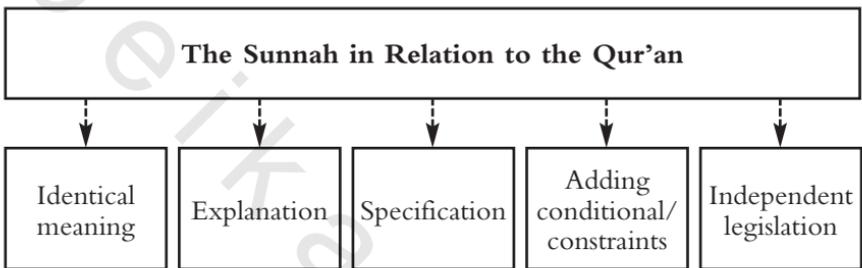| The Sunnah in Relation to the Qur'an				
Identical meaning	Explanation	Specification	Adding conditional/ constraints	Independent legislation

Chart 4.3. A classification of the possible relationships between the traditions of the Sunnah and the Qur'anic verses.

If the Qur'anic expression is 'general' and the Sunnah expression is 'specific' regarding the same topic, Shāfiʿīs, Ḥanfīs, Ẓahirīs, Zaydīs and Jaʿfarīs consider the (single-chained) Sunnah to be 'specifying' the general expression of the Qur'an and, thus, restricting its general expression. Ḥanafīs consider this 'specification' to be a sort of invalidation of the 'confirmed and absolute' general expression of the Qur'an and, therefore, reject the single-chained narration that place constraints on the Qur'an's general expressions.

Malik's opinion on this issue is to look for supportive evidence to the single-chained hadith that specifies the general meaning of the verse before rejecting it. His additional supportive evidence should be some ʿamal (tradition) of the people of Madinah (an evidence which is invalid to all other schools), or a supporting analogy (qiyās). Otherwise, Malik applies weighed preference (tarjīh) and invalidates the single-chained narration.

If the hadith implies a ruling that has no relation with the Qur'an, all schools of law accept it as legislation on condition that it does not fall under actions that are specific to the Prophet. Actions specific to the Prophet could be actions exclusive to him out of prophethood considerations or actions that he did out of custom (ʿādah) of a 'man living in seventh century's Arabia.' Chart 4.4 shows this classification.
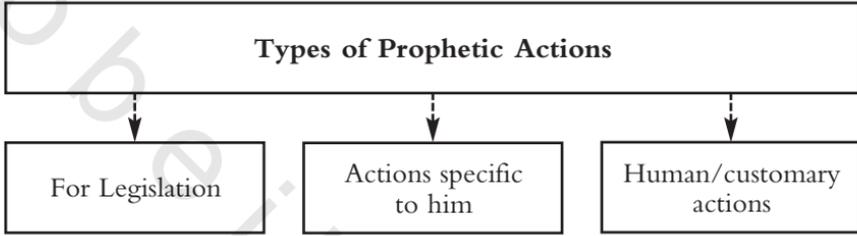

Chart 4.4. Types of Prophetic actions according to their implications on 'legislation.'

Some Mālikīs and Ḥanbalīs had added two other types to the Prophet's actions that do not fall under generally abiding 'legislation,' namely, actions 'out of being a leader' and actions 'out of being a judge.' Al-Qarāfī, for example, included all of the Prophetic actions during wars in his 'leadership actions', as well as governance-related decisions, as explained in Chapter One. He said that identifying the type of the Prophet's action according to his classification has 'implications for the law.' For example, he considered the Prophet's actions 'out of being a judge' to be valid legislations 'only for judges' when they assume their role in courts, rather than for every Muslim. Recently, following al-Qarāfī's example, al-Tahir ibn Ashur (also from the Mālikī school) added other types of actions for 'specific intents,' which are not meant to imply universal legislation, such as, advice, conciliation, discipline, and 'teaching high ideals' to specific people (Chapter Six explains in detail).

Ibāḍīs include 'acts of worship' in actions 'specific to the Prophet'. These are actions that he did not practice regularly. Other schools of law consider such actions 'recommended.' A few Muʿtazilīs differentiated between the Prophet's 'acts of worship' (ʿibādāt), which they

considered the only type that is 'abiding to all Muslims,' versus all of his other actions, which they considered matters of 'worldly judgements' (*muʿāmalāt*). The question of how to differentiate *ʿibādāt* from *muʿāmalāt* remains an open question, even in the Muʿtazilī theory.

The scope of the Prophet's 'independent judgements' (ijtihad) is a topic of difference of opinion, and in my view, an open question. Literalists/Ẓāhirīs, and a few scholars from other schools of law, disagreed with the majority opinion that confirms the Prophet's ijtihad is possible.[7] Ibn Hazm based his disagreement on the 'uncertainty' of human reasoning, as opposed to the 'certainty' of the revelation which was available to the Prophet any time.[8] Al-Ghazālī's counter-argument is that, 'the Prophet's description of the revelation entails that it did not occur based on his requests but rather as an occasional contact initiated by The Angel.'[9]

The other basis of disagreement with the principle of the Prophet's ijtihad is the scope of *waḥī* (revelation) mentioned in the Qur'an.[10] Some exegetes interpreted the verses to mean that, 'whatever speech the Prophet utters is a revelation.'[11] This interpretation was rejected by the majority of schools, which defined a class of 'worldly affairs' and 'specifities' in the Prophet's hadith, as explained above.

There is related debate among jurists, who agreed to the principle of prophetic ijtihad, on whether or not this ijtihad was subject to error. Although the Qur'an mentioned that God did correct the Prophet on a number of occasions,[12] a number of jurists rejected the possibility of erring in the independent prophetic judgements based on the concept of infallibility (*ʿiṣmah*).[13] Most schools, however, acknowledged the possibility of error in the prophetic deliberation on the condition that, 'it would be immediately corrected by a revelation', unless it is concerned with some 'worldly affair.'[14] Differentiating between what is a 'worldly affair' and what is not proves to be an open question! The following is an example of such error in a matter of worldly affairs, which was narrated in the hadith known as the hadith of the pollenating of palm trees.'[15] Muslim's narration states: Ṭalḥah narrates:

> I was walking with the Prophet peace be upon him when he passed by some people at the tops of their palm trees. He asked: 'What are they

doing?' They answered: 'Pollenating the male into the female.' He replied: 'I do not think that this will be of benefit.' When they were told about what the Prophet said, they stopped what they were doing. Later, when the trees shed down their fruits prematurely, the Prophet was told about that. He said: 'If it is good for them they should do it. I was just speculating. So, pardon me. But if I tell you something about God, then take it because I would never lie about God.' Another narrator added: 'You know your worldly affairs better than me.'

Another hadith that adds to the dilemma of defining the sphere of 'worldly affairs' is the hadith of '*al-ghīlah*.'[16] Muslim and Mālik report that the Prophet said: 'I had almost intended to forbid *ghīlah*. Then, I noticed that the Byzantines and Persians do that without it causing any harm to their children.'[17] These hadiths, in my view, keep the question of 'what is to be considered a worldly affair' an open question.

On the other hand, valid hadiths are classified into most famous, famous, and single-chained. Most famous narrations are as absolute as the Qur'an, according to all schools, since they are narrated after a large number of companions (there are various estimates of the number 'large'), who could not possibly and logically agree to lie. Hadith included in this category are related to Islam's most famous acts of worship (basic actions of prayers, pilgrimage, and fasting).
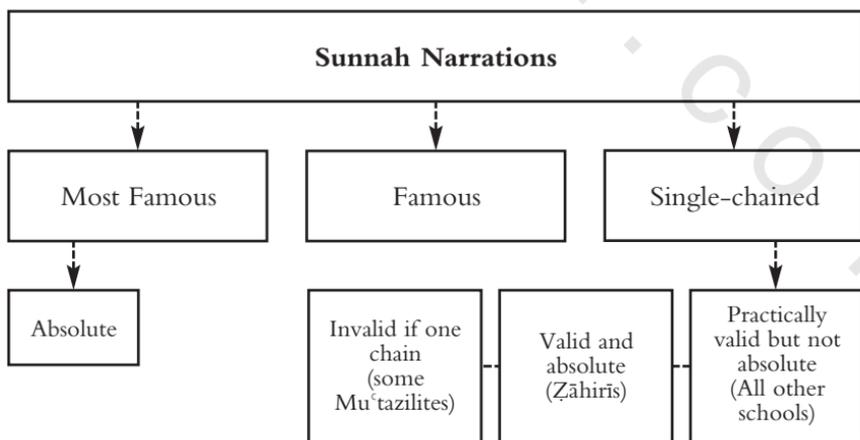

Chart 4.5. Types of Prophetic narrations in terms of their number of narrators.

However, it does not include hadith in the form of sayings. The absoluteness of these narrations, according to all schools, imply an obligation on every Muslim to believe in them, in addition to practice them. The most famous narrations are very few. Estimates range from a dozen to eighty narrations.

There comprises a category of 'famous narrations' narrated by a number of narrators not numerous enough to define it as 'logically impossible' for them to agree on lying. This category includes a small number of the hadith available in traditional sources (less than one hundred hadith according to all accounts), which makes its impact on the law limited, from a practical point of view.

The category of hadith which includes the vast majority of narrations is the *āḥād* (single-chained) category. All schools of Islamic law, except for some Muʿtazilīs, relied on this type in their derivation of their fiqh. These are narrations conveyed via one or a few 'chains of narrations,' usually with slightly different wordings. The verification procedures of the narrators and narrations are detailed extensively in the Sciences of Hadith.[18] The narration has to be valid in terms of its chain of narrators (*al-sanad*) and its content (*al-matn*). For the content of a hadith to be acceptable, the main criteria is to be linguistically correct and not to be in 'opposition' with another hadith, 'reason,' or 'analogy,' in a way that cannot be reconciled.[19] However, practically speaking, authenticity of hadith (*al-ṣiḥḥah*) was merely judged based on the chain of narrators (*al-sanad*). Differences of opinion in judging the *sanad* had implications on the law. Chart 4.6 summarises basic criteria for accepting *sanad* and *matn*.

Acceptable narrations by the Ẓāhirīs are 'certain' and 'absolute,' i.e., 'valid for juridical derivation' and 'required for correct belief,' even if they were single-chained. All other schools consider single-chained narrations to be juridically valid but not part of the Islamic creed. Some Muʿtazilīs differentiate between sayings and actions (including approvals) narrated in hadith. They do not consider actions to be valid evidences of legislation (that are abiding to every Muslim), except in the area of acts of worship (*ʿibādāt*). On the other hand, they consider 'sayings' to be valid evidences of legislation in *ʿibādāt* as well as *muʿāmalāt* (worldly transactions). The question of how to differentiate

ibādāt from *muʿāmalāt* is another open question. Most schools believed that *ibādāt* are the issues that 'cannot be rationalised,' which still keeps the question open.[20]

Trusting a narration entails a group of conditions for bearing (*ḥaml*) or learning the hadith and another group for conveying or narrating the hadith, which all schools agreed upon, in principle. For being accepted as a bearer of a hadith, a narrator has to be mature
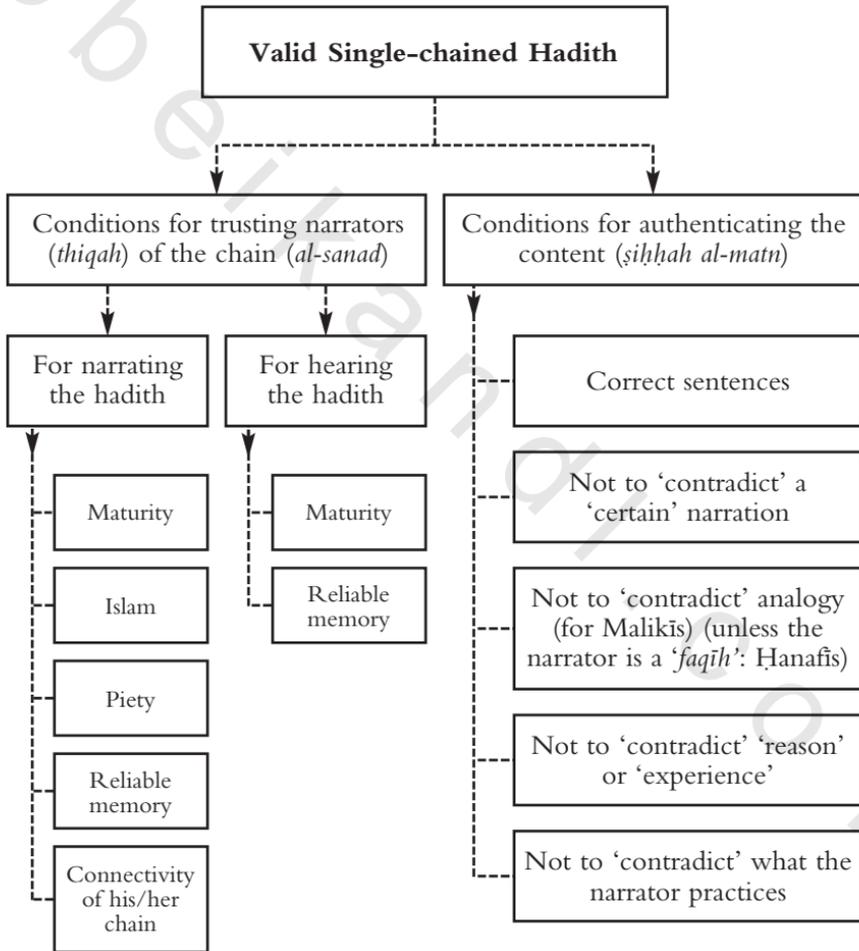
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                    ┌─────────────────────────────┐
                    │  Valid Single-chained Hadith │
                    └─────────────────────────────┘
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Conditions for trusting narrators (*thiqah*) of the chain (*al-sanad*)

Conditions for authenticating the content (*ṣiḥḥah al-matn*)

For narrating the hadith

For hearing the hadith

Correct sentences

Maturity

Maturity

Not to 'contradict' a 'certain' narration

Islam

Reliable memory

Not to 'contradict' analogy (for Malikīs) (unless the narrator is a '*faqīh*': Ḥanafīs)

Piety

Not to 'contradict' 'reason' or 'experience'

Reliable memory

Not to 'contradict' what the narrator practices

Connectivity of his/her chain

Chart 4.6. Conditions for validating single-chains narrations in traditional Sciences of Hadith.

(most estimates for his/her age is seven years old) and known to have a reliable memory (*al-ḍabṭ*). For narrating a hadith, a narrator has to be mature, Muslim, pious, has a reliable memory, and has a connected (*muttaṣil*) chain of narrators/teachers between him/her and the Prophet. The exact specifications of each of these conditions are subject to many differences of opinion amongst scholars of hadith, even within each school. Moreover, there are clear divisions in terms of trusted narrators between the Sunni schools (Mālikīs, Shāfiʿīs, Ḥanafīs, Ḥanbalīs, and Ẓāhirīs), and the Shia schools (Jaʿfarīs and Zaydīs). Ibadis have their own group of trusted narrators as well. Sunni schools accepted all companions and their students, including the 'Shia' imams and the 'Ibāḍī' students of the companions (who were much later labelled as Shia and Ibāḍī after the establishment of these parties, as explained before). For Sunnis, however, later generations of Shia, Ibāḍīs, and Muʿtazilīs are not generally acceptable as trustworthy narrators of hadith because of their alleged 'innovations' (*bidʿah*). On the other hand, Jaʿfarīs and Zaydīs do not accept the companions' narrations (except for the companions who were considered part of the Prophet's household or *āl al-baīt*). This is largely due to the conflict between ʿAlī on one side and Muʿawiyah and ʿĀ'ishah on the other, which became the civil war and Battle of the Camel (*Mawqiʿah al-Jamal*) in 37AH/ 657CE. Nevertheless, narrations from the Shia sources produced juridical rulings that are quite similar to other Sunni rulings (except for some minor differences in fiqh, which are as much as the differences between any other two Sunni schools). In my view, differences between Sunni and Shia schools were and remain to be in the area of *kalām* and politics, that is, political positions over the companions' post-ʿUthmān civil war. Ibadis also ended up with a fiqh that is quite similar to the rest of the schools, despite the historic political differences between them and the rest of the schools.[21]

The last condition for accepting a narrator, which is the ability to relate a connected chain of narrators/teachers up to the Prophet, is a matter of significant differences amongst schools of Islamic law. A chain with missing narrators from the beginning, the middle, or the end of the chain has various levels of credibility and different terminologies in the Sciences of Hadith, and has contributed to many differences of

opinion. For example, the *mursal* hadith (which is a narration related directly to the Prophet without mentioning intermediate narrators/companions) had a significant impact on differences in *fiqhī* opinions. Schools of law took different positions on *mursal* hadith (refer to Chart 4.7). Mālikīs and Ḥanafīs accept it from the students of the companions only. Al-Shāfiʿī did not accept such hadith except when there was supporting evidence, such as other narrations of the same hadith (even if they were also *mursal* narrations). Jaʿfarīs and Zaydīs accept it from the Imams on their authority. Aḥmad ibn Ḥanbal considers the *mursal* narration to be 'weak,' in terms of authenticity, and therefore, would not use it unless no other narration was available. However, he gives the *mursal* hadith priority over other secondary evidences (such as analogy).

Regarding the narrations themselves (of the degree *aḥād*), they have to be conveyed in complete sentences. Moreover, they cannot contradict with other 'certain' narrations or analogy (according to Mālikīs, and unless the narrator is considered a '*faqīh*,' according to Ḥanafīs). Nor can they contradict the narrator's practices or 'reason,' according to Muʿtazilīs.[22] However, in my view, the very definitions of 'contradiction,' 'certainty,' and 'reason' in traditional schools of law require 'philosophical updating,' as this book will argue. Moreover, the condition that 'reason' should not contradict with narrations is problematic, since al-Ghazālī, amongst other jurists, included in their definition
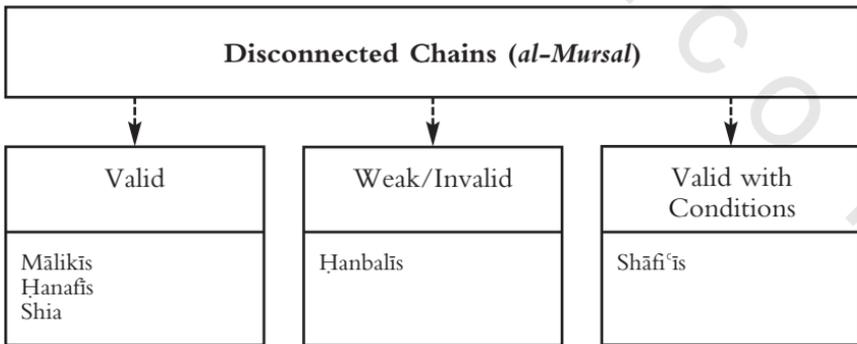

Chart 4.7. Positions of some schools of law regarding the mursal hadith.

of reason, which was 'what is acceptable according to common sense and experience.'[23]

The next section studies the linguistic tools that various schools of law used in deriving rulings from the primary scripts/sources introduced in this section.

4.2. SCRIPT-BASED LINGUISTIC EVIDENCES

Overview

When jurists talk about 'an evidence' from the Qur'an or the prophetic tradition, they actually mean a ruling that is derived from a specific expression of a verse or hadith, according to one of the categories of linguistic expressions explained in this section. Expressions, or 'terms' are categorised in terms of clarity (*wuḍūḥ*), implication (*dilālah*), and scope (*shumūl*). These expressions and the methods of deriving meanings/rulings from them is a shared concern for all schools of the Islamic law. With the evolution of the schools of law and the increasing popularity of Greek philosophy in jurists' circles, these classifications ended up resembling the 'conceptions' (*taṣawwurāt*) sections within medieval treaties on logic, in content and structure, as this section explains.

Classifications of Terms/Expressions

| Terms in terms of clarity (*wuḍūḥ*) | Terms in terms of implication (*dilālah*) | Terms in terms of scope (*shumūl*) |
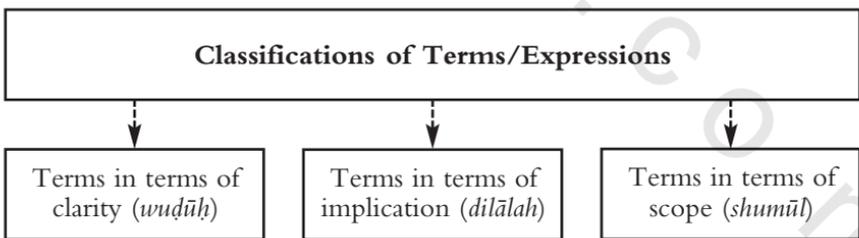
Chart 4.8. Classification of terms/expressions in terms of clarity, implication, and scope.

Clarity

A binary classification of clarity is agreed upon amongst schools, in which expressions are classified into 'clear' and 'unclear' rulings.[24] Jurists further divided clear terms into into four levels of clarity, which are ordered from clearest to least clear. They are 'firmly constructed' (*muḥkam*), 'text' (*naṣṣ*), 'apparent' (*ẓāhir*), and 'explained' (*mufassar*). This division is made based on three criteria, namely, the possibility of specification (*takhṣīṣ*), interpretation (*ta'wīl*), and abrogation (*naskh*).
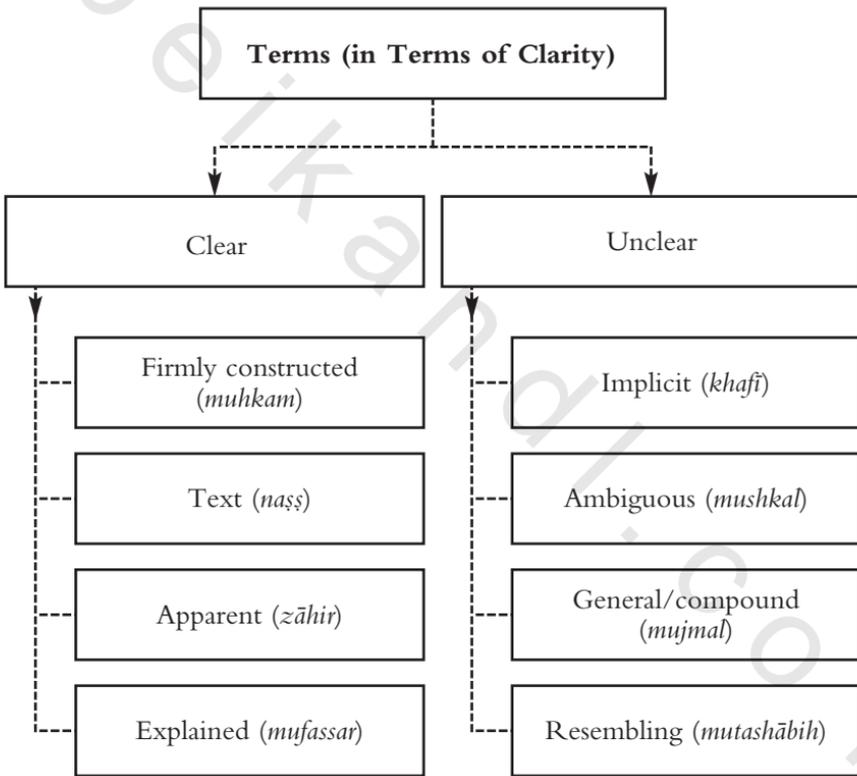
Chart 4.9. Classification of 'clear' and 'unclear' terms.

	Possibility of Specification	Possibility of Re-interpretation	Possibility of Abrogation
Firmly constructed	No	No	No
Text	Yes	Yes	No *except with evidence*
Apparent	Yes	Yes	Yes
Explained	Depending on the 'explaining' evidence		

Chart 4.10. Classification of clear terms according to the possibility of their specification, re-interpretation, and abrogation.

A firmly constructed term is a clear expression that 'does not need any specification or interpretation,' and is 'proven not to have been abrogated' (i.e., cancelled during the time of the Prophet).[25]

The implication of this type of terms is considered stronger than all other terms, i.e., it specifies, interprets, or even abrogates 'opposing' expressions. The conditions of 'proven' not to be 'abrogated' or 'in opposition' are problematic, since abrogation and opposition are unjustifiably and inconsistently claimed, as will be explained later.

A 'text' (*naṣṣ*) is a clear expression, but could be specified via some other expression. It could also be abrogated with an 'opposing' evidence.[26] The evidence that has the capacity to specify, interpret, or abrogate a *naṣṣ* has to be another *naṣṣ* or a *muḥkam* expression. This purely linguistic approach to the prioritisation and the application of evidences is endorsed by most schools of law. However, some jurists suggested evidences outside *al-naṣṣ* that has the capacity to 'oppose' *al-naṣṣ*, such as, interest (*maṣlaḥah*) and custom (*ʿurf*). For example, al-Ṭūfī, a leading Ḥanbalī jurist, gave precedence of *al-maṣlaḥah* over a specific *naṣṣ*. Ibn ʿĀbidīn, a leading Ḥanafī jurist, restricted the meaning of *al-naṣṣ* with *al-ʿurf*. These opinions raise a serious question about the 'absoluteness' of the direct implication of *al-naṣṣ* that is claimed in all schools of law, which had resulted in a great deal of inflexibility in dealing with evolving realities (*al-wāqiʿ*). This point is of

special importance and will be dealt with in the context of 'openness' of the system of Islamic law.

The next level of 'clarity' is the 'apparent meaning' (*al-ẓāhir*), which is defined as a separate category from *al-naṣṣ* only in the Ḥanafī school. According to Ḥanafīs, the difference between *al-naṣṣ* and *al-ẓāhir* is in: 'the meaning of *al-naṣṣ* is intended in the script, while the meaning of *al-ẓāhir* is understood as a secondary implication.'[27] The implication of *al-ẓāhir* in the law is also 'certain,' it is claimed, unless a *naṣṣ* or a *muḥkam* 'opposes' it. The lowest level of clarity is what is called the 'explained' term (*al-mufassar*). Jurists mean by an 'explained' expression an unclear expression that is explained by other clear ones. The level of clarity after the explanation depends on the level of the explaining term, whether *muḥkam*, *naṣṣ*, or *ẓāhir*.

Similarly, *uṣūlīs* divide 'unclear term' (*ghayr al-wāḍiḥ*) into four categories, depending on whether the 'lack of clarity' comes from the structure of the term itself or from its scope, i.e., its capacity to include certain meanings. The four categories are implicit (*khafī*), ambiguous (*mushkal*), general (*mujmal*), and resembling (*mutashābih*).[28]

An implicit term is unclear in terms of what should be included in its scope.[29] For example, jurists had differences of opinion over whether the expression of 'thief,' which is mentioned in verse 5:38, includes 'fraudulents' and 'shop lifters' or not. Schools of law resulted in providing different answers to this question based on their methodologies

	Reason for Non-clarity	
	Structural	Scope
Implicit		√
Ambiguous	√	
Whole		√
Resembling	√	

Chart 4.11. Classification of types of unclear expressions, based on the reason behind their non-clarity.

in dealing with implicit expressions. Ḥanafīs (except Abū Yūsuf) did not include 'shop lifters' in the category of 'thieves' because of the 'difference in the names,'[30] they said. There is clearly a great deal of literalism (*ḥarfiyyah*) in this view. On the other hand, Mālik, Shāfiʿī, and Aḥmad considered what they called 'the meaning of theft' to be the criteria of considering someone a 'thief.' They further asserted that this 'meaning' should be 'defined according to custom.'

A similar example is the word 'killer' in the hadith, 'a killer does not inherit [from the murdered].' A difference of opinion arose as to whether a 'killer by mistake,' 'by instigation,' or 'by association' is implicitly included in that term. For example, al-Shāfiʿī included everybody that could be 'called' a killer in the term, with or without intention to kill. Mālik, on the other hand, insisted that the 'purpose/intent' of the person should be to kill and, therefore, did not include 'killing by mistake' in the term. Ḥanafīs took a rather literal opinion on this issue, and decided that the implicit meaning in the word 'killer' is the action of killing itself. Thus, if the person himself/herself carried out the action of killing, whether or not intentionally, then he/she is included in the hadith. Otherwise, he/she is not included in the term, even if he/she had helped the murderer, even intentionally, with the action of the killing! These are example of incomprehensible rulings that jurists sometimes issue just to keep in line with their fundamental linguistic theories. The negative implications of the resulting 'rulings' on the higher objectives (*maqāṣid*) of justice and social order are clear in the above two examples.

An ambiguous term (structurally) implies more than one meaning and 'could not be understood except with outside evidence.'[31] A classic example is the word 'periods' (Arabic: *qurūʾ*), mentioned in verse 2:228. Schools of law differ over this expression due to their differences over outside evidences that they used to explain the ambiguity. Thus, their difference of opinion in this example, boils down to their difference over the methodology of dealing with, again, 'opposing evidences.'

A 'whole' term (*mujmal*) is an expression that includes a number of situations and rulings in its meaning, which are in need of other expressions or evidences for clarification.[32] Examples are 'prayer' or

'pilgrimage' mentioned in the scripts, which imply a number of detailed rulings known from other scripts. Jurists claimed that after illustrating this *mujmal* expression, it becomes clear, i.e., either *naṣṣ*, *muḥkam*, or *mufassar*.[33]

Finally, the 'resembling' (*mutashābih*) term is an Arabic expression that could not be understood 'rationally,' jurists said.[34] Examples are individual Arabic letters mentioned at the beginning of some chapters of the Qur'an, and expressions used to describe God in 'human-like' terms. In this case, some form of interpretation or *ta'wīl* has to be carried out in order to clarify the 'resembling' expression.

In my view, the above classifications of clear and unclear expressions are arbitrary! My reason behind this 'radical' view is that the difference between the levels of *muḥkam*, *naṣṣ*, and *ẓāhir* depends on specification, interpretation, and abrogation, as jurists maintained. However, countless instances in the *fiqhī* literature of various schools prove that almost every *muḥkam* or *naṣṣ* expression is in fact subject to difference of opinion on whether it is actually 'specified,' 'interpreted,' or 'abrogated' by other expressions. Therefore, the categories of *muḥkam*, *naṣṣ*, and *ẓāhir* converge to one category of *al-ẓāhir*, which if interpreted or explained, will depend on the 'level of clarity' of the explaining expression. Similarly, most scriptural expressions could be 'whole' and in need of clarification as to its components, or ambigious/implicit and in need of clarification as to its meaning, and so on. There are no 'natural' differences between these categories.

Implication

The second classification of terms is according to the implications or meanings (*dilālāt*) implied by them. The two classifications of implications, which are endorsed by all other schools in similar terms, are the Ḥanafī's and the Shāfiʿī's. After analysing both, I realised that the two schools endorse very similar categorisation of implications, albeit in slightly different means of articulation. Chart 4.12 and Chart 4.13 summarise the Ḥanafī and Shāfiʿī classifications, respectively.
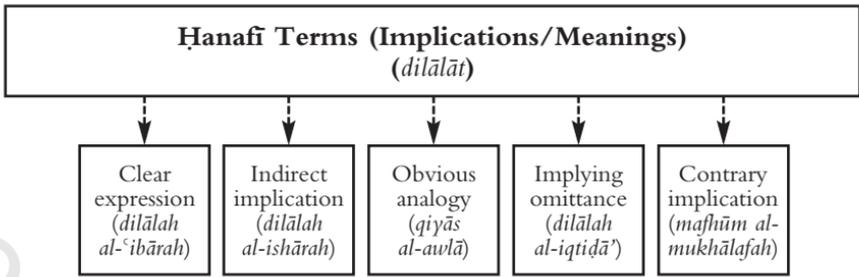
Ḥanafī Terms (Implications/Meanings) (*dilālāt*)				
Clear expression (*dilālah al-ʿibārah*)	Indirect implication (*dilālah al-ishārah*)	Obvious analogy (*qiyās al-awlā*)	Implying omittance (*dilālah al-iqtiḍāʾ*)	Contrary implication (*mafhūm al-mukhālafah*)

Chart 4.12. Implications of expressions according to the Ḥanafīs.

The Ḥanafī Classification of Implications

According to Ḥanafīs, a 'clear expression' (ʿibārah) implies a certain meaning in a direct and straightforward manner, which could be *muḥkam*, *naṣṣ*, *ẓāhir*, and *mufassar*, as explained above. On the other hand, an 'indirect implication' (*ishārah*) implies a meaning based on an understanding of a relationship between an (indirect) meaning and another (direct) meaning. For example, the 'verse of debts' implies (directly) that the consent has to be written according to the parties' agreement, but it also implies (indirectly) that the contract is legally binding to both parties in front of a court, even though this is not directly stated in the verse. Another example is the 'verse of consultation' (or *shūrā*), which directly implies a governing system that is based on people's consent, but could indirectly imply 'accountability' and 'transparency.' These two examples are meant to show how extending direct implication (ʿibārah) to indirect implication (*ishārah*) could contribute to a much-needed expansion and 'contemporisation' of the interpretations of the scripts. However, direct ʿibārah has absolute priority over indirect *ishārah*, according to all schools. Moreover, clear direct ʿibārah is considered definitive/certain, while indirect *ishārah* is probable (*ẓannī*) and, thus, does not, formally speaking, entail juridical 'obligation' of its implied rulings, such as 'legal abidance' or 'transparency.' The 'levels of rulings' are introduced and discussed later.
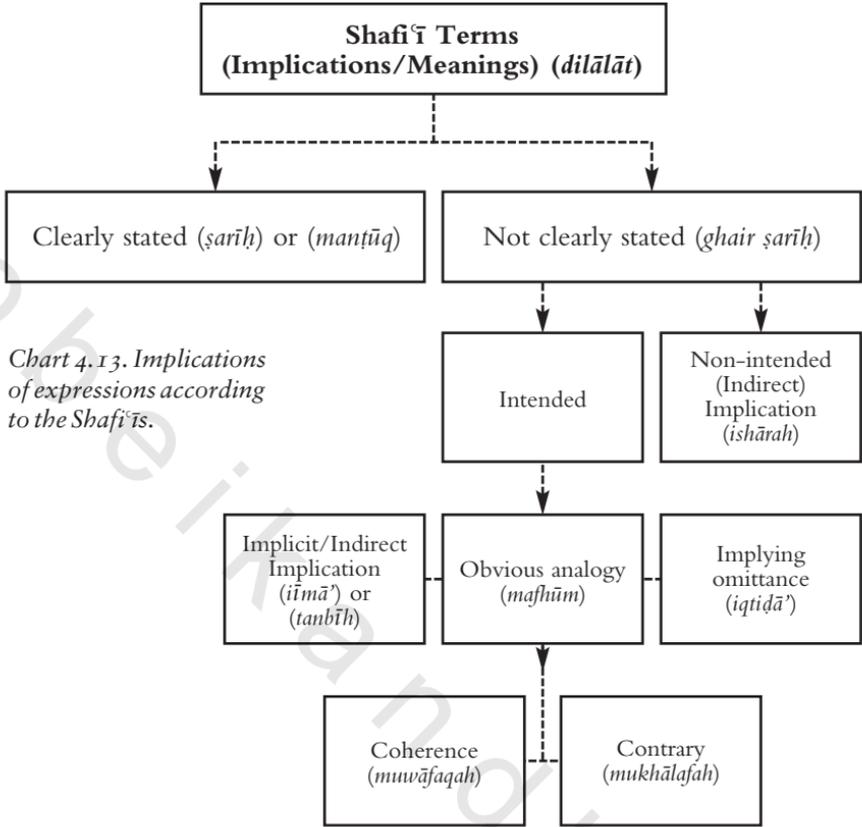
Obvious analogy (*qiyās jalī*) is an implication that is derived from the expression by 'common sense.' Some jurists call it the 'implication[35] of the implication.' For example, forbidding 'eating' what

belong to the orphans without a right to do so, as verse 4:10 states, also implies wasting this wealth in any other way. Another example is the implication of the verse that orders a son or daughter not to say a 'word of grumbling' to their parents. The 'obvious analogy' implies an order not to harm parents by any means. This form of analogy is less formal than syllogistic analogy and its implication is used by most jurists. In addition, Ibn Taymiyah used the validity of the 'obvious analogy' to criticise the claimed 'certainty' of Aristotle's syllogistic analogy.

A final implication in the Ḥanafī classification is an implication of an omitted word (*iqtiḍā'*), or words that are also concluded, again, by 'common sense' from the expression. Omittance is a form of eloquency in Arabic expressions and a form of ambiguity, too, which could result in juridical flexibility and, also, differences of opinion. For instance, 'forbidden upon you is anything that dies by itself,'[36] implies ommitance of either the word 'eating,' i.e., it is forbidden to eat dead animals, or the word 'using,' i.e., it is forbidden to use a dead animal's bones or skin in any way.[37] In this example 'using' is more general than 'eating.' Thus, schools of law differed over whether to give priority to the 'general substitution' or the 'specific substitution' for the ommited word. Shāfiʿīs endorsed the 'general' choice while Ḥanafīs endorsed the 'specific.'

The Shāfiʿī Classification of Implications

The Shāfiʿī's classification of implications (Chart 4.13) show direct similarities with the Ḥanafī's, namely, 'clearly stated' (*ṣarīḥ*), which in similar to the Ḥanafī's *ʿibārah*, '*mafhūm*' (understood by implication), which is similar to the Ḥanafī's *qiyās al-awlā* (obvious analogy), and *iqtiḍā,* (implying ommitance). The difference between the two classifications is a level that the Shāfiʿīs added to determine whether the 'unclearly-stated' expression is 'intended' (by the expression) or not, and therefore, whether the 'indirect meaning' will be considered an indirect implication (*ishārah*) or implicit implication (*īmā'*). The technical difference between *ishārah* and *īmā'* is that *īmā'* is directly related to the *ʿillah* (appropriate 'cause') of the expression, while *ishārah* is concluded by 'the language sense' without following the

**Shafi'ī Terms
(Implications/Meanings) (dilālāt)**

Clearly stated (*ṣarīḥ*) or (*manṭūq*)

Not clearly stated (*ghair ṣarīḥ*)

*Chart 4.13. Implications
of expressions according
to the Shafi'īs.*

Intended

Non-intended
(Indirect)
Implication
(*ishārah*)

Implicit/Indirect
Implication
(*iīmā'*) or
(*tanbīh*)

Obvious analogy
(*mafhūm*)

Implying
omittance
(*iqtiḍā'*)

Coherence
(*muwāfaqah*)

Contrary
(*mukhālafah*)

formal procedure of extracting the *ʿillah*.[38] However, in terms of juridical implications, the Shāfiʿīs' extra category does not make any practical difference.

Jaʿfarīs and Zaydīs had introduced a different classification of 'firmly constructed' (*muḥkam*) terms that is also similar to the Shāfiʿī and Ḥanafī classification. Jaʿfarī and Zaydī categories of terms are: 'clear' (*jalī*), 'apparent' (*ẓāhir*), 'implied' (*mafhūm*), 'specific' (*khāṣ*), 'rationally embellished' (*taḥsīn ʿaqlī*), and 'allegorical' (*majāz*), in that order.[39] The definition of each of these categories is similar to the corresponding categories of Ḥanafī and Shāfiʿī. The only significant addition in this categorisation is the 'rationally embellished' category, which opens the door for free ijtihad, on condition that there is no related clear, apparent, implied, or specific script.[40]

However, there are two other differences between the Ḥanafī and Shāfiʿī classifications that do have juridical implications. They are the interrelations between the categories of implications and the 'contrary implication.'

The Ḥanafī and Shāfiʿī classifications differ in terms of the prioritisation of these implications, i.e., which implication to apply first in case there is more than one in the expression(s) at hand. The Ḥanafī's order is:

1. *ʿIbārah.*   3. *Qiyās al-awlā.*
2. *Ishārah.*   4. *Iqtiḍāʾ.*

The Shāfiʿī's order is as follows (using the Ḥanafī terms, while disregarding the difference between the two types of indirect implications):

1. *ʿIbārah.*   3. *Ishārah.*
2. *Qiyās al-awlā.*   4. *Iqtiḍāʾ.*

This difference in the order of *qiyās al-awlā* and *ishārah* had resulted in a number of differences in *fiqhī* rulings between Ḥanafīs and the rest of schools of law (which generally followed the Shāfiʿī classification). For example, one verse of the Qurʾan states: 'But whoever deliberately slays another believer, his requital shall be hell.'[41] This verse implies (indirectly, i.e., *bi al-ishārah*) that hell is the (only) punishment for murderers.[42] However, another verse states: 'Upon him who has slain a believer by mistake there is a duty of freeing a believing soul from bondage and paying an indemnity to the victim's relations.'[43] Shāfiʿīs made an obvious analogy or *qiyās al-awlā* between a killer with intention and the killer without intention who is mentioned in this verse. Therefore, Shāfiʿīs judged that an intentional killer should pay a indemnity equal to the indemnity that a mistaken killer pays, in addition to the default punishment.

Shāfiʿīs gave priority to obvious analogy over indirect implication because it is the 'closest implication to the direct implication of *al-naṣṣ* (or *al-ʿibārah*),' while Ḥanafīs gave priority to *al-ishārah* because it is 'closest to the structure of the wordings since it is an integrative part of

al-naṣṣ.'44 Therefore, both schools are in fact endeavoring to be as close as possible to the literal meaning of *al-naṣṣ*. This book suggests, however, that greater weight should be given to the rationale/purpose of *al-naṣṣ*, rather than its literal meaning.

Contrary Implication

All traditional schools of Islamic law, except for the Ḥanafīs, agree with the Shāfiʿīs in dividing the *mafhūm*/implication into *mafhūm al-muwāfaqah* (coherence implication, which include the examples of 'obvious analogy,' mentioned above), and *mafhūm al-mukhālafah* (contrary implication). Contrary implication means that the 'existence of a fact implies the absence of the contrary.' In formal logic, it is the proposition that 'α' is equal to 'NOT NOT α.' Schools of law which endorsed contrary implication divided it into five different types, namely, title (*al-laqab*), attribute (*al-waṣf*), condition *(al-sharṭ)*, limit/end (*al-ghāyah*), and number (*al-ʿadad*). This means that the mention of one of these types in a script implies, according to contrary implication, the logical absence and juridical invalidity of its opposite. Ḥanafīs rejected this type of implication since 'a ratio legis (*ʿillah*) of a script cannot imply two opposite rulings simultaneously.'45

An example of a 'title' is the word 'pastured' (*sāʾimah*) mentioned in the hadith: 'there is zakah charity due on pastured cattle.'46 Therefore, non-pastured cattle are not included in zakah, according to all schools of law, except for the Ḥanafī school, which did not endorse contrary implication.47
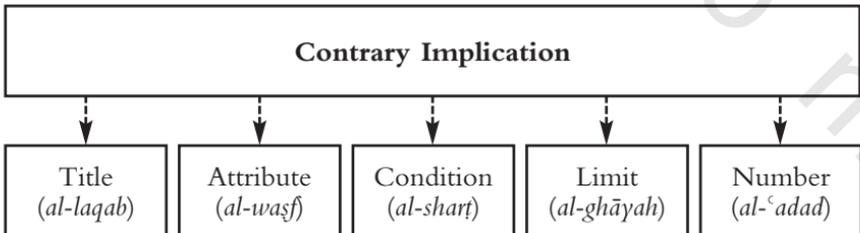
Chart 4.14. Types of contrary implication.

An example of an attribute is 'believer' associated with the women mentioned in verse 4:25 (in the context of marriage). Therefore, al-Shāfiʿī made believing a 'condition' for that marriage to be valid and so did not allow marriage with non-believers. Ḥanafīs, who do not endorse contrary implication, allowed Muslim men to marry 'believer' and 'non-believer' women.

An example of a condition is the verse, 'if they [i.e., your divorcees] happen to be with child, spend freely on them until they deliver their burden.'[48] According to contrary implication, if the divorcee does not have a child, then she is not entitled to the support mentioned. Ḥanafīs disagreed.[49]

An example of a 'limit' is found in verse 2:187 on fasting: 'eat and drink until you can discern the white streak of dawn against the blackness of night.'[50] This verse implies that eating and drinking are allowed until the stated time limit is reached and not allowed afterwards. Ḥanafīs agree on the same conclusion but consider 'eating and drinking' in this example to be a default ruling that is 'restricted' by fasting, rather than by contrary implication.[51]

Contrary implication was also applied to numbers. If a verse or hadith mentions a number, then all other numbers are invalid, and no other number could replace the number mentioned in the text. An example is the percentages and thresholds mentioned in the hadith on zakah (obligatory charity). Ḥanafīs also do not allow changing the numbers, but base their opinion on the direct implication of the text (al-naṣṣ), rather than on contrary implication.

It is true that all schools of law exclude attributes that are mentioned for the sake of other 'allegorical purposes' from 'contrary implications.' They also exclude contrary implications that 'oppose' other scripts.[52] However, this method (illustrated by the examples mentioned) show a sort of 'Exclusive-OR,' to use a logical term,[53] that is implicit in the very reading of the scripts and, thus, does not allow a range or a variety of rulings to be applied according to different situations. This method added to the inability of traditional Islamic law to change with changing circumstances and, thereby, hindered the scripts from contributing to that change. For example, the 'implication of numbers' resulted in an 'opposition' (taʿāruḍ) between a number of

hadith narrations regarding certain kinds of zakah, which varied within a certain range.[54] This forced jurists to cancel/abrogate certain narrated numbers in order to apply the method of implication of numbers consistently. For example, there is a difference between the 'Book of Abū Bakr,' the 'Book of ʿAlī,' and the 'Book of ʿAmr ibn Ḥazm' in terms of the numbers for what should be taken as zakah out of camel herds.[55] Due to these differences in narrations and the implication of numbers, jurists were divided over which numbers to endorse (and, thus, which to reject based on contrary implication). A few scholars including al-Tabari, however, decided that a valid choice could be based on any of the above narrations.[56]

Nevertheless, if we consider a different dimension, other than the implication/counter implication dimension, we will not have to face or resolve any contradiction. The purposes (*maqāṣid*) of zakah include facilitation, as jurists had concluded. Some contemporary jurists maintained that the principle of facilitation implies that numbers differed based on considerations regarding the circumstances of the donors themselves.[57]

Scope

Expressions/Terms were also categorised according to their 'scope,' and theoretical differences over the relationship between the resulting
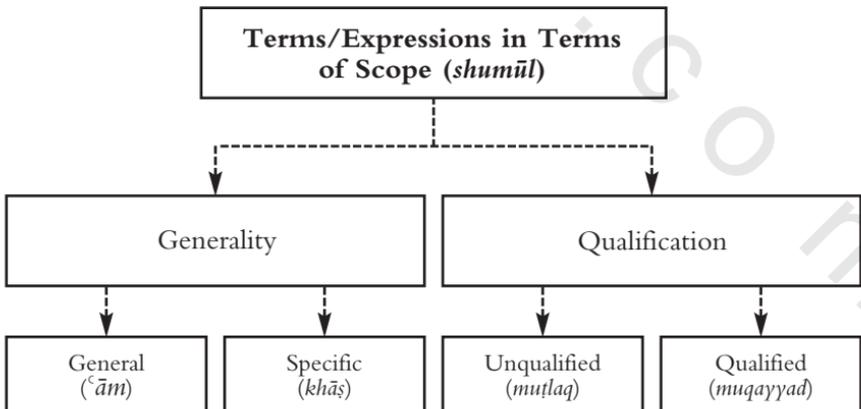
Chart 4.15. Classification of expressions in terms of their scope.

categories generated some difference of opinion on the practical *fiqhī* level. Once more, reminiscent of some Greek categorisations, terms were classified in terms of 'generality' and 'qualification.' Thus, terms were further classified into the binary categories of 'general' versus 'specific,' and 'unqualified' versus 'qualified.'

Generality

A general (*ʿām*) term includes more than one entity in its expression, while a specific term includes only one entity, whether it is a person or an attribute. Jurists agree that a specific term is 'certain' (*qaṭʿī*) in its implication, and thus cannot be probable (*ẓannī*) based on any speculated hypothesis.[58] However, jurists differed over the 'certainty' of the scriptural general term. Ḥanafīs considered it 'certain' (*qaṭʿī*), while all other schools considered it to be 'probable' (*ẓannī*) and, thus, 'specifiable.' This difference of opinion had an impact on scripts that were thought to be in 'opposition.' For example, a difference of opinion occurred over the implication of general verses of the Qur'an versus the
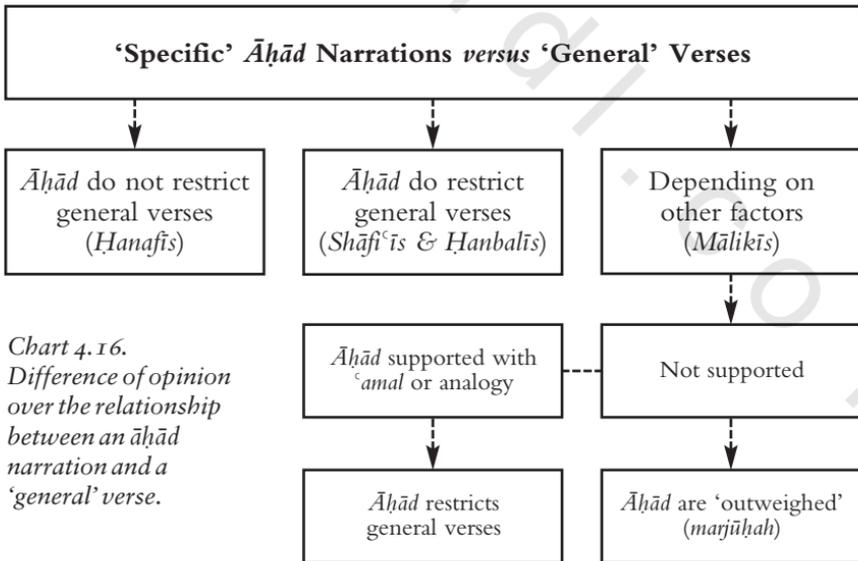
Chart 4.16.
Difference of opinion over the relationship between an āḥād narration and a 'general' verse.

implication of *āḥād* specific terms that could theoretically restrict them. One classic example is verse 5:6 that states: 'When you are about to pray, wash your face, and your hands and arms up to the elbows,' which is a 'general' expression that is not specified by any specific order of washing. However, a number of narrations describe how the Prophet had consistently followed a certain order in his ablution. Ḥanafīs rejected the 'requirement' of order in ablution (and considered it a 'recommendation') based on their theory that general expressions are 'certain' and not to be specified by 'probable' *āḥād* narrations. All other schools of law required ordering, since they considered the specifics mentioned in the hadith to be 'restrictions put on the general meaning of the verse.'[59] Mālik, on the other hand, agreed with the restrictions based on the tradition of the people of Madinah (*ʿamal ahl al-madīnah*), which supported the above-mentioned *āḥād* narrations. Without that *ʿamal* (or alternatively, a valid analogy), Mālik would have considered the hadith 'in opposition' (*muʿāriḍ*) with the verse and, therefore, outweighed (*marjūḥ*).

Qualification

A similar difference of opinion occured in the way different schools of law dealt with 'qualified' verses 'unqualified' expressions (Chart 4.17).
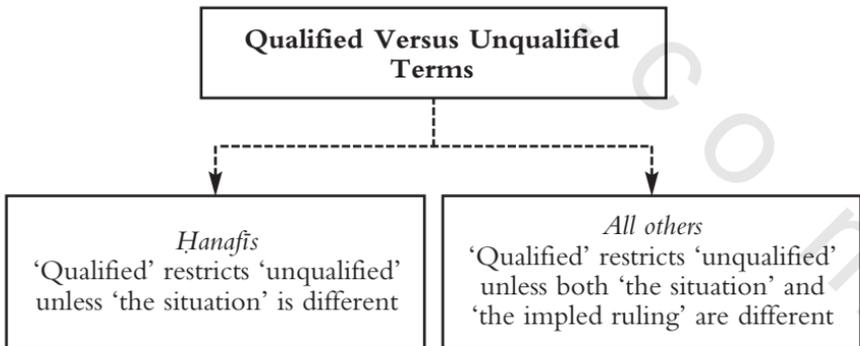
Chart 4.17. Difference of opinion over qualified versus unqualified terms/
expressions.

When jurists studied qualification of a certain expression, they looked into two factors, (1) the 'situation' or the case that the script is dealing with, and (2) the ruling that the script implies (which ranges from 'obligation' to 'prohibition'). They defined the relationship between a 'qualified' and a 'non-qualified' term based on the following four logical possibilities of similarity and difference:

1. A similar case and a similar ruling.
2. A similar case and different ruling.
3. A different case and similar ruling.
4. A different case and a different ruling.

The following are four illustrative examples for the above four possibilities, respectively:[60]

1. The hadith in which a man broke his fast intentionally and asked the Prophet how he could compensate for it. The Prophet asked him to fast for two months. In a different narration of a similar situation, the Prophet asked the enquirer to fast for two 'consecutive months.' All schools of law apply the specification of sequence here and, thus, restrict the first general expression with the second (specific) expression.
2. Two narrators addressed zakah (obligatory charity) of camels. The first narration mentioned 'camels' with no further qualification and the second mentioned 'pastured camels,' which means that non-pastured camels are not included in the ruling of zakah. However, because of the similarity of the 'situation,' i.e., camels' zakah, all schools agreed to restrict the unqualified expression with the 'pastured' qualification.
3. Several verses addressed the issue of witnesses in various situations, such as verse 2:282, 'have witnesses whenever you trade with one another,' and verse 65:2, 'let two persons of [known] probity from among your own community ...' The first verse, which mentions an 'unqualified' witness, is addressing the situation of a trade transaction, while the second verse, which mentions a witness 'qualified' with 'probity,' is talking about witnesses of

divorce. Yet, all schools of law (except for the Ḥanafīs) restricted the unqualified expression of the first verse with the qualification mentioned in the second verse and, thus, required a 'proof of probity' for all witnesses.

4. An example of two verses with two different cases and two different rulings is the verse, 'fast for three days' (related to the ruling of breaking an oath) and the verse, 'fast for two consecutive months' (related to the ruling of *ẓihār*).[61] Because of the difference in the situation and in ruling, all schools agreed on not restricting the first verse with the 'consecutive' qualification mentioned in the second verse.

As we can see from the above analysis of 'scope,' there is a general trend amongst classic jurists to encourage 'specification' and 'qualification.' This trend added to the already inflexible and restricted methods of literal linguistic derivations. In these pure linguistic theorisations of 'extracting rulings,' little consideration, if any, is given to the underlying circumstances or the intended objective/*maqṣid* of the *naṣṣ*. For example, rulings for 'compensations' (*kaffārāt*), similar to the one mentioned above, are supposed to remain open and are not 'qualified' or 'restricted.' This gives the muftī a chance to address various people according to their educational needs, which is the purpose behind these *kaffārāt*, to start with. Restricting this area to the strictest possible ruling (such as requiring two consecutive months of fasting) defeats this purpose, and also goes against the well-known general purpose of facilitation and magnanimity in matters of worship.

Similarly, much of the juridical deliberations on zakah were focused on issues such as whether the cattle is supposed to be 'pastured' or not, whether gold should be 'ring-shaped' (*muḥallaq*) or not, whether a 'needy' (*miskīn*) person could also be 'poor' (*faqīr*) or not, whether glass, copper, or salt are considered 'metals' or not, and so on. All of these zakah debates miss the real point/purpose behind zakah as a social welfare system. Similarly, rulings related to courts and procedures should not be merely tied to linguistic derivations and terms, but should, rather, consider the society and its evolution and the 'absolute' objective of achieving justice. However, in addressing the issues above,

jurists resorted to the fundamentals of specifity and qualification, rather than the fundamentals of social justice and common good. Linguistic derivations are perhaps necessary for defining pure acts of worship, but they should not be considered sufficient sources for judgement on issues related to public interest. These issues should be dealt with according to a value- and purpose-oriented methodology. Chapter Six elaborates on a 'purposefulness-based' approach.

Linguistic Evidence: The Impact of Greek Philosophy

The general categorisation of knowledge, according to Islamic medieval philosophies, follows the 'conception' and 'assent' scheme (Chart 4.18). Conception is divided into terms (*alfāz*), meanings (*maʿānī*), and definitions (*taʿārīf* or *hudūd*).[62] Terms are studied in terms of their implication of meanings, generality, degrees of being, composition, and the relationship between words and meanings.
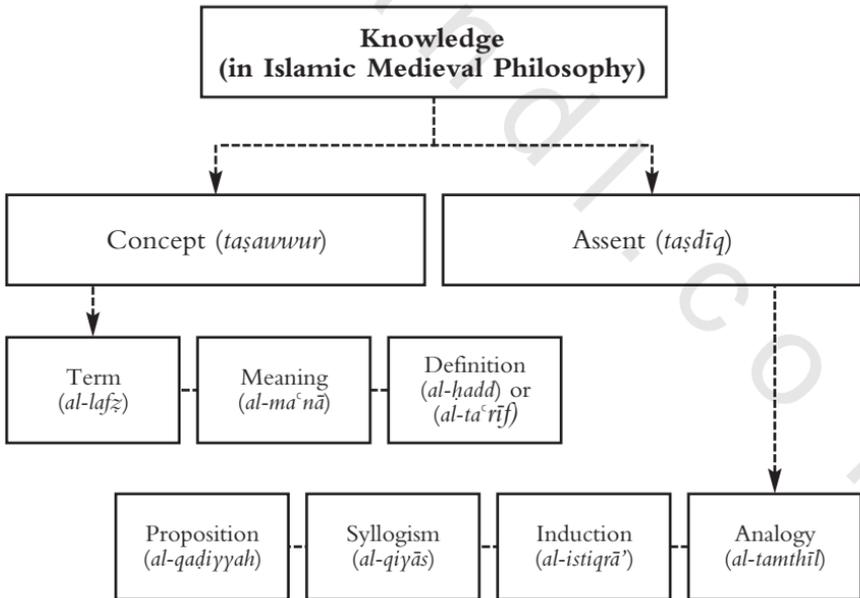
Chart 4.18. Classification of knowledge in Islamic philosophy.
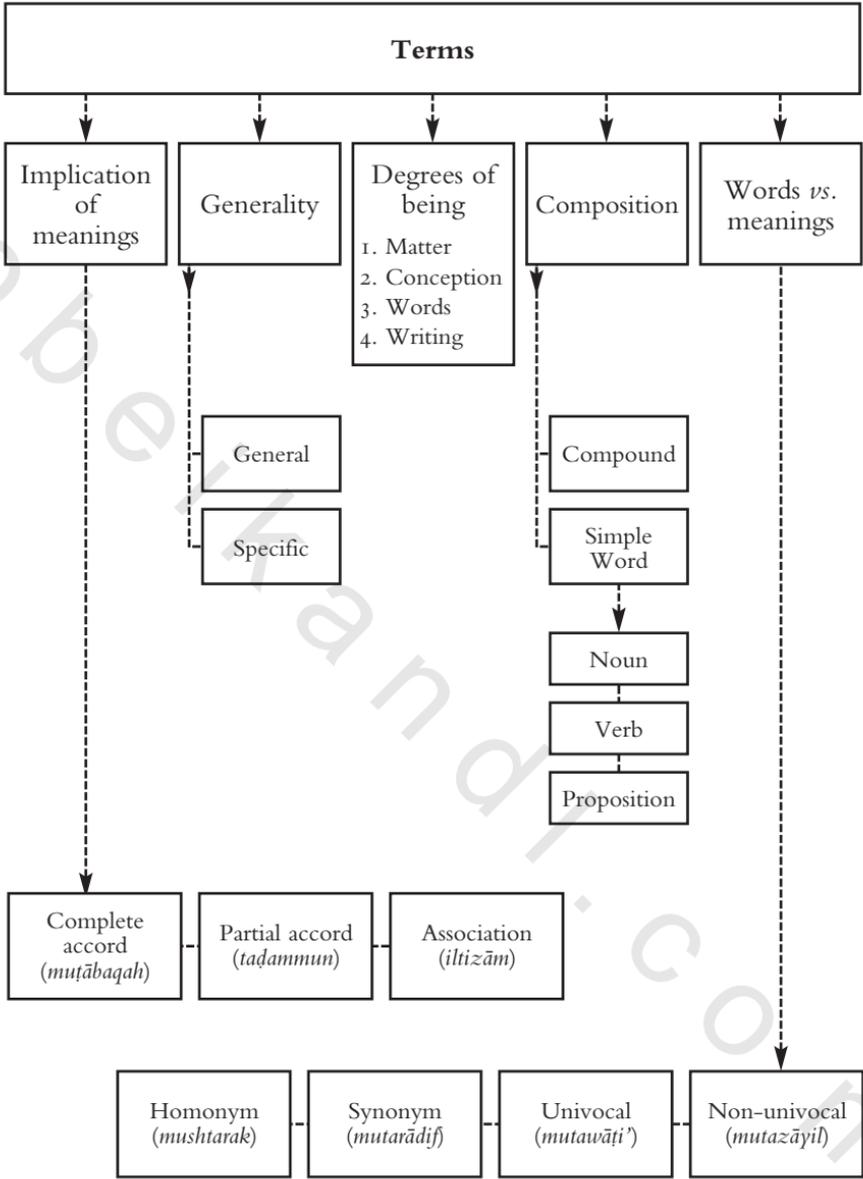
Chart 4.19. Classification of terms in Islamic philosophy.

Words imply meanings in complete accord (*muṭābaqah*), partial accord (*taḍammun*), or association (*iltzām*). Terms, in reference to generality, could be divided into 'general' and 'specific.' Terms could be simple non-dividable words (such as nouns, verbs, or prepositions), or otherwise compound. Finally, words could be homonyms, synonyms, univocal, or non-univocal.
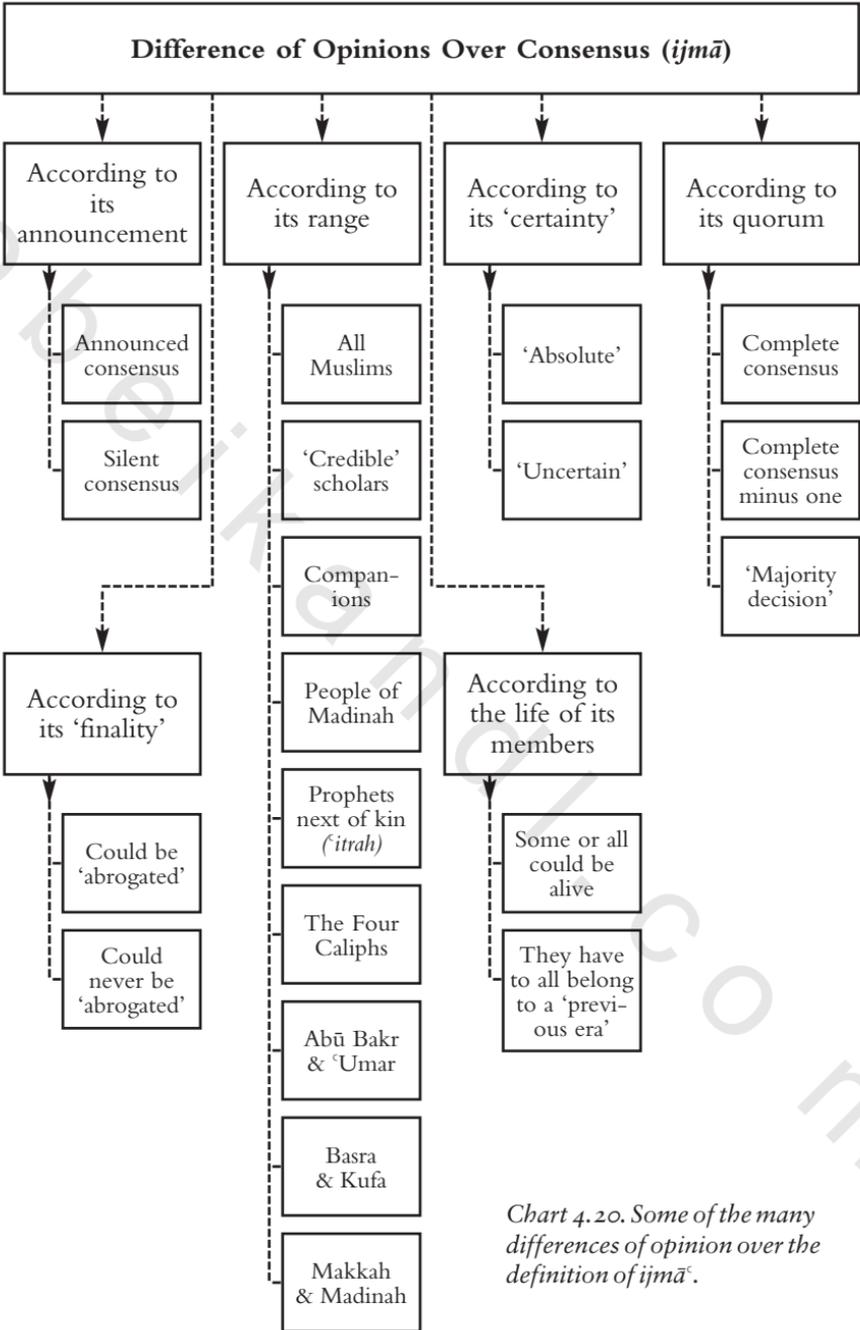
The effect of Greek philosophy, especially Aristotle and the Peripatetics, on the above categorisations is obvious, from the 'conceptions' and 'assents,'[63] to 'homonyms' and 'synonyms.'[64] It is clear that later Islamic philosophers and juridical theorists generally followed Ibn Sīnā (Avicenna) in his commentaries on Greek philosophy. Islamic philosophers also viewed 'meanings' through Aristotle and Ibn Sīnā,[65] as shown by their studies of essence (*dhāt*) versus accident (*ʿaraḍ*), definite (*yaqīnī*) versus uncertain (*ʿadam yaqīnī*), and so on.

The impact of Greek philosophy on Islamic fundamentals of law, via Islamic philosophy, is obvious. Jurists were either 'philosophers,' such as al-Ghazālī, Ibn Rushd, and Ibn Taymiyah, or influenced by philosophers, directly or indirectly. Thus, the way 'terms' are categorised, and how they are related to 'meanings,' is quite 'Greek.' Under this influence, traditional Islamic fundamentals of law, despite its different streams, followed a Greek 'logic' (in Arabic: *manṭiq*, which literally means, utterance), hence, its essence-based definitions, binary classifications, and syllogistic analogies. Chapter Six will revise these Greek influences, from various angles, in light of contemporary systems theory.

4.3. SCRIPT-BASED RATIONAL EVIDENCES

Overview

Scholars differentiated between 'primary sources,' which are the Qur'an and prophetic traditions, and 'secondary sources,' which they only applied 'if there is no evidence from a *naṣṣ*,' i.e., specific (*khāṣṣ*) Qur'anic verse or hadith. This section introduces the following secondary sources: namely, consensus, analogy, interest, juridical preference,
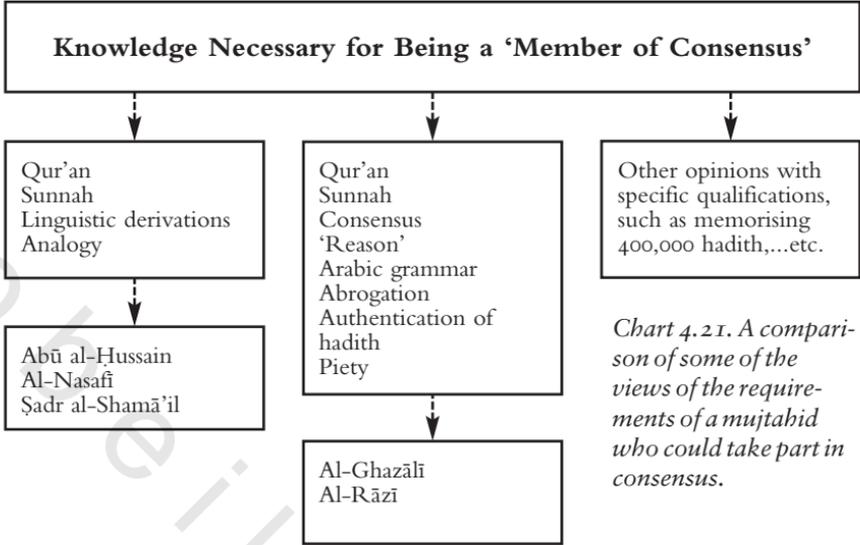
Difference of Opinions Over Consensus (*ijmā*)

According to its announcement
- Announced consensus
- Silent consensus

According to its range
- All Muslims
- 'Credible' scholars
- Companions
- People of Madinah
- Prophets next of kin (*ʿitrah)*
- The Four Caliphs
- Abū Bakr & ʿUmar
- Basra & Kufa
- Makkah & Madinah

According to its 'certainty'
- 'Absolute'
- 'Uncertain'

According to its quorum
- Complete consensus
- Complete consensus minus one
- 'Majority decision'

According to its 'finality'
- Could be 'abrogated'
- Could never be 'abrogated'

According to the life of its members
- Some or all could be alive
- They have to all belong to a 'previous era'

Chart 4.20. Some of the many differences of opinion over the definition of ijmā.

blocking the means, custom, imam's opinion, companion's opinion, traditions of people of Madinah, and presumption of continuity. Jurists who endorsed any of these sources, based their endorsement on evidence from 'the scripts,' too. Thus, in my view, the differentiation between 'scripts' and 'secondary evidences' is actually a differentiation between 'linguistic' and 'rational' evidences, both of which are script-based.

Consensus

The ironic fact about 'consensus' (ijmāʿ), which most schools of law count as an 'absolute' source of legislation, is that there is no 'consensus' over its very definition. In fact, there are dozens of different definitions and conditions for its occurrence, even within each school of law. Al-Ghazālī, from the Shāfiʿī school, defined it as the consensus of the whole 'ummah of Islam' over a certain religious matter.[66] Most scholars, however, defined it as the consensus of 'credible' scholars, who reached the level of *mujtahid* (independent deliberator). There are several definitions, however, for that level of credibility of scholars, which range from 'learning Qur'an, Sunnah and analogy,' to many more requirements, including 'memorising four hundred thousand hadith.' Charts 4.20 and 4.21 compares some of these opinions.

Traditional classifications of schools of law contributed to the difference of opinion over ijmāʿ, since some schools did not count scholars from some other schools as worthy of being part of a legitimate consensus.[67] Some definitions of consensus restricted it to the 'consensus of the companions,' as, for example, the Ẓāhirī definition. However, there are several views on what makes a person – who saw or met the Prophet – a 'companion.' Some scholars consider every person who met the Prophet to be part of a legitimate consensus. Others, like Ibn Ḥazm and the Ḥanafī school, limited the number of such companions to a number less than one hundred and thirty.[68] Mālikīs expanded the definition to include the consensus of the 'People of Madinah,' and considered this consensus to be a legitimate source of legislation.[69] More details on this evidence is provided later, since it has been used interchangeably with ʿamal (custom) of the people of Madinah.[70]

Knowledge Necessary for Being a 'Member of Consensus'

Qur'an	Qur'an	Other opinions with
Sunnah	Sunnah	specific qualifications,
Linguistic derivations	Consensus	such as memorising
Analogy	'Reason'	400,000 hadith,...etc.
	Arabic grammar	
	Abrogation	
	Authentication of	
	hadith	
	Piety	

Abū al-Ḥussain	
Al-Nasafī	
Ṣadr al-Shamā'il	

| Al-Ghazālī |
| Al-Rāzī |

Chart 4.21. A comparison of some of the views of the requirements of a mujtahid who could take part in consensus.

Jaʿfarīs and Zaydīs both consider the Prophet's next of kin (ʿAlī, Faṭimah, al-Ḥasan and al-Ḥusain) to form a legitimate consensus.[71] However, some Jaʿfarī *uṣūlī*s rendered consensus 'redundant' because, 'a consensus is supposed to reveal the opinion of the infallible Imams,' the first of whom is ʿAlī, in any case.

A narration related to Aḥmad ibn Ḥanbal and Abū Ḥāzim (a leading Ḥanafī scholar) considers the consensus of the first four Caliphs (Abū Bakr, ʿUmar, ʿUthmān, and ʿAlī) legitimate consensus. No other school of law endorsed this type of consensus. Some comparative *uṣūl* books mentioned some opinions which approved the 'consensus' of Abū Bakr and ʿUmar, Makkah and Madinah, and even Kufa and Basra. No school of law had endorsed these opinions.

There is also a difference of opinion regarding whether consensus has to be 'complete,' i.e., an agreement by each and every member of the consensus, or it could be achieved by some form of 'majority decision.' All schools of law endorsed the condition of complete consensus for its validity. However, al-Ṭabarī and Abū al-Ḥusain al-Khayyāṭ believed that it could be achieved with 'one individual disagreement.' The whole issue seems to be hypothetical, rather than something that ever really happened. Portraying consensus as some form of collective

decision-making is inaccurate, because it was not narrated in any historical account that a process of 'consensus-testing' was ever carried out amongst jurists.

Another difference of opinion occurred over whether the 'era' of the members of consensus has passed or not. Most schools endorsed the opinion that ijmāʿ should count once scholars at any time reach it.[72] Aḥmad ibn Ḥanbal and some Muʿtazilīs considered the fact that, 'one or more of the consensus members might change his/her opinion as long as they are alive.' And since they view ijmāʿ as a binding and 'non-changeable' authority, they judged that members of ijmāʿ should all be deceased so that it is guaranteed that none of them will change his/her opinion and render their ijmāʿ void. Al-Juwaynī, from the Shāfiʿī school, differentiated between consensus over 'certain' and 'uncertain' matters. He held the same opinion of Ibn Ḥanbal regarding the 'era of consensus' in case of 'uncertain' matters, which, according to him, are subject to changing of one's opinion, versus 'certain' matters.[73] However, al-Juwaynī did not provide criteria to differentiate between 'certain' and 'uncertain' matters.

One classification of ijmāʿ is whether it has to be announced by each and every member of it, an opinion that many scholars deemed 'practically impossible.'[74] Thus, some schools of law endorsed what they called 'silent consensus,' which means that members of the ijmāʿ whose opinions are not known could be considered in agreement with all other members who made their opinion known. There is neither announced nor silent consensus over this form of consensus. In fact, there are twelve different opinions about its validity.[75]

Finally, regarding whether or not a ruling that is based on consensus could ever be changed or 'abrogated,' all schools of law (except for a few scholars) took the opinion that such a ruling could never be changed.[76] This view was actually based on the *uṣūlī* rule that states that, 'no abrogation could be valid after the prophetic era,' and the 'logical' contradiction between the authority of the first consensus and the subsequent ones.[77] However, I think that, according to this rule, rulings that were directly connected to a certain time, because of certain circumstances, are unjustifiably made 'eternal.'

Ibn Ḥazm's critique of ijmāᶜ was as follows: 'matters of consensus are either explicitly mentioned in the Qur'an or most famous hadith, or otherwise, matters of difference of opinion over some interpretation or *āḥād* narration. In the first case, the verses or hadith do not need consensus for evidence, since they are primary evidences in their own right. In the second case, consensus is untruly claimed.' He argued: 'consensus could never be proven, even if it were to be restricted to the companions, whose number was in the thousands.'[78]

Despite all of the above differences of opinion, most *uṣūlī*s in various schools of law consider consensus to be an 'absolute/certain' (*qaṭᶜī*) evidence that generates 'absolute' knowledge. Examples are, al-Baghdādī, al-Juwaynī, al-Ghazālī, Abū al-Ḥussain, al-Shirāzī, al-Samarqandī, al-Nasafī, al-Farra, al-Sarkhasī, among others. A few *uṣūlī*s, including al-Rāzī and al-Āmidī, considered consensus an 'uncertain' evidence.[79]

Analogy

Analogy (*qiyās*) is a secondary source of legislation that is viewed as legitimate by the four Sunni schools of law, Muᶜtazilīs, and Ibāḍīs. Jaᶜfarīs, Zaydīs, Ẓāhirīs, and some Muᶜtazilīs, describe analogy as 'legislation according to whims.' Imam Jaᶜfar al-Ṣādiq, reportedly,

Chart 4.22. Difference of opinion over the legitimacy of qiyās.

Analogy (Legitimacy)	
Legitimate 'source' of rulings	Invalid
Shāfiᶜīs Mālikīs Ḥanbalīs Ḥanafīs Ibāḍīs (included in *al-ra'ī*) Muᶜtazilites	Ẓāhirīs Shia Zaydīs Some Muᶜtazilites
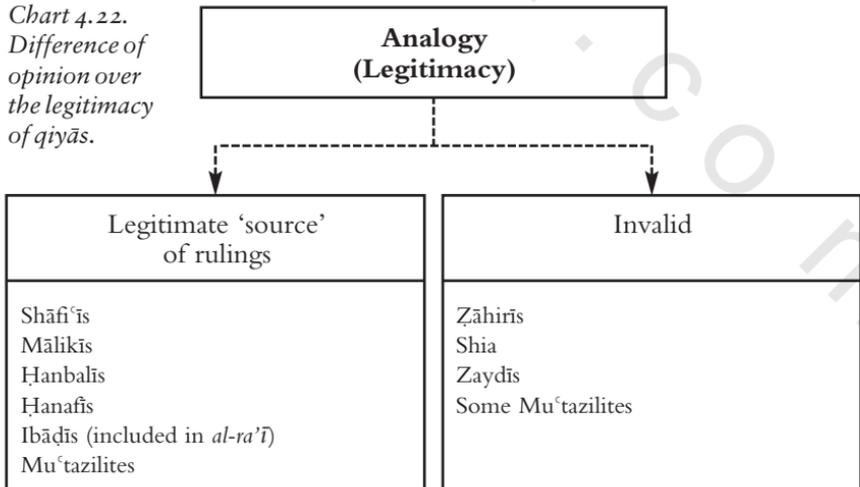
(a)
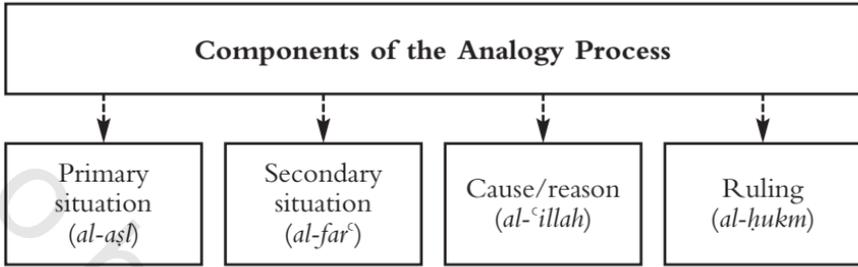
(b)
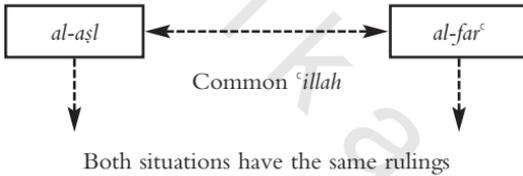
Chart 4.23. (a) The four components/units of analogy and (b) how the components interact in the analogy process.

asserts that, 'there is no question without a direct answer from the Book or the Tradition.'[80] However, analogy is actually a process of juridical decision making, rather than a 'source' of legislation.

The analogy process has four components, namely, primary situation (*al-aṣl*), secondary situation (*al-farᶜ*), cause/reason (*al-ᶜillah*), and the ruling (*al-ḥukm*). Analogy (*qiyā*s) is carried out between two situations/cases, the ruling of the first (primary) situation has been previously decided, while the ruling of the second (secondary) situation is unknown. *Qiyās* entails that if there is a (speculated) common cause (ᶜillah) between the two situations, then, by analogy, the ruling in the first situation applies to the second.[81]

However, *qiyās*, according to Ẓāhirīs, Shia Jaᶜfarīs, Zaydīs and some Muᶜtazilīs, is 'uncertain' and an 'innovation in the religion.' Ibn Ḥazm articulated this stand by referring to *qiyās* as, 'a judgement without confirmed knowledge following uncertain evidences.'[82] Ibn Ḥazm also criticised those who supported the legitimacy of *qiyās* based on ijmāᶜ, based on his view that 'ijmāᶜ could never be proven.'[83]

Ibn Ḥazm, and Ẓāhirīs in general, consider the literal meaning of only the Qur'an or hadith to carry any legitimacy in the Islamic law. His point of view is that human 'reason' is basically some sort of 'whim and speculation' that could be 'useful in worldly matters but not in matters of faith.'[84] The Ẓāhirīs rejection of analogy resulted in a number of strange *fatāwā* that are often cited as amusing stories. These *fatāwā*, which were based on the rejection of analogy, caused the Ẓāhirī school a great deal of unpopularity on a public level. For example, Ibn Ḥazm narrated a hadith in which the Prophet is reported to have said: 'A virgin's consent [to a marriage proposal] is to stay silent [when asked for her opinion].' Ibn Ḥazm commented: 'Therefore, if she says "yes" then her marriage contract is void!'[85] Ibn Ḥazm did not wish to make an analogy between an agreement by means of 'silence,' as mentioned in the hadith, and an agreement by means of 'saying yes.' Other schools made it a matter of 'options' for the bride to give a silent or oral consent. Ḥanafīs made the whole procedure subject to custom, since, they explained the hadith, it is 'shameful for an (Arab) woman to say yes in such a situation.'

Jaʿfarīs, Zaydīs, and Muʿtazilīs accept analogy if the cause (ʿillah) is stated in the script and not 'speculated.' Other schools considered this form of reasoning to be a direct linguistic derivation of rulings from scripts, rather than a valid form of analogy. Ibadis include *qiyās* in a general category of reasoning that they call *al-ra'ī* (using opinion).[86]

Despite the high status that he attributed to 'reason,' al-Naẓẓām, a leading Muʿtazilī jurist, rejected reasoning by analogy. He said that rulings of the Islamic law 'do not necessarily follow a rational line of thought.'[87] He mentioned many examples of rulings of the Islamic law that are 'irrational' because they, 'did not equate in judgement between equal entities and did not differentiate in judgement between different entities.' Two examples, according to al-Naẓẓām, are, 'requiring two witnesses to prove murder and four witnesses to prove adultery,' and 'ablution by washing certain organs of the body that were not the cause of uncleanness.'[88] In my view, the inconsistencies that al-Naẓẓām had pointed out are not evidences for 'irrationality,' but rather, for the 'change of rulings according to their purposes.' A '*maqāṣidī*' approach to these rulings show that the whole purpose of seeking witnesses is to

confirm certain incidents (the act of murder, in the first incident, and the act of 'public adultery,' in the second). Therefore, the numbers are not prime purposes of the rulings in their own right, but rather tools for the sake of correct court procedures. In the second example, ablution has a pure ritual purpose. Ḥanafīs among others did not allow analogy in cases of *ʿibādāt* (rituals or pure acts of worship).[89] They defined these acts as 'acts which cannot be rationalized,' and gave examples such as acts of worship and procedures for pilgrimage.[90] This book argues for the utilisation of such *maqāṣidī* (that is, purpose-oriented) approaches as the basis of analogical reasoning itself.

Finally, Mālikīs allowed the 'primary situation' in analogy to be an analogy in its own right. This means that a ruling for a situation could be generated from an analogy, without need of an actual 'primary situation.' Then, a ruling could be generated from the new ruling, and so on. This extension of the definition of *qiyās* in the Mālikī school opens possibilities for relying solely on 'causes' for generating a sequence of valid analogies, rather than relying on primary situations that must necessarily be 'mentioned in the scripts.'

A 'cause' (*ʿillah*) is at the heart of the analogy process. Schools of law agreed upon three specifications for a valid *ʿillah*. Schools of law that endorsed analogy agreed on visibility (*ẓuhūr*), extension (*taʿaddī*), and validity (*iʿtibār*). Visibility entails 'the ability to perceive the cause' and to 'confirm its existence in a situation.' Extension entails the ability to extend the cause to other situations, whereas there is a lack of a script that restricts that extension. Validity means the lack of an 'invalidating statement' by a script which rejects the consideration of the 'cause.'[91]

However, schools of law differed over a condition/specification, which they called 'consistency' or 'exactness' (*inḍibāṭ*) of the cause. Exactness of a cause means 'not to change significantly with changing circumstances.'[92] The reason behind the controversy over the consistency/exactness criteria is the controversy over whether or not analogy is allowed according to the 'wisdom behind the ruling' (*ḥikmah*). The following are examples which illustrate the difference between *ʿillah* and *ḥikmah* in classic schools of law.

An exemption (*rukhṣah*) from fasting is granted to Muslims who are 'ill or are travelling.' Illness or travelling for a certain distance (concluded from related hadith) are valid *ʿillal* or causes behind this exemption. The wisdom (*ḥikmah*) behind this exemption is 'facilitation.' For the elderly, scholars granted the same exemption from fasting based on analogy with the illness 'cause,' not based on the 'wisdom' of facilitation. That is why, in most schools of law, this exemption is not given to a laborer, for example, who has a great deal of hardship in keeping up with fasting while carrying out a physically demanding job. Scholars, from various schools, claimed that illness or travel is 'measurable' and 'deterministic' and, therefore, are exact causes for *qiyās*, while 'facilitation' is not measurable and 'changes with circumstances.' Therefore, '*ḥikmah*' was considered too 'lucid' to be a valid criterion of juridical analogy. One could argue here that this 'causal,' rather than 'teleological,' view of *qiyās*, misses the point behind the exemption ruling, even if it achieves *inḍibāt* (exactness) and formality on a procedural level. Chapter Six discusses the importance of considering *maqāṣid* in the process of *qiyās* in more detail.

In order to carry out a correct analogy, *uṣūlis* outlined a multiple-step process (*maslak)*, which is outlined below. A *manāṭ* is the ratio legis, grounds, effective cause, the prime criterion, or the 'reason' behind the rule.

1. Extraction of the grounds (*Takhrīj al-manāṭ*): It is a process of reflection upon the primary script in order to extract as many possibilities as possible for grounds (*ʿillah* or effective causes) for the primary ruling. These possibilities for grounds are the 'attributes' that the subjects or materials mentioned in the primary script, which represent possible candidates for being the *ʿillah* behind the ruling.

2. Eliminating the alternatives (*Tanqīḥ al-manāṭ*): In this step, jurists apply some form of *ratio decidendi*, to use a term from the British philosophy of law. The different attributes that resulted from step number one are examined one by one, in an Exclusive-OR manner, to use a logical term, in order to determine one chosen attribute, after excluding/clearing out all others. Despite the superficiality in this attribute-based process, scholars had made a condition for the winning attribute, which will be called '*ʿillah*' afterwards, which is to be an

'appropriate' attribute (*waṣf munāsib*). Appropriateness (*munāsabah*) is generally defined as the 'fulfilment of interest' (*taḥqīq al-maṣlaḥah*). This *maṣlaḥah* was not clearly defined in early literature on *uṣūl al-fiqh*. However, in later literature of Sunni *uṣūl* (which are the schools that endorsed analogy anyway) one could notice a growing tendency to relate 'appropriateness' with 'purposefulness,' i.e., to relate *munāsabah* with *maqāṣid al-sharīʿah*. This tendency is most evident in al-Shāṭibī's theory on *maqāṣid*, and to a lesser degree in the earlier theories of al-Ghazālī's, al-ʿIzz's, and al-Qarāfī's theories on *qiyās*.[93] Al-Ṭūfī defined *al-waṣf al-munāsib* as, '*al-maṣlaḥah* that leads to the legislator's purpose (*maqṣid*).'[94] The vast majority of the *uṣūlī* schools had not endorsed equating the 'cause' of the ruling with the 'purpose' of the ruling, since the 'purpose' is not '*munḍabiṭ*.'[95] Chapter Six presents a different perspective.

3. Asserting the realisation of the ratio legis (*Taḥqīq al-manāṭ*): This is the final step in the *qiyās* process, in which the *mujtahid* jurist verifies whether the ʿillah applies to the real-life situation under consideration. For example, intoxication is the ratio legis behind the 'prohibition of liquor' (which is the prime ruling). When an ijtihad is made regarding a certain substance, the question would be: Is intoxication realised in this substance or not? Another example: the intention to kill is the ratio legis behind the persecution of a killer. However, in the case of murder, the question would be: Was the intention of killing verified or not? A final example: 'poverty' and 'need' is the ratio legis behind receiving zakah (obligatory annual charity). The question of *taḥqīq al-manāṭ*
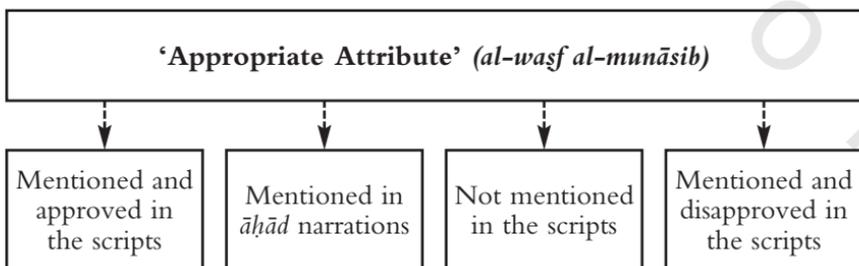
Chart 4.24. The four categories of appropriate attributes.

would be: Is that specific person 'poor' and 'in need' or not? Therefore, I would say that *taḥqīq al-manāṭ* (asserting the realisation of the ʿillah) is on the borderline between fiqh and science, and should not depend solely on the *mujtahid* (as is the case in traditional *uṣūl*). To illustrate, one could ask the question, 'how' is the *mujtahid* going to prove, assert, or verify that a certain substance is an 'intoxicant,' a certain suspect has a certain 'intention,' or a certain person is 'poor'? In nowadays world, these kinds of questions have to be referred to the 'specialists' in related branches of science, and not to jurists. Chapter Six elaborates.

Jurists from various schools differentiate between the ʿillah that 'is supported by the script' and the ʿillah that is conceived by the *mujtahid* but could not be proven to have the script's support.[96] Based on this, they divide the 'appropriate' attribute into the four categories shown in Chart 4.24.

Schools of law agree that if an attribute is 'disapproved' by a script, despite its apparent benefits, then it cannot be used in *qiyās*. For example, the benefits of increasing one's wealth by means of usury are mentioned and disapproved of in the related scripts. Similarly, the benefits of trade in liquor and gambling are also mentioned and disapproved of in the scripts. If the attribute is explicitly mentioned in the scripts, such as the intoxication of liquor or intention (ʿamd) in killing, then *qiyās* based on it is valid, even according to the schools which did not endorse *qiyās*, namely, the Jaʿfarīs, Zaydīs, Muʿtazilīs, and Ẓāhirīs. These schools, however, consider the attribute/ʿillah to be an 'implication of the script' (*dilālah al-naṣṣ*), rather than an implementation of analogy.

If the attribute is implied in general terms in the scripts, under some other section or related to some other ruling, then it is a valid 'appropriate attribute' according to the Shāfiʿīs and Ḥanafīs. Shāfiʿīs call it *al-mulāʾim* (the 'suitable' attribute), while the Ḥanafīs refer to it as *al-munāsib* (the 'appropriate' attribute), and consider it a 'rational evidence.'[97]

What jurists meant by an attribute that is 'not mentioned in the scripts' is an attribute that cannot be concluded by direct linguistic derivations from specific verses or hadith, as described earlier. Interests (*maṣāliḥ*) that could be 'speculated' from the scripts but lack the
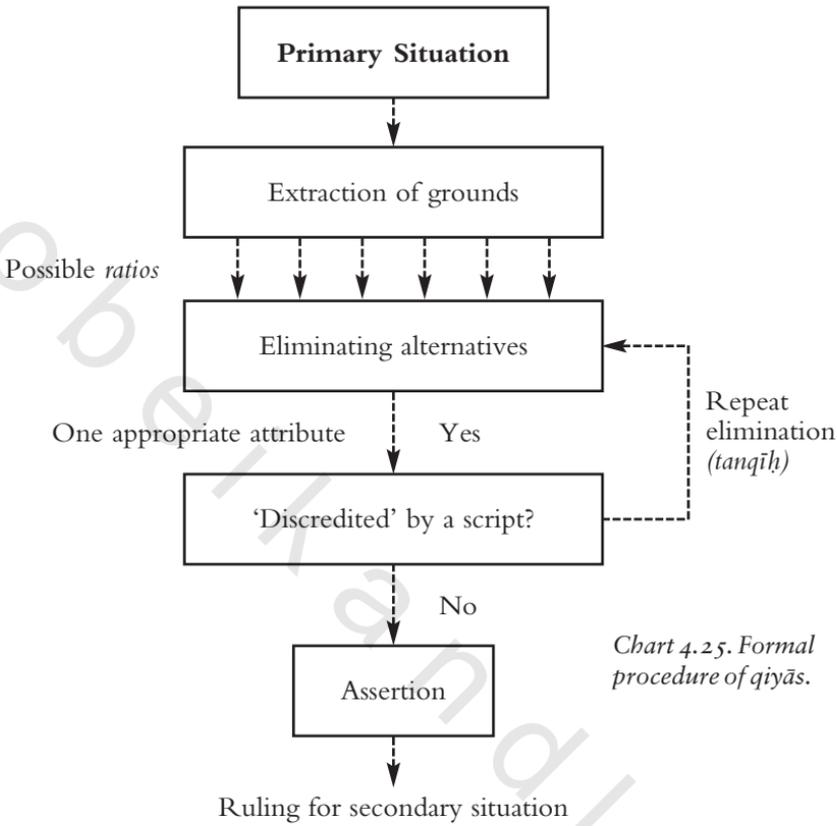
Chart 4.25. Formal procedure of qiyās.

endorsement of an explicit language that states their validity or invalidity are classified, according to all schools of law, as *maṣāliḥ mursalah* ('non-restricted' interests). The next section discusses this point under the general secondary source of legislation that the jurists called '*istiṣlāḥ*' (bringing interests), the validity of which was also the subject of difference of opinion.

Jurists also discussed causes where the result of *qiyās* 'contradicts the implication of another script that is specific about the (secondary) situation.' Al-Shāfiʿī, Mālik, and Ibn Ḥanbal agreed that, 'there is no place for *qiyās*' if there is a related verse or hadith. They applied this rule even if they deem the verse 'probable' in its implication or the

hadith 'probable' in its authentication or implication. However, if the implication of the verse or hadith is 'probable,' they allow *qiyās* to 'restrict the probable meaning.'[98]

However, Mālik added that if the hadith is 'probable' (for example, *āḥād*), and contradicts 'multiple *qiyās*' (i.e., more than one *qiyās* that imply a ruling that is 'opposing' to the linguistic implication of the hadith), then the 'multiple *qiyās*' is called an '*aṣl*' (a fundamental ruling), and is given priority over the 'probable' hadith.[99] For example, Mālik rejected the 'authenticity' of the *āḥād* hadith, 'if a dog drinks from your bowl then wash it seven times,' based on several analogies/*qiyās* with other verses and hadith that permitted eating from animals caught by hunting dogs. Therefore, Mālik concluded an *aṣl* that, 'dog saliva is clean.'[100]

The above difference between Mālik and the other schools of law over the capacity of an *aṣl* (fundamental rule) to invalidate an 'authentic' *āḥād* narration is similar to their difference over the role of *maṣlaḥah* (interest). The next subsection explains.

Interest

The classification of *maṣlaḥah* (interest, good, benefit, utility) into *maṣlaḥah* that is 'supported by scripts,' 'discredited by scripts,' and 'not mentioned in the scripts,' imply a special literal definition of what jurists called 'script.'

Some Muʿtazilīs disputed the existence of a category of unrestricted interests (*maṣlaḥah mursalah*), based on their fundamental concepts of


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┌─────────────────────────────────────────────┐
│          Interest (maṣlaḥah)                │
└─────────────────────────────────────────────┘
   ↓              ↓                    ↓
┌──────────┐  ┌──────────────┐  ┌──────────────┐
│ Supported │  │ Unrestricted │  │ Discredited  │
│ by a      │  │ (mursalah)   │  │ by a         │
│ script    │  │ not          │  │ script       │
│ (muʿtabarah)│ │ mentioned in │  │ (muhdarah)   │
│           │  │ the script   │  │              │
└──────────┘  └──────────────┘  └──────────────┘
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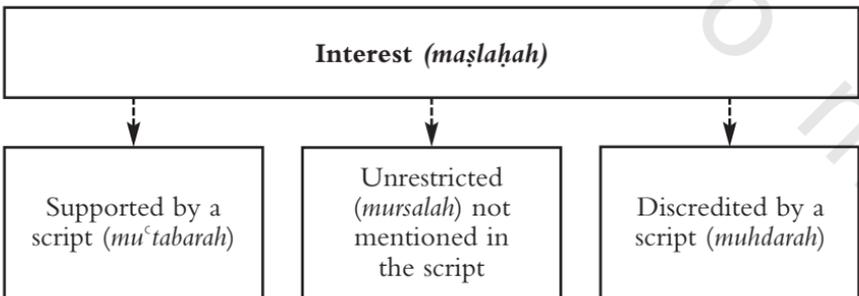
Chart 4.26. Classification of interests based on their (literal) mention in the script.

rational 'embellishment and repugnancy' (*al-taḥsīn wa al-taqbīḥ al-ʿaqlī*). They argued that because the Islamic way of life is comprehensive, everything has to be either an embellished and encouraged good or a repugnant and discouraged evil, whether mentioned in direct or indirect terms in the scripts. This is a typical Muʿtazilī opinion that no other school shared, despite its strong argument.

Jurists differed over the legitimacy of *al-maṣlaḥah al-mursalah*. Mālikīs and Ḥanbalīs accepted this *maṣlaḥah* to have legitimacy, based on the Qur'an, prophetic tradition, ijmāʿ, and *qiyās*. That is why they did not allow such *maṣlaḥah* to 'contradict' with any of the above evidences.[101] Ibāḍīs included it in their *raʾī* (using opinion).[102]

Mālik, according to al-Shāṭibī, endorsed *al-maṣlaḥah al-mursalah* under a number of conditions, which could be summarised in three points as follows.[103]

1. To fall under the areas of worldly dealings (*muʿāmalāt*) and of customs (*ʿādāt*), and not in the area of acts of worship (*ʿibādāt*).
2. Not to contradict any specific script or fundamental *aṣl*.
3. To lead to a higher interest or a general purpose that is mentioned in the script.

Legitimacy of 'Unrestricted Interests'		
Legitimate even contrary to scripts	Legitimate without contradicting scripts	Invalid source of legislation
Al-Ṭūfī	Malikīs Ḥanbalīs Ibāḍīs	Shāfiʿīs Ḥanafīs Shia Zaydīs Ẓāhirītes
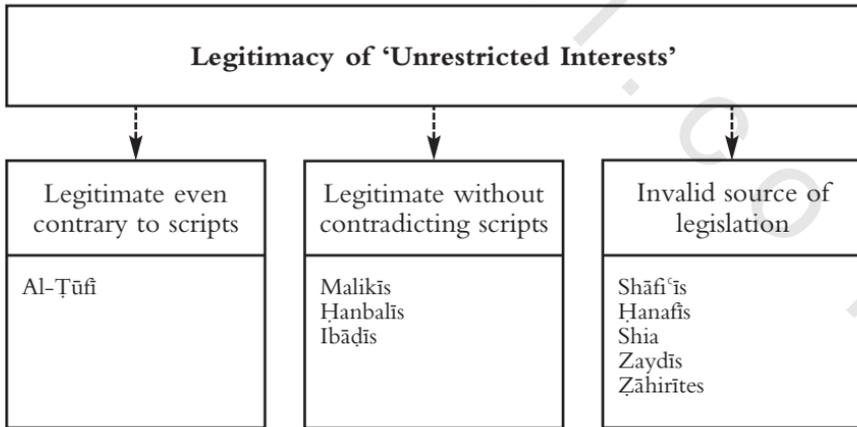
Chart 4.27. Difference of opinion over al-maṣlaḥah al-mursalah.

Later Ḥanbalīs included *al-maṣlaḥah al-mursalah* in their rule of 'the change of fatwa according to change of circumstances,' for which Ibn Taymiyah and Ibn al-Qayyim were most famous of and wrote extensively about.[104]

Al-Ṭūfī, a leading Ḥanbalī scholar, took a controversial position, which is still causing a heated debate until today.[105] He judged that *al-maṣlaḥah* is the purpose of the Islamic law, in principle, and that the (specific) scripts that contradict with *al-maṣlaḥah* should simply be disregarded. His definition of *maṣlaḥah* was even more controversial, because he said it was up to 'the judgement of custom and reason.'[106]

The rest of the schools of law judged that *al-maṣlaḥah al-mursalah* is an invalid source of legislation. However, in my view, all schools applied their own methods of considering *al-maṣlaḥah* in their ijtihad, one way or the other. Shāfiʿīs, for example, include '*maṣlaḥah*' in the concept of *munāsabah* in *qiyās*, as previously discussed.[107] Ḥanafīs include *maṣlaḥah* in their *istiḥsān*.[108] Jaʿfarīs and Zaydīs, on the other hand, invalidated *maṣlaḥah* based on the fact it is 'uncertain,' and 'does not 'represent the infallible Imam's opinion.'[109] Nevertheless, there is a great deal of '*maṣlaḥah*' in the Jaʿfarī and Zaydī juridical method of 'rational evidence' (*al-dalīl al-ʿaqlī*), which they apply, 'after the Qur'an, Sunnah, and consensus.'[110] Finally, the Ẓāhirī school is the only school that rejected *maṣlaḥah* and did not replace it with any alternative evidence.

Juridical Preference

Positions over juridical preference (*istiḥsān*) were also divided in a binary manner. Shāfiʿīs, Jaʿfarīs, Zaydīs, and Ẓāhirīs, consider *istiḥsān* an illegitimate and 'uncertain' evidence.[111] Al-Shāfiʿī and Ibn Ḥazm defined it as, 'choice according to desires,' and 'a source of contradiction.'[112] On the other hand Ḥanafī, Mālikī, ʿIbāḍīs, Ḥanbalī, and Muʿtazilī schools endorsed *istiḥsān* as a source of legislation.

What is common amongst all versions of *istiḥsān* is that the *mujtahid* judges a certain situation based on a certain basis, which is different from the usual basis/principle upon which similar situations are judged (Chart 4.28).

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┌─────────────────────────────┐
│   Legitimacy of Preference  │
│        (istiḥsān)           │
└─────────────────────────────┘
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Legitimate evidence	Invalid evidence
Ḥanafīs	Shāfiʿīs
Mālikīs	Shia
Ḥanbalīs	Zaydīs
Muʿtazilīs	Ẓāhirīs
	Ibāḍīs
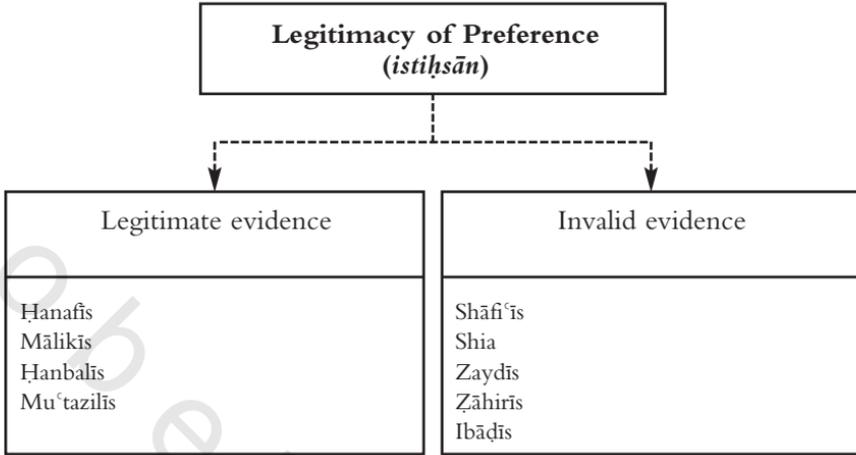
Chart 4.28. Difference of opinion over istiḥsān.
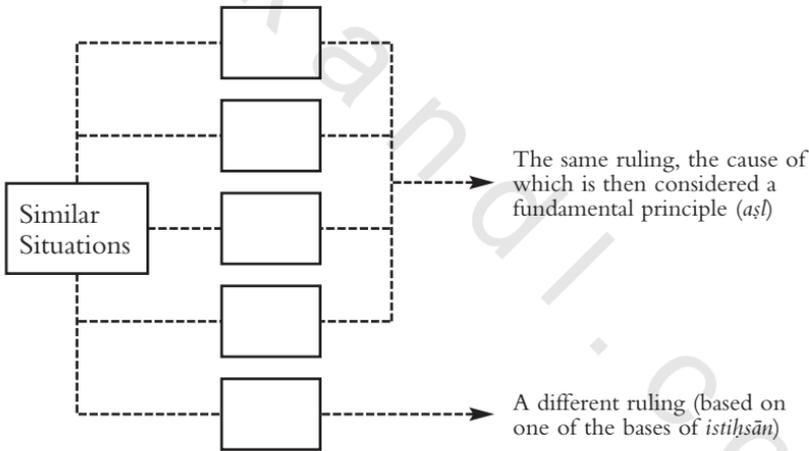
Chart 4.29. Judging a certain situation based on a basis that is different from the principle upon which similar situations are judged.

Contrary to al-Shāfiʿī's description of *istiḥsān* as 'judging according to desire,' his teacher, Mālik, had described it as 'nine-tenth of knowledge.'[113] For Mālik, *istiḥsān* entails a deep consideration of certain factors which should change a jurist's usual judgement. These factors, which are called the bases of *istiḥsān*, could be divided into six

categories, namely, script, consensus, necessity, analogy, public interest, and custom.[114]
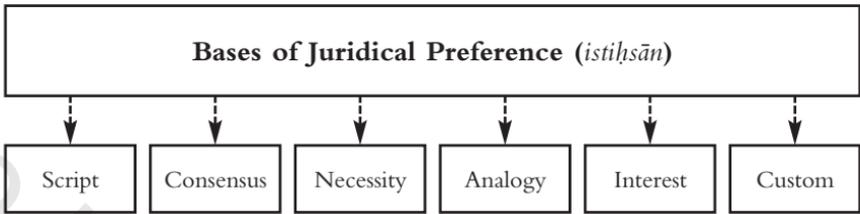
Chart 4.30. Classification of the bases of istiḥsān.

The following are illustrative examples of these bases from various schools that endorsed istiḥsān:

1. *Istiḥsān* based on the script: Narrated hadith forbids exchange of 'similar goods' unless the exchange is done instantly. Otherwise, it is considered a kind of 'deferred usury' (*ribā al-nasī'ah*). However, other scripts allow interest-free loans, which would fall under *ribā al-nasī'ah*. Mālikīs classify the ruling that allows loans under '*istiḥsān* based on the script.'[115] For all other schools, the above case falls under linguistic 'specification' (*takhṣīṣ*).

2. *Istiḥsān* based on consensus: Similar to the loan's *istiḥsān*, *istiṣnā'* (purchase with order, i.e., with deferred delivery) is considered lawful according to *istiḥsān*. The default rule in deferred delivery, according to all schools, is prohibition. A fundamental rule states: 'It is prohibited to sell what you do not possess' (based on the related narration). However according to Ḥanafīs, there is a 'consensus' on the lawfulness of such transaction, which is grounds for an exception from the fundamental rule.[116] 'Consensus,' which Ḥanafīs claimed in this case, is rather a social agreement over a certain custom, as Ibn ʿĀbidīn, a later Ḥanafī scholar, noted.[117] This observation raises an interesting question on the relationship between 'custom' and 'fundamental rules' that are derived from scripts, which will be discussed later.

3. *Istiḥsān* based on necessity (*darūrah*): Some jurists mentioned the example of allowing medical doctors to see patients' private parts, for the necessity of treatment, under this category.

4. *Istiḥsān* based on analogy (*qiyās*): In this case, two analogies contradict and one of them is selected. For a traditional example, Ḥanafīs decided that the saliva of birds of prey, such as eagles, is clean. Two analogies contradicted: the first is with the saliva of meat-eaters, such as lions, which they view as forbidden. The second analogy is with the saliva of humans, who also eat meat. Ḥanafīs chose the second analogy, based on *istiḥsān*.

5. *Istiḥsān* based on public interest: The traditional example in fiqh literature is the 'liability of craftsmen' (*taḍmīn al-ṣunnāᶜ*), despite the well-known hadith which states that, 'a craftsman is trusted.' The hadith implies that a craftsman is not liable for damage of crafted goods. However, several schools of law held craftsmen liable based on *istiḥsān* of 'public interest.'

6. *Istiḥsān* based on custom: Traditional examples mentioned under this category are the same examples mentioned under '*istiḥsān* based on consensus.' This, again, raises the question of the relationship between 'consensus' and 'custom' in the fundamentals of the Islamic law.

Blocking the Means

Blocking the means (*sadd al-dharā'iᶜ*) is another 'reasoning procedure' that some jurists considered to be a 'source of legislation,' especially in the Mālikī school.[118] Most jurists do not mention blocking the means as separate evidence, but included its meaning in '*al-maṣlaḥah*.'[119] *Sadd al-dharā'iᶜ* entails forbidding or blocking a lawful action because it could be means that lead to unlawful actions.[120] Jurists from various schools mentioned that 'leading to unlawful actions' should be 'more probable than not,' but they differed over how to systemise the comparison of probabilities. Jurists divided 'probability' of unlawful actions into four different levels (Chart 4.32).[121]

The following are examples that jurists mentioned to illustrate the above categories:

1. An example of an action that results in a 'certain' harm is 'digging a well on a public road,' which will certainly harm people. Jurists agreed to block the means in such case, but had a difference of
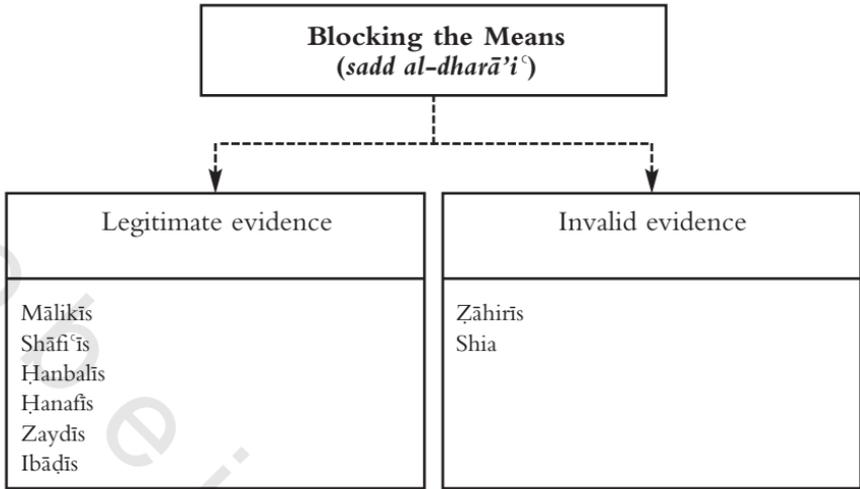
Chart 4.31. Difference of opinion over sadd al-dharā'iʿ.
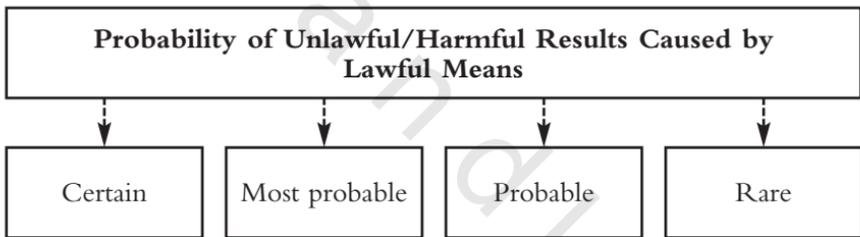
Chart 4.32. Four 'categories' of probability, according to jurists who endorsed blocking the means, namely, certain, most probable, probable, and rare.

opinion over whether the well-digger, in this example, is liable for any harm that happens to people because of his/her action. The difference of opinion is actually over whether prohibiting some action entails making people liable for the resulting damage if they carry that action out, or not.

2.   An example of an action that results in a 'rare' harm, according to al-Shāṭibī, is selling grapes, even though a small number of people will use them to make wine. 'Blocking the means' does not apply to such action, jurists agreed, 'since the benefit of the action is more than the harm, which happens in rare cases in any case.'[122]

3. Harm is 'most probable,' jurists argued, when 'weapons are sold during civil unrest or grapes are sold to a wine-maker.'[123] Mālikīs and Ḥanbalīs agreed to block these means, while others disagreed because, as they argued, harm has to be 'certain' to justify blocking its means.

4. Harm is 'probable,' some jurists claimed, 'when a woman travels by herself,' and 'when people use legally-correct contracts with hidden tricks as means to usury.'[124] Again, Mālikīs and Ḥanbalīs agreed to block these means, while others disagreed because the harm is not 'certain' or 'most probable.'

The above examples show that means and ends are subject to variations in economic, political, social, and environmental circumstances, and not constant rules. 'A woman travelling by herself,' 'the selling of weapons,' or 'selling of grapes' could lead to probable harm in some situations, but could definitely be harmless or even beneficial for people in other situations. Therefore, it is inaccurate to classify actions according to probabilities of harm in 'hard' categories, as shown above. Chapter Six will suggest a 'continuous spectrum' of probabilities, in order to allow the jurist to move along that spectrum, according to the underlying circumstances, without assigning specific categories of probability to any specific action.

Finally ethically speaking, 'blocking the means' is a consequentialist approach.[125] It could be useful in some situations, but could also be misused by some pessimistic jurists or politically-motivated authorities. Some examples are provided and explained in Chapter Six.

Previous Jurisprudence

Based on the Qur'an, God had revealed a sharīʿah to prophets before Muhammad similar to the Islamic sharīʿah.[126] Therefore, some schools of Islamic law included 'previous jurisprudence' (*sharʿu man qablanā*) within valid evidences of the Islamic law. However, jurists who agreed to apply rulings from *sharʿu man qablanā* stipulated that these rulings must be mentioned in the Qur'an or the prophetic traditions.[127] Their rationale behind this stipulation is to confirm that the rulings were not abrogated by new (Islamic) rulings.

Ẓāhirīs and Jaʿfarī's rejected *sharʿu man qablanā* as a source, also based on the concept of abrogation. Their view is that the Islamic law had abrogated all laws before it. A few jurists decided not to give an opinion on this issue because, they said, 'they do not have enough basis to judge.'[128]

Previous Jurisprudence (*sharʿu man qablanā*)		
Valid, only if conveyed through Islamic scripts	Invalid evidence	No basis to judge
Shāfiʿīs Ḥanafīs Mālikīs Muʿtazilītes Zaydīs	Ẓāhirīs Jaʿfarīs	A few individual jurists
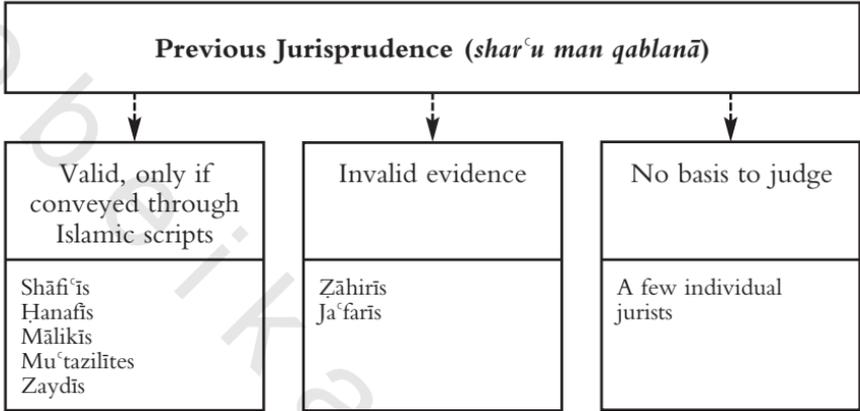
Chart 4.33. Difference of opinion over sharʿu man qablanā.

A Companion's Opinion

In addition to the difference of opinion over what defines a 'companion,'[129] there is a difference of opinion over the juridical validity of a companion's opinion or *raʾī al-ṣaḥābī* (Chart 4.34). A companion's opinion, for Ibn Ḥanbal, is valid evidence that applies if the jurist 'cannot find a (direct) evidence in the Qurʾan or Sunnah.'[130] Abū Ḥanīfah held the same position, but later Ḥanafīs gave *qiyās* a higher priority over a companion's opinion. Al-Shāfiʿī gave priority to consensus and analogy, in addition to the Qurʾan and Sunnah, over applying a companion's opinion.[131] Mālik set a condition for the validity of *raʾī al-ṣaḥābī*, which is to agree with Madinah's tradition (ʿ*amal ahl al-madīnah*).[132]

Some jurists mentioned that there is a 'consensus' over the validity of this evidence,[133] which is inaccurate for two reasons. First, later jurists from various schools did not accept a companion's opinion as evidence in its own right, such as al-Ghazālī, al-Āmidī, al-Subkī, al-

Shawkānī, and Ibn Taymiyah.[134] Secondly, Ibn Ḥazm (and the Zaydīs) 'prohibited' the 'imitation of anyone other than the Prophet', including the companions.[135] Jaʿfarīs and Zaydīs take only the opinions of the companions from the ʿitrah (Prophet's next of kin).[136]

A Companion's Opinion (ra'i al-ṣaḥābi)		
Valid evidence	Valid for selected group of companions	Invalid evidence
Ḥanbalīs Shāfiʿīs Ḥanafīs Mālikīs	Shia Zaydīs Ibāḍīs	Zāhirīs Al-Ghazālī Al-Subkī Al-Shawkānī Ibn Taymiyah
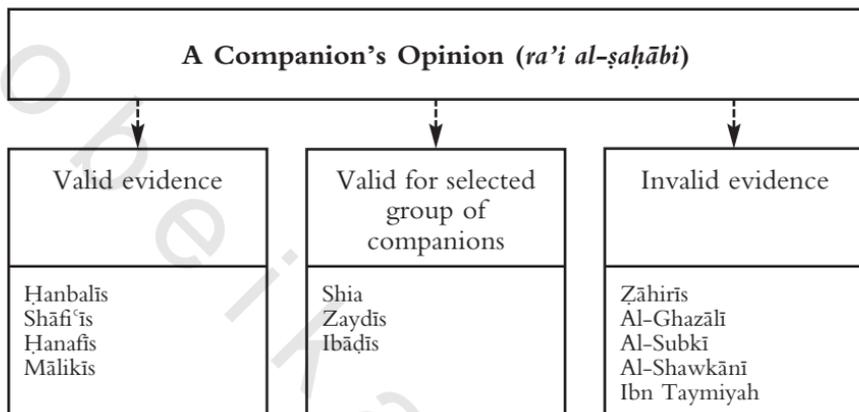
Chart 4.34. Difference of opinion over ra'ī al-ṣaḥābī.

Tradition of People of Madinah

The tradition (ʿamal), also called the consensus (ijmāʿ), of the people of Madinah is a key evidence/source in the Mālikī school. Based on ʿamal, Mālik had judged everything in the methods of the law, from the interpretation of verses to the authenticity of single-chained (āḥād) narrations and other secondary evidences.

A few scholars from other schools of law, such as Ibn Taymiyah and Ibn al-Qayyim from the Ḥanbalī school, agreed with the legitimacy of this evidence in principle because they considered it a form of 'collective narration after the Prophet'.[137] All other schools disagreed with consensus of the people of Madinah based on their own definitions of consensus. Al-Shāfiʿī disapproved any specific status for Madinah and argued that this kind of consensus opens the door for 'everybody to claim some consensus for their own region.'[138]

Ibn Ḥazm, and a number of other jurists, disputed the idea of claiming a consensus of a whole city the size of Madinah, on a 'logical' basis.

Ibn Ḥazm cited many cases in which Mālik had claimed a Madinan consensus, despite different opinions endorsed by other students of companions who also lived in Madinah at the time of Malik.[139]

The Tradition of the People of Madinah (*ʿamal ahl al-Madīnah*)	
Legitimate evidence	Invalid evidence
Mālikīs	All the rest
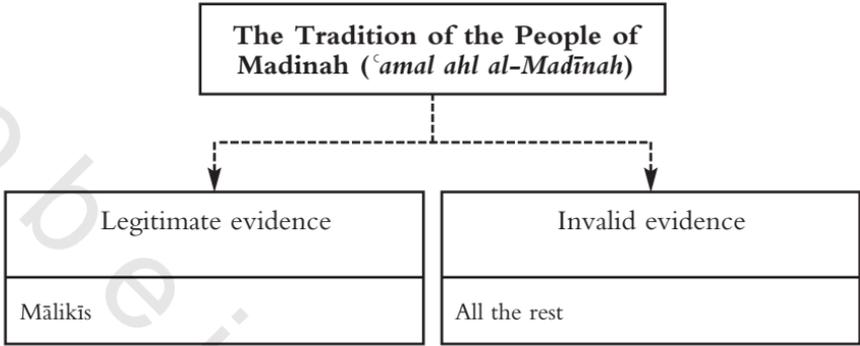
Chart 4.35. Difference of opinion over ʿamal ahl al-Madīnah.

Custom

All schools of law consider custom, or *al-ʿurf*, in their theories one way or another (Chart 4.36). However, there is a basic difference between jurists who considered *al-ʿurf* to be a standalone evidence (with some conditions they stipulated), and those who considered it to be merely a 'consideration' that is only effective in the applications of rulings (which are decided based on other evidences, in any case).

Ḥanfīs and Mālikīs endorsed a fundamental rule that made custom an 'evidence' similar to a scriptural evidence (*al-thābitu bi al-ʿurfi kal-thābiti bi al-naṣṣ*).[140] However, Ḥanafīs and Mālikīs consider it to be valid only if it 'does not contradict an evidence from the Qur'an or Sunnah.'[141] Al-Ṭūfī differed with his Ḥanbalī school over this issue, and considered *al-ʿurf* to be a method of defining *al-maṣlaḥah* (in addition to 'reason'). Therefore, al-Ṭūfī practically gave *al-ʿurf* priority over specific evidences from the Qur'an and Sunnah. Ḥanafīs and Mālikīs did not go as far as al-Ṭūfī in giving such authority to people's social evolution, but considered *al-ʿurf*, nevertheless, to be an evidence that 'specifies the scriptural general evidences.'[142] For example, an 'authentic' narration entails 'forbidding every sale with a condition.'[143] However, Ḥanafīs and Mālikīs allow sales with conditions that are

'customarily agreed upon.' Ibn ʿĀbidīn articulated their position by writing: 'Does this mean that ʿurf can judge a hadith? The answer is, no. ʿUrf judges the analogy/qiyās based on the hadith, not the hadith itself. The reason behind the hadith (of forbidding sales with conditions) is to reduce people's disputes. Therefore, ʿurf is coherent with the meaning of the hadith.' I, however, argue that this mechanism of interpretation of the scripts, based on how much people's traditions fulfil the 'meaning,' or the 'purpose,' behind them, is a flexible mechanism that enhances both 'openness' and 'purposefulness' in the Islamic law, as will be explained in Chapter Six.

Moreover, to be able to judge situations based on 'what is customarily agreed upon,' scholars from the Ḥanafī and Ḥanbalī schools of law put a condition for a jurist to have an 'understanding of the status quo' (fiqh al-wāqiʿ).[144] This is another point of interaction between the law and social sciences, in which verified statistical data or sound sociological analysis play an effective role in deciding whether the desired 'meaning' or 'purpose' is met in reality.

Tradition/Custom (al-ʿurf)	
An independent evidence	A 'consideration' in applying the rules
Mālikīs Ḥanafīs Al-Ṭūfī	All other schools
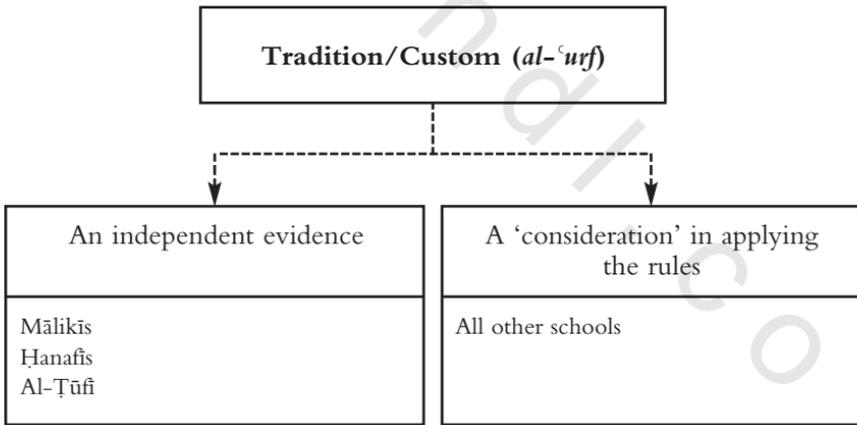
Chart 4.36. Difference of opinion over al-ʿurf.

Presumption of Continuity

Presumption of continuity (istiṣḥāb) is a reasoning principle, rather than an 'evidence' or a source of legislation in its own right. It entails the continuation of a current status (permissibility, innocence, and so

on) until some event entails otherwise. Presumption of continuity is an 'evidence' that is approved by all various schools of law. However, some Muʿtazilīs object to giving it a separate name on the basis that it is included in the 'judgement of reason.'[145] Jaʿfarīs do include *istiṣḥāb* in the 'judgement of reason,' but also establish its legitimacy based on (interpretations of) a number of narrations.[146] Jurists defined presumptions or *istiṣḥāb* in a variety of ways. The following are four examples of these definitions.[147]

1.   The presumption of permissibility until proven forbidden.
2.   The presumption of innocence until proven guilty.
3.   The presumption of attributes until proven otherwise.
4.   The presumption of duty until proven fulfilled.

   Chapter Six will argue that the above fundamental rules are in effect a *maqāṣid*-based understanding and application of the Islamic law.

Prioritisation of Evidences

To outline the relationship between all the evidences mentioned in this section, the following chart 4.37 how each school 'prioritised' its valid evidences. The rankings are based on the school's main books of *uṣūl al-fiqh*, in addition to my observation of each school's mainstream trend. Some re-ranking applies subject to certain conditions (as the arrows on the chart illustrate).

   Ḥanafīs give priority to Qur'anic evidences over all other evidences, including the Sunnah. They do not 'specify' or 'qualify' a general or unqualified expression of the Qur'an with a hadith. If they could not find evidence in the Qur'an, they search for a hadith that applies to the case in hand. A companion's opinion is next, in validity, after the Prophet's saying. Then, they carry out analogy. Ḥanafīs give analogy priority over hadith if it is an *aḥād* narration. But juridical preference, which comes next to analogy, overrides analogy if it is 'inappropriate,' i.e., if it misses the purpose of the law. Then, consensus is the evidence that comes next in rank, theoretically, even though I have not personally come across a ruling in the Ḥanafī school that is built exclusively on

Ḥanafī

If narration
is *āḥād*

1. Qur'an
2. Sunnah
3. Companions opinions
4. Analogy
5. Preference
6. Consensus
7. Custom
8. Presumption of continuity

If analogy is
'inappropriate'

Shia (and Zaydīs)

1. Qur'an
2. Sunnah
3. Consensus (of ʿitrah)
4. Companions opinions (ʿitrah)
5. Presumption of continuity

Shāfiʿīs

If narration
is *āḥād*

1. Qur'an
1. Sunnah
2. Consensus (of companions)
3. Companions opinions
4. Analogy
5. Presumption of continuity

At one level

Ḥanbalīs

1. Qur'an
2. Sunnah
3. Companions opinions
4. Consensus
5. Analogy
6. Interest
7. Preference
8. Blocking the means
9. Presumption of continuity

Mālikīs

If narration
is *āḥād*

1. Qur'an
2. Sunnah
3. Companions opinions
4. Madinah's tradition
5. Analogy
6. Interest
7. Blocking the means
8. Custom
9. Presumption of continuity

via preference,
if applies

Ibāḍīs

1. Qur'an
2. Sunnah
3. Consensus
4. Analogy
5. Presumption of continuity
6. Preference
7. Interest

Muʿtazilītes	Ẓāhirīs
1. Qur'an	1. Qur'an ---┐
2. Sunnah	2. Sunnah ---┘ At one level
3. Consensus	3. Presumption of continuity
4. Analogy	
5. Interest	
6. Preference	

Chart 4.37. An overview of the prioritisation of evidences in various schools of Islamic law.

some 'consensus.' Custom and presumption of continuity are evidences in their own right that apply if none of the above is valid. Ḥanafīs give custom, however, priority over the literal implication of narrations if it achieves the same interest.

Shāfiʿīs place the Qur'an and Sunnah at the same level, i.e., a hadith is as valid as a verse, and if they 'contradict,' the more 'specific' and 'qualified' expression restricts the more 'general' and 'unqualified' expression. Consensus (of the companions) is applied in the Shāfiʿī methodology, on condition that it does not contradict with the implication of the Qur'an or hadith. If the companions do not have consensus over a certain issue, the opinion of one of them is applied. Then, if none of the above is available, they will apply analogy. Finally, Shāfiʿīs apply presumption of continuity as a last resort.

The Jaʿfarī and Zaydī procedures of ijtihad are quite similar. They apply the Qur'an, then the Sunnah. The opinion of one member of the Prophet's ʿitrah, or their consensus comes next. The Shia definition of presumption of continuity includes a variety of 'rational' procedures that they apply if they do not find any of the above *nuṣūṣ* and narrations. The Ẓāhirī/Literal school endorsed only the linguistic evidence of the Qur'an and Sunnah (at the same level of authority or *ḥujjiyyah*), and presumption of continuity as a reasoning procedure. They did not approve any other source of legislation.

Mālikīs apply the Qur'an, the Sunnah, a companion's opinion, Madinah's tradition, analogy, and interest, in that order. However, Madinah's tradition is given priority over *āḥād* narrations if they 'contradict.' Analogy is also given priority over *āḥād* narrations if they 'contradict,' given that they do not contradict Madinah's tradition. Moreover, Malik had frequently given interest (*maṣlaḥah*) priority over analogy, in the name of *istiḥsān* (juridical preference).

Imam Aḥmad ibn Ḥanbal mostly resorted to the evidences of the Qur'an, Sunnah, and the companion's opinion. He considered analogy to be a last resort, and rarely applied it. Later Ḥanbalī jurists developed the following list of evidence: Qur'an, Sunnah, companion's opinion, consensus, analogy, interest, preference, blocking the means, and presumption of continuity, in that order. This Ḥanbalī ranking is quite similar to the Ḥanafī ranking except for giving 'consensus' a higher priority over analogy, and counting 'blocking the means' as separate evidence.

Ibāḍīs apply the Qur'an, their narrations of hadith, 'consensus,' and analogy, in that order. They give *istiṣḥāb* priority over *istiḥsān* and *maṣlaḥah*.

Finally, since the Muʿtazilī school gave authority to reason (*al-ʿaql*) as, 'an independent source and the law's most fundamental evidence,'[148] some scholars are inclined to giving 'rational implication' (*al-dilālah al-ʿaqliyyah*) precedence over all other implications.[149] However, the Muʿtazilī process of juridical reasoning is quite similar to the rest of the traditional schools of law. In my view 'reason' is a theory in the Muʿtazilī philosophy of religion (*kalām*), rather than a method of ijtihad in the Muʿtazilī philosophy of law.

4.4. RULINGS

Overview

This section analyses both types of Islamic juridical rulings, accountability (*taklīfī*) and declaratory (*waḍʿī*) rulings. Accountability rulings are analysed in terms of their levels and issues related to legal capacity. The three types of declaratory rulings are discussed, namely, causes,
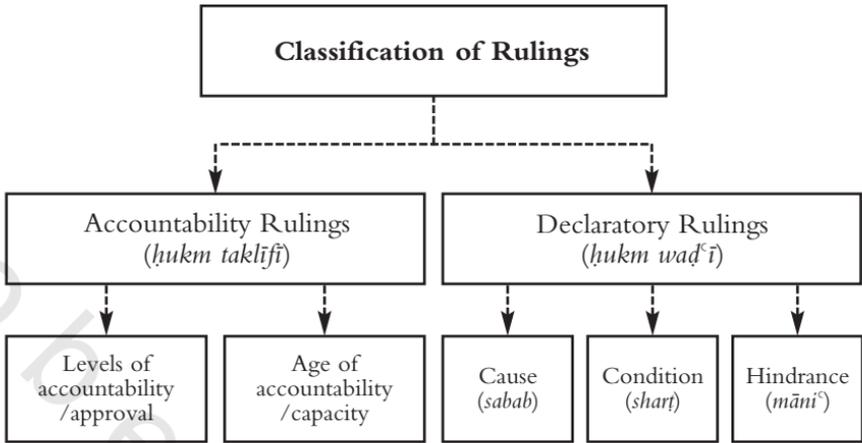
Chart 4.38. Classification of rulings into accountability and declaratory rulings.

conditions, and hindrances. Chart 4.38 presents a summary of the classification of rulings in traditional schools of Islamic law.

Levels of Approval

Schools of Islamic law, except for Ḥanafīs and some Muʿtazilīs, divide the juridical 'levels of accountability' into five levels, namely, obligation (*wājib*), recommended (*mandūb*), lawful (*mubāḥ*), discouraged (*makrūh*), and prohibited (*ḥarām*). Ḥanafīs added two levels to the five-level classification based on 'certainty' of the evidences. Some Muʿtazilīs divide all actions into 'obligation' and 'prohibition,' and rejected all intermediate levels of approval. This is in accordance with the Muʿtazilī fundamental theory that all actions are 'naturally' and 'intrinsically' divided into 'embellished' (*ḥassan*) and 'repugnant' (*qabīḥ*) actions, which could be understood rationally. Chart 4.39 summarises the above differences of opinion, which will also be further explained.

Obligations and Prohibitions

Schools of Islamic law agree on identifying obligations based on orders/imperatives in the scripts. A fundamental rule states that, 'the

Accountability Rulings (*al-ḥukm*) – Levels of Approval

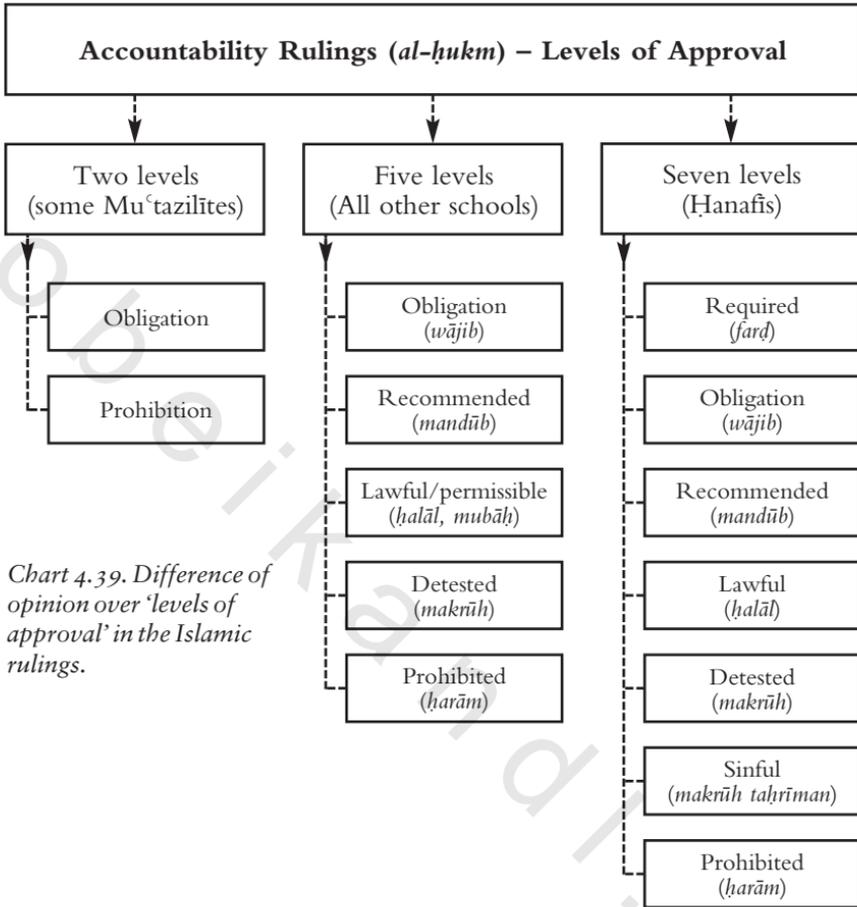| Two levels (some Muʿtazilītes)	Five levels (All other schools)	Seven levels (Ḥanafīs)
Obligation	Obligation (*wājib*)	Required (*farḍ*)
Prohibition	Recommended (*mandūb*)	Obligation (*wājib*)
	Lawful/permissible (*ḥalāl, mubāḥ*)	Recommended (*mandūb*)
	Detested (*makrūh*)	Lawful (*ḥalāl*)
	Prohibited (*ḥarām*)	Detested (*makrūh*)
		Sinful (*makrūh taḥrīman*)
		Prohibited (*ḥarām*)

Chart 4.39. Difference of opinion over 'levels of approval' in the Islamic rulings.

default implication of an order (*amr*) is obligation.' Likewise, the default implication of a negative order (*nahī*) is prohibition.[150] Jurists theoretically classified obligations in various ways depending on their timing, alternatives/choices, scope, and whether they are 'precisely measured.' Chart 4.40 is a summary.

Optional Levels

If there is evidence that an order in not meant to be abiding, i.e., that it is permissible not to carry out the action, then the related action will
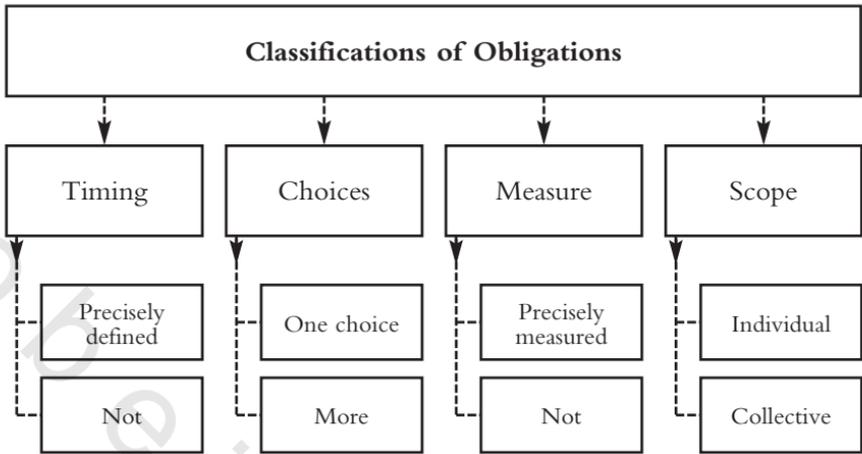
Chart 4.40. Classifications of obligations.

fall into a different category which most jurists call 'recommended.'[151] This evidence is usually a hadith that demonstrates that the Prophet had approved or carried out an action that is 'contrary' to the order. Similarly, a 'contrary' evidence in case of prohibition moves the action from the level of 'sin' (*ḥarām*) to the level of 'detested' (*makrūh*).

Ḥanafīs differentiate between two levels of obligation and two levels of prohibition, based on the level of 'certainty' of the evidence. Thus, Ḥanafīs differentiate between 'requirement' and 'obligation,' and 'prohibition' and 'sinful.' Narrations via *āḥād* are an example of 'uncertain' evidences.

The practical implication of this differentiation is that 'requirements' and 'prohibitions' become integral parts of the religion (*maʿlūm min al-dīn bi al-ḍarūrah*), which means that they are part of not only the Islamic practice code but also the Islamic belief system. This means that 'denying' any of the 'requirements' or 'prohibitions' puts one's faith in jeopardy, while denying matters of 'obligation' or 'sin' is not a matter of creed. All other schools of law make the same differentiation, in terms of the 'integrative parts of the religion,' without giving the two levels of obligation separate names. The relationship between the concept of 'certainty' and 'sanctifying human opinions' will be discussed in Chapter Six.

Also according to Ḥanafīs, if the evidence supporting the obligation is 'certain,' then the related action is required for 'legal correctness.' Otherwise, there are no legal consequences of the action and it becomes 'void.' For example, according to Ḥanafīs, if a trade transaction is carried out without one of the *farḍ* or required conditions, such as the lawfulness of the goods, then it is legally 'void,' as if never happened. But if the missing condition is a *wājib*, such as witnesses, then the transaction is still correct and legally abiding, despite the deficiency. All other schools do not make this differentiation, and thus render both actions invalid, whether the missing condition, for example, is *farḍ* or *wājib*.
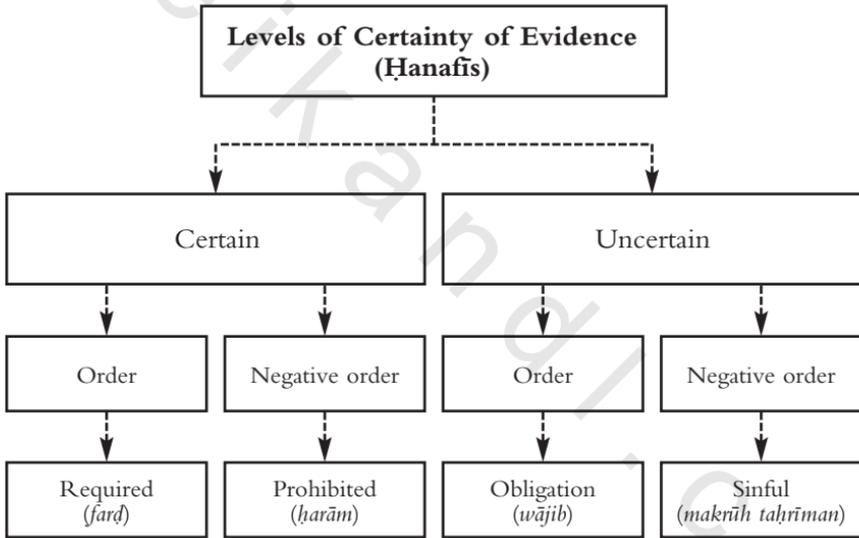

Chart 4.41. *The Ḥanafī classification of levels of obligation and prohibition based on the evidence's 'certainty.'*

Declaratory Rulings

Declaratory rulings are reasons, conditions, and hindrances. A ruling applies if its reasons exist, conditions are met, and hindrances are absent, as applicable. A 'reason' (*sabab*) is similar to a 'cause' or *ʿillah*, as discussed earlier. A condition (*sharṭ*) could be either defined by the

scripts or agreed upon by people (in the field of transactions). A hindrance (*mānī'*) is a situation that renders the legal effect of the reason invalid. 'Correctness' (*al-ṣiḥḥah*) is reached if reasons exist, conditions are met, and hindrances are avoided. Otherwise, the transaction or action is void/incorrect (*fāsid* or *bāṭil*).

For example, prayers are obligatory if the 'reason' of prescribed timing is reached, the condition of ablution is met, and hindrances, such as mental incapacity, are absent. A second example: death is the 'reason' behind inheritance, life of the heir is a condition, and the heir killing the deceased is a hindrance from inheritance. A final example: a contract is the 'reason' behind certain financial obligations, witnesses are conditions, and the prohibition of goods is a hindrance from maintaining legal consequences for that contract.

Legal Capacity

Accountability or legal capacity (*ahlīyah*) in the Islamic law is classified by jurists into two levels, active legal capacity (*ahliyyah al-adā'*) and receptive capacity (*ahliyyah al-wujūb*). Active legal capacity entails rights, obligations and legal qualification, while receptive legal capacity entails rights without obligations or qualifications.[152] Jurists differentiated between the following four stages of human life, namely, from conception to birth, from birth to age of differentiation (*tamīyz*) to puberty (*bulūgh*), and from puberty to death.

The receptive legal capacity of an embryo only entails a right for what is of benefit to the embryo and its anticipated life. The 'period of pregnancy' is a topic that is discussed in fiqh in the context of rights

	Conception to birth	Birth to 'differentiation'	'Differentiation' to puberty	Puberty to death
Active legal capacity	—	—	√ (partial)	√ (full)
Receptive legal capacity	√ (partial)	√ (full)	√ (full)	√ (full)

Chart 4.42. The jurists' classification of legal capacities in terms of human life stages (from Hasaballah's Uṣūl al-Tashrī').[153]

entailed because of pregnancy (for the baby and the mother). Jurists agreed on a minimum period of six months based on the 'implication of numbers' (*dilālah al-ʿadad*) in verses 46:15, 'and her bearing him and his utter dependence on her took thirty months,' and 2:233, 'mothers may nurse their children for two whole years.'[154] However, there is a 'difference of opinion' regarding the maximum period of pregnancy, ranging from nine months to seven years! The evidences that jurists depended on in these judgements were either 'companion's opinion' or 'custom,' which is determined by 'asking people with experience in such matters.'[155]

Age of 'differentiation,' according to jurists, is the age at which a child is able to 'know what buying and selling is.'[156] Jurists had a difference of opinion as to whether the limit (*ḥadd*) of differentiation is the age of five, of seven, or eight. Again, all opinions are based on a 'companion's opinion' or 'experience.'[157]

Between birth and differentiation, a subject (*mukallaf*) lacks 'active legal capacity' but has a (full) 'receptive legal capacity,' i.e., capacity for receiving and giving inheritance, charity, and so on.[158] This full receptive capacity continues until death, and it takes on an 'active legal capacity' from the time of puberty (Chart 4.32).

The age of puberty is also a matter of a 'difference of opinion,' whether it is 'nine years,' 'seeing hair on the (boy's) face,' 'twelve years,' or 'the ability to conceive (for girls) and cause conception (for boys).'[159] Evidences presented depended on 'people's experience' and various indirect linguistic implications from the scripts.[160]

Active legal capacity entails responsibility of the subject/*mukallaf* for his/her own decisions, and independence from the approval of others in transactions. However, from the age of differentiation to the age of puberty, this capacity is partial, i.e., some decisions taken by the *mukallaf* have to be approved by guardian(s).[161]

Finally, the 'sign of death' is also a matter of a similar 'difference of opinion' in classic schools of Islamic law. Also based on 'custom,' signs of death, according to jurists, are 'collapsing cheeks,' 'inclined nose,' 'relaxed palm and legs,' or 'ceasing to move.'[162]

This subsection, which discussed various issues related to 'legal capacity,' included a number of issues that fell within the realm of what

we call today 'science' rather than the realm of what we call 'law,' such as, 'period of pregnancy,' 'age of differentiation,' 'sign of puberty,' and 'sign of death.' Thus, in my view, these issues are not supposed to be determined according to a scholar's opinion or 'what people say,' but rather according to sound statistical conclusions based on some representative sample of medical and social records. Chapter Six will discuss 'openness' in the systems of Islamic law, and will elaborate on the important role that natural and social sciences could play in a systems approach to the Islamic law.