THE LEGAL PHILOSOPHY OF AL-GHAZĀLI:
LAW, LANGUAGE AND THEOLOGY IN
AL-MUSTASFA

A thesis presented by

Ebrahim E. I. Moosa

to

The Department of Religious Studies

in partial fulfilment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Religious Studies

University of Cape Town

Rondebosch, Western Cape

March 1995/Shawwal 1415
The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.
DEDICATION

In the Name of Allah, the Most Gracious, the Dispenser of Grace.

To my parents, Ishāq and Ḥūri, and all my teachers.
ABSTRACT

Abū Ḥāmid al-Ghazālī is a major figure in Muslim thought and famous for his writings on theology and mysticism. Al-Ghazālī’s first career was that of a jurist and he had made major contributions to the jurisprudence of the Shafi’ī school. As time goes on, his juristic contributions are increasingly being relegated to a secondary level.

This thesis attempts to place one of al-Ghazālī’s last writings on legal theory (usūl al-fiqh), al-Mustasfā, in perspective and evaluate its significance in the genre of usūl al-fiqh literature. The focus of this thesis is the interface between law, language and theology as it manifests itself in a ‘close reading’ of al-Mustasfā and his biography as a jurist.

Al-Ghazālī’s legal theory was very much shaped by his personal biography, intellectual, political and social contexts, which in turn were constituted by the language of theology and law. The controversies centered around the use of philosophical theology and ‘foreign knowledge’ in the discourse of religion. Al-Ghazālī attempted to negotiate the tension-ridden ideological chasms between traditionalist and rationalist tendencies by fusing and synthesising the disparate intellectual disciplines. The battlefield for these ideological conflicts was the discipline of legal theory and law. In his role as synthesiser of disciplines, a bricoleur, al-Ghazālī often ended up vacillating between binary opposites, and was caught between stability and instability, order and disorder. Despite his attempts to stabilise language by means of a metaphysics, it was the semiotic nature of language that continuously destabilised his juridical and theological discourses.
ACKNOWLEDGEMENTS

It is a pleasure to acknowledge the many people and institutions that have made a contribution to this thesis.

Firstly, I owe a debt to all those of my teachers who introduced me to the joys of learning. Debts to first-teachers are impossible to discharge. At the risk of omission, I must mention Mawlānā Yūsuf Karaan, an excellent story-teller and first-teacher who inspired me to explore the world of Islam as a child, as well as Mr Adam Peerbhai in my early teens. To the late Shaykh Abū Bakr Najaar, I owe a great deal for sharing with me his vast knowledge and experience. His unexpected death left many of us the poorer. Most of all, I miss the memorable discussions and debates I could have with him, even though at times we would vehemently disagree. At the seminary of Deoband the dedication of two excellent teachers and conversation partners, Mawlānā Badr al-Ḥasan al-Qāsimī and Mawlānā ʿAbd al-Khāliq Madrasī steered me in the direction of critical thinking and reflection. To the Nadwatul ʿUlamāʾ for showing me the diversity of discourses in Islamic thought. Professor Fāthi ʿUthmān served as a role model in many of my early intellectual choices, both as an employer in London and discussion partner.

The comradely solidarity and friendship of dozens of people in the Muslim Youth Movement of South Africa can never be adequately acknowledged. ʿAbd al-Rashīd ʿUmar, a close friend and associate for more than a decade has been an unflinching bastion of support even in the most trying times.

One learns a great deal from former students and associates for their critical appraisal that re-cast some of my own mis-apprehended ideas. For this I would be amiss if I do not mention Saʿdiya Shaikh, Soraya Bosch, Gary Wilson and Aslam Fataar for their contributions to my own thinking.

My thanks to Muḥammad ʿAlī Moosagie for generously making available his excellent library and for listening to some of my ideas, even though for the most of times our conversations appeared to be heated debates. Muḥammad Saʿīd ‘M S’ Kagie has over the years been a staunch and intimate friend. Without the dedicated assistance of the extra pair of eyes of my friend and bookseller Abdul Aleem Somers I would have been deprived of great treasures of knowledge. Shamiel Jeppie has been an intellectual soul-mate for more than a decade and remains a source of inspiration and committed friendship. Farid Esack has been a childhood friend who has been a pillar of strength and encouragement in
times of great adversity. To all these friends, and others not mentioned, I owe a debt that
can hardly be repaid and thanks is insufficient a term.

The University of Chicago awarded me their South African Fellowship during
1990-91 which gave me access to their excellent resources. The Centre for Middle
Eastern Studies, particularly, its director Professor John Woods, did not allow me to feel
like a stranger for a single day. I deeply appreciate his generosity and that of his
colleagues, Professors Rashid Khalidi and Wadad al-Kadi who gave freely of their valuable
time. Some lasting friendships were made during my brief stay in Chicago with Marda
Dunsky, Jefferson Gray, Annie Campbell Higgins and Muhammad Fadil. I would also like
to thank the Islamic Academy of South Africa for their support during my years as a
graduate student and their on-going support for the promotion of the discipline of Islamic
Studies in this country. Mr Sulayman ‘Solly’ Ghoor and Mr Akhtar Thokan deserve
special mention.

My colleagues in the Department of Religious Studies at the University of Cape
Town were particularly considerate in letting me pursue my doctoral research. Associate
Professor Charles ‘Chuck’ Wanamaker was determined to see this thesis through during
his term as head of department and creatively facilitated teaching relief for me.

Dr Abdul Kader I. Tayob, my supervisor and colleague, deserves an award for his
patience and gentle motivation. No student could hope to have a more careful and
attentive thesis supervisor than him. I have profited enormously from his friendship,
erudition and counsel over the years, and especially, while writing this thesis. As one of
his first doctoral students, I can only pray: allahumma iftah laka bi al-khayr.

Last, but not least, is my gratitude to my family, parents, brothers, sisters, uncles,
aunts, in-laws and the extended family network, for their steadfast support for my
intellectual and social endeavours over the years. Even if they disagreed, they never lost
faith in what I was doing. I am indebted to my eldest uncle, Muhammad I. Moosa who
has not only been a pillar of strength to me but whose care and advice I deeply appreciate.
To my wife Fahimoenisa, for her silent support and for assuming some of my
responsibilities during my long absences from home, I owe a great deal. To Lamya (7),
who regularly monitored my progress, and Shibli (3) who had to suffer the deprivations of
my attention, there will hopefully be more time, now that the “pieces” (Shibli’s perhaps not
incorrect construction of thesis) is out of the way.
# TABLE OF CONTENTS

Abstract.......................................................................................................................................................... iii

Acknowledgements........................................................................................................................................ iv

Table of Contents........................................................................................................................................ vi

Title Abbreviations and Transliteration....................................................................................................... ix

Introduction..................................................................................................................................................... 1

Chapter One
The Absent ‘Text’: Al-Ghazālī the Jurist...................................................................................................... 7
   Introduction.................................................................................................................................................. 7
   The Role of the Jurist in the Saljuq Era..................................................................................................... 9
   Early life and Family History.................................................................................................................. 10
   Education.................................................................................................................................................. 12
   The Beginning of a Career....................................................................................................................... 14
   al-Ghazali the Theologian (Mutakallim) and the Saljuq Era..................................................................... 18
   al-Ghazali the Ideologue......................................................................................................................... 21
   al-Ghazali the Jurist (Faqīh)..................................................................................................................... 23
   Key Role of al-Ghazali in the Genealogy of Shafī‘i Jurisprudence (Diagram).......................................... 25a
   Remembering the Dramatic..................................................................................................................... 26
   Reading the (Auto)Biography: Three Events............................................................................................ 28
      The Self................................................................................................................................................. 28
      Memory and Writing.............................................................................................................................. 30
      Exodus from Baghdad........................................................................................................................... 32
   Conclusion.................................................................................................................................................. 36

Chapter Two
The Text and Context of Usūl: The Background of the Battle between Traditionalism and Rationalism.......................................................... 38
   Introduction............................................................................................................................................. 38
   The Relationship Between Law And Theology: From the Formative madīna to the Classical dawla.......................................................... 39
   The Interdependence of Law And Theology............................................................................................. 42
   Tracing the Genealogy............................................................................................................................. 46
   Typology of Legal Theory...................................................................................................................... 52
   Conclusion............................................................................................................................................... 58

Chapter Three
Jurisprudence as Gardening: Theologising the Jurist’s Empire Through Masks and Metaphors.......................................................... 61
   Introduction............................................................................................................................................. 61
   Ambiguous Wording and ‘The Quintessence’......................................................................................... 62
   Theology and Law in al-Ghazālī............................................................................................................. 64
   Theology and Law in al-Mustasfa.......................................................................................................... 68
   Designing ‘Roots’ (Usūl): Structure of Usul......................................................................................... 74
   Structure of ‘Roots’ (Usūl) in al-Mustasfa............................................................................................ 75
   Logic and Legal Theory........................................................................................................................... 77
   The Four Axes (Aqtāb)............................................................................................................................ 79
Structure as Ideology: The Aesthetic Ideology ......................................................... 81
Conclusion .................................................................................................................. 85

Chapter Four
Language and the Rhetoric of Ambivalence .......................................................... 87
Introduction .................................................................................................................. 87
Legal Theory as Discourse and Rhetoric .................................................................. 90
Language and Determination ...................................................................................... 93
The Language of Law: From al-Shafi'ī to al-Ghazālī ............................................. 96
The Structuring of Language in al-Musta'sfā ......................................................... 102
Linguistic Topoi ......................................................................................................... 103

On the origins of language: Linguistic determinism ............................................. 103
Original positing and uses of language ..................................................................... 108
Distinguishing between lexical, religious and legal terms .................................... 110
Completely signifying speech ('al-kātām al-mufid'): The hermeneutical field .... 113
Explicit Denotation: Naṣṣ .......................................................................................... 115
Hermeneutics: Ta 'wil ............................................................................................... 118
Grammatology of Lugha .......................................................................................... 124
Conclusion .................................................................................................................. 128

Chapter Five
Meaning and the Metaphysics of Presence ............................................................ 131
Introduction .................................................................................................................. 131
Contextual Semes: Qarīna ....................................................................................... 132
Metaphor: (Haqiqā) Literal and (Majāz) Figurative Expressions......................... 134
Perspicuous Declaration (Bayān): Indeterminate (Mujmal) and Determinate (Mubayyan) .................................................................................................................. 137
Method of Understanding the Intention of Discourse (Khitāb) ......................... 142
Psycho-linguistics: Inner Speech (Kalām al-nafs) .................................................. 143
Law and Writing ....................................................................................................... 147
Conclusion .................................................................................................................. 150

Chapter Six
The Dialogics of the Determinant (Hukm) and Discourse (Khitāb):
The Poetics of Goodness, Detestability and Liability ............................................. 152
Introduction .................................................................................................................. 152
On Hukm and Khitāb: Determination and Discourse ........................................... 154
Khitāb as Speech Event .............................................................................................. 164
Jakobson's Framework for Speech Events (Diagram) ........................................... 164a
Legal Theory as Speech Event (Diagram) ................................................................. 165a
Goodness and Detestability ...................................................................................... 167
On the Discourse of Liability ..................................................................................... 171
Rebuttal of al-Ash'ari's Doctrine of "Liability Beyond One's Capacity" .............. 176
Conclusion .................................................................................................................. 181

Chapter Seven
The Jurist Working in the Public Interest ............................................................... 183
Introduction .................................................................................................................. 183
Independent Juristic Discretion (Ijtihād) ................................................................. 183
The Validity of Juristic Discretion (Ijtihād): One or Many? ................................. 190
Between Indicants and Signs: Language and the Relativity of Juristic Discretion .... 194
The Doctrine of Public Interest (Maslaha) ............................................................. 197
al-Ghazālī on Maslaha .............................................................................................. 200
Typology of Maslaha ................................................................................................. 202
Analogy and Maslaha ............................................................................................... 206
Applications of Maslaha: Illustrations .................................................................... 209
TITLE ABBREVIATION AND TRANSLITERATION

Mu for al-Mustasfa of Abū Ḥāmid al-Ghazālī followed by volume and page number e.g., Mu, 1:3

- ل (l) for l
- م (m) for m
- ث (th) for f
- خ (kh) for l
- ذ (dh) for n
- ر (r) for w
- ز (z) for h
- ش (sh) for -at in construct form
- ص (s) for ʕā
- ض (d) for ʕū
- ط (t) for i
Introduction

*But if all justice begins with speech, all speech is not just.*

_Derrida, Writing and Difference*

Those familiar with the struggles of modern Muslim societies in their bid to come to terms with change know very well the formidable challenges the discipline of legal theory (*usūl al-fiqh*) in particular, and law in general, poses to contemporary Muslim scholarship. Our knowledge of the complex history of legal theory, the evolution of the discipline and its sub-themes is still in its infancy. This thesis was undertaken in order to understand some of the issues that make Muslim legal theory what it is and in knowing that, to be in a position to suggest how it has evolved and what it could become. I feel the best way of understanding the legal ethos of Islam is through an understanding of the lawmakers and jurists, for it is my belief that biography is strongly linked to productivity. This led me to the choice of al-Ghazālī as the subject of my thesis.¹

Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (450-504/1058-1111) occupies a celebrated status in the history of Muslim intellectual history. He was renowned to be instrumental in a major paradigm shift in Islamic thought in the sixth/twelfth century. His magnum opus, _Ihya' Ulūm al-Dīn (The Revival of the Sciences of Religion)_ remains a masterpiece of ethico-moral and spiritual reflections on religious thought and practice. Al-Ghazālī is also remembered as a champion of theology who attacked the Muslim philosophers for their views which conflicted with

theological dogmas. His views on Islamic mysticism (taṣawwuf) are as thought-provoking today as they were 900 years ago, and mystics throughout the ages have venerated his memory. It takes little persuasion for even the most cursory reader of his biography to admit that al-Ghazālī - a man of complexity and enigma - has become an institution in himself.

My choice of al-Ghazālī was partly prompted by the intriguing question as to why he is rated less as a jurist in the intellectual legacy of Islam, considering his valuable contribution to the discipline. Somehow it seems his contributions to theology, philosophy and mysticism have overshadowed his juristic persona. Al-Ghazālī was a phenomenal figure. In my view he was an intellectual who wrestled with the social realities of his time. In his writings he certainly comes across as what Levi-Strauss would call a bricoleur, a craftsman who had his hand on all things. Al-Ghazālī was a man of many talents who cultivated a range of intellectual and practical interests. In pursuit of some of these interests he crossed several boundaries and made several shifts, not all of which earned him praise.

An aspect which aroused my curiosity was that having started his career as a jurist, and after several personal crises, he closed his prolific career by writing his penultimate work on legal theory. This clearly suggested that he considered it an important discipline. In addition to that, I was inquisitive as to whether al-Ghazālī had made any special contribution to the discipline of legal theory, or whether his lack of renown as a jurist stemmed simply from the fact that he had not really been a leading light in the field.

Introduction

The prolific output by scholars in Ghazalian studies makes any new essay on this daunting figure an intimidating prospect. This study attempts to develop some insights in al-Ghazālī's treatment of legal theory with the primary focus on his last meditation on this subject - *al-Mustasfā min 'Ilm al-Uṣūl (The Quintessence from the Discipline of Principles)*. Commenting on the merit of *al-Mustasfā*, the late Egyptian jurist, Muḥammad Abū Zahra said:

For in this book he [al-Ghazālī] provided an excellent explanation of the issues of the science of legal theory, exploring all its dimensions and pursuing all its aspects. And in this book al-Ghazālī the philosopher and jurist truly emerges. 3

This thesis intends to examine legal theory in terms of al-Ghazālī's semiotics, his philosophy of signs. The general approach is to understand the interrelations of law, theology and politics against referent systems of value. Such studies of Islamic legal theory are of recent origin, and in the discipline of Islamic studies in general, a nascent theme. Even if al-Ghazālī were well understood, and there existed a general agreement as to what he meant by his legal semiotics, this would still be a risky venture. Indeed, the proverbial nerve for failure must in any case be attendant.

The methods I have used in this thesis are adaptations from the work of post-structuralist and post-modern writers. I am fully aware that both approaches are the subject of considerable debate in modern academia. Nevertheless, I have undertaken some 'close-readings' of the Ghazalian text. In Islamic studies some pioneering work using the theories of postmodernism and deconstruction has been done, but this genre of writing is still viewed as an adolescent newcomer upsetting the established

---

Introduction

orthodoxies. Islamic law is perhaps one of those fields of study most resistant to newer methodological inquiries. And yet, law is the most frequently employed discipline in Muslim societies and provides the main ideological platform of contemporary Islamic revival. On a daily basis the legal and ethical vocabulary of Islamic law is being incorporated, re-defined and re-interpreted into our common discourse for presentation to a more universal jury with fascinating and sometimes unpredictable consequences.

The challenges and anxieties are obvious. Innovation in method received stoic resistance in the past, as it does in the present. One of al-Ghazālī's commentators, al-Sayyid Muḥammad al-Zabīdī (d. 1205/1790), came to his defence on the issue of theoretical and methodological innovation. Al-Zabīdī said:

I have rarely seen an adherent of a method failing to condemn the method he chose to ignore and in which he could not see benefit.4

Should I succeed in this attempt, then one has introduced for further inquiry the strong possibility that politics, economics, culture and legal system(s) are not only more dynamic formations than they are normally credited with, but also a "motion-picture" universe that is continually becoming, infinitely developing and changing in response to genuinely novel elements.5

---


6 al-Zabīdī, Ithāf, 1:29 says: "wa qallama ra 'aytu sālika tariqin illa wa yastaqbihu al-tariq allai lam yaslukha wa lam yuftah 'alayhi min qibaliha."
As matter of course, then, this focuses on the issue of language. Wittgenstein's view of language as a form of life, a mode of being which is breaking away from the atomistic picture of language and meaning and moving towards a more contextual one, is now popularly accepted. In this sense, the contemporary Muslim jurist and legal theorist is more a translator than an innovator. The Javanese actually have a word to describe the phenomenon of adapting an old language to suit the present - *jarwa dhosok.* It was Alton Becker who pointed out that one universal aspect of cultural life is the keeping alive of old texts. In doing so, language is given a life which is at once old and new. This dialogical aspect of past-present in the study of the law and legal texts places it in patterns of what has been and will be, patterns that are themselves compositions. "The law," in the words of Boyd White, "is thus at its heart an interpretive and compositional - and in this sense a radically literary - activity." As we make the move from an atomistic appreciation of language to a contextual one, new questions arise just as older ones lose force. One addresses the silences, and waits for a sign!

When we read al-Ghazâlî within the context of the world he inhabited, we may be able to relate aspects of his legal theory to his environment. Al-Ghazâlî's world was characterized by transitions of a political, cultural and more importantly, an intellectual nature. With the emergence of the Saljuqs (1055-1141), the Abbassid caliphate experienced divisive theological and legal schisms. The challenges of new knowledge

---

* Ibid.
* Ibid.
Inherited from the surrounding cultures made their impact in earnest; and al-Ghazālī tried to create a space and a role for himself in that environment. Restless and independent, he was prepared to leap the boundaries of intellectual disciplines, by reading both philosophy (falsafa) and philosophical theology (kalām), practising as a jurist (faqīḥ), advising those in power as a counsellor and ideologue, and engaging in mysticism (taṣawwuf). Some of these disciplines were supposed to be contained within hermetically sealed borders, but al-Ghazālī constantly trespassed by relating them to each other. His interventions in legal theory wove a range of ideas into the fabric of the law. Some of those threads were controversial, such as theology, logic, and aspects of language, which constantly undermined the rigidity of those intellectual forces that wished to secure the closure of the Islamic canon. In a bid to reform, intervene, construct and reconstruct, al-Ghazālī oscillated between order and chaos, stability and instability, and the conventions that forbid and permit. It appears as if the need to transgress was an important dimension of al-Ghazālī’s intellectual makeup.

The chapters of this thesis explore and expose al-Ghazālī’s complex legal philosophy. The first chapter gives a brief sketch of his formative years and particularly outlines his role as a jurist which has been overshadowed by other dimensions of his persona. The second examines the general role and preponderance of theology in legal theory in general, while the third tests the extent of theological influence in al-Mustaṣfa. The fourth and fifth chapters are crucial to the thesis as it uncovers the centrality of language in al-Ghazālī’s legal theory. In the light of this chapters six and seven follow al-Mustaṣfa’s approach to some key issues of Islamic legal theory. Six examines the semiotic relationship between the determinant (ḥukm), discourse (khitāb) and liability (taklīf), and seven explores the semiotics of independent thinking and creative juristic discretion (ijtihād), and public interest (maṣlaḥa). The conclusion follows.
Chapter 1

The Absent 'Text': Al-Ghazālī the Jurist

Introduction

Abū Ţāmīd al-Ghazālī was a prolific and brilliant writer, whose reputation as a jurist was recognised by his fiercest critics. Even his opponents among the scholars of the Maghrib, in particular Abū ʿAbd Allāh al-Māzarī (d. 536/1141), acknowledged his prowess as a jurist as being superior to his forays in theology (kalām) and philosophy (falsafa). Recently, some of his earlier works on positive law (fiqh) and legal theory (uṣūl al-fiqh) have attracted academic attention. His hitherto unpublished works on jurisprudence are now being edited for publication.

It seems surprising that al-Ghazālī’s juristic career and writings have been largely neglected if not ignored by his biographers. Ernst Kris, a pioneer in the psycho-social evaluation of biographies maintains that “biography is an institution.”

1al-Subkī, Tabaqāt, 6:241.


By this he means the biography has a social function. Biographies in general constitute an 'intricate interweaving of mythic, paradigmatic and historical elements.' All of these elements are present in al-Ghazālī's biographies, and viewed holistically, they constitute the 'institution' that Kris believes forms a separate literary category.

This chapter will focus on the early life of al-Ghazālī and the factors which contributed to the evolution of his juristic career. The intention is to show that it was primarily his success as a jurist that made his extraordinary achievements in other fields of religious thought possible. Makdisi says:

The insistence on law in the education of the scholar was important because it was the visible way of determining his orthodoxy. After this he could go into all sorts of subjects to satisfy his intellectual curiosity.

It was the status that al-Ghazālī attained as a jurist that gave him the academic credibility and weight needed to transgress boundaries of intellectual disciplines and make extremely controversial contributions to such other disciplines as theology (kalam), Sufism (taṣawwuf) and philosophy (falsafa).

---


Chapter 1

The Role of the Jurist in the Saljuq Era

According to Lambton and Makdisi, the jurists (fuqaha') in al-Ghazālī’s era were part of an elite group, generally known by the term 'ulamā', (lit. learned ones). While they primarily concentrated on religious affairs, there was no rigid separation between religion and politics. The 'ulamā' of this time could have been academic professors of law, theologians, judges (qudāt), and those who occupied the office of the jurisconsult (muftī). Our knowledge of the social history of the 'ulamā', which included jurists, theologians (mutakallimūn) and judges, in the post-formative period (third/ninth centuries) and earlier, is still in its infancy. Nevertheless, Cohen’s study of the economic background of Muslim jurisprudents in the classical period of Islam, which ended in the middle of the eleventh century/fifteenth century, showed that they derived from all strata of Muslim society.

Lambton’s study also shows that while many of the 'ulamā', especially the judges, were in the employ of the state, there were also some who had private sources of income and cherished their autonomy from the state. Many jurists found themselves in the unenviable position of being in the employ of the state, and could not display their disagreement with their political patrons in public. Notwithstanding these

7 Ann K. S. Lambton, Continuity and Change in Medieval Persia: Aspects of Administrative, Economic and Social History, 11th-14th Century (New York: Bibleotheca Persica, 1988), 297
10Lambton, Continuity and Change, 311-327.
restrictions, they played a vital role in shaping their societies through the practice of an important profession. In conjunction with other offices of the state, they were responsible for the execution and elaboration of the law. In fact, the ʿulamāʾ continued

... to perform various functions which were necessary for the continuation of the life of the community and to act as notaries for their Muslim brethren.11

They also played a vital role in the successive state formations during the Abbassid reign in the fifth/eleventh and sixth/twelfth centuries. One can safely assert that during the post-formative period of Islam, the jurist played a very seminal social and political role, none more so than al-Ghazālī, who was himself an academic jurist. Thus, his first career was to provide a solid foundation for his later forays into the realms of Islamic theology and mysticism. Indeed, it was the cornerstone of his multi-faceted life.

**Early life and family history**

Al-Ghazālī was born at Tūs in Khurasān, near the modern Mashhad, in 450/1058-9. Some reports maintain that he may have been born in Ghazāla, a nearby village. Tūs was a provincial city of Khurasān in the third/tenth century and also a district in itself.12 The city was conquered during the reign of the third caliph ʿUthmān b. ʿAffān (d. 36/656). The historian, Yaqūt al-Ḥamawī (d. 681/1282) observed that it was reputed for its Islamic architecture and beautiful gardens. Several prominent scholars and persons of influence hailed from Tūs, including al-Ghazālī’s longstanding patron, ʿHasan b. ʿAlī (d. 485/1092), who held the title of Nizām al-Mulk, the influential wazīr or chief minister to two Saljuq sultans.13 The close relationship al-

---

Ghazālī enjoyed with Niẓām al-Mulk may well have been as a result of their common origins.

The district of Tus was said to comprise more than 1000 villages. Some accounts say Tus comprised of two major towns, al-Ṭabarān and Ṭūrān, and in some instances that a second part, reputed to have been called Nuqān, is mentioned. It was partly due to the fact that Tus was both a city and a district, that the misconception that it was a 'double' town became current among later Arab geographers.14 After it had been destroyed in 791/1389, Tus re-emerged as Mashhad in northern Iran. The Abbassid caliph Harūn al-Rashīd (d. 193/809), and the eighth Shi‘ī ʿImām ʿAlī b. Mūsa al-ʿ Ṭiṣā (d. 203/818) were buried there.15 Al-Ghazālī was also buried in Tus.

Not much is known of al-Ghazālī’s father. Al-Subkī says that he was fond of the company of the devout and the learned, and prayed that God provide him with sons who would serve the faith. Although his father died when al-Ghazālī was relatively young, he seems to have had a telling influence on his son’s life, for in the moral economy of al-Ghazālī’s biography, there are definite indications of a subliminal pater incertus. His father’s will stated that his two sons be educated from the proceeds of his estate. For this purpose they were placed in the custody of an unknown pious elder of Tus, known for his tendencies toward mysticism (tasawwuf). When the income from the estate was depleted, the al-Ghazālī children were forced to attend a boarding school where they were educated and fed.

14Streck, “Mashhad.”
There are no extant historical records on al-Ghazālī’s mother. While some sources say that she lived long enough to see her son’s rise to fame, others say that she died while al-Ghazālī was still very young. The latter view seems to be more feasible, and possibly explains why the al-Ghazālī children were placed in foster-care, for it is unlikely that they would have been reared by strangers, had their mother been alive.

Al-Ghazālī had three daughters who survived him. Their details are unknown, and we only have the name of one, Sitt al-Muna. A son, called Ḥāmid, who died in his youth, is the reason why al-Ghazālī is called Abū Ḥāmid, the father of Ḥāmid.

**Education**

One of the earliest teachers with whom al-Ghazālī studied in Ṭūs was Ahmad b. Muḥammad al-Radḥakānī. Before he reached the age of 20 he went to Jurjān. Recent research has put paid to the popular belief that while he was there, al-Ghazālī studied with Abū Naṣr al-Ismā‘īlī (d. 405/1014). According to modern biographical treatises, Abū Naṣr died 45 years prior to al-Ghazālī’s birth. The modern scholar, Abd al-Karīm al-Ya‘fī has now identified al-Ghazālī’s teacher as being the scholar and jurist, Abū al-Qāsim Ismā‘īl b. Mis‘āda al-Ismā‘īlī (d. 477/1084), also known as Ibn Sa‘da. The

---

16 Sulayman Dunya says that al-Ghazālī’s mother lived to see her son’s fame, see his al-Ḥaqīqa fi Nazar al-Ghazālī (Cairo: Dār al-Ma‘ārif, 1965), 18-19. ‘Abd al-Dā‘im Abū al-ʿAtā al-Baqrī al-Anṣārī says that she died when he was very young, Tārīkh al-Ghazālī: Kayfa Arrakha al-Ghazālī Naṣṣahu (Cairo: Maktaba al-Angele al-Miṣriyya, 1975), 3.

17 Shams al-Dīn Muḥammad b. Ahmad b. ʿUthmān al-Dhahabī, Siyar ʿĀlam al-Nubalā‘, ed. Shu‘ayb al-Arna‘ūt (Beirut: Mu’assasah al-Risāla, 1945/1984), 19:326; al-Subkī, Ṭabaqāt, n. 6:192. Al-Fayūmī says the one daughter’s name was Sitt al-Nisā‘.

18 ‘Abd al-Karīm al-Ya‘fī, “Sirat al-Imām Abī Ḥāmid al-Ghazālī wa Makānatuhu,” al-Turāth al-ʿArabī, no. 22 (Jamāḍ al-Ūlā 1406/January 1986) : 11. This is also confirmed by Ahmad Shams al-Dīn in his “Muqaddima” to volume of 7 of al-Ghazālī’s collected works, Muṣmū‘a Rasāʾīl al-Imām al-Ghazālī, ed. Ahmad Shams al-Dīn (Beirut: Dār al-Kutub al-ʾIlmiyya, 1988/1409), 5; Aṣīf Tāmīr (al-
most interesting aspect of Abū al-Qasim’s tutelage is the fact that he was a member of the Ismāʿīlī Shīʿa, a sect which al-Ghazālī was to oppose vigorously later in his career.

After studying the religious and linguistic disciplines in Tūs and Jurjān, he went to the Naysabūr Nizāmiyya college with some other students from Tūs. Here he studied more advanced disciplines of positive law (fiqh), theology, logic and philosophy under the celebrated teacher, Imām al-Ḥaramayn ʿAbd al-Malik b. ʿAbd Allāh al-Juwaynī (d. 478/1085). While at Naysabūr he also studied with Abū ʿAli al-Farmadhī (d. 477/1084-5). Al-Ghazālī’s brilliance rapidly gained renown and his powers of speculative thought were regarded unsurpassed.

Al-Ghazālī’s genius has been chronicled from an early age. While still a student of al-Juwaynī, he broke a hallowed convention of the time by writing a book called, al-Mankhūl min Taʿlīqat al-Uṣūl (The Sifted from Notes on Principles). During the classical period of Islam, it was an unwritten rule that one did not write a work during the lifetime of one’s teacher, or while still under tutelage. In what appears to have been a moment of supreme irritation at al-Ghazālī’s impertinence, al-Juwaynī is said to have remarked: “You buried me while I am alive, could you not wait until I was dead”? Al-Juwaynī’s statement could be interpreted as admiration for his student’s intellectual achievement, but was more likely a scathing reproach for his audacity.

---

(Al-Ghazālī Bayna al-Falsafa wa al-Dīn (London: Riad el-Rayyes Books, 1987), 41, identifies this teacher as Ibn Sa’d, and not Ibn Miṣʿada as al-Yaḥyā and Ahmad Shams al-Dīn report.

19 al-Dhahabi, Siyer, 18:566.


Chapter 1

Most biographers have recorded anecdotes of the tension that existed between the young al-Ghazālī and his mentor al-Juwaynī, especially the latter’s envy. While most of these accounts can be classified as being hagiographical, aimed at boosting al-Ghazālī’s status, they can also be subjected to more rigorous scrutiny to uncover the strained relationship between al-Ghazālī and his renowned teacher. In addition to the fact that they show that al-Ghazālī was prepared to break conventions from an early age, they also shed light on the psycho-social relationships between students and teachers during the period.

There were two other students of al-Juwaynī with whom al-Ghazālī competed regularly. They were Abū al-Ḥasan Ālī b. Muḥammad b. Ālī al-Ṭabarānī, better known as Ilkiyā al-Harāṣī (d. 504/1110) and Aḥmad b. Muḥammad al-Muzaffār al-Khawwāfī (d. 500/1106). Al-Juwaynī is reported to have remarked: “al-Ghazālī is a brimful ocean; Ilkiyā a lion ready to leap, and al-Khawwāfī an incinerating fire.” He also said that ‘research is the strength of al-Khawwāfī, conjecture belongs to al-Ghazālī, and eloquence to Ilkiyā al-Harāṣī.”

The Beginning of a Career

Historical sources are not clear what al-Ghazālī did between 478/1085 and 484/1091. While some biographers say that he remained at the Naysabūr Niẓāmiyya, others say that he joined the retinue of scholars and theologians which accompanied the chief minister, Niẓām al-Mulk. Perhaps he did both. What is known with certainty is that, in 484/1091, Niẓām al-Mulk appointed him as professor of Shafī’i law at the Baghdad Niẓāmiyya college. With this appointment, al-Ghazālī’s intellectual excellence was recognised. During this period he wrote some of his most influential

24 al-Subkī, Tabaqāt, 6:196.
work on theology and the refutation of the philosophers which contributed to his popularity.

This period of teaching was to be short-lived, lasting only four years. In 488/1095, while he was in Baghdad, a nervous breakdown and a personal spiritual crisis caused him to vacate his teaching post. A number of events combined to precipitate his departure from Baghdad. Just a year prior to his resignation, al-Ghazālī enjoyed public exposure when he administered the oath of office to the newly acceded Abbasid caliph, al-Mustāzhir. It is likely that al-Ghazālī was exposed to political threats through his connection with al-Mustāzhir, who along with other dignitaries of Baghdad, had supported Tuğush (d. 488/1095) in his claim to the sultanate. Tuğush, however, was defeated by the Saljuq Barkyārūq (d. 498/1105). McDonald postulates that al-Ghazālī must have had serious fears because of his relationship with the royal palace, for he surrendered his professorship and left Baghdad. Added weight is given to this theory by the fact that al-Ghazālī only resumed public teaching after the death of Barkyārūq.

Others believe that he fled Baghdad in 488/1095 to escape the assassin's dagger. Prior to his exodus from Baghdad, there had been a spate of politically motivated killings. First, the chief minister, Nizām al-Mulk was assassinated in 485/1092, followed by Sultan Malikshah who was allegedly poisoned in the same year. These assassinations were closely followed by that of the new chief minister, Taj

Chapter 1

al-Mulk in 486/1093. Given his close ties to these notables at the Saljuq court, it is likely that al-Ghazali may, at the very least, have feared for his life.

His early relationship with the Isma'ilis with whom he studied in Jurjan also bears examination at this point. The Nizari Isma'ilis may have considered him a traitor for he gained entry into their closed circle when he was a student and then, not only did he abandon them, but actively opposed them. The Saljuq regime and the Abbassid caliph of Baghdad were bitterly opposed to their Isma'ili Shi'i adversaries. Al-Ghazali's anti-Shi'i polemics can be found consistently throughout his writings, but his most virulently anti-Isma'ili treatise, al-Mustazhiri, emanated from the time when he was in the caliph's service. Little wonder then that his flight to Damascus is also believed to have been precipitated by fear of Isma'ili reprisals against him!

The best documented reason for his retirement from the Nizamiiyya has been attributed to the deep spiritual crisis which he suffered at this time. He was plagued by intellectual self-doubt and viewed his teaching career as having been contaminated by impure and egotistic motives. This debilitating illness could also have been an hysterical paralysis which could have been related to hostile relationships with significant others in infancy and childhood, as studies in other contexts have shown. As we know, al-Ghazali was orphaned in early childhood. From the onset of that illness during adulthood, al-Ghazali started to search for a more profound experience of the truth to substitute a deep psychological deprivation, which he ultimately found in mysticism. While this psychological explanation may not altogether be incorrect, it does somehow suppress the effects of his political activities under the broad categories

30 Tamir, Bayna al-Falsafa wa al-Din, 43.
32 Ibid., 17.
of moral incrimination and psychoanalysis. In fact, al-Ghazālī’s exodus from Baghdad could have been as a result of some or all of these factors, social, political and personal.

Under the pretext of pilgrimage (hajj), al-Ghazālī left Baghdad for the spiritual centres of Damascus and Jerusalem. In Damascus, it is reported that he frequented the gatherings of the jurist, Naṣr b. Ibrāhīm al-Maqdīsī (d. 490/1096), who is said to have had sufi leanings. There is confusion about the other places to which he travelled during this time. It is known that he intended to meet the ruler of the Maghrib, Yūsuf b. Tāshfīn (d. 500/1107). Some believe he may have travelled as far as Alexandria before turning back.33 However, when he learned of the latter’s death, he abandoned his trip to that region. In any event, after an absence of between four to five years, he returned to Tūs in 493/1099-1100, where he completed the writing of the Iḥyā‘ Ulūm al-Dīn.

Around 499/1106 Nizām al-Mulk’s son, Fakhr al-Dīn ʿAlī, now the wāzīr to Sanjar, persuaded al-Ghazālī to return to the Nizāmiyya college in Naysābūr. In 500/1106, however, Fakhr al-Dīn was killed by an Ismāʿīlī adversary. It is not clear for how long after that al-Ghazālī remained in Naysābūr. Some believe he returned to Tūs after the death of the wāzīr, while other sources suggest that he may have finally retired from official teaching around 503/1109-10. During this period, he spent most of his time in sufi practices, writing and teaching a select group of students. It was between his second spell of official teaching and final retirement, that he completed the
work on legal theory, al-Mustafā, the central focus of this thesis. On 14 Jamād al-Thānī 505 - 18 December 1111, not long after his withdrawal from public life, he died at the age of 53.

al-Ghazālī the Theologian (Mutakallim) and the Saljuq Era

In evaluating al-Ghazālī's role as a theologian, it is necessary to place him in the broader context of the religious and sectarian revival of his time. Makdisi correctly points out that the revival of the Sunni theological tradition did not begin with the Saljuqs, nor the activities of Nizām al-Mulk, for that matter. Far from any significant revival, Nizām al-Mulk assisted by al-Ghazālī, vigorously promoted the legal school of Shāfi‘ī and only implicitly advanced the doctrinal tenets of Aš‘arism. The received wisdom which hails al-Ghazālī as the champion of Aš‘arism is questionable. Makdisi’s study points out that at the time a traditionalist Sunni revival was firmly in control which glorified the explicit words (naṣṣ) and held them to be sacred. This trend was implicitly and sometimes explicitly pitted against the rationalising legal and theological schools in Islam. According to Makdisi:

Ghazzālī’s career in Baghdaḏ was too late and too brief to have allowed him to do for Aš‘arism what he is supposed to have done; namely establish it as the middle of the road orthodoxy. Ghazzālī could not have taught Aš‘arism in the madrasa even if it had been possible. He was professor of Shāfi‘ī law, and that is the subject he taught... Outside of that traditional institution of learning, the madrasa, he pursued other subjects, including philosophy, queen of the “foreign sciences” or ilm al-awa’il."

34 Bagley, Counsel for Kings, xxxvi.
36 Ibid.
Ashārism, therefore, could only have been propagated by infiltrating the sermon (wa'z), and not through formal teaching (tadris). Fierce sectarian competition prevented open proselytisation to theological schools.

The power structure of the Abbassid empire had undergone a major change just prior to al-Ghazālī’s era. In 334/945 the Buwayhids - Daylamī Persians from the Ṭabaristān region - captured Baghdād. They remained in power for just over 100 years until 447/1055 when they were defeated by the Saljūqs, Turkish warriors from Central Asia. The Mu'tazilites, along with the Shi‘ites, had supported the Buwayhid dynasty. The fortunes of both the Mu'tazilites and Shi‘ites waned when the Suljūqs came to power. From then onwards, the Saljūqs effectively limited the power of the Abbassid caliph in Baghdād.

Tughril Beg, the first of the great Saljūqs, was the first to order the public cursing of al-Asḥārī from the pulpits of Khurasān where the worshippers were predominantly followers of the Shafī‘ school. The key proponent of this anti-Shafī‘ persecution, says al-Subkī, was the Mu'tazilite ʿAmīd al-Mulk, Maṭbūr b. Muḥammad al-Kundūrī (d. 456/1064), the wazīr of Tughril Beg. He extracted permission from the sultan to take action against the heretics (al-mubtadaʾa‘ī), namely the philosophers and the Shi‘a. Al-Kundūrī sought support from the Mu'tazilites, who according to al-Subkī:

---

40 He had supported the unsuccessful claim to the throne of Alp Arsalan’s brother Sulaymān and was put to death with the approval of Niẓām al-Mulk. Bagley, Counsel for Kings, n 1, xxxiii; al-Subkī, Ṭabaqāt, 3:390.
... pretended to follow the school of Abū Ḥanīfah, whereas their hearts were saturated with the infamies of the Qadarites and only sought affiliation to the Hanafi school as a cover for themselves. 41

However al-Kundurī’s successor as ważīr was Nızām al-Mulk, a loyal follower of the Ashʿarite creed and the Shafīʿi law school. His interventions to the influential Saljūq rulers, Tughril Beg (d. 455/1063) and Alp Arsalān (d. 465/1072) created an opportunity for Ashʿarites and moderate sufis to gradually strengthen their ties with the new and moderate section of the Saljūq rulers. Initially, Ashʿarism was tolerated, but later it flourished becoming an influential factor within those circles close to the state. 42

The Niẓāmiyya colleges under the patronage of Nızām al-Mulk, but particularly the one in Baghdād, were founded to oppose the two intellectual forces of Ḥanafism and Ḥanbalism. 43 Whether as true Ḥanafites or pretenders, Ḥanafism was a formidable force in Baghdād. Ḥanafism was also supported by the efforts of Abū Saʿd al-Mustawfī (d. 494/1101), who built a mausoleum over the grave of Abū Ḥanīfah around 459/1066, to which was attached a college (madrasa) for the propagation of Hanafi law. In the Abbassid capital of Baghdād, where al-Ghazālī found himself, fierce competition between Shafīʿi/Ashʿarī and Ḥanafi/Muʿtazilī schools was common. Both the Muʿtazilites and Ashʿarites represent different forms of rationalist discourse. It may even be reasonable to imply that there was a battle for intellectual space among partisans of kalām themselves. The discipline of theology (ʿilm al-kalām) was itself in crisis. Two forms of kalām, or rather two types of kalām with different political agendas were pitted against each other: Ashʿarite-kalām versus Muʿtazilite-kalām. At

source, both Ash'arite and Mu'tazilite-kalām were based on the rational defence of religion by way of speculative arguments.

However, the problem becomes more complex on further investigation. While the Mu'tazilites and Ash'arites, excoriated each other in bitter struggle, the Hanbalis were quite content to act as spectators. While the rationalist tradition was being torn by strife, the strength of Hanbali thought went unchecked, leading to its eventual hegemony in Baghdad. In addition, it thrived on the influence and activism of al-qādī Abū Ya'la (d. 458/1065) and later the nobleman (shari'f) Abū Ja'far (d. 470/1077), a cousin of the Abbassid Caliph. It was in this context that al-Ghazālī played his role as a theologian (mutakallim) by engaging in extensive debates and writings, not only against the Ismā'īlīs and the Mu'tazilites, but also against the Hanbalis and the Hanafi law school. He was to show contrition later in his life for his attacks on Abū Hanifa, the founder of the Hanafi school. Al-Ghazālī also dedicated specific works, such as the Qawā'id al-Aqa'id (Rules of Dogma) and the al-Musta'zhiri to theological topics, which served the dual purpose of repudiating the views of his adversaries and establishing an acceptable theological doctrine.

al-Ghazālī the Ideologue

A large part of al-Ghazālī's career coincided with the political successes of the Saljuq sultans, especially the activities of the ambitious Nizām al-Mulk. Al-Ghazālī was too much of a realist to regard the government of the Saljuqs as being truly Islamic. He reformulated Muslim political and constitutional theory, thereby harmonising the relationship between the caliphs and the real controllers of power, the

Saljuq sultans. The old Persian adage that "religion and the monarchy are twins" was a political aphorism very much in currency at the time. Against this background, the political in-fighting between various Saljuq potentates manifested itself in the tensions between Shafi'i/Ash'ari factions and the Hanafi/Mazari groups. As a senior religious figure, al-Ghazali could not insulate himself against some of these ideological feuds.

He was forced to become involved in matters of politics to the extent that he had to take sides in an internal political feud among the Saljuq rulers. This involvement resulted in the work Naṣḥat al-Mulūk (Counsel for Kings), written in the genre of "mirrors for princes," written in the phase after his retirement from teaching in Naysabur. A point of interest here is that al-Ghazali set aside a special chapter in this work, titled "Women and their Good and Bad Points." The essence of this chapter was that some of the wives of the Saljuq rulers, especially Turkân Khâtûn, the wife of Malikshâh, played a key role in the clandestine intrigues of succession to the sultanate. Not only does the chapter provide an insight into al-Ghazali's attitude towards women, but also the extent of his partisanship in the conflict. He felt so strongly about the matter, that he deemed it necessary to warn his contemporaries and future generations about the role of women in politics:

---

49 E. Ashtor, A Social and Economic History of the Near East in the Middle Ages (London: Collins, 1976), 210. Ashtor says: "There is good reason to believe that the great success of the Seljukids were partly due to the favourable attitude or even active help of the sunni theologians and other staunch supporters of Moslem orthodoxy."
50 Bagley, Counsel for Kings, xxxvi
Chapter 1

It is a fact that all the trials, misfortunes and woes which befall men come from women, and that few men get in the end what they long and hope from them ...".

Towards the end of his life al-Ghazālī wished to change his image of being a state ideologue, but by then he was too deeply immersed in the affairs of the Saljuqs. Although he was reluctant to teach in Naysābūr after his retirement, he was prevailed upon to do so by the wāzīr Fakhr al-Mulk. Even at such a late stage, he wished in vain to distance himself from the patrons of power.

al-Ghazālī the Jurist (Faqīh)

The primary concern of this chapter is to ascertain why the accounts of al-Ghazālī's juristic career are so inadequate. There must be reasons why, his biographers have generally ignored this aspect of his life. It could be that al-Ghazālī had ambitions of being more than just a jurist and saw himself as a grand religious reformer. In many respects he was ideally suited to multifaceted roles. He was familiar with Sūfism and had the added advantage of being an accomplished theologian. It is likely that the fame which grew from these talents overshadowed his equally distinguished, if not quite as visible, legal abilities. His mastery of the controversial disciplines of mysticism and theology could also be responsible for the marginalisation of his juristic talents. Al-Ghazālī, the controversial theologian and Sūfī, features much more prominently in the biographical literature than does any other dimension of his life. Criticism against him also centered around these two areas. Ibn al-Jawzī, for instance, was vehement in denouncing al-Ghazālī's idiosyncratic views on asceticism, citing "... the reason for his deviation from the rectitude of proper

51Bagley, Counsel for Kings, 172.
52Exception to my generalisation is a work by Ḥusayn Amin, al-Ghazālī Faqīhan, wa Faylasūfan wa Mutasawwifan (Baghdad, 1963).
understanding (al-fiqh)...” was “... because of his association with the sufis. He viewed their lifestyle as the goal.”

Nevertheless, al-Ghazâlî’s student Muḥammad b. Yaḥyâ b. Mansûr described him as the “Second al-Shâfi‘î.” Ibn Āsākir praised al-Ghazâlî as having been an “authority” in both the law (fiqh) of the Shafi‘î school (madhhab) and in comparative law (kâna imâman fi al-fiqh madhhaban wa khilâfan). Al-Ghazâlî was credited with the renewal of the Shafi‘î school of law (jaddada al-madhhaba fi al-fiqh).

It is well known that al-Ghazâlî was not a very accomplished traditionist (muḥaddith). What he lacked in the discipline of tradition, he certainly made up for in

55 al-Subkî, Tabaqât, 6:214; I have translated khilâf here as comparative law. The term khilâf is opposed to madhhab, where the latter refers to doctrines having the consensus of the school’s doctors. Khilâf deals with the disputed questions of law, whether it is in one or several schools of law. Since khilâf is about comparing and disputing, the notion of comparative law is appropriate. George Makdisi, The Rise of Colleges, 109.
57 Traditionists have accused al-Ghazâlî of lacking proficiency in knowledge of ḥadîth, a deficiency which he seemed to have attempted to redress in the closing years of his life. Muḥammad b. Īdris al-Shâfi‘î (d. 205/820) to whom al-Ghazâlî is equated, was also poorly rated for his knowledge of ḥadîth, yet he became immortalised in the law school. A disciple of al-Shafi‘î, Ahmad b. Ḥanbal, said of his teacher: “He was the most discerning (ṣfâh) of people when it came to comprehending the Book of God or the Tradition (Sunna) of His Prophet was concerned, but spent little time in search of Prophetic narrations (ḥadîth).” Muḥammad b. Ḥasan al-Ḫuḍâwî al-Thâkabî al-Fâsî, al-Fikr al-Sâmî fi Ta'rîkh al-fiqh al-Islâmî, ed. Ṣâd al-‘Azîz b. Ṣâd al-Fattâh al-Qârî, (Cairo: Maktaba Dâr al-Turâth, 1397 AH), 1:395. Al-Shâfi‘î and al-Ghazâlî may share more than what their biographers
the field of law. His contribution becomes evident when one examines the chronological catalogue of legal manuals used in the Shafi'i school. Al-Shafi'i (d. 204/820) wrote the Kitab al-Umm which was abridged by his Egyptian student al-Muzani (d. 264/878), as the Mukhtasar al-Muzani. Nearly one and a half centuries later, in the eleventh century, al-Juwayni (d. 478/1085) wrote a commentary on the Mukhtasar al-Muzani called Nihayat al-Matlab fi Dirayat al-Madhhab. Al-Ghazali abridged this work and called it the al-Basih. From this work he culled three smaller abridgements, the al-Wasit, the al-Wajiz and the al-Khulasa. The genealogy of Shafite jurisprudence flowed from al-Shafi'i to al-Ghazali. (See diagram.)

During the three centuries following his death, al-Ghazali's works were undeniably pivotal in the development of the legal canon of the Shafi'i school. Much of the later developments were dependent on his writings and interpretations of the master texts of the Shafi'i school. Jurists would later use his works to extrapolate rulings for the school. The leading Shafite jurist, 'Abd al-Karim b. Muhammad al-Qazwini al-Rafi'i (d. 623/1226) abridged al-Ghazali's al-Khulasa into a work called al-Muharrar. Al-Rafi'i also produced a commentary on al-Ghazali's al-Wajiz, called Fath al-Aziz (Sharh al-Wajiz). The second most important figure after al-Rafi'i in the Shafi'i school was Yahya b. Sharaf b. Murti al-Nawawi (d. 676/1278). It was he who abridged the al-Muharrar into the Minhaj al-Talibin, now an authoritative source for thought they had in common. But the significant point that this comparison raises is that at least in the twelfth century, knowledge of traditions as the main yardstick for measuring the intellectual excellence of a scholar had waned. Al-Ghazali's indiscriminate use of unverified prophetic traditions (hadith) also exposed him to criticism which indirectly affected his credibility as a jurist. Ibn al-Jawzi says that in the Ihya Ulum al-Din, al-Ghazali wrote on the method of the Sufis and ignored the rule of fiqh, see Ibn al-Jawzi, al-Muntaqam, 9:169.

Chapter 1

Key Role of al-Ghazālī in the Genealogy of Shāfi’ī Jurisprudence

al-Shāfi‘ī (d. 205/820)

Kiubah al-Umm

al-Muzanī (d. 264/877)

al-Mukhtasār

al-Juwaynī (d. 478/1085)

Nihāyat al-Matlab

al-Ghazālī (d. 504/1111)

al-Wasit

al-Basīt

al-Wajiz

al-Khulāsa

al-Raﬁ‘ī (d. 623/1226)

Fath al-‘Azīz

al-Muḥarrar

al-Nawawi (d. 676/1278)

Minhāj al-Ṣāhibīn
Chapter I

juridical responsa (fatāwā) in Shāfi‘ī jurisprudence. Although several commentaries, glosses and notes have been written on the Minhāj, it must be kept in mind that al-Ghazālī was the key link in the transmission of the jurisprudential sources of the Shāfi‘ī school between the fifth/eleventh and seventh/thirteenth centuries. Even in legal theory (usūl al-fiqh), al-Ghazālī’s al-Mustaṣfi‘a ranks as third in the trio of works in this field. Only the al-Mū’tamad of Abū al-Ḥusayn al-Baṣrī (d. 413/1022) and the Kitāb al-Burhān of al-Juwaynī (d. 478/1085) preceded it in the hierarchy of such works.

Remembering the Dramatic

If the empirical evidence supports al-Ghazālī’s pedigree as a jurist par excellence, then there must be some explanation as to why he does not occupy that status in the tradition. I venture to suggest that the historical sources tended to focus on the controversial and dramatic, with the result that the ordinary events were underplayed, if not completely ignored. For the historian of religion an important issue is “to what extent ideal concepts such as those presented in a founder’s biography shape subsequent life-tellings.” Kris attributes the transformation of the mythical into

---


factual as the ‘biographical formulae.’ By constantly repeating the same incident or events, a process is set into motion whereby the image of the subject is affected. Al-Ghazālī’s biography has been made vulnerable to mythology by the inclusion of several such elements, in particular, the myths which surround his role as a theologian (mutakallim) and mystic (mutaṣawwīf). These were controversial disciplines at the time and provided ample material for historical drama.

Several myths were circulated to legitimise al-Ghazālī’s theological and mystically-inspired writings. ‘Legitimizing-edifying-dreams’ do not only play a crucial role in reinforcing these myths as Kinberg’s study has shown but are also suggestive of a semiotic coding of information at more subtle levels. “Dreams that instruct people how to behave, think, or react to definite situations in their daily lives” are widely found throughout Islamic literature. Various law schools (madhāhib) were also the subject of a range of such legitimizing dreams. Abū al-Ḥasan al-Asḥāṣī, for instance, left the Muʿazzilite fold on the basis of a dream. ‘Al-Ghazālī’s theological and ṣūfī works were popularised by similar legitimizing dreams. Abū al-Qāsim Saʿīd b. ʿAbī al-İsfaraʿīnī for instance, saw the Prophet of ʿIlām in a dream approving one of al-Ghazālī’s theological texts, Qawāʿid al-Aqāʾid. ʿIbn Hīzman, an outspoken critic of al-Ghazālī’s Iḥyāʾ Ulūm al-Dīn, dreamt that he was beaten on the command of the Prophet for criticising al-Ghazālī’s book, and when he woke up, found the whip marks on his body. These events were dramatised in a bid to bolster al-Ghazālī’s authority in the disciplines of theology and mysticism. Al-Ghazālī’s biography thrives on his success as a ṣūfī and theologian and thus accounts for him being accorded the honorific Ḥujjat al-Islam (Authority of Islam). His legal contributions could not

64 Kris, “The Image of the Artist,” 65.
possibly match such levels of drama and were thus reduced to the level of the ordinary in the historical memory.

Reading the (Auto)Biography: Three Events

When reading al-Ghazālī’s autobiography and biographical accounts, some events impress more than others. An endeavor will be made to place three of these events into a particular theoretical framework so that they can amplify an overall assertion that authors, even of arcane legal theory, and their biographies cannot be entirely separated. These events or social dramas are the keys to understanding the ideas, feelings and emotions of the biographical subject. I suggest that three events epitomise the social dramas of al-Ghazālī’s life, as evident from his autobiography and biographies. Historical precision may not always be appropriate and, indeed, not even possible as worldviews are not easily chronicled in the manner that political events are, but this in no way detracts from their reality from the viewpoint of the subject.67 One way of examining the broad themes of biography is to see each human experience as a chain of rites de passage through varying stages of liminality, or the individual’s social drama of pilgrimage. The three events described here symbolise recurring themes in al-Ghazālī’s biography.

The Self

The first event took place in al-Ghazālī’s childhood on the occasion when his tuition came to an abrupt halt due to a lack of funds. He was then advised to join a school (madrasa) in Tus where he would receive free tuition and lodging facilities to become a jurist. During more reflective moods in later life, al-Ghazālī lamented the fact that his career as a jurist came about by coincidence, since his main goal to study

was in order to survive. This event troubled al-Ghazālī to such an extent that it warranted a comment in his autobiography: “We sought knowledge for purposes other than God, but [knowledge] refused to be [harnessed] except for God” (taḥalbnā al-ʿilmā li ghayr allāh fa abā an yakīna ʿilla lillāh). A strong sense of guilt is evident in these words, occasioned by the fact that the knowledge which was to bring him such acclaim had not been gained with noble and moral goals in sight. At that time in his life, he studied because it was expedient to do so, and because he was fed as well as educated at the madrasa. However, he did manage to come to terms with these feelings of guilt by viewing the issue deterministically and concluding that knowledge did not allow itself to be used in pursuit of a lesser goal.

Many of al-Ghazālī’s biographers continue to be puzzled by this statement. Al-Anṣārī says that it is unclear whether he was commenting positively, or negatively. I believe it symbolises al-Ghazālī’s life-long battle with his self and his continuous struggle to celebrate the purity of motive, rectitude and moral order. His last words on his deathbed, which he had reiterated to his disciples on many occasions was “cultivate sincerity of motive” (aiaykum bi al-ikhlas). He was strongly aware that anything which might accrue from talent or influence was worthless if the greater good of a moral cause had not been served. This dilemma of faith and constant struggle to allow only purity of motive, generated al-Ghazālī’s moral and ascetic-self, the ṣūfī. The statement that “knowledge refused to be [harnessed] except for God” is an overpowering indication of the degree to which he had enlightened himself. Overcoming the egotistical motive and turning the referent to God was, for him, of the utmost importance.

69 al-Anṣārī, Iʿtirāfīl, 6.
Chapter 1

Memory and Writing

The next account recalls an episode when the young al-Ghazālī was returning from Jurjān where he had been studying and had taken notes (ta'liqa) from his Ismāʿīlī teacher in Jurjān. On his return to Tūs he was accosted by a group of vagrant robbers (āyyarūm) who relieved him of his possessions, including his notes. He pleaded with the thieves to return the notes which were his most prized possession, representing years of labour. He offered them all his goods except the notes, saying they would be of little benefit to them anyway. The leader of the band of the thieves derided him saying: ‘How can you claim that you have knowledge, when we have taken it away from you. Now you have been stripped of its knowledge and left without knowledge (ʿilm)!” This event had a profound effect on al-Ghazālī. He firmly believed that God had used the robbers to convey to him the message that memory should be the prime instrument used to store knowledge.

Consequently, he memorized the notes during his three-year stay in Tūs. Viewed from a post-modernist perspective, al-Ghazālī would be faulted for his erroneous belief in memory as a ‘treasure” and a “presence”.

After this incident al-Ghazālī disclaimed ‘writing,’ associating it with ‘theft’. He asserted that writing can be possessed by thieves and taken away from one, leading to deprivation.

When reading the later works of al-Ghazālī like al-Mustasfā, it becomes evident that his attitude towards writing suffered a change. In a discussion about the conditions of juristic discretion (ijtihād), al-Ghazālī made several observations as to what constituted the proper qualification of a master-jurist (mujtahīd). He then argued in favour of several concessions on these conditions all of which favoured writing...
against memorisation." For instance, he said, that one did not need to memorise the entire Qur'ān, the legal verses of the Qur'ān, hadīth statements dealing with law, or those cases of existing consensus and rules of grammar, in order to qualify as a master-jurist. It would suffice if one had sufficient knowledge and access to authorised copies of these source materials.

Here we have two positions of al-Ghazālī: the young al-Ghazālī returning from Jurjān and the Sufī retired at Tūs. There could be a number of explanations for this change in attitude towards writing, but I will offer one. Al-Ghazālī juxtaposes memory and speech in opposition to writing, just as he posits literal against metaphorical, nature against culture and positive against negative. Use of the superior term celebrates the logos whereas the use of the inferior term (e.g. the metaphorical instead of the literal) marks a linguistic fall. Hence, all analysis is strategically returned to its origins, located in voice and, by inference writing is degraded. By privileging memory over the written word, al-Ghazālī believes he would have direct knowledge through phonic speech. "The unmediated presence of the self to its own voice, as opposed to the reflective distance that separates the self from the written word." He identifies the spoken sound captured in memory with meaning (thought). This phonocentrism, is also characteristic of Muslim logocentrism, which treats writing as merely an external, supplementary addition to the written word. It is also a reference to an origin, a pure source of meaning where the knowledge of the notes originates, namely from his Ismā'īlī peers in Jurjān. It traces the knowledge to a site, a point, be it language or authority, beyond which we need not go further. This is called a metaphysics of presence. Logocentrism and a metaphysics of presence are characterised by the irrepressible desire to have a transcendental signified which engenders a closed

\[74\text{Mu, 2:350-54.} \]
\[75\text{Ibid.} \]
linguistic and knowledge system. I would identify this instance as an illustration of the crude logocentrism of the young al-Ghazālī.

The later and older al-Ghazālī is more experienced and enriched by his mystical experiences. In the mystical world the sign does not point to itself, but to another sign. Although there is a gravitation to the Sign, signifying God, the interrelation between signifier and signified is less rigid and referential. The mystical world places a greater emphasis on symbolism, instead of literalism. After this experience, al-Ghazālī has a different appreciation of writing and no longer associates it with theft. Contrary to his earlier stance, he does not require knowledge to be memorized. A written source is sufficient. He no longer privileges voice, but considers writing as another referent. While the written source may still be considered a source and site of originary meaning, the switch that al-Ghazālī makes from sound to writing opens the possibility of at least limiting logocentrism and the metaphysics of presence, and thereby opening the boundaries of a closed linguistic and knowledge system. The significance of these observations are that they indicate the shifts in al-Ghazālī’s position. In addition, if one reads the two instances together it creates a certain sense of ambiguity and ambivalence as to the extent logocentrism inheres in his thought, or whether the mystical experiences had radically changed his perspective of knowledge, especially in law.

Exodus from Baghdad

Al-Ghazālī’s exodus from Baghdad is a legend that also makes a significant autobiographical statement. In my opinion it is perhaps the most express statement of rites de passage within a ritual subject. Al-Ghazālī had undertaken a ‘pilgrimage’ which had serious personal and social consequences. Turner believes that in the major

76Derrida, Of Grammatology, 49.
historical religions, pilgrimage is the “functional equivalent” of partly a type of *rites de passage* and partly that of “rituals of affliction.” In preliteracy small-scale societies, but also in cultures where pilgrimage systems are strongly developed, people often undertake a penitential journey to some shrine in order to cure illness or difficulties of body, mind or soul by miraculous power, or better morale.\textsuperscript{7} Al-Ghazālī’s long absence from Baghdād, I believe, was such a pilgrimage.

For while al-Ghazālī did undertake the obligatory pilgrimage (*hajj*) to Makka during this exodus, much of his reflections about his spiritual sojourn was in and around Damascus and Jerusalem, both sites of non-obligatory shrines of pilgrimage in Islām. Both were places of great spiritual traditions of the Jewish prophets and saintly figures revered by different forms of Islām. Al-Ghazālī said:

I announced that I had resolved to leave for Mecca, all the while planning secretly to travel to Syria... Then I entered Damascus and resided there for nearly two years. My only occupation was spiritual exercise and combat with a view to devoting myself to the purification of my soul and the cultivation of virtues... Then I travelled from Damascus to Jerusalem, where I would go daily into the Dome of the Rock and shut myself in. Then I was inwardly moved by an urge to perform the duty of pilgrimage... So I travelled to the Ḥiǧāz.\textsuperscript{8}

During this liminal phase, al-Ghazālī wrote his opus, the *Iḥyā’ Ulūm al-Dīn*, which was hailed as a major reflective and sometimes unconventional religious writing. It was during this period that al-Ghazālī suspended the normal rules of religion, crossed


boundaries and undertook new spiritual experiments. He was accused of engaging in antinomian practices that invited criticism from people like Ibn al-Jawzi (d. 597/1200) who chastised him for deviating from the rule of law (tarak fihi qanun al-fiqh). Ibn al-Jawzi expressed his shock at al-Ghazali who recommended spiritual devotees who wanted to surrender their accoutrements of prestige and status (jah) by means of spiritual exercises, to steal clothes from the public baths. He advised devotees to put on someone else's clothes and wear their own clothes on top of it. They should then walk away slowly giving the owners of the clothes enough time to detect that their clothes had been stolen. People will then accuse the person for being a "public bath's thief" (sāriq al-hammām). In this way the public humiliation suffered will break down the devotees' pride. Stealing from the baths, said Ibn al-Jawzi was nothing short of theft for which the offender was liable for amputation. Al-Ghazali also suggested that devotees suffering of pride should do the menial task of meat-shopping. After having purchased the meat they should hang it around their necks in an act of self-humiliation. Ibn al-Jawzi deemed both these suggestions as being utterly detestable (ghāyat al-qubh).

Al-Ghazali's brief antinomian streak during his spiritual wandering reflects his fatigue with the profane life of an academic jurist. He refused to be called a jurist (faqīn) and described law (fiqh) "a mere science of this world." As a ritual subject he detached himself from his previous social status. Through experiences of liminality, al-Ghazālī transformed himself into a ṣūfī with a newly defined position in society.

---

82 Ibid.
'Abd al-Ghafir, our main informant about the once fiery, arrogant and polemical jurist-theologian, observed the changes he saw in al-Ghazâlî:

I visited him several times. I watched him, remembering how he used to conduct himself in bygone days with maliciousness, looking down upon people with contempt, making light of their [views] in arrogance and haughtiness, boasting his extensive natural gifts of thought, eloquence and mind, only seeking glory and status. Now he was just the opposite of all that. He was cleansed of that detritus. At first I thought all this was a contrived and deliberately cultivated, in order to show off what he had become. But after a long observation and examination of the man, my doubts were proven wrong. The man had really recovered from his earlier delusion.

The gradual and ambivalent changes and stages in al-Ghazâlî's life were evident. He had completed his pilgrimage by arriving at the destination of taṣawwuf. While it is not clear who al-Ghazâlî's spiritual mentor was after al-Farmadhî, he does seem to have enthusiastically read the works of early ṣūfis such as Ḥârîth al-Muḥâsibî (d. 243/857) and Abû al-Qâsim al-Qushayrî (d. 465/1072). When he returned to Ṭūs, he cultivated a community of followers who were sympathetic to a reformed vision of Islâm in which taṣawwuf was an important ingredient. So while al-Ghazâlî clearly remained within the juridical tradition of Islâm, he did nuance the nature of Islamic practices towards the ideals of taṣawwuf. Thus we see him contributing to a tendency within Islâm which combined law (sharî'â) and mysticism (tariqa). If one treats al-Ghazâlî's exodus as an event then it symbolizes his capacity to transgress, break out of boundaries and embrace innovations. Surely, intellectual innovations were not new to al-Ghazâlî, but during the exodus, which marked a very critical stage of his life, he was prepared to transgress and test the limits of strict religious laws and experiment with spiritual practices that raised the ire of his peers.

84 al-Dhahâbî, Siyar, 19:324.
Conclusion

The abiding interest of scholarship in al-Ghazālī is precisely because of his fascinating life experience and biography. They bear testimony to his complex personality and extraordinary influence in Muslim thought.

As we enter late modernity or post-modernity, there is a growing number of questions that interrogates the legal project in modern Islam. It particularly questions the relationship between law, ethics and the social context, with a view to understanding the role and status of law in modern Muslim societies. By looking at one major figure like al-Ghazālī we see that the life of the jurist and the life of law cannot be separated. To the contrary, they flow into each other. In examining al-Ghazālī, we observe that more than just the training of the jurist impacts on his work. His psyche, life-experience and personal proclivities subtly, and at times overtly, determine his meta-theory of law or legal theory (usūl al-fiqh). I have tentatively tried to put the selected fragments of al-Ghazālī’s biography into focussed conversation with his juristic self.

One notices several dimensions of al-Ghazālī’s personality. The theologian in him is constantly engaged in larger ideological battles with adversaries. As a state ideologue for the Saljuqs and the Abbassids, he was bound to be caught up in the crossover of political feuds. At times he became deeply involved in these battles whilst declaring his repugnance for politics. His role as a ṣūfī brings temporary relief, but little distance between himself and his political peers. Nevertheless, as an ideologue he did make some interventions in reformulating the existing constitutional relationships between the caliph and the powerful sultans.

His fame as a theologian and ṣūfī seems to have dramatised and sensationalised his role and function in the Islamic legacy, thus limiting posterity’s access to, and
inquiry about his contributions as both jurist (faqīh) and theoretician of law (uṣūlī). Given the controversy that he generated in theology and mysticism, it may be plausible that the Shāfiʿī law school to which he claimed affiliation may have been keen to remember him as a theologian, but not very enthusiastic about promoting him as a jurist. Al-Ghazālī has been immortalised by his work on moral theology, the Iḥyāʾ, but his contributions to law immortalised the Shāfiʿī scholars like al-Rāzī and al-Nawawī.

The biography symbolically discloses dimensions that may give us greater insight into al-Ghazālī. He confesses to his lifelong personal battle against egotism and arrogance, culminating in his relentless search for rectitude and moral order. The biography also shows that al-Ghazālī can be unsure of himself and vacillate between polar positions. At the same time he can also be goal-oriented and may even be prepared to transgress the limits and boundaries prescribed for him, if such an expedient action may serve a greater good. His biography shows that he is often prepared to work within contradictions and conflicts which lends a fascinating dimension to his work.
Chapter 2

The Text and Context of Usūl: The Background of the Battle between Traditionalism and Rationalism

Introduction

Hodgson maintains that the closing years of the period 334/945 to 504/1111, which he has called the early middle period, can be characterised as an era of maturity and dialogue among the intellectual traditions of Islam. The crowning glory of this period was the newfound tolerance between the šāfīʿa-minded 'ulamā' on the one hand, and the esoteric sufis and philosophers on the other. If anything, al-Ghazālī personified this era in his intellectual development - as jurist, šāfī, and theologian-philosopher. His critique of philosophy notwithstanding, al-Ghazālī did adopt philosophical techniques and methods in the elaboration of law and theology. For once, some of the bigotry of šāfīʿi-mindedness was relatively blunted by the esotericism of Sufism and philosophy which ushered in a culture of tolerance and maturity.

At best, the ground was laid for a full and varied intellectual and spiritual development with the blessing of Islam ... With the establishment of the international Islamicate social order, however, there had come into being new ways of ensuring unity and even the discipline of Muslim society.

In the assessment of this period one would be remiss in not including al-Ghazālī among those who pioneered the forging of this unity. Al-Ghazālī must be acknowledged for his role in the intellectual synthesis of the disciplines of dialectical

---

2 Ibid., 192.
theology, philosophy, Sufism and law. Not only was his critique of philosophical thought in general in the *Tahāfut al-Falāsifa (The Incoherence of The Philosophers)* a creative and innovative project but it also legitimated those aspects of philosophy that did not conflict with religion.

This period can also be characterised as one of action and reaction as the forces of traditionalism and rationalism pitted themselves against each other. The issue at stake was the degree to which rationalism could be used to explain the disciplines of law and theology, and to what extent these disciplines could be allowed to interface. The traditionalists, of course, abhorred the very mention of philosophical/dialectical theology (*kalam*) and clashed vigorously with the rationalists. The source of this conflict and the outcome thereof will be examined in this chapter. It therefore becomes crucial to investigate how al-Ghazālī, especially as a legal theorist, navigated the intellectual waters of nascent 'Sunni internationalism.' In our bid to unmask the identity and nature of al-Ghazālī's legal theory, it is necessary to obtain a general picture of the links that existed between legal theory and an important cognate discipline, theology, during the period when al-Ghazālī began to influence the intellectual environment.

**The Relationship Between Law And Theology:**

**From The Formative *madīna* To The Classical *dawla***

The early middle period also marks almost two centuries of state formation that followed the dissipation of absolutism in 334/945. Certain changes were generated in the overall economic, social and intellectual formation of Muslim society. By the end of the sixth/twelfth century, after Shi'ite and Ismā'ili dissent was subdued, a new Sunni

---

3Ibid.
Islamic internationalism came into existence. I would argue, that the caliphal state was gradually being displaced by a more complex state structure. This transformation was hastened during the middle period as a result of the growth of Muslim societies through conversion and conquest, which, as a matter of course, paved the way for a more cosmopolitan society. The most dramatic of these changes were those that affected the nature of political power and authority. Literally, the word *madīna* means to be held under authority.⁴ Authority over the ‘flock’ (*raʾīyya*) in the *madīna*-model, manifested in both the primitive Islamic state and the absolutist empire, was very direct and personal, and governance was a matter of ensuring that the rules of the Prophet or the caliph applied.

New state formations manifested themselves in the form of the cosmopolitan medieval state. It was another *dawla*, literally meaning “change, turn or good fortune” (especially the good fortune it brought to the rulers!).⁵ Sunnī internationalism involved new social experiments in statecraft. Al-Ghazālī also contributed to these in his reformulation of constitutional law to meet the needs of the Saljūq sultanate.⁶ In the new Islamic state, power and authority were indirectly administered to elicit obedience from the “subject.” This transformation in the nature of the state is semiotically explicable in the shift from *madīna* to *dawla*. The *madīna*-model signified charismatic authority, represented by the prophet or his viceregent. The *dawla*-model, on the

---

⁴Edward William Lane, *An Arabic-English Lexicon*, (Cambridge: Islamic Text Society, 1984), 1: 945. The word *madīna*, says Lane, also means “being had, or held in possession, or under authority.”

⁵Ibid., 1:935. According to Lane, the term *dawla* means “a turn, mutation or fortune, from an unfortunate or evil to a good and happy state or condition.” Frantz Rosenthal, “Dawla,” in *Encyclopaedia of Islam*, 2d ed.

other hand, signified indirect power and authority, via an elaborate bureaucratic structure headed by the caliph-regent and the sultanate. Rational authority represented by the philosopher-king image of the sovereign ruler was a characteristic feature of the new state. The shift in state formation coincided with greater sophistication in the ideological discourse of Muslim society, and this in turn necessitated the development of equally sophisticated legal theory and theology.

A sophisticated politico-theology was required to equip the new state with the necessary coercive authority. These changes had already been manifested in the sectarian strife between competing theological and political groups within the middle period, the main protagonists among whom were the Qadarites, Jabarites, Hanbalites, Mu'tazilites and the Shi'ites. Power is the epiphenomenon of the law, and it is the discourse of the law which gives legitimacy to the political institutions and processes. Law played an important role in introducing and maintaining the new order, but it was legal theory, including in particular the underlying legal philosophy of the judicial structure, which intersected with the politics of the new state model. I believe that political theology informed legal philosophy, and this in turn accelerated the maturity of ideological consent for the new political order. Hence, it is necessary to examine the interaction between the legal theory and the theology of the time as a crucial indicator of the influence of the environment on Islamic disciplines. No religious discipline can avoid being altered by the socio-political transitions and contests for power of the times.

It was Makdisi who, in recent times, urged us to "consider together the development of law and theology." The reason for doing so, he says, is that "we

cannot hope to understand the nomocracy of İslâm if we study the theology of Islam without its relation to Islamic law." Makdisi directs us to look for the manifestation of theological disputation in close association with Islamic law. One could add that such an examination should also consider the background of the 'disciplines under discussion in order to deepen our understanding of this period.

The Interdependence of Law And Theology

In the twentieth century, Joseph Schacht explained the relationship between law and theology in early madîna-Islam, saying:

We might even say that the distinction of two separate literary traditions for religious law and theology, as it has developed, is to some extent fortuitous and provoked by practical reason.9 He argues that a certain amount of symbiosis had taken place between the traditional law schools and their theological counterparts. The reasons for this, he says, were not doctrinal, historical or geographical, but adventitious.10 Given the mutually beneficial relationship between law and theology, Schacht preferred to describe the religious law of Islam as "essential" and its theology as an "epiphenomenon." 11 This suggests that it is the law which generates the theology or, at least acted as a coastguard patrolling the borders of theology.

Schacht's rationale is that the formative periods of Islamic theology and law do not coincide.12 For instance, he says that it was the political powers and the jurist-

---

8Ibid.
10Ibid., 7.
11Ibid., 11.
12Ibid., 15.
lawyers who promoted the idea of imitating a legal authority (taqlīd), and not the theologians. According to both Schacht and Hallaq, a move to close the "gate" to independent discretion and creative thinking (ijtiḥād) only became evident in juristic circles. Schacht places this move at the end of the fourth/tenth century, while Hallaq believes it occurred in the fifth/eleventh or sixth/twelfth century. 13 Official proscriptions were laid down, saying that it was the duty of every Muslim to follow the recognised authorities (taqlīd) of each school. But this did not mean an end to independent juridical discretion (ijtiḥād), since, as Hallaq correctly argues, the closure of the "gate" of ijtiḥād was an historical fiction. The fictional assertion, says Schacht was:

... not the cause, but a symptom of a state of mind that had been induced by fear of doctrinal disintegration, a fear that was not farfetched at a time when orthodox Islam was threatened by the extreme Shi‘ite movement of the Isma‘īlīs and their propaganda. Islamic law reacted to it by imposing the duty of taqlīd, but the reaction of theology was different ... in contrast with religious law, theology insisted that taqlīd was not enough (italics mine). 14

Theoretically, the different aims of law and theology could possibly explain the hiatus that exists between the two disciplines. Theology's interest was to establish credal structures. Moreover, theology maintained that, although believers may not have access to the proofs and arguments of beliefs, it was not sufficient merely to follow their teachers in doctrinal matters; they must be personally convinced of the belief. Jurists and lawyers, on the other hand, tried to create ideal social structures. What "bonds Muslims," says Schacht, "is not so much a common creed as a common way of life, a common ideal of society." 15 What both Schacht and Hallaq point out is that despite their very different beginnings, law and theology developed an

---

15 Ibid.
interdependent relationship which could not be easily severed. When law felt threatened by the political and theological schisms, it attempted a strategy of fortifying itself from all outside influences by limiting juristic discretion (*ijtihad*).

To understand the reasoning behind the fortress mentality of law and the openness of theology in the sixth/twelfth centuries and earlier, provides the keys to comprehending the future relationship between law, legal theory and theology. The partially successful move to restrict *ijtihad* was mainly intended to have a similar effect of limiting the relatively uninhibited discipline of theology. Since the two were interdependent, it could have had that effect, bearing in mind the strategic alliances which had been made between the law schools and their theological counterparts from time to time.

In the wake of the anti-*ijtihad* campaign, the law schools, especially the traditionalist ones, saw this as an opportunity to de-link itself from the theological schools in pursuit of their puritan ideals. The idea was to systematise legal theory when it was freed from the influence of theology and ‘foreign knowledge’ which reflected a larger socio-political mood. The anti-*ijtihad* campaign to separate law and legal theory from theology, was not universally accepted. But it did provide the momentum, in a limited way, for those who wished to do so.

A number of factors favoured the interdependence of law and theology. Firstly, law could not be totally severed from theology because some of the most important theses of legal theory were premised on theological deductions. Secondly, theologians in the early middle period who were anxious to promote their ideological causes could not find a more effective vehicle than legal theory to further some of their goals. This is perhaps the main reason why, according to al-Azmeh, theological schools sought affiliation with legal schools in order ‘to embed theological tendencies in the body of
the social mass of the law schools." Indirectly, theology impinged upon the substance of the law through incorporation in legal theory. This manifested itself in the emergence of legal dogma, guarding the sources of the law, forms of legal interpretations, grammar, language, and religious polemics. Thirdly, the broader cosmopolitan influences in the Muslim empire as well as the need for more sophisticated forms of political-theology encouraged the interdependence between law and theology.

Rahman applauds the integration of legal theory during the early middle period into the larger field of Islamic thought, especially theology, since legal theory gained coherence through this integration. What Rahman laments, however, is the imposition of unsynthesised theological dogma upon legal theory that had the "unfortunate" consequence of "blatant contradictions in the juristic doctrine." Once a body of legal theory had been sanctified and approved, there was a desire to minimise if not eliminate any future threat to the stability of that edifice. Hence the call for a divorce between theology and legal theory under the euphemistic rubric of the closure of the "gates" of *ijtihād*. The main fear, as stated by Schacht, was that without the desired theoretical stability, the terrain of law would become the battlefield of epic socio-political struggles.

---

17 Ibid.
19 Ibid.
20 While there is sufficient evidence to indicate that the social and political struggles inevitably found their way into the law, it has not been adequately admitted, nor sufficiently illustrated by the historians of law.
Closure and exclusion raises the question of the hidden affiliations which exist in the separation of law and theology. The genealogical reconstruction of theological doctrine, implicates legal doctrine in a series of other discourses. What we do find disseminated in legal texts, and in al-Ghazālī’s texts for that matter, are the signs and ‘texts’ which allude to the intellectual battles, the changing patterns of thought, the contradictions, the paradoxes, and the transitions of intellectual thought that took place during the early middle period of Islam. Legal theory still carries those marks, even though the historians of law prefer to recycle the juridical fiction of true discourse and authoritative judgement.

Tracing the Genealogy

It has been argued that philosophical and theological disputes have had an unmistakable influence on the discipline of legal theory. A range of political events generated a series of intellectual trends that occurred in Muslim societies from the second/eighth to the fifth/eleventh centuries. These conflicts were largely over philosophical theology and politics, with the result that the literature of legal theory underwent a substantial metamorphosis. In the hands of al-Shāfiʿī (d. 150/767), the literature of legal theory was simply an elementary form of juridical theology. As time

21 The concept of genealogy is employed here in opposition to the classical philological conception of history. As a move away from the metaphysical terms of history of those of origin, objectivity and legal proof of precedent fact, genealogy simply traces the contingent descent, the chance affiliations and alien forms from which specific singular objects of discourse were formed. See Michel Foucault, “Nietzsche, Genealogy, History,” in Language, Counter-Memory, Practice: Selected Essays and Interviews, ed. with an Introduction by Donald F. Bouchard, trans. Donald F. Bouchard and Sherry Simon (Oxford: Basil Blackwell, 1977), 139-164 passim.

passed, it became increasingly more complicated and sophisticated as it was impregnated with philosophical theology. This foreshadowed the confrontation between rationalism and traditionalism. In the third/ninth century the term rationalism embraces discursive and speculative knowledge, and does not differ much in its principles from Stoicism and Aristotelian logic. The traditionalists of the time were those groups whose ideology centered around the literal theory (*naṣṣ*) of the revealed text and the traditions (*ḥadīth*). Traditionalism strongly resisted the encroachment of foreign ideas into Islamic disciplines.

Three major political landmarks in the third/ninth century set the scene for the changes in the intellectual landscape of Islam. The first landmark was the Inquisition (*mihna*) which began during the rule of the Abbassid caliph al-Ma'mūn (d. 218/833), and continued under his successors, al-Mu'tasim (d. 228/842), al-Wathiq (d. 233/847) and al-Mutawakkil (d. 247/861). Over a period of fifteen years they enforced the Mu'tazilite doctrine as the official state creed under the cloak of rationalism. This act of despotism could hardly have been said to serve rationalism, and was later the cause of its demise when al-Mutawakkil finally abandoned the movement. During the Inquisition, the little known Ahmad b. Hanbal (d. 241/855) rose to prominence as the champion of the traditionalist cause.

The second landmark was the defection of Abū al-Ḥasan al-Ash'ārī (d. c. 325/937) from the ranks of the Mu'tazilites. He joined the traditionalist camp under the banner of Ibn Hanbal. Al-Ash'ārī placed rationalism in the service of traditionalism and his conversion was a major victory for the traditionalist cause against the Mu'tazilite school.

---

The third landmark was the promulgation of the traditionalist creed under the caliph al-Qādir (d. 422/1031) at the beginning of the fifth/eleventh Century. The Qādirī creed, as it became known, was seen as the ultimate manifesto of resurgent traditionalism against any deviations.24 Within traditionalism however, there were two distinct schools of thought: one followed the founding fathers of Islām (salafi) in matters of dogma which was puritanical in its traditionalist make-up; and the other was inclined towards rationalism placed in the service of religious ideas. This division foreshadowed the heated battle which was to take place within Ashārisim. After the public defeat of the Muʿtazilite creed around the middle of the third/ninth century, all rationalist tendencies would be besieged. As a result, all philosophical theologies, including those of the rationalist Ashāris, sought refuge outside the theological schools.

The Muʿtazilites entered the Ḥanafi law school, and the rationalist Ashāris found their way into the Shāfiʿī law school. Ashārisim also succeeded in gaining a foothold in some sections of the Mālikī law school. This new relationship between the law schools and their theological refugees was, at first, a mutually rewarding exercise, perhaps, slightly more to the advantage of the theologians than the lawyers. Such alliances are common in a politically unstable environment, but the Shāfiʿīs in particular soon recognised the error of welcoming the Ashāris into their midst.

There was dissent among the Shāfiʿī ranks, as they arrived at different ‘readings’ of Abū al-Ḥasan al-Ashārī. One faction argued that he was a traditionalist, in the sense of being a follower of the founding fathers of Islām. The other faction, on the other hand, argued that he employed philosophical theology in order to defend the

faith. The problem with the writings of al-As ṣarī was that he claimed to be a traditionalist while not fully subscribing to their strictures. Pro-kalām Ashārism and anti-kalām Ashārism emerged from this ambiguity. The traditionalists were not so much opposed to reason as they were to those whose explanations of religion contained theological arguments. They viewed the latter as being the product of foreign knowledge. They believed that there was nothing inconsistent in a traditionalist using reason in defence of religion and the elaboration of the law. The anomaly arose when someone claiming to be a traditionalist employed philosophical theology and rationality in defence of a religious premise. This clash signalled the divide between Muslim rationalism and Muslim traditionalism.25

Traditionalists would use practical reason only to understand the Qurʾān and the traditions (ḥadīth) of the Prophet. Anything not comprehensible through reason, they would reserve judgement and declare their belief in it without further inquiry (bīlā kāyfa). Muslim rationalists, among both the Ashārites and the Muʿtazilites, would also advocate the use of reason in understanding the religious sources. However, should a matter appear to contradict reason they would subject it to metaphorical interpretation (taʿwīl) and rationalisation. The confusion and contradiction that existed in the conflict between rationalism versus traditionalism was further heightened by a third scenario. It is very likely that some of the Ashāris, and this may have been a practice initiated by al-Ashārī himself, reverted to the use of philosophical theology (kalām) in defence of the faith after having rejected it at some stage.

Ibn ʿAsākir and al-Subkī, for instance, have tried to show that Ashārism is really pro-kalām.26 In fact the aim of al-Subkī's Ṭabaqāt was to establish the

25 Makdisi, "Ashārī and Ashārites (2)," 22.
credentials of Ash'arism as a school which followed middle-of-the-road traditionalism and favoured kalām. Al-Subki's professor, al-Dhahabi, a dedicated Shāfi'i and Ash'arī, took just the opposite position, arguing that Ash'arism was anti-kalām. The point that I particularly wish to stress here is that Ash'arism's position on kalām is, at best, difficult to pinpoint and, at worst, ambiguous.

The inner tensions within the law schools on the question of kalām led to a new type of theology promulgated by the traditionalists, a juro-moral theology called usul al-din - literally, 'fundamentals of religion.' Abū al-Muzaffar al-Sam'ānī (d. 489/1095), was one of the first scholars to make this distinction, thereby avoiding the term kalām. The main purpose of this juro-moral theology was to create an alternative discipline to philosophical theology for studying the fundamentals of religion. Juro-moral theology (usūl al-dīn) and i.e.gal theory (usūl al-fiqh) had some common topics, such as the discussions on consensus, disputation and arguments. In support of usūl al-dīn, the traditionalists tried to restrict legal theory (usūl al-fiqh) exclusively to jurisprudential matters. At bottom it was nothing but a clever pretext to deny the pro-kalām Ash'arite/Shāfi'i's the opportunity of smuggling kalām arguments into the discipline of legal theory. The vehemence against kalām can be gauged from the words of the Andalusian traditionist (muḥaddith), Ibn 'Abd al-Barr (d. 463/1070):

27 Makdisi, "Ash'arī and Ash'arites (1)," 60.
28 Ibid., 65.
29 Note the number of titles which describe usul al-din: al-Ash'ari, al-Jbana 'an Usūl al-Diyāna; al-Samarqandi, Usūl al-Dīn; 'Abd al-Qāhir al-Baghdādi, Kiāb Usūl al-Dīn; Fakhr al-Dīn al-Rāzī, Ma'ālim Usūl al-Dīn, to mention but a few.
31 Ibid., 38 for Abu Shāma's condemnation of pro-kalām theologians.
32 Both al-Anṣāri (d. 1119/1707) and Ibn 'Abd al-Shakūr (d. 1225/1810), tell us that particularly among the moderns (muta'akkhirūn) of the law schools there was a desire to separate theology from legal theory: see Muhammad b. Nizām al-Dīn al-Anṣārī, Fawā'id al-Raḥmūt, 2 vols., on the margins of al-Mustasfa (Beirut: Dār al-Kutub al-Ilmiyya, 1403/1983), 1:10.
There is consensus among the jurists and traditionists in all the cities (amṣār) that the people of kalām are innovators and deviant. And none of them are recognised by any of the cities to be among the ranks of the learned (ulamā'). The learned are people of tradition (āthār) and those who have juridical insight (tafaqquh) into such traditions. They are distinguished in terms of their perfection, distinction and understanding.11

The traditionalist viewpoint of separating legal theory from kalām became entrenched. Even a leading Mu'tazilite theologian like Abū al-Ḥusayn al-Baṣrī (d. 436/1044) supported the separation of kalām from the discipline of legal theory.12 Ironically, he continued by saying that without knowledge of kalām, the reader will be unable to understand legal theory and will therefore fail to understand the subject.13 Generally, the legal theory authored by Mu'tazilite scholars generously entertained issues related to kalām and legal philosophy. Yet, in theory, all authors made the rhetorical disclaimer of distancing themselves from kalām in treatises of legal theory. This only illustrates that even the most hardened rationalist legal theoreticians had to make 'ideologically correct' statements in order to make their work, at least on the surface, acceptable to their traditionalist opponents, even though the content and conclusions of their work differed radically from these statements.

Clearly, the anti-kalām rhetoric of the traditionalists was not merely directed at the Mu'tazilites but also at their fellow Ash'arite schoolmen.14 Their anti-kalām stance, however, had an effect on the production of traditionalist uṣūl al-dīn, and kalām-less legal theory. A closer examination of the types of legal theory could provide more

---

13Ibid.
14Several works have been produced in condemnation of kalam, like those of Abū Sulayman al-Khaṭṭābī al-Buṣṭī (d. 388/998), author of al-Ghunyāʾ an al-Kalām wa-Aḥlihi [Freedom from kalām and its Partisans]; the Hanbalite mystic, al-Ansārī al-Ḥarawī (d. 481/1088), Dhamm al-Kalām [The censure of Kalām]; or the Hanbalite traditionalist, Ibn Qudāmā (d. 622/1225), Tahrif an-Nazar fi Kutub Ahl al-Kalām, translated by Makdisi as Ibn Qudama’s Censure of Speculative Theology (London:1962). See Makdisi, "Ash'āri and Ash'arites (1)," 48-49.
insights as to the pattern of the interface between law and theology among the schoolmen.

**Typology of Legal Theory**

Ibn Khaldün (d. 780/1397) distinguishes between two types of literature in legal theory; that of the Shafi'i theologians ('ulamā' of kalām) and the Ḥanafi jurists. The Shafi'i theologians claim to deal exclusively with principles in their legal theory, employing speculative theology, while the Ḥanafi jurists try to harmonise principles (uṣūl) and rules (qawā'id) with the applied derivatives (furū') of the positive law. A third type of literature, combining the methods of the Shafi'i theologians with those of the Ḥanafi jurists was also developed. Ibn Khaldün made the distinctions for a very specific reason - to explain the use of analogy in different types of legal theory. Since then this classification has erroneously become the accepted standard typology for legal theory in the early ninth/fifteenth century. But we already know that within at least one law school, the Shafi'i school, there were legal theorists who espoused what Laoust calls speculative theology and others who adopted an anti-kalām juro-moral

---

37 Abd al-Rahmān b. Muḥammad b. Khaldūn, *Muqaddima Ibn Khaldun*, (Beirut: Dār al-Ṭīl, n.d.), 504-505. Some of the key authors among the Shafi'i 'ulamā' of kalām were: Ḥāmid b. ʿUmar bin Surayj Abū al-ʿAbbās (d. 306/918); Abū al-Ḥasan al-ʿAshʿarī (d. 524/934); al-Qādi Abū Bakr al-Bāqillānī (d. 413/1022); al-Qādi ʿAbd al-Jabbār b. Ḥāmid al-Ḥamdānī (d. 415/1024); Abū al-Ḥusayn al-Basrī (d. 436/1044); al-Ghazālī (d. 505/1111) and Fakhr al-Dīn al-Rāzī (d. 606/1209). Titles of Ḥanafi uṣūl al-fiqh works: Some of the key authors in the Ḥanafi trend were al-Māturīdī himself (d. 370/981); al-Karkhī (d. 349/951); al-Jassās al-Rāzī (d. 370/980); Abū Zayd al-Dabūsī (d. 430/1038); al-Pazdawi (d. 483/1090); al-Sarakhsī (d. 490/1096) and ʿAbd al-ʿAzīz al-Bukhārī (d. 730/1329). See the “Muqaddima” by al-Shaykh Khalīl al-Mays in al-Mukhtārim fi Usūl al-Fiqh of Abū al-Ḥusayn al-Basrī (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.).

38 Authors of uṣūl works that combine the methods of the 'ulamā' of kalām and the Ḥanafīs are: Muzaffar al-Dīn al-Sāʿūdī (d. 694/1294); Ṣadr al-Sharīʿa (d. 747/1346); Ibn al-Humām (d. 861/1456); Ibn ʿAmīr al-Ḥāj (d. 879/1474); Tāj al-Dīn al-Ṣubkī (d. 771/1369) and Ibn ʿAbd al-Shakūr (d. 1259/1808).
theology. Neither can we ignore the fact that the Hanafi jurists were not oblivious to theological concerns in their study of legal theory. However, even these distinctions suppress the larger narrative of the intellectual history of legal theory. Given the complex interweaving of legal theory and theology, it should be obvious that Ibn Khaldun's standard typology of legal theory, whether typifying that of Shafi'i theologians or that of Hanafi jurists of the time, was inadequate. It does not shed light on the full scope of this debate and only creates certain lines of differentiation. Read superficially, the variety in methods does not indicate any significant epistemological differences between the various genres of usul-writing.

Haji Khalifa recorded a statement from 'Ala al-Din Abū Bakr b. Ahmad al-Samarqandi (d. 553/1158) which may shed light on our exploration of the deeper implications of the distinctions of style and method in legal theory:

---

39 Naming a brand of legal theory as that espoused by the Shafi'i theologians may reflect the attempts by later Shafi'i's like al-Subki, who wished to create a new image for a Shafi'i school comprising both traditionalists and rationalists. This created the impression of a broad-minded Shafi'i school which was inclusive of all the sciences, including kalam, see Makdisi, "Ash'ari and the Asharites (I)," 60. Also see Henri Laoust, "Safi et le Kalam d'apres Razî," in Recherche d'Islamologie: Recueil d'articles offert a Georges Anawati et Louis Gardet par leurs collegues et amis (Louvain et Louvain-La-Neuve, 1978), 399.  
40 Makdisi, "Juridical Theology," n 2, 42, also has problems with this rigid classification. Aron Zysow, "The Economy of Certainty; An Introduction to the Typology of Islamic Legal theory" (Ph.D. diss., Harvard University, 1984), 121, reinforces this point. After discussing the status of an imperative in the various schools, Zysow observes: "This is a further example of the fact which must be very plain by this point, that the standard representation of the usul of the Hanafis as peculiarly legal, in contrast with the theological usul of the other schools is without foundation."
Know that *usūl al-fiqh* is a derivative of the science of principles of religion (ْibl *usūl al-dīn*). It was therefore inevitable that writings on this subject would reflect the creed of their authors. Now most of the writings on *usūl al-fiqh* were written by the *Muʿtazilites* our opponents in fundamental principles [of religion], and the people of *hadith* traditionalists, our opponents in applied derivatives. Thus one cannot rely on their writings.¹

Al-Samarqandi, a Ḥanafī, is clearly expressing his disagreement with the writings of both the *Muʿtazilites* and the traditionalists on legal theory. In the case of the former, their fundamental principles were theologically unacceptable to him, and, in the case of the latter, the manner in which they deduced applied derivatives (*furūʿ*) in positive law from the traditions was objectionable. It seems that although he was keen to search for sound theological principles, he was not prepared to simply deduce secondary rules from the literal traditions. This gives us an indication of his inclination towards informed judicial opinion (*ra'y*). Al-Samarqandi laments the disturbing feature of sixth/twelfth century Ḥanafī writings on legal theory. The best works he said, were those of scholars whose presentations involved a synthesis of the science of fundamental principles (*usūl*) with the applied derivatives (*furūʿ*) such as al-Māturīdī’s *Maʿākhibd al-Sharʿ* (Sources of the Law) and *Kitāb al-Jadal* (Book of Dialectic).

Although the presentations of the traditionalists were excellent, he admitted that they failed to "master the subtleties of fundamental principles and reason which led their views to concur with those of their opponents on some topics."²

In al-Samarqandi’s opinion, the Ḥanafīs were forced to capitulate as a result of their own intellectual ineptitude and lack of perseverance. The most valuable insight to be gained from al-Samarqandi’s quotation is that he did not consider legal theory to be an autonomous discipline. His mention of juro-moral theology (*usūl al-dīn*), the traditionalist alternative to theology, signals his distance from philosophical theology. Nevertheless, it suggests that even in traditionalist circles, legal theory had at least

---

²Ibid.
some links to theology. This means that the differences between the various theological schools, as mentioned by al-Samarqandî, were more than just stylistic and methodological differences. They referred to more substantive differences in the perception of law and legal theory, in which the role played by kalām was hardly insignificant.

Some contemporary scholars caution against exaggerating the role of theology in legal theory. Hallaq questions detailed investigations of theological postulates in legal theory since he believes that this is to assert that legal theory is a theological construct and to deny that there is any positivistic value of legal theory with other branches of substantive law. Hallaq asserts that questions such as whether God’s speech was an act or an attribute “were never discussed in legal theory.” Hallaq’s criticism is primarily directed at the orientalist scholars like Goldziher and Hurgonje who held the view that legal theory was a theological construct. He maintains that some contemporary scholars, Weiss among them, have uncritically accepted some of these assertions.

One should admit, however, that while one cannot reduce legal theory to being a theological construct, it is nevertheless structurally tied to theology. Otherwise it is difficult to understand how, within one school alone, tensions between pro-kalām and anti-kalām Shāfî theorists could have existed. In a bid to avoid a simplistic conclusion, one should not underestimate the way in which theology determines legal

---


45 Hallaq, “Review.” I am also indebted to Prof. Hallaq for some personal correspondence on this topic.
theory. Much of one's conclusion will also depend on the sample of legal theory examined. In the case of al-Āmidī (d. 631/1233), legal theory was heavily influenced by theology. Later scholars, like Abū Ishaq al-Shāṭibī (d. 790/1388), the Andalusian legal theorist and jurist, based his metatheory of law on certain theological premisses, distinguishing between the two senses of the will of God, (as expressed in God’s speech) - *irāda khalqiyya qadarīyya* - a demiurgical creative will and *irāda amriyya* - a will expressed in the command to do certain things and to refrain from others. 46 Al-Shaṭibī pointed out that theological differences between the Ashʿarites and the Muʿtazilites also surfaced in juristic terms, such as the notions of obligatoriness and prohibition. The juristic dispute had as its premiss a theological disagreement, namely whether “obligatoriness and prohibition ... are referable to the properties of a substance or to the nomothetic discourse of the law (*sharīʿa*)”. 47

The object of legal theory is to deal with the sources of nomothetic discourse, these being the locus of the divine will. This divine will finds expression either directly, in human activity with humanity as the substrate, or indirectly, where humanity is delegated a certain discretion. 48 God creates the normative archetypes of human activity, the *al-ahkām al-sharīʿiyā* and the human actors, and “leaves the marriage of reality and archetype to the actors.” 49 How God makes these archetypes known has been discovered through theological exploration and serves to confirm the notion that some issues of legal theory were based on *kalām* postulates. The main topic of legal theory, namely the Qur’an, is unquestionably affected by theological doctrines.

---

47 Ibid 1:45.
49 Ibid.
Two examples of major debate in classical Islam come to mind. The first was the controversy about whether the Qur'ān was the created or uncreated word of God. The Mu'tazilites claimed that the divine word was created, which implies that human beings are the recipients of the divine revelation. In contrast, the Ash'ari notion of the uncreatedness of the revelation diminishes the human element in the revelatory order. For the Ash'aris, the divine word became a sacerdotal order, unattainable to discourse, and it therefore had a semiotic value, "gesturing towards and standing in for the authority of religion and its experts." The other example was the issue of the abrogation of certain passages of the Qur'ān. The Mu'tazilites rejected the concept of abrogation claiming that to do so would be tantamount to bada', an arbitrary claim that God had changed his mind. The Ash'aris maintained that given His omnipotence, anything was possible. These examples, relating as they do, to the very fabric of Islam should put the matter of theologisation of legal theory beyond doubt.

The theologisation of legal theory could also have been seen as playing a more subtle, but equally important role in ratifying the ideological concerns of the time. Al-Azmeh argues that the very systematisation by means of a legal hierarchy was not only intended to provide a sense of theoretical coherence, but also a certain amount of ideologisation. Legal theory was thus designed to give coherence to the body of positive law (fiqh) that was in currency before the systematisation of legal theory. Legal theory was then the agency of ratification,
the location in which the legal institution and its skills are constituted as ideological elements in society. Like other ideological facts they are constituted by naming, by the attachment to them of primary normative values.44

The act of naming something as *sharī'a* marks a moment in Islamism which is not an abstract or logical one, as some theologians would be inclined to think, but one which transcribes the politics of the world into the very structure of legal discourse, and confers upon the *usūl*, especially the textual ones, a logical primacy they do not have.45

This worldliness of the text in legal theory cannot be disconnected from the politics of juridical-theology in early Islam.46 Legal theory and theology, therefore, form a discursive relationship, where bodies of knowledge relate to social practice and the structure of society. This means that it is primarily a power relationship, and whenever power comes into play, a relationship becomes political. What Hallaq calls the "given or self-evident premises" of legal theory are precisely those elements which require investigation in order to establish just how "self-evident" they really are.47

**Conclusion**

It becomes clear that the Islamic disciplines that emerged in the middle period of Islamic history were not insulated from the political and intellectual turbulence of the time. The tension between *sharī'a*-minded and traditionalist approaches versus more eclectic and innovative approaches is evident. The central debate was over the

44 Ibid., 256.
45 Ibid.
47 Ibid., 178.
legitimacy of the philosophical or dialectical theology (ḥilm al-kalām) which was viewed as an alien and foreign influence on Islam.

Theology shared some common interests with legal theory. While the traditionalists eschewed theology, they favoured the advancement of legal theory. Legal theory had, therefore, to be purged of the negative influences of theology, and so a sterilised juro-moral theology (uṣūl al-dīn) was developed. These internal conflicts within the disciplines were, however, reflections of larger issues within the Muslim community in the middle period. The new state evolution symbolised by the emergence of the cosmopolitan dawla were the instruments of larger changes in Muslim society. The new forms of authority and power required new discourses to elicit consent from their political subjects. Political-theology, in particular, and theology in general, were the mainstay of the new ideological discourses. But these ideological discourses were in themselves not free from the internal conflict. Legal theory, given its intimate relationship with theology could not remain free from the effects of these conflicts and was also ideologically interpellated. The foreign thought introduced by the rationalists could be embodied in the term kalām - philosophical or dialectical theology. This importation of rationalist thinking caused disorder and instability among the legal and theological ranks - an interesting and exciting situation for those who welcomed change and growth, but one which the traditionalists found very threatening, and which they tried, by all means, to suppress.

Critical scholarship can neither cloud nor ignore these theological disseminations in uṣūl al-fiqh literature. Hallaq’s critique against reductionism is invaluable in that it restrains us from being tempted to read off kalām from uṣūl al-fiqh texts as if uṣūl mechanically emanates from the first principles of kalām. Surely, by now it is recognised that there is no unmediated presence of texts. The problematic area of reductionism is a hastening towards generalisation and essentialism, which
claims that law is immutable or eternally attached to kalām precepts and therefore monolithic and rigid.\(^{58}\) Any genealogical analysis of usūl al-fiqh would be unable to avoid an explanation of the singular references, the discontinuities, the recurrences and play, the surfaces of events, the shifts and subtle contours that refer to kalām in usūl al-fiqh texts. The paralysing effects of essentialism have been evident in the methodologies of some orientalist scholars, and even some contemporary orthodox scholars, and this reduces the intellectual project and denies it inventiveness and creativity. In our bid to unmask the identity of al-Ghazālī's usūl al-fiqh it becomes necessary to probe the links between kalām and usūl as a site of critical investigation.

\(^{58}\)Ibid., 195.
Chapter 3

Jurisprudence as Gardening:
Theo(r)logising the Jurist’s Empire Through Masks and Metaphors

Introduction

Ibn al-Jawzī, one of al-Ghazālī’s biographers, tells us that on his retirement from public life, when he lived in Tūs, al-Ghazālī built a beautiful house (wa bana dāran hasanatan) with a landscaped garden (wa garasa fihā bustānān). Beautiful gardens are in keeping with the medieval tradition of Islamic Persia. A life of abstinence and asceticism did not have to be devoid of aesthetic comforts, it seemed.

This detail may at first seem trivial, but in the context of al-Ghazālī’s legal theory it gains significance. For in the al-Mustasfā, al-Ghazālī used several botanical metaphors to describe the structure of his legal theory. Imagine, the retired al-Ghazālī taking a daily walk in his garden and enjoying its beauty. While admiring the flowers and fruit-trees, he would also be ordering his reminiscences. Gradually it dawns on him that legal theory is very much like a tree, with roots, bark, branches and fruits. There is a strong likelihood that al-Ghazālī’s daily routine and surrounding botanical context may have induced the aesthetic metaphor from botany which he employed extensively.

In this chapter sections of the al-Mustasfā will be subjected to a close reading in order to examine to what effect al-Ghazālī employed the aesthetic metaphor in the

---

Ambiguous Wording and 'The Quintessence'

Al-Ghazālī describes his last work as \textit{al-Mustasfā fī Īlm al-Usūl} (The Quintessence in the Discipline of Principles). This is how the title is written in the published version of this book.\(^3\) The use of the shortened term 'discipline of foundations or principles' (\textit{ilm al-usūl}), was the generic term used by Muslim bio-biographers, historians and even jurists. The discipline of fundamentals could have two referents: discipline of the foundations of law (\textit{īlm usūl al-fiqh}), or, discipline of the foundations of religion (\textit{īlm usūl al-dīn}). The ambiguity of the title of this work of al-Ghazali cannot summarily be dispensed with. For if it was considered to be a work on legal theory (\textit{usūl al-fiqh}), then the question arises as to why al-Ghazālī did not state the title of the work as \textit{al-Mustasfā min Īlm Usūl al-Fiqh}, instead of leaving it unqualified as \textit{īlm al-usūl}. Only the biographer al-Safādī (d. 764/1363) said that the proper title was \textit{al-Mustasfā fī Usūl al-Fiqh (The Quintessence in the Discipline of Principles)}.\(^4\) Other leading biographers, however, give it the title \textit{al-Mustasfā min Īlm al-Usūl} (The Quintessence of the Discipline of Principles). Interestingly, an earlier title by al-Ghazālī was also titled \textit{al-Mankhūl min Īlm al-Usūl} (The Sifted Portion of the Discipline of Principles). In both instances al-Ghazālī's titles were non-specific and did not state whether they were legal theory (\textit{usūl al-fiqh}) or, juro-moral theology (\textit{usūl al-dīn}). The title and, by definition, the

\(^3\)In the Bulāq edition the cover page reads \textit{al-Mustasfā fī Īlm al-usūl} and the title page reads \textit{al-Mustasfā min Īlm al-usūl}.


contents of the book, therefore become intriguingly polysemous. Scholars are partially correct when they say that it is a work on usūl al-fiqh. However, close investigation of the semantics of the title, coupled with an equally close reading of the text and some historical perspective of terminology produce a very different picture. Two questions come to mind. Firstly, did al-Ghazālī deliberately make the title ambiguous by only calling it al-Mustaṣfā min ʾIḥl al-ʿUṣūl? And, if so, why did he leave the title open to ambiguity and question? Why did he not call it al-Mustaṣfā min ʾIḥl Usūl al-Fiqh in the first place? It seems strange that he did not qualify it as a work of legal theory, since this is what is declared in the introduction as we will see, and verified in the content. But this is not the whole story.

A close reading will show that both the openness of the title and the privileged status of kalām in the al-Mustaṣfā are stock topoi in al-Ghazālī's text and are the equivalent of his “signature.” The “disseminating” power of language, namely its capacity to graft itself onto new contexts of meaning makes it possible for the topoi to dissolve itself without notice but still function as signifying systems that generate all kinds of allusive cross-reference from one text to another. This supports Derrida’s claim about the materiality of language. Effects of meaning are caused by chance collocations, unlooked-for homonyms, and a stubborn defence against language being reduced to a stable economy of words and concepts.

8 Ibid.
9 Ibid.
Chapter 3

Theology and Law in al-Ghazālī

When al-Ghazālī made his appearance on the academic terrain the 'politics' of theology (ilm al-kalām) were already considered part of the controversial band of 'foreign sciences.' Fazlur Rahman (d. 1988) believed that al-Ghazālī's contribution to the relationship of law and theology did create a synthesis between the two, as much as providing both disciplines with a personal meaningfulness and depth.19 According to Rahman, al-Ghazālī attempted a

... bilateral synthesis between theology and Sufism on the one hand, and law and Sufism on the other. Sufism stands in the centre, which is in perfect consonance with the personal character of al-Ghazālī's reform.11

Al-Ghazali himself made some critical remarks about theology and law. In his Mizān al-ʿAmal, he said:

... as for dialectic, it is the least beneficial for genuine guidance. For the real searcher of truth is not convinced by an argument based on the assumptions of the opponent [as kalām is] which assumptions may not be true in themselves. As for the common man, they are beyond his understanding [and hence useless for him], while the disputatious opponent, even when he is silenced [by the mutakallim's arguments], usually persists in his own beliefs and merely thinks that he is unable to defend his position saying, that only if the founder of his school were alive now and present, he would get rid of the mutakallim's arguments. Now, most of what the mutakallimun say in their disputations with other sects is just dialectics.12

He then goes on to say that kalam is a heresy (bidʿa) and an evil. In order for kalām verities to become true, they have to be lived through and be experienced by the human heart, for in the universe only God's will is operative.

Al-Ghazālī had a love-hate relationship with kalām; at different stages of his life he expounded differently on it, and many of the remarks he made on this score are

---

11 Ibid.
ambiguous. This makes it difficult to pin him down to an outright condemnation or approval of kalām. At one point, he did concede that as a scientific tool it could be used with caution by those who employed it skilfully, especially in debates.

In Mizān al-'Amai al-Ghazālī characterised fiqh “as a science to the body just like medicine,” and declared that fiqh was as much superior to grammar, a purely verbal science, as grammar is to the arts of dance and music. Similarly, in the Ihtīfā', he granted jurisprudence and jurists the power to deal indirectly with matters of religion. However, he also highlighted what he saw as the abuse of law in citing the view of Abū Yusuf, the disciple of Abū Hanīfa, who managed to find a legal loophole to avoid the payment of the annual poor tax, zakāt. Al-Ghazālī then approvingly cited the comment of Abū Hanīfa, who said that such a loophole was merely a product of Abū Yusuf’s legal understanding (fiqh), but it certainly bordered on defeating the ends of law. Al-Ghazālī added that while such lawyering may legitimate a legal practice, it ignored the harmful spiritual effects of such practices. He also condemned the jurists for their preoccupation with the minutiae of law and their abjuring of moral philosophy. Although he said nothing directly, he censured jurists and lawyers, saying that one could guess why they vied with each other to manage religious endowments, trusts, and be appointed to governmental office, pointing to the material gain that they derived from such work, legitimate though that might be. “Indeed the science of religion (ʿilm al-dīn),” he said, “has been destroyed because the

14Ibid.
15al-Ghazālī, Mizān, 135 and 137.
17Ibid., 1:157.
18Ibid., 1:169-70.
learned (ulama') have espoused evil." He toned down his harsh assessment of jurists and said:

If you ask me whether this is my own belief, in which case it is opposed to the unanimous opinion of the jurists (fuqaha'), or whether I am only relating an opinion, in which case whose opinion is it? I will reply that I am only relating the opinion of the sufi school on which I have based the major part of my present book... If you ask me whether this opinion is true, I will say that this book is not meant to explain what is true and false by an argument, but that it contains counsels... so that a person may not ignore what the sufis had said. For what they say is apparently not of a remote possibility, so that a seeker of knowledge and guidance should at least investigate its possibility.

Rahman's assessment of al-Ghazali's attempt to relate law and theology to the inner life of the individual is an accurate one. However, he does point out a shortcoming in al-Ghazali's reformation of the law. Al-Ghazali was intent only on reforming the law in as much as it affected personal piety. Therefore, he reduced the law to a personal phenomenon where both law and theology were to be related to the spiritual life and thus personalized. He did not attempt to reform the content of the law or theology. Rahman lamented that one of the most brilliant minds in Islamic thought limited his reforms of law and theology to the personal sphere. When he did reform law and theology in the public sphere, al-Ghazali did not propose a moral philosophy whereby those laws were to be followed.

Rahman's lament is indicative of the two types of arguments that seem to recur in the discourse of legal theory: questions of epistemology and questions of ontology. By defining terms, concepts and meanings, al-Ghazali went to great lengths to formulate a

---

19Ibid., 1:170.
20al-Ghazali, Mizan, 137.
theory of knowledge with great conceptual clarity. On the other hand, his *sufi* insights alerted him to the essence and purpose of life, which he introduces to law and legal theory. This also enables him to criticise jurists for their failure to grasp the moral and ontological questions of law.

In his autobiography, *al-Munqidh min al-Ḍalāl (Deliverance from Error)*, al-Ghazālī claims to have abandoned all theology, logic, law and philosophy in order to embrace the esoteric path of Sufism. However, he did return to these disciplines once again. According to the contemporary Egyptian scholar Abū Zayd, the later al-Ghazālī was not content to play the role of a theologian, or philosopher or even the role of a *ṣūfī*, but instead sought to present a unified project for the revival of the science of religion.

Al-Ghazālī was therefore preparing for another phase of his life, as a public reformer where the disciplines of theology and law would interact. *Al-Mustaṣfā* must then be placed at that stage of his life when he attempted to reform the content of the disciplines in order to give substance to his social reforms. Chronologically, *al-Mustaṣfā* is one of the last instances where al-Ghazālī disclosed his epistemological presuppositions while reflecting on legal theory.

The al-Ghazālī that Rahman criticises is the author of the *Ihyāʾ* and *Mizān*, where he mainly contemplated personal reform. It seems that the later al-Ghazālī was beginning to seek a public role for his reform. This is consistent with Laoust's observation that *al-Mustaṣfā* is the legal philosophy underlying al-Ghazālī's politics:

---

Avec le Mustaṣfā... elle résume la théorie de l’ordre légal qui sert d’infrastructure à sa théorie politique. Mais, à toutes les différentes étapes de sa carrière, Gazālī avait été amené à s’intéresser au problème politique; au problème de la dévolution, de la nature et de la finalité du pouvoir, et par suite, à celui des rapports de la religion et de l’État.24

This observation should be read together with Marshall Hodgson’s observations of al-Ghazālī’s social goals. He argues that as a ṣūfī al-Ghazālī developed a perception of truth akin to that of the prophets and consequently has attempted “to infuse the religious forms of his time with spiritual life.”25 In this attempt, says Hodgson,

the work of al-Ghazālī may be said to have given a rationale to the spiritual structure that supported society under the decentralized political order, the order that resulted in part from the work of his patron Niẓām al-Mulk.26

In the light of this observation, al-Mustaṣfā can be viewed as the juridical component of the reformist al-Ghazālī. In the Iḥyā’, for instance, he already recognised that the role of law and lawyers was to counsel rulers on sound forms of governance.27

Theology and Law in al-Mustaṣfā

On introducing al-Mustaṣfā and its objectives, al-Ghazālī extols the merits of legal theory citing it as the “most noble of sciences which combines reason (aql) and transmitted report (ṣamʿ) with informed opinion (raʿy) and revelation (sharʿ).”28 In order to explain the significance of this description, he provides a typology of the different types

24Henri Laoust, La Politique de Gazālī, (Paris: Librarie Orientaliste Paule Geuthner, n.d.), 182. Translation: “Al-Mustaṣfā... sums up the theory of legal order which serves as a structure for his political theory. But at all the stages of his career, al-Ghazālī could not avoid the political issues, such as the issue of the devolution of power, the nature and ends of power which led to the issue of the relationship between religion and the state.”


26Hodgson, Venture, 2:190.


28Mu, 1:5.
of knowledge or sciences (ʿulūm). His primary distinction is between rationally derived knowledge or science (ʿulūm ʿaqliyya), such as medicine, geometry and mathematics, and religious knowledge or science (ʿulūm diniyya), such as the exegesis of the Qurʾān, the study of tradition and law.29

Each type of knowledge is further subdivided into the epistemological categories of universal (kullī) knowledge, and particular (juzī) knowledge. Among the religious disciplines, only philosophical theology is universal.30 All the other religious disciplines, law (fiqh), legal theory (usul al-fiqh), exegesis (tafsīr), traditions (ḥadīth), Sufism (ʿilm al-bātān) are epistemologically speaking, particular (juzī).31

Al-Ghazālī further maintained that, in the hierarchy of religious sciences, theology was not only the most universal of all disciplines, but that the role of the dialectical theologian (mutakallim) eclipsed the role of the legal theorist (usulī).32 He saw the role of the theorist as being limited, to a specific type of indicants only related to revealed legal determinants (adillat al-ḥākām al-shariyya). Conversely, the theologian was free to evaluate any proof.33 Among the religious sciences, al-Ghazālī regarded dialectical or philosophical theology as the “highest ranking science,” because it was the science that provided the epistemological foundations of all the religious sciences, what he called “the point of departure” (idh minhu al-muzūl).34 Here was one of the points at which al-Ghazālī

29Ibid.
30Ibid.; Makdisi, "Ashʿarī and Ashʿarītes (1),” 66, says that the Shāfīte al-Subkī also argued the superiority of kalām over fiqh. Al-Subkī in an interpellation of a statement by Ibn Surayj comes close to saying that law cannot go beyond kalām (and therefore superior to it); for it is kalām which goes beyond law. In the hierarchy of religious sciences, kalām occupies the higher level.
31Mu, 1:5.
32Ibid.
33Ibid.
unambiguously asserted the primacy of theology with respect to legal theory. In other words, theology had an apodicticity - the status of 'origin' of all knowledge. In al-Ghazālī's view, theology was something of a metalanguage from which all truth emanated.

To leave us beyond doubt of this, al-Ghazālī provided an illustration. When one accepted the bona fides of a prophet, it was theology that provided the first principles to establish the veracity (ṣidq) and argumentative validity (nujjā) of statements made by the Prophet. Hence all disciplines, traditions, Qur'ān, or law, "are all particular (juz'ī) in relation to [the epistemological authority of] 'ilm al-kalām." This is another way of saying that kalām relativises all disciplines, and we can see that theology acquired the status of an oracle and it became, in and of itself, the oracle of truth.

After stressing the primacy of theology, al-Ghazālī introduced a rhetorical caveat in the form of a question and answer in order to illustrate the need for limiting the use of theology. He asked:

Does that [distinction between universal and particular sciences] presuppose that it is a precondition for a legal theorist (usūlī), jurist (faqīh), exegete (mufassir) and traditionist (muhaddith) to have proficiency in philosophical theology ('ilm al-kalām)? For surely, after having dispensed with the highest universal (al-kullī al-'alā) how will it be possible to condescend to the lowest particular (al-juzī al-asfal)?...Our response is that it is not a precondition [to be proficient in kalām] to be a legal theorist (usūlī) ... It [kalām] is indeed a precondition in order to qualify as a master-scholar in several disciplines ('ālim muḥtaq) ... for surely there is not a single one of the particular disciplines, but their fundamental principles are accepted on the basis of the imitation of authority (taqlīd) ...

The apodictic status of kalām in al-Ghazālī's legal theory vindicates the claim of some modern scholars that legal theory was philosophical theology. While this may not be so.
for all types of legal theory, al-Ghazālī's legal theory could not be dislodged from theology.

Al-Ghazālī realised a greater value for theology in the al-Mustasfa than he did in the Mizān. Contrasting the role of the legal theorist (usūlī) and theologian (mutakallim), he said that the theorist's subject matter only dealt with the sources of the shari'a while the theologian's domain was the "study of the generalities of things," namely, everything that "existed" (mawjud). The existents were then subdivided into further categories of eternal (qadim), created or adventitious (hādith), substance (jawhar) and accidents (ārkā). Theology can prove that the eternal (qadim) does not multiply and is indivisible, unlike created (hādith) substances. Theology can, by means of argumentation, provide those criteria for the category of eternal, necessary essences (awsaf), certain matters (umār) and determinants (ahkām). Using negative proofs, he said that certain determinations (ahkām) were neither necessary nor impossible in their application to the eternal. The task of the theologian and the role of reason (aql) ends at the point when one can prove that it was possible to attribute acts to the eternal. Reason, he said, could prove the truthfulness of the Prophet, accept his teachings about God and the day of Judgement, but it cannot perceive these ideas on its own, nor can it declare them to be impossible.

The sharī' [revelation] can supplement what the intellect lacks in independent perception. Hence, the intellect cannot on its own perceive that obedience is the cause of happiness in the hereafter, or that sin is the cause for damnation. Nor can it determine the impossibility [of these aforementioned things] either... (italics mine)!

---

38 Mu, 1:5.
40 Ibid.
41 Ibid.
After whetting his reader's appetite in the few paragraphs, al-Ghazālī then launched into a critique of some legal theorists who had been "overwhelmed by their personal obsession with theology" (li-ghalabat al-kalām 'ala ẓabā'ī), or were preoccupied with issues of grammar or positive law to such an extent that it had intruded into their writings on legal theory. He singled out the Hanafi legal theorist, Abū Zayd al-Dabūsī (d. 430/1038), criticising him for introducing elements of positive law (fiqh) in his treatises on legal theory.

These prefatory remarks suggest that al-Ghazālī was paving the way for his own propensity towards theology in the study of legal theory. His reliance on theology plays more than just a secondary role. Nevertheless, he successfully introduces this discipline by the artful use of the technique of deflection. While he draws the reader's attention to those theorists who insert theological, grammatical and positive law overlays in their presentations of legal theory, he deflects the attention from his own forays into theological issues in al-Mustasfa. Aware of his paradoxical position on this matter, al-Ghazālī maintained that his digression into theology while discussing legal theory was a partial one. After some elaborate prefacing, al-Ghazālī admits that he will not make the radical departure of purging theology from legal theory (usūl al-fiqh) discourses because "weaning from what is familiar is hard to take and people tend to shun the novel."

He listed several theological issues in a hierarchy of their importance and their relevance to legal theory. Legal theorists were justified in using the theologians' definitions of knowledge (ʿilm), discursive or speculative thought (nazar), and proof

---

42 Mu, 1:10.
43 Ibid.
44 Ibid.
45 Ibid.
(dalīl), but they could not borrow their use of demonstrative proofs (iqāma 't al-burhān). The reason for this inter-disciplinary borrowing was that the theologians’ definitions assisted the legal theorists in their conceptualisation. Terms such as “consensus,” “discursive thought” and “proof” were already used in theology and there was no need to re-invent them for the purposes of legal theory, al-Ghazālī explained.

In the same way that the proof-value (ḥujjīyya) of consensus and syllogism (qiṣās) properly belong to the discipline of legal theory, discussion of these becomes unavoidable in the study of positive law (fiqh). He made the point of telling the reader that these debates had unfortunately been “dragged” (ijrār) in for the purposes of rebuttal only, not for substantive discussion. For instance, theology was “dragged” into legal theory in order to rebut those who opposed (munkirūn) the proof-worthiness (ḥujjīyya) of knowledge (ʿilm) and discursive thought (nazar).

Al-Ghazālī’s detailed apology for employing theological arguments suggests an awareness of the ‘politics’ of theology and its relationship with law within Ashʿarism. Through a variety of narrative strategies and phrase regimes he attempted to fulfill the ends of his own discourse in al-Mustaefa. He wanted to tread a cautious middle path between pro-kalām Ashʿarism and the anti-kalām factions, although he was more inclined to pro-kalām Ashʿarism. His method of achieving this goal was to use the technique of dialectical irony: negative towards kalām but also employing it. The effect of this technique was ambiguity and dissimulation. One reason for blurring his attitude towards theology was to make his work acceptable to the diverse audiences for whom he was writing. One must allow for the fact that as someone who had mastered the discourse of dialectical theology, al-Ghazālī was also, to some extent, a prisoner of the discipline. In

46 ibid.
47 ibid.
48 Makdisi, “Ashʿarī and Ashʿarites (1),” 66.
the *Mizān* he spoke as a self-professed ṣūfī who did not even wish to entertain the relationship between Sufism and theology. In *al-Muṣṭasfa* he not only transgressed boundaries, he also stated emphatically that theology was the universal of which Sufism, along with legal theory were both subsidiaries. Indeed, indirectly he was saying Sufism was founded upon the primary principle of *kalām*. It is possible that the al-Ghazālī of *al-Muṣṭasfa* was again revising his position on theology, law and the other religious sciences and his revisionist *cum* reformist stance may well have been the reason for the production of a major work on legal theory, prefaced by discussions on logic and theological principles. This gives ample scope for speculation as to whether al-Ghazālī was continually attempting to revise his canon, at the same time as re-writing his intellectual [auto]biography.

**Designing ‘Roots’ (Uṣūl): Structure of Uṣūl**

The contemporary Egyptian philosopher, Ḥasan Ḥanafi, has argued that legal theory generally had a trilateral structure, representing three dimensions of Muslim conscience, “les trois dimensions de la Conscience.” These three dimensions are: the historical conscience (*la conscience historique*), the eidetic conscience (*la conscience eidetique*) and the practical conscience (*la conscience active*). The historical conscience (*al-shuʿūr al-taʿrikhī*), according to Ḥanafi, constitutes the objective data of legal theory, namely the revelation, tradition (*ḥadīth*), consensus and analogy. This dimension provides for the historicity of the data and involves its verification and extent of reliability. The eidetic conscience (*al-shuʿūr al-taʿammulī*) is the reflective process of understanding, analysis and theorisation which constitutes the core dynamism and method

---


of the discipline. The main focus of the eidetic conscience is the linguistic debates and juristic syllogism. The practical conscience (al-shār al-amālī) is the search for the legal determinant and its application and provide the solution to existential problems. Under this rubric, all the elements related to the search for the practical solution, such as the qualification of the jurist (mujtahid) are addressed.

Hanaṭī’s method, which shows influences of French structuralism, is innovative and serves as an effective heuristic device. Like all heuristic devices it suffers the limitations of universalism, essentialism and reductionism. The differences and varieties of legal theory which could possibly modify this model needs to be accounted for in a comprehensive theory. Any model must show sensitivity to historical lacunae which influence the discipline to which it refers. Nevertheless, Hanaṭī presents legal theory as a product of a variegated Islamic conscience and this also discloses the language of moral philosophy in Islam. In this sense his thesis of legal theory as “ conscience” is supported by Makdisi’s studies of the history of legal theory. Makdisi concluded that legal theory had taken over the role which theology (kalām) used to play in Muslim discourse and that in future it will be the legal theorists who will determine Islamic theology rather than the theologians (mutakallimūn) themselves.1 Hanaṭī and Makdisi have used different processes - philosophy and history - but both have arrived at the conclusion that legal theory is a manifestation of Islamic moral philosophy.

Structure of ‘Roots’ (Uṣūl) in al-Mustasfā

The structure of al-Mustasfā is a quadrilateral one, in which each lateral is an axis (quṭb lit. pole pl. aqṭāb). Al-Ghazālī’s selection of the metaphor was spontaneous in al-Ghazālī’s writing because he was preoccupied by Sufism (tasawwuf) at that stage of his

51 Makdisi, “Juridical Theology,” 46.
Each of the poles formed part of the grid or structure of his legal theory. In the following paragraph, the reader should also note the additional metaphors employed to elaborate the structure of his jurisprudential framework.

The first axis (quṭb) discusses the determinant (ḥukm) which he described as the "harvest" or "fruit" (thamra). The second axis was "the bearer of the fruit" (al-muthmir). The third axis discusses the methods of utilization or, "the methods of growing fruits" (turūq al-istithmār) and, the fourth axis deals with the "fruitgrower" (al-mustathmir).

In addition to Sufism's highest manifestations, the four axes are suggestive of the aesthetic metaphor in al-Ghazālī's repertoire of legal theory. His intense use of botanical terms permeates his reflections on legal theory. The objective of legal theory is to develop a sound and rationally defensible method by which determinants (ahkām) can be derived from the primary sources of law, namely the Qur'ān and Sunna, and from the secondary sources by means of consensus (ijmāʿ) and juristic syllogism (qiṣāṣ). In effect legal theory is both the method and theory which informs the jurist. Its productive capacity is effectively captured in the botanical metaphors.

In addition to the use of botanical and axial metaphors, al-Ghazālī pursues a logical division of his categories. Before discussing the axes in detail he provides an introduction (muqaddima) to logic. Thereafter, he subdivides the content into component (fann), chapter (bāḥ), part (fasl) and controversy or problem (mas'ūla), all of which are structures he borrows from logic. At times these subdivisions are preceded by one or two prefaces and a conclusion. Occasionally, he announces that a component (fann) will comprise a "book" (kitāb), in which he provides greater detail. Sometimes, a component will be accompanied by a division (qism) or several divisions and sometimes there will be

52F. de Jong, "al-Kūb," in Encyclopaedia of Islam 2nd ed.
an explanation (byān) at the end. Al-Ghazālī is not always consistent in his classification which makes the reader unsure about the value of the classification. At times, he uses terms such as division (qism) and part (fasl) interchangeably which lends a certain amount of indeterminacy to the categories. Ironically, it was precisely because he wished to limit indeterminacy that al-Ghazali insisted on the use of logic in legal theory.

**Logic and Legal Theory**

The introduction to logic in *al-Mustasfī* was privileged by al-Ghazālī:

This [introduction] is not part of legal theory, nor [part of] any of its special preliminaries, but more than that: it is the introduction to all knowledge. And whosoever is not fortified with this introduction, then no validity can be ascribed to his [her] knowledge as a matter of principle.⁵³

But his artful ambiguity towards logic remained. Immediately following this quotation he said:

Whosoever does not wish to transcribe this introduction should then start the book from the first axis (qutb), for that is indeed the beginning of *usul al-fiqh* proper.⁵⁴

However, immediately after that, he added:

In the same way that speculative knowledge is dependent on this introduction, so does legal theory [also depend on it].⁵⁵

In the introduction to logic, al-Ghazālī is consistently ambiguous in his assertions, retractions, apologies, and his dependence on logic. This undoubtedly has major implications on the earlier positions he had adopted vis-a-vis philosophy, theology and the rational sciences. He approves of logic but disapproves of philosophy and philosophers, once again demonstrating his inconsistency, since both disciplines are part of the

---

⁵³ *Mu*, 1:10.
⁵⁴ Ibid.
⁵⁵ Ibid.
controversial 'foreign sciences'. But there is also considerable debate among students of al-Ghazālī as to whether he rejected philosophy entirely or only some aspects of it.\footnote{Abū al-‘Alā’ Afīfī, “Atkar al-Ghazālī fi Tawjīh al-Ḥaṣāt al-Aqliyya wa al-Ruḥiyya fī al-‘Islām,” in Abū Ḥāmid al-Ghazālī, 736; Ḥasan al-Ṣā’ī, “al-Manḥaj al-Wadā’ī’ inda al-Imām al-Ghazālī,” in Abū Ḥāmid al-Ghazālī, 433-447 passim.}

The introductory treatise on logic contains an Islamising rhetoric, where he uses illustrations from theology and positive law (fiqh) to support his arguments on logic. The origins of this logic have Aristotelian-Stoic roots in Greek philosophy.\footnote{Wael Hallaq, “Logic, Formal Arguments and Formalization of Arguments in Sunni Jurisprudence,” in Arabica, 38 (November 1990): 320.} He attempted some form of Islamisation of Greek logic by fusing it with Islamic elements. In doing so, he avoids the pure abstraction of Greek logic and tries to give it concrete expression. For instance, he took the Greek syllogism and compared it to the inductive analogy (al-qiyās al-istidlālī) of legal theory by showing the resemblance between the two methods.\footnote{Rafīq al-‘Ajam, al-Manṭiq ‘inda al-Ghazālī fī Abū ‘abdīl al-Araṣṭawīyya wa Khushūṣiyyatihī al-Islāmiyya, (Beirut: Dār al-Mashriq, 1989), 304.} Similarly, he related certain aspects of demonstrative proof (burḥan) to inductive certainty (al-istidlāl al-yaqīnī). He thus adapted the forms of Greek logic, and by providing illustrations from Islamic law and quotations from the Qur’ān, demonstrated that Islamic sources could also be used to support logic.

But al-Ghazālī had greater ambitions for logic and legal theory in al-Mustaṣfā. His purpose was to create a coherent and standard language in Arabic that would serve the object of establishing epistemological certainty (yaqīn) within the structure of language itself. For this reason, he reorganised the basic and hitherto incontrovertible premises of the prohibited, permitted, indifferent, legal causation (i‘la) and the issues of language, into an integrated discursive system which would co-ordinate meaning, certainty and language into a unified system. Both the language of logic and the language of revelation would...
therefore become standardised inferential orders expressed through the Arabic language. This will be discussed in greater detail in the next chapter. But first, to grasp the depth of the reliance of legal theory on language discussions, an overview of the contents of al-Ghazālī’s legal theory would be in order.

The Four Axes (*Aqṭāb*)

The first axis deals with the determinant or assessment, called the *hukm.* Although the “fruit” of any labour normally comes at the end of the process, in al-Ghazālī’s structure it is discussed first. In modern disciplines, following the model of a factory, one would discuss the preliminary phases of any process in an order of priority first, and then address the yield of the process. The *hukm* is treated first, precisely because of the fact that legal theory is concerned with the product of the legal process. It obtains prominence within al-Ghazālī’s metaphoric discourse. In it he discusses four components (*fann* pl. *funūn*) of the determinant (*hukm*): its essential reality (*haqīqa*), divisions, constituent elements (*rukūn* pl. *arkān*) and the process by which a determinant manifests itself.

The second axis investigates the indicants (*adilla*) of the determinant, which are the four textual sources (*usūl*) of the law. The first source is the Book of Allah. Here al-Ghazālī’s primary discussion is embodied in the “book of abrogation” (*kitāb al-naskh*) which has two chapters (*abwāb*) and a conclusion. Several controversies (*masā’il*) are addressed, the main ones being the definition, the essential reality and the evidence of abrogation, as well as the constituent elements and conditions for the abrogation of the revealed text. It concludes with a brief history of the topic. In his treatment of the second source, namely the tradition of the Prophet, al-Ghazālī does not specifically focus on any

---

59The Arabic word *hukm* cannot be reduced to one translatable phrase in English. Therefore, I use the words “determination,” “assessment” and “rule,” interchanging when the contextual sense requires such adaptation.
particular aspect of the discipline of hadīth studies. The main thrust here is concerned with guaranteeing the epistemological propriety of prophetic narratives. Similarly, in his treatment of the third source, consensus (ijmā’), he also deals mainly with epistemological issues. In the fourth source, attention is focussed on ‘the indicant of reason’ (dalīl al-aql) and the presumption of continuity (istishāb).

The third axis consists of a preface (ṣadar), an introduction and three components (funjūn). The preface emphasizes that “this axis is the central pillar of the discipline of ḫuṣūl.” The first component deals with sentences and methods of deriving indicants from phrases; the second deals with words, their meanings and inferences; and, the third with how to derive determinants (akhām) from words which includes detailed discussions on juristic analogy (qiyyās) and its variants.

The fourth axis addresses the jurist in three components (funjūn). The first deals with the question of creative and independent juristic discretion (ijtihād); the second deals with the need to follow authority (taqlīd) and juristic inquiries (istiftā); and, the third deals with the method of weighing and preferring (tarjīh) competing juristic viewpoints.

The four axes deal effectively with the issue of the legal Determinant (ḥukm), the Text (uṣūl), meaning the four sources, the Method which involves the language and hermeneutic debates and, the jurisdiction of the Jurist (mujtahid). But the structure of al-Ghazālī’s legal theory does not only serve as a convenient vehicle for presentation, it is inundated with metaphorical elaborations, next to be explored.

60Mv, 1:315.
Chapter 3

Structure as Ideology: The Aesthetic Ideology

In addition to his mastery of the disciplines of theology, philosophy and logic, the author of al-Mustasfī, was well versed in Sufism. In his description of the quadrilateral structure of legal theory around four axes (aqfāb), he had borrowed from the imagery of Islamic mysticism or Sufism. In mysticism, the axis (qūb), is the head of the saintly hierarchy, known as the axis of axes (qūb al-aqfāb). In this framework the qūb is the high-point in the numinous hierarchy. Corbin has shown that this was essentially a Shi‘ī idea appropriated by Sunni mysticism.

Employing the ṣūfī metaphor indicates hierarchy, transcendence, hidden axes and ontological space as being the key symbols of the legal aesthetics of al-Ghazālī. He supplemented the mystical metaphor with an aesthetic metaphor borrowed from botany. Each element of the aesthetic metaphor is then disaggregated into its component parts thus providing a composite and coherent picture, justifying the use of the metaphor of the "tree." The use of the metaphor cannot simply be dismissed as serving a heuristic function. The double metaphors of mysticism and aesthetics, are suggestive of a deeper imagination and ideology at work in al-Ghazālī.

There may be a reason why al-Ghazālī employed aesthetics, botany, the theory of art, and the appreciation of the beautiful, to illustrate his model of legal theory. In fact, the very etymological construction of the discipline, “roots of fiqh” (uṣūl al-fiqh) was conceived in the metaphor of the tree which gave rise to such often-used terms as “roots,” (uṣūl) and “branches,” (furū‘) in Islamic law. This provides this author with a further incentive to analyse the role of the aesthetic metaphor in law at large.

61 F. de Jong, “al-Kuṭb.”
62 Ibid.
Paul de Man explained that "aesthetic ideology" is most effective in its bid to "reconcile the various binary oppositions that bifurcate modern society and culture." Although de Man is talking about modern society, his reflections are valuable because they can be used to explain how aesthetic ideology was used and the ways in which it has been accommodated by such various disciplines as politics, ethics and hermeneutics. The aesthetic ideology conveniently lends itself to a sense of harmony, or a law of totality. Aesthetic contemplation could lead to a harmonising of disparate faculties, cognitive fields and activities, and

... as a normative discourse it promises a future Utopia in which all remaining conflict, dissension and value disagreements will be transcended in a new organic community."

De Man believes that, by resorting to aesthetic ideology or aesthetic imperialism, one tries to avoid the problem of language. As Norris put it, the aesthetic ideology claims to put together the sensuous, the conceptual and the legal. This allows the illusion of naturalism and falsely promises to overcome the "obstinate, resistant signs of textual difference by assimilating the language to a model of transcendental, unitary thought and perception." De Man's strategy against this persuasive ideology is an ascetic, close reading of the text. He pays extreme attention to textual detail, rhetorical and linguistic arrangements, and shows a distrust of grand theories of interpretation. He is attentive to the aesthetic tone of the text, in a bid to keep the aesthetic within its proper domain of art and "deprive it of its fraudulent assertion of epistemological rigour or ethical and political propriety."
A close reading of the text of *al-Mustasfa* manifests the great effect to which al-Ghazâli employed the aesthetic ideology in law. My hypothesis is that he did so to harmonize the disparateness between ontology and epistemology. For indeed, in legal theory, he found not only a statement of being - namely a moral philosophy - but also a theory of knowledge, epistemology. Generally, legal theory is either considered to be epistemology by proponents of *kalam* or hermeneutics in the view of traditionalists. Al-Ghazâli seems to adopt the view that legal theory can encompass both concurrently. An effective way of negating this difficulty without actually having to deal with the epistemological problem of saying that legal theory combines both hermeneutics and epistemology, is to employ an ideological framework that blurs these distinctive differences and gives legal theory a semblance of unity.

In al-Ghazâli's quadrilateral structure, each of the four laterals in his description of legal theory occupies an autonomous sphere since each is an axis (*qub*). While the Determinant, Text, Method and Jurist on their own have independent frames of reference when dealt with separately, there is little evidence of their intertextuality. The botanical metaphor does, of course, give a semblance of unity and wholeness. The axial metaphor performs a different function. The main issue that the aesthetic ideology avoids is the recurring question of language, given the beguiling effect of the metaphor. Nietzsche described the figurative drive as the impulse towards the formation of metaphors. Like all ideas that originate through trying to equate the unequal, a metaphor also attempts to establish an identity between dissimilar things. Later, Nietzsche called this figurative drive, the unconscious “will to power” or will to truth.

---


68 Shehaby, “Stoic Logic,” 82 for his comment.
What, therefore, is truth? A mobile army of metaphors, metonymies, anthropomorphisms; truths are illusions of which one has forgotten that they are illusions ... coins which have as their obverse effaced and now are no longer of account as coins but merely as metal. 69

Aesthetic imperialism promises to overcome "the obstinate, resistant signs of textual difference by assimilating language to a model of transcendental, unitary thought and perception." 70

The aesthetic ideology in the most mature of al-Ghazâlî’s legal writing requires an explanation. In the sections dealing with the Determinant, Text and Method, al-Ghazâlî followed the conventions charted by his predecessors. There could, however, be some plausible explanation as to why he invented his own method of dealing with the Jurist as a separate axis. Firstly, I wish to rule out the opinion that it was purely accidental and unmeditated. The axis on the Jurist is too central to the structure and texture of the work to be deemed accidental. A plausible explanation here is that if al-Ghazâlî was to examine the issue of the Jurist under the rubric of Method, it would compel the Jurist to conform to the historical strictures of the discipline. The discussion on Method focuses largely on linguistic issues, rhetorical and logical forms that had been produced by previous jurists, linguists, and grammarians. By discussing the Jurist separately, the very ‘act’ of separation infers that the Jurist occupies an independent space and allows him/her an opportunity to experiment creatively in the discipline. In providing the Jurist an autonomous space, al-Ghazâlî allowed a slight loosening of the grip of the methods used previously to discuss the discipline of legal theory. The axial metaphor lends itself to this independence and autonomy.


70Norris, Paul de Man, 38.
In effect, al-Ghazālī subtly dissented from the conventional theorisation of legal theory by asserting that his theory was based on four primary axes. Viewed from another angle, this structuring could be seen as an innovative activity. But he effectively hid his innovation and dissent by employing the enchanting metaphor of botany and gardening, mediated by the aesthetic ideology of the primary axes. The aesthetic ideology was useful in trying to create an impression of naturalism of both wholeness and independence. The ideology provided the foil that there was a unitary and undifferentiated perception in the approach to Islamic legal theory.

Conclusion

In this chapter, I undertook a 'close reading' of some of al-Ghazālī's texts in order to ascertain the interaction of law and theology. The central texts of religious traditions, and al-Mustasfā is such a one, needs to be read with an adequate sense of their full rhetorical complexity. In order to do this, says Derrida, one requires prudent, differentiated, slow and stratified readings. In my close reading, I have searched for the rhetorical techniques which were employed in the service of more important, but less observable interests.

It is clear that despite his protestations to the contrary, al-Ghazālī could not avoid the temptation of theologising his legal theory. Theology assures its hegemony over other discourses by preconstructing the discourse of legal theory as part of the rhetorical practice. Furthermore, in my opinion, al-Ghazālī cautiously and artfully avoided unnecessary confrontation with the politics of the Islamic disciplines of the time, by deliberately ensuring that the descriptive title of al-Mustasfā itself was ambiguous - making it difficult to establish whether it was a work on legal theory (usūl al-fiqh) or juro-moral theology (usūl al-dīn).

31Norris, Paul de Man, 33.
Al-Ghazālī employed a variety of writing and rhetorical techniques in order to unify the discourse of legal theory through the use of metaphors, organisation of material, structuring the discipline, and an insistence on rigidly following logical methods. All this he did in order to give coherence to what he would like to project as a system of thinking, universal, autonomous, independent of context, monologic and distanced from the struggle for social values.

Nevertheless, a close reading suggests that despite his attempts to stabilise the edifice of legal theory with theology (*kalām*) and logic, it did not necessarily dissolve the ambiguities and uncertainties. Moreover, al-Ghazālī tried to cloak his intellectual innovations and dissent in legal theory in the aesthetic metaphor. The minute analysis of the latter discloses more than what it hid and destabilised, against al-Ghazālī’s best intentions.
Chapter 4

Language and the Rhetoric of Ambivalence

Introduction

The third axis (quth) of al-Mustasfa examines the substantive issues of language in legal theory. Language constitutes both the epistemological postulates and the hermeneutical force of the discipline of legal theory. Al-Ghazâli went to great lengths to explain the ‘postulate of language’ (mabda’ al-lugha).¹ In this chapter language will be treated as a discourse and not as isolated units.² The legal philosopher Villey observes that:

... law manifests itself to us only in forms of discourse ... discourses subject to the laws of a language. Everything which jurists and the legislator utter is regulated, conditioned and channelled by this language. It is not sufficient to say that language is their instrument, without adding that this instrument like all techniques, dominates them. Language is a servant-maitresse, and in reality the language is itself knowledge; its vocabulary and syntax are a mode of thinking about the world, of carving out a structure of the world; of our science, our language constitutes the first half (italics mine).³

The examination of al-Ghazâli’s treatment of language will follow the thrust of Villey’s observations, especially in exploring the “servant-master” role that language plays in legal discourse. The degree to which language constitutes knowledge and a way of “thinking about the world” will also receive special attention.⁴ We need to understand.

¹ Mu, 1:318.


⁴ Ibid.
how language, the acts of language and the characters and the communities which were created operate in al-Ghazâlî's legal theory.

This need to understand how we construe ourselves within our environment is not viewed as part of the common understanding of language. Rather, language is treated as a vehicle or a container which transmits messages without ever becoming involved in the transmission process itself. Our fundamental use of language is propositional in character, depending 'for its existence on chains of reasoning, deductive or inductive in character, that are external to itself and context.'\(^5\) This understanding of language has as its premise in the idea that everything is capable of being recast; is capable of being translated into any language and that our knowledge is universal, transparent and neutral, independent of what is happening beyond our own doorstep, only existing in the unconsciousness of the reasoning mind. The modern discipline of Islamic studies, and more so, the academic study of Islamic law and legal theory generally ascribe to the assumptions described above.

But there is another way of thinking about language. According to Wittgenstein 'to imagine a language means to imagine a form of life.'\(^6\) This description does not paint language in neutral or transparent tones, but imparts to it its own force, vibrancy and colour. "There is no non-linguistic observer, no non-linguistic observed."\(^7\) This is a way of imagining language not as a set of propositions but as a


\(^6\)Ibid., ix.

\(^7\)Ibid., xi.
"repertoire of forms of action and of life." Also, according to Boyd White, "our purposes, like our observations, have no pre-lingual reality, but are constituted in language - in this sense they too are lingual in nature." This sense of language denies the claim of logic and rationality that our words have identical meaning each time they are used. Much of the meaning of words is derived from the tones, the inflections, and gestures used, as well as context in which they are uttered. In this way, "we can imagine languaging as a kind of dance," says Boyd White, "a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context."

Without doubt, the two versions of language described above cannot exist in pure forms in everyday life. Both are at work in imperfect relation to each other. Sometimes, it may be necessary to act as if language were transparent, such as when giving street names, ascertaining a day of the week, or a calendar month. But we also know that such forms of languaging are reductive, and like all such systems will become pathological unless we can be sure of what has been left out. Therefore, we have to shift the focus of our attention so that we come to see language as having its own reality and see its forms as forms of life.

In the study of Muslim legal theory, language is generally treated as being propositional, transparent and neutral. Perhaps now is the time to view the language of legal theory as a form of life and action, as well as listening to what it tells us about

---

8Ibid.

9Ibid.

10Ibid., xii.
the ambience of both the author and the discipline. Viewing language as a discourse is one way of discovering the hidden actions of language-use.

**Legal Theory as Discourse and Rhetoric**

In the broadest and loosest of terms, the concept of discourse can be applied to any sequence of utterances that forms a sentence or a more complex structure. More sharply defined, the processes that intervene and determine the relationship of a language to the formulation of utterances are called discursive processes. The relation of bodies of knowledge to social practice and structure, is called a discursive formation. The study of Islamic legal theory and the field of discourse analysis is as yet unknown. At both the level of discursive process and discursive formation, this study challenges the hermetic security of the meta-langue of Islamic law, namely legal theory.

De Man took J. L Austin's (d. 1960) description of utterances as being either constative or performative, and had applied this typology to legal texts in the Western tradition. A constative is a descriptive statement capable of being analysed in terms of truth values. Performatives cannot be analysed in terms of truth values. A performative is a sentence or utterance where an action is performed by virtue of the sentence being uttered, like "I marry you...", "I repudiate you," "I promise." Legal texts, says de Man, exist in a permanent state of suspension between "constative" and "performative" modes which appear to stipulate precisely the terms by which it should

---


12 In Arabic grammar such a sentence is called a *jumla mufida*. 
be understood. At the same time, it also attempts to "authorise" future readings, revisions and extensions which it cannot determine in advance, "but which none the less provide its only source of retroactive authority." De Man's observations are equally applicable to Muslim legal texts.

There is a twofold deconstructive process at work in the text. On the one hand, there is a rhetoric of tropes at work, the effect of which is to subvert or render undecidable any utterance which apparently seems to be couched in constative terms. On the other hand there is

a repetitive, quasi-mechanical "grammar" of figural drives and substitutions which makes it impossible for language ... to maintain the delusion of authentic, self-present meaning. Rhetoric and grammar continuously "undo" each other. Rhetoric undoes grammar and logic by creating the possibility of undecidable utterances in terms of propositional content. Similarly, grammar undoes rhetoric since tropes have an aleatory and random character that seems indifferent to meaning and content.

Grammar and rhetoric are therefore of interest to us here. In terms of grammar, the reference of the sign to an extra-linguistic realm is fundamentally an idealist notion.

---


14 Ibid.


16 Ibid.

17 Ibid.
This extra-linguistic reality is viewed as a product of language itself and not as a set of competing discourses.\textsuperscript{18} It is seen as a product of language itself by means of metalepsis, the trope that reverses cause and effect through a shuttling exchange of priorities.\textsuperscript{19} An instance of metaleptic reversal is when laws are justified as past effects of present causes. For example, birth control, family planning and even abortion are seen by liberal legal reformers in modern Muslim societies as having been anticipated in the laws of the past which permitted coitus interruptus (\textit{azl}). Modern issues were probably the last thing preoccupying the minds of the classical jurists and judges who formulated such laws. The first community to read the texts of those religious laws also had very little idea of what the laws would mean to future generations. Modern liberal reformers do everything in their power to broaden the original intention of these laws in order to accommodate their modern reforms. This form of metaleptic substitution - the habit of justifying past effects of present causes - is constantly called into play by those reformers who wish to bring about change in Muslim societies. Abrogation (\textit{naskh}) of the Qur'\textacuted{\textl{\texttilde{	extae}}}n provides an excellent case in point where the effect of judicial abrogation is viewed as acceptable as an original cause and part of the intent of the revelation. The truth is that abrogation was a highly disputed notion among the early legal and theological schools and not universally accepted by all.

I do not intend to discuss that aspect of rhetoric which abuses language through insincerity and exaggeration. In this discussion, the term rhetoric applies to the interrelationship of language and power. Critical rhetoric specifies and indicates the political dimensions of legal language and the manner in which the relations of power are inscribed in legal texts in non-communicative ways. Both these theoretical

\textsuperscript{18}Goodrich, \textit{Legal Discourse}, 136.

\textsuperscript{19}Norris, "Resistance to Theory," 180-81.
observations will be applied, overtly and covertly, to the analysis of the language postulates in al-Ghazālī.

Language and Determination

In al-Mustasfā, al-Ghazālī juxtaposes his various and often contradictory assertions in a particular way. This method of positing produces an effect akin to a pseudo-dialectic. Literary critics, such as de Man, describe this as the "insight" that the reader gains from the text. Says de Man:

It is necessary, in each case, to read beyond some of the more categorical assertions and balance them against other much more tentative utterances that seem to come close, at times, to being contradictory to these assertions. These contradictions cancel each other out and do not gain entry into a synthesising dialectic. They are therefore termed a pseudo-dialectic. Like contradictions, there are also different levels of explicitness which do not facilitate a common level of discourse where "the one always lay hidden within the other as the sun lies hidden within a shadow, or truth within error."

Let us assume that al-Ghazālī was a critical author/reader of the Muslim juridical text. The "insight" I am referring to seems to be an unstated principle, a negative moment which animates his thought and leads his language away from its

---

20 Juxtaposition is a fundamental anatomical quality in Arabic and Islamic thought, says al-Azmeh, Arabic Thought, 55.


22 Ibid., 103.
asserted stand, perverting and dissolving his stated commitment to the extent that it becomes devoid of substance. This is done in such a manner as to place the very possibility of assertion into question.23 “Yet it is this negative, apparently destructive labour that led to what could legitimately be called insight.”24 The reader of al-Ghazālī should not find much difficulty in applying de Man’s method of analysis, thereby grasping the “insight.” Bearing in mind that al-Ghazālī was often caught between conflicting and contradictory ideological stances, I wish to argue, that the “insight” gained from the Ghazalian text, is connected to his understanding of religious language in general, and the doctrinal conflicts in Islamic history concerning the nature of divine speech, in particular. After all, the raison d’être of legal theory was to make sense of the nomothetic discourse (khīṯāb al-sharīʿa) in the human context.

I will illustrate the insight from the chapter on language titled, “The method of harvesting (istihmār) determinations (aḥkām) from the productive (muthmirāt) [sources] of principles (uṣūl).”25 By exploring the agricultural metaphor of harvesting (istihmār), al-Ghazālī tries to give the impression that the derivation of determinations (aḥkām) from the sources is a productive enterprise. He describes the axis dealing with language as:

23See Eric L. Ormsby’s summary of the debate on inconsistency in al-Ghazālī’s thought in Theodicy in Islamic Thought: The Dispute over al-Ghazālī’s “Best of all possible worlds” (Princeton: Princeton University press, 1984), 100-1, where al-Ghazali’s opponents al-Turtushi, al-Mazari and others accuse him of dangerous mixing of disciplines to the detriment of students and public alike.

24Ormsby, Theodicy, 103.

25Mu, 1:315.
... an indispensable part of the discipline of [legal] theory (ʿumdat ʾilm al-ʿusūl) because the field of exertion for the jurists (maydān saʿy al-mujtahidīn) is in seeking determinations from their roots (min ʿusūliha) and to harvest (wa ʿijtināʿiha) them from their branches.\[^{26}\]

The ‘roots’ and ‘branches’ referred to are nothing but words, phrases, sentences and syntax; in short - language. Here he sees language as part of an elaborate agricultural process, larger than gardening, which involves the cycle of sowing, hoeing, nurturing and finally harvesting the crop. Harvesting the crop is surely the ultimate objective of the entire process of farming, but one would be amiss in not seeing it as part of a larger plan. In the same way as farming is a complex and interdependent process where premature and incorrect harvesting could result in disaster, so too is language a complex interrelated process.

Having asserted the indispensability of language as a means of discovering determinations, al-Ghazālī then seemingly goes on to detract from his earlier statement, by saying: ‘the determinations (aḥkām) in themselves are not linked to the choice of the jurist’ (idh nafs al-aḥkām layṣat tarābitu bi ikhtiyār al-mujtahidīn).\[^{27}\] The implication of this statement is that the determinations pre-exist the jurist, disclosing a form of epistemological determinism or foundationalism. A theological assumption intrudes in al-Ghazālī’s thinking which underscores the point that the hermeneutical activity of the jurist is denied any form of subjective relationship with the text. Indeed, al-Ghazālī is explicit in saying that humanity, or as he put it, “creation has no influence in the founding (taʿṣīs) and invention (taʿṣīl) of the determinations.”\[^{28}\] Although al-Ghazālī uses the complex metaphor of production, his understanding is that

\[^{26}\]Ibid.
\[^{27}\]Ibid.
\[^{28}\]Mu, 1:315-316.
determinations present themselves as objective moments to the jurist. Reading the text in this manner provides us with the “insight” that the extra-linguistic reality of theology is constituted within language although there is an attempt to maintain the illusion that it is separate from language. It is only when these two citations of al-Ghazālī are read together that one can see how he attempts to create a pseudo-dialectic of language which can be viewed as constitutive in one instance and instrumental in the other.

We should not be surprised by this type of foundationalism within al-Ghazālī. Al-Ghazālī attempted the fusion of language and analytics (logic) in such a manner as to ensure that language provided apodictic meanings and predictable outcomes. At a later stage, I will explore the extent to which these theoretical assertions are simply rhetorical and grammatological devices which could provide different interpretations.

The Language of Law: From al-Shāfi‘ī to al-Ghazālī

The central concern of language in the discipline of legal theory has already been noted by the modern scholar, al-Azmeh. He argues that because of such semasiological features of the Arabic language as abbreviations, implication, metaphor, metonymy, and the occultation of sense, linguistic concerns are imposed on the theorisation of legal theory.29 Legal theory is primarily a text-based enterprise, and our understanding of the divine logos comes from what is found in the Qurʾān, the Prophetic statements and the decisions of successive generations of jurists. In short, legal theory (uṣūl al-fiqh) says al-Azmeh, is “religion in the modality of knowledge,” which is actually the pursuit of the “positive association between humanity and divinity” by means of knowledge and knowledge is constituted in language.30

29al-Azmeh, Arabic Thought, 88.

30al-Azmeh, Arabic Thought, 86, 174.
It is generally accepted that in Islam the Word is the *logos*. The Qur’ān is the *ipsissima verba* of God. All the religious disciplines are integrally connected to the Word, which is the interface between the divine and human. Very early on in the genesis of Islam, the ability of language to express both the human and divine in one instance was subjected to a severe test. The nature of revelation formed the sub-text of the battle for theological supremacy between the Ash’arites and the Mu’tazilites. In their respective responses to this debate, each side proposed an epistemology and ontology closely resembling the grammatology of Arabic writing. Grammatology studies the history of systems of inscription and signs. Both the Ash’arites and the Mu’tazilites produced forms of writing, because “writing,” says Derrida, “in general covers the entire field of linguistic signs.” Thus, each theological group tried to manipulate the signs in a particular way which we call writing or inscription. Legal theory is a form of “writing” or inscription of signs in order to derive values of epistemology and ontology from the divine word. The divine word is a form of “writing,” (*kitāb*). With legal theory being a form of languaging or writing, it would be instructive to locate al-Ghazālī in the tradition of Muslim grammatology as a master-jurist (*mujtahid*) and more especially as a follower of the Shāfī’ī legal tradition.

Al-Shāfī’ī’s *al-Risāla* is the earliest available treatise on legal theory known for its systematic rigour and desire to give structure and coherence to the Arabic language. Al-Shāfī’ī’s study of the Qur’ān from a juridical point of view had led him to understand that the Qur’ān consisted of various discernible categories of verses. Al-Shāfī’ī begins his *al-Risāla* with a lengthy discussion on the “perspicuous declaration”

---

31 Derrida, *Of Grammatology*, 44.

(al-bayān), which "is a collective term for a variety of meanings which have common 
roots but different ramifications."33 The sum total of revelation, al-Shāfi‘ī argues, 
includes various "manifest aspects of perspicuous declaration" (wujuh al-bayān), 
which are more akin to different registers of interpretation than anything else.34 From 
the very inception, al-Shāfi‘ī makes a bid to anchor these registers of interpretation 
(wujuh) as being part of revelation itself via the perspicuous declaration.

This perspicuous declaration (bayān) is specifically directed to the Arabs who 
generally have no problem in understanding it, although some portions are less clear 
than others. For non-Arabs, unfamiliar with the Arabic language, the clarity of the 
declaration may present problems.35 Mastery of the Arabic language and its nuances is 
stressed as a pre-requisite for fulfilling religious obligations.

It is obligatory upon every Muslim to learn the Arab tongue to the utmost of 
his power in order [to be able] to profess through it that 'there is no God at all 
but God and Muhammad is His servant and Apostle,' and to recite in it [i.e. the 
Arabic tongue] the Book of God, and to utter in mentioning what is incumbent 
upon him.36

Revealing indeed is al-Shāfi‘ī's even more strongly dogmatic assertion about 
the Arabic language itself: 'Of all the tongues, that of the Arabs is the richest and the 
most extensive in vocabulary. Do we know any man except a prophet who

33Majid Khadduri, al-Shāfi‘ī's Risāla: Treatise on the Foundations of Islamic Jurisprudence 
Muḥammad Shākir (Cairo: Dār al-Turāth, 1399/1979), 21.

34Khadduri, Treatise, 67; al-Shāfi‘ī, al-Risāla, 21.

35Ibid.

36Khadduri, Treatise, 93; al-Shāfi‘ī, al-Risāla, 48.
apprehended all of it." It is virtually impossible to ignore al-Shâfi'i's insistence that perspicuous declaration (bayân) and the Arabic language are coterminous.

For al-Shâfi'i, the understanding of language is rooted in the revelatory inscription of *al-bayân* (perspicuous declaration). The Qurʾān, also described as *al-bayân*, is the basis of legal knowledge, indeed all knowledge. "No misfortune," said al-Shâfi'i, "will ever descend upon any of the followers of God's religion for which there is no guidance in the Book of God to indicate the right way." Al-Shâfi'i was not original in his ideological assumption that the Qurʾān was the signifier of all knowledge. Prior to him, during the first/seventh century the Khārijites advocated the claim that the Qurʾān could resolve all difficulties and answer all outstanding questions. However, al-Shâfi'i is credited for being the first person to give a sophisticated intellectual structure to this ideological position.

Al-Shâfi'i's next stage of reasoning shows that such terms as general, specific, absolute, restricted, implicit and explicit are linguistic categories which are derived from the Qurʾān and therefore, imparted by revelatory communication. He says: 'It is [God's] divine disposition to express something, part of which is literally general which

---


40 Ibid.

is intended to be obviously general.”42 We should note therefore, that even the hermeneutical devices he uses are glossed with sacrosanct overtones. Al-Shafi‘I collapses the distinction between the world of meaning (the Arabic language) and the world of divine communication (al-bayān), or revelation. In the end revelation and language are inseparable and indistinguishable because by equating the hermeneutical categories and linguistic devices, by which language is understood, he caused them to become isomorphic relations of revelation.

Al-Shafi‘I’s four manifest aspects of a perspicuous declaration (wujuh al-bayān) are: 43

1. texts (nass),
2. an obligation explained by the Prophet (fard),
3. prophetic practice (sunna), and
4. individual reasoning and juristic discretion (ijtihad).

These aspects are registers of interpretation representing three types of authority. The text for the authority of God; the obligation and prophetic practice for Prophetic authority, and the independent discretion for the authority of the Jurist. Al-Shafi‘I makes the perspicuous declaration a simulacrum of the deity.

The result of al-Shafi‘I’s involvement with al-bayān is discernible. Language not only shapes experienced reality, and hence revelation and the Law of God, it also constitutes it. At first glance this may seem to ascribe an extremely modern perspective to al-Shafi‘I’s work. But the difference in al-Shafi‘I’s use of language lies in the fact that he does not ascribe to a semiological theory of language which uses a self-contained system of signs whose meanings are determined by their relations to

42Khadduri, Treatise, 94; al-Shafi‘I, al-Rišāla, 52.

43Khadduri, Treatise, 68; al-Shafi‘I, al-Rišāla, 21-22.
each other. In al-Shāfi‘ī’s model, there still remains a “transcendental signifier,” an extra-linguistic subject or object which constitutes that reality, and this signifier is, in theory, God. Having recourse to such a “transcendental signifier” allows the notion of substitution to become possible, in the instance where the same referent has substitutes that generate ambiguity in signification. For instance, in the battlefield of the first civil war of Islām, when the Khārijites tried to assert the absolute sovereignty of God on the basis of the literal Qur‘ān, it was the caliph ʿAlī who pointed out to them the complexity of signification. In response to the Khārijite agitation, he said that “the Book [of God] does not speak itself, indeed men speak it,” pointing out this perpetual ambiguity in language opened the way for ʿAlī and the Khārijites’ ideological inscription of language, in the same way that al-Shāfi‘ī was to do later.44

Al-Shāfi‘ī’s ideological inscription proceeds from the doxology that states that the explicit denotation (nass) has the ability to resolve all perceivable problems. It has already been pointed out that this ability stems from the Arabicity (urūba) of the revealed text.45 Arabicity, which is self-evident and empirical, then lends itself to a comfortable “fit” in order to make the leap to the doctrine of the inimitability of the Qur‘ān, known as ījāz. For both the meaning and vehicle of revelation have an inimitably sacrosanct character which renders void all other attempts at generating a competing meaning and style. Understanding the doxology pertaining to the Qur‘ān becomes a daunting prospect, since on the hand it contains all realities, and on the other, its linguistic signification is absolutely comprehensive. The only way by which


45 Abū Zayd, al-Shāfi‘ī, 22.
any misunderstanding of the Qur'an could be prevented was through the development of method and rules which would avert chaos in interpretation given the many possible ways of interpretation. It appears that al-Ghazālī followed in the footsteps of al-Shā'ī, for he also believed in organising the structure of language.

**The Structuring of Language in al-Mustasfā**

In al-Ghazālī's discussion on language in *al-Mustasfā*, the language of jurisprudence is described by use of a trilateral formation. Words or terms denote a determinant (*hukm*) by three primary means:

1. structure and discourse arrangement (*ṣīgha* and *manzūm*)
2. intended sense and meaning (*fahwā* and *maṣhūm*)
3. denotation and intelligibility (*maṣnā* and *maṣqūl*)

Under the rubric of “structure and discourse arrangement,” the following linguistic categories are carefully examined: indeterminate (*mujmal*) and clarified (*mubayyān*); apparent (*zāhir*) and interpreted (*mu'awwal*); imperative (*amr*) and prohibited (*nahiy*); general (*ām*) and specific (*khāṣṣ*). The rubric of “understanding the intended sense and meaning” of terms encompasses al-Ghazālī’s views on issues dealing with the textual evidence such as the notion of the requirement of the textual proof (*iqtiṣā'), inference (*ishāra*), understanding of legal causation (*maṣhūm al-ta'īl*), understanding of the inarticulate premise (*fahm ghayr al-mantiq*); levels of indicants of discourse (*dalīl al-khaitāb*); proof-value of prophetic actions; and, proof-value of actions generally. The

---

46 In translating *manzūm* or *nasm* as “discourse” arrangement I have followed Rammuny’s pioneering studies on al-Jurjānī’s linguistics, see Raji M. Rammuny in “Al-Jurjānī: A pioneer of Grammatical and Linguistic Studies,” in *Historiographia Linguistica*, 12, no. 3 (1985): 351-371 passim.

47 The term *maṣnā* is similar to *fahwā* and *maṣhūm*, in so far that it is the “idea” or “mental image” which accrues in the mind in response to a question “what is it”?, when one investigates the quiddity of something.
discussion on the "denotation and intelligibility of terms" is mainly a discussion of juridical analogy (qiṣṣa) as well as legal causation.

Al-Ghazālī treats each of these topics with the required attention and detail they deserve by summarising the views of his predecessors and then indicating his own preference. To a large extent he concurs with the views of al-Shāfi‘ī or al-Bāqillānī. In order to grasp the leitmotif of al-Ghazālī's general understanding of language, I will conduct a selective examination of some of the topoi of his discussions on language.

**Linguistic Topoi**

*On the origins of language: Linguistic determinism*

Whether the source is the Qur‘ān, sunna, or consensus, it is the Prophet who articulates the dogma via phrases, deeds, silence, or a tacit approval. When studying al-Ghazālī's discussions of these sources of Islamic law one cannot ignore the persistence of a strong element of linguistic determinism. Language is seen as being virtually providentially determined, thereby generating a set of meanings that satisfy the ontological and epistemological requirements of theology. These theological assumptions surface in discussions on:

1. nomothetic discourse (*khīṭāb al-sharī‘*)
2. the word of God (*kalām allāh*)

In al-Ghazālī's writings, as with those of some of his Shāfi‘ī predecessors, language is far more than a substrate; it is correlative to revelation, explained by the notion of discourse (*khīṭāb*) which forms the equivalent to the perspicuous declaration (*al-bayān*) introduced by al-Shāfi‘ī. The linguistic categories are providentially predisposed to generate the 'fit' with revelation. It is in this sense that language goes further than purely reflecting revelation - it also constitutes it. This correlation
accounts for the ahistoricity of the revelation which results in it being received in many quarters as a sacerdotal word, incapable of being set in any time or space, or contained in any concrete form: “a devotional element, unattainable to discourse.”

In this sense the word has a semiotic value which signifies and supplements the authority of religion and its experts.

In contrast, al-Ghazālī’s view on the origins of language is a dialectical one. Although he subscribes to al-Shāfi‘ī’s views on the revelatory nature of language, his views on the provenance of language are more complex. First, he proposes three scenarios for the origins of language:

1. that languages are known to humans by conventional (ṣīḥāḥ) means only
2. that languages are known by means of periodic instruction (ṭawqīf)
3. that the initial elements of language were by periodical instruction and the rest by conventional means

Al-Ghazālī then creates two sets of arguments: one hypothetical, the other factual. In the hypothetical argument, all three scenarios are considered to be possible. Again the arguments are quasi-theological. The Eternal and Omnipotent Power, says al-Ghazālī, cannot be incapable of creating sounds and letters which people could hear and see, and from these a language was developed. This then allows for the theory of the divine origin of language, in so far as the Creator generates the original sounds and letters within people. In discussing the accepted theory of the conventional origin

---

48 al-Azmeh, Arabic Thought, 68.

49 Mu, 1:318.

50 Mu, 1:319.
of language, again he says that God can unify the activities of the *compotes mentis* (ُعَقَالَة) in such a manner that they themselves could discern the need to communicate, and hence they could design a language. The modality for this would be the same primitive means by which a parent teaches a child a language, or the way in which a mute expresses himself/herself by means of signs. If each exclusive scenario is possible, al-Ghazālī argues, then a combined scenario - partly periodic instruction and partly conventional - is also eminently possible.

In his factual ('reality') argument, he says that there is no unequivocal way of knowing the origins of language since we have no categorical and demonstrative rational proof, no plurally transmitted report (*tawānur*), nor any unequivocal revelation (*sam*ۤ) to support such an assertion. Therefore, he says, further speculation on the subject would be indulgent.۵۱ The Qur'ānic verse, “And He [God] taught Adam all the names,” which theoreticians often quote as proof of the divine origin of language, is not cogent proof, since it is open to several interpretations, said al-Ghazālī.۵۲

Unable to formulate a final position on the origins of language in the section directly dealing with it, al-Ghazālī did not commit himself. In a subsequent discussion as to whether nouns can be established by analogy, he merely proposed a view. It is interesting to observe how he arrived at this proposition. In a manner of argumentation resembling that used by the literalists (*Zāhirites*), al-Ghazālī opposed extending the signification of a designated word to another signifier, unless Arab authorities justified such an association on the grounds of a periodic instruction (*tawqīf*). For example, the word *khamr*, signifies the beverage made of grapes,

۵۱*Mu*, ۱:۳۲۰.

۵۲Ibid.
because it "obscures" the intellect. If a date, or raisin beverage called nabīdhi were to cause a similar effect, the term khamr would not be the appropriate term for describing this new substance. To equate nabīdhi with khamr would be unsatisfactory and tantamount to linguistic ‘fabrication' (ikhtirā') or ‘inventing lies' (taqawwul) conflicting with the periodic instruction (tawqīf) dimension of the Arabic language.

Only if the Arabs were to tell us that they call nabīdhi by the term khamr could it be legitimately used, and not on the grounds of a logical analogy. Similarly, when the Arabs inform us that every root word (masdar) has an active participle (fa'i) the creation of the active participle dārib from the root q-r-b should be assumed to have been constructed on the basis of periodic instruction (tawqīf), and definitely not by analogy. Al-Ghazālī's resistance to logical analogy as formative ground in language was consistent. One of his favourite rebuttals against his polemical adversaries was the phrase, repeatedly found in al-Mustasfa, that "analogy is not applicable in language" (la qiyyasa fī al-lugha).

Here al-Ghazālī comes out very strongly in favour of the tawqīf origins of language.

Al-Ghazālī then argues that although some words might share certain elements of meaning by correspondence and analogy, they would not necessarily be used by the Arabs in that sense. The term zānī (fornicator) for instance, is used to describe the illegal act of heterosexual fornication. On the basis of analogy, the term zānī could thus also be applied to homosexuality when the male pudendum is inserted into another

---

53 Mu, 1:320; 1:322.

54 Ibid.

55 Mu, 2:5; also Mu 2:10 "Inna al-qiyyās bātilun fī al-lugha liannaha tuthbatu tawqīfan"; Mu, 2:39 "wa al-lughatu tuthbatu tawqīfan wa naqlan, la qiyyāsan wa istidlālan."
male's posterior. Similarly, the word thief (ṣarīq) is also applied to a necromaniac (corpse thief) on the basis of analogy since the two words share certain elements of correspondence. Al-Ghazālī disagrees with these analogical extensions. The basis of his disagreement is that one uses a false syllogism. For example, the Arabic term adham, meaning "a black horse," would be an inappropriate term to use to describe "a black person;" just as it would be incorrect to take the term qarūra, meaning "a glass vessel to store liquids," and apply it to describe a "clay jug" or a "pool of water," simply because both words signify the storage of liquids. He insists that the licence for all etymological conjugations (tafrīf) that are based on analogy must be provided by way of periodic instruction or transmission (tawqīf), and only from Arabic speakers. On the grounds of these illustrations, al-Ghazālī concludes that "indeed language is entirely positing and periodic instruction, where analogy is not applicable." (anna al-lughata wad un kulluha wa tawqīfan laysa fiha qiyāsun aślan).

At first, al-Ghazālī argued that there were no universal arguments supporting the theories of the conventional or revelatory origins of languages. However, later on when discussing the role of analogy in the formation of nouns, he came down firmly in support of language as a "specific positing (waḍ) of a particular phonemic configuration, a word to designate a particular sense" as well as supporting the primacy of periodic instruction (tawqīf) in language-use, rather than convention or analogy.

56 Mu, 1:322.

57 Mu, 1:324.

58 al-Azmeh, Arabic Thought, 116.
Al-Ghazālī's insistence on following the authority of the Arabic-speaking community for the interpretation of words, is a central proposition of his legal philosophy. On closer inspection, the privileging of the interpretative community is a consequence of a more dogmatic formulation of language, namely the supremacy of positing (wadī'). Once he had committed himself to his theory that language originated from transmitted authority, the interpretative community became a logical corollary.

Al-Ghazālī was not aware of his limitations as evidenced by the fact that he was unable to go beyond interpretation itself. Despite his best intentions, the desire to preserve the authority of the interpretative community was in itself interpretation and therefore also an ideological moment. Al-Ghazālī's goal of resorting to the authority of periodic instruction (tawqīf) as a standard of objective criteria was not always realisable. For instance it is known that, even in al-Ghazālī's era, grammarians and lexicologists differed in their views on matters pertaining to the Arabic language. Al-Ghazālī does not reopen these debates but strategically aligns himself to the consensus position on these issues by citing examples from the linguistic practice of the Arabs. He would frequently invoke the slogan: "no analogy in language" (la qiyās fī al-lugha) which became a valuable rhetorical device in his repertoire, just as in a previous age, the slogan "there is no rule but that of God," (la ħukm illa lillāh) was the foundationalist rhetorical creed of the Kharijites.

**Original positing and uses of language**

The debate on the origins of language led to the question of how language is used. Clearly, the assumptions for language as positing and language as convention would be different. According to al-Ghazālī lexical nouns (al-asma' al-lughawiyya) have significance at two levels: by original positing or coinage (wadī'iyya), and by
convention (ṣūfīyya).\(^{59}\) He concedes that the meanings of lexical nouns which had originally been posited as general can be subverted to be used in their customary (ṣūfī) or specialised sense. An example of when a lexical meaning is overshadowed by its conventional use is the word dābba, which originally meant "every creeping thing." But subsequently it has been used for things that creep on four feet, excluding thereby human bipeds or the centipede. So with the word mutakallim, which lexically means "a speaker," but more commonly is the signifier for a "dialectical theologian," and the term faqīh, which originally meant means the "one who has discernment," but now means a jurist. Both words - even though they each have a posited (ṣawā') meaning - now have a more specialised meaning. One can compare this to English where "speaker" would cover any number of orators, but "Mr or Madam Speaker," or "the Speaker" would be understood, in most instances, to be dealing with a very specialised parliamentary occupation.

A word can also be used in such a manner that it is totally devoid of its original positing, such as the word, ghāʾit which used literally, refers to "a depressed piece of ground with a protective circumference," but its more common usage is the figurative sense, signifying human excrement.\(^{60}\) The original positing of ghāʾīt was forgotten in language use and only the figurative use comes to mind.

Technical terms adopted by professionals (muḥtarifūn) and artisans (arbāb al-sanāʾ āt) to describe their tools, are named by positing and not by convention.\(^{61}\) If

\(^{59}\textit{Mu, 1:325.}\)

\(^{60}\textit{Mu, 1:326.}\)

\(^{61}\textit{Mu, 1:325.}\)
things were not named by their positing this would have meant that all nouns, and by implication language, had conventional origins. Al-Ghazālī infers that there is a substratum of positing on which all subsequent linguistic developments were based, and therefore, the search for the origins of language should never be abandoned.

Al-Ghazālī admits to an evolution in language, the examples of ghā'īt and dābbā being cases in point. This evolution takes the form of semantic growth where the new meanings of the words do not stray from the original positing such as with the word dābbā which is now used to signify a particular species of creeping animals, where originally it may not have had that signification. The new application does not make its original signification totally absurd or irrelevant. The extreme case is ghā'īt where the literal term was hardly in use but the figurative sense was used more frequently. In both examples there is a semantic link, however tenuous, between the original positing and the subsequently evolved meanings of the words. In this way al-Ghazālī continues to insert linguistic determination in complex language usage, which he does by creating several categories of terms.

Distinguishing between lexical, religious and legal terms

Legal theory by its very nature had to deal with different kinds of terms. It was crucial for the theorist to know in what sense a term was employed. Al-Ghazālī then informs us under the rubric of legal terms (al-asma‘al-shar‘iyā) that some groups, the Mu‘tazilites, the Khārījites and some unidentified jurists (fuqahā‘), distinguished between the following categories of terms.62

---

(1) lexical (lughawiyya)  
(2) religious (diniyya)  
(3) legal (shariyya)

He cautiously elaborates these categories of his theological opponents, but does not indicate his own agreement or disagreement. Engaging in circumlocution, he employs a detailed but unconvincing quote from al-Baqillani who rejected the validity of such categorisation. Al-Baqillani's position on legal terms is encapsulated in the dictum: “that the revelation (shar) had discretion [to change meanings] by imposing a condition (shar_t) [on meanings], not by changing the posited (waď) [meanings of the word],” (fa as-shar tasarrufun bi waď al-shart la bi taghyīr al-waď).

Al-Ghazali agreed that the revelation (shar) did exercise discretion in generating meanings but drew our attention to the convention of language (urf al-lugha) which also had to have some sort of discretionary influence. Semantic growth, at this level, takes place in two ways. The first is to specify (takhṣīṣ) the scope of the signified (musammayāt). For example, the word dabba should in strict lexicographical terms apply to every creature that walks, crawls or creeps. But we know, as customarily applied now, the word is only used for crawling quadrupeds. Similarly, the revelation specified and limited the signification of words like, pilgrimage (hajj), fasting (sawm) and faith (imān) to make them special signifiers. Thus in the same way that the revelation (shar) had a discretionary use of language, the Arabs were also entitled to discretionary use of their language (idh li 'al-shar urfun fi al-isti māl kamā li al- 'arab). The second form of semantical development is to loosen the restrictions on a word. One way of doing so would be to call something by the name with which it is associated or connected. For example, “wine” (khamr) is called “prohibited”

---

63Mu, 1:330.
(muharrama) but, in strict terms, it is only the consumption of the beverage that is prohibited, not the beverage per se. A mother is described as “prohibited” (muharrama), yet, in strict terms, it is only sexual intercourse with her that is prohibited. The same rule is applied to the general term “prayer” (salāt), which included the essential parts of bowing (rukūṣ) and prostration (sujūd). However, all the associated actions and gestures of praying, including bowing or prostration are popularly identified as prayer (salāt) in the customary usage of the revelatory discourse (sharī'ah).

Al-Bāqillānī argued that there should be some form of sanction for legal terms by means of periodic instruction (tawqīf), but he did not provide an example. In reply, al-Ghazālī said that such a requirement was only necessitated when the goals (maqāṣid) of repeated statements (takrīr) and contextual indicators (qarā‘in) were unclear and not easily understood.64 So the lexicographical terminology of salāt, strictly meaning “supplication,” began to assume the meaning of “ritual prayer” once certain other commonly associated actions had been added to it’s meaning in customary usage. The word ḥaJJ, literally meaning “to intend,” came to be known as the formal pilgrimage once the other associated actions had been added to its commonly accepted usage. These and other terms are fairly clear and therefore do not need revelatory sanction for their technical use. Clearly, al-Bāqillānī was more concerned with keeping the primordial origins of language intact, and therefore wished to control excessive discretion in the use of language. He would have preferred, therefore, to have had a periodic instruction (tawqīf) to legitimate language use. Al-Ghazālī, in contrast, would appear to have been content to allow language users the liberty to employ discretion in the determination of religious and legal language, on

64Mu, 1:332.
condition that the users had a clear understanding of the hermeneutical intent of their statements. Here, al-Ghazālī clearly preferred the hermeneutical movement in language - with emphasis on the significance of repetition and contextual indicators as interpretative keys - to a language strictly governed by periodic instruction. While al-Baqqillānī favoured the retention of linguistic normativity, al-Ghazālī was inclined to hermeneutics and linguistic subjectivity. Al-Baqqillānī insisted on the autonomy of the legal lexicon, while al-Ghazālī would only admit to the partial autonomy of the legal lexicon.

So far one observes how an extremely structured discussion on language presents itself in al-Mustaṣfā. Al-Ghazālī actually led the reader into the debate by employing a logical pattern of creating categories, divisions and subdivisions to suggest that the entire project was visible from an archimedian vantage point. When al-Ghazālī’s point was equivocal, and he preferred not to disclose his own position, then he would introduce several categories and viewpoints. In such instances, he subtly juxtaposes his own view among the various positions he was positing, those of his adversaries - such as the Muʿtazilites - and then, with equal art, leave the decision as to whether he supported or rejected the opinions of his adversaries to the reader.

**Completely signifying speech ('al-kālam al-mufīd'):**

**The hermeneutical field**

Having discussed the origins of language and the use of terminology, al-Ghazālī then approached the gist of the linguistic debate in law: the question of signification. The spoken word can either completely signify something or be unable to do so. The hermeneutic domain only concerns itself with the provision of a completely signified spoken language.
Al-Ghazâlî maintains that there are two types of signifying actions (*dalāla*).\(^{65}\)

(1) those that signify (*yadullu*) something

(2) those that do not signify anything

The first type is signification by means of an essence (*ma yadullu bi dhāthiḥ*).\(^{66}\) Rational indicants (*al-adilla al-aqliyya*) are said to signify with their essence. The second type is signification by means of positing and original coinage (*wadâ*), which are of two types: verbal signs and non-verbal signs, such as signals (*ishāra*) and symbols (*ramz*). This typology appears to be of an ontological kind that al-Ghazâlî introduces in language. Certain words in themselves can signify something else, such as logical propositions. Other words and signs signify semiotically, in relation to other signs.

At another level of categorisation al-Ghazâlî then divides verbal signs into those that signify (*mufid*), in other words they have meaning, and those signs that do not signify (*ghayr mufid*) and have no meaning. In order to illustrate verbal denotation al-Ghazâlî presents three types of sentences in terms of their economy of signification:

(1) fully autonomous in their denotation

(2) not autonomous in their denotation except by means of a contextual indicator (*qarîna*)\(^{67}\)

(3) partially autonomous in their signification

Sentences which are fully autonomous in their denotation are verses like: "Do not go near fornication (*zinā*) (Q.17:32)." "Do not kill yourselves (Q4:29)." Such statements were called explicit denotations (*nâṣî*) because of the lack of ambiguity (*zuhûr*) in their

\(^{65}\) *Mu*, 1:333.

\(^{66}\) Ibid.

\(^{67}\) Other terms I use to translate *qarîna*, are "contextual indicator," or "contextual seme," and occasionally as an "associative sign."
meaning. An example of a sentence which only became autonomous in its denotation with the assistance of a contextual indicator would be the verse: “Or he in whose hand is the marriage-tie forgoes his claim... (Q. 2:237.” A contextual indicator clarified that the “hand” meant the power of the guardian or husband and thus made it possible to understand the verse. An example of partially autonomous denotation is the verse “Till they [agree to] pay the exemption with a willing hand, after having been humbled [in war] (Q. 9:29).” 68 The full sense of how exemption had to be paid is not clear from this verse and therefore it is deemed partially autonomous.

Explicit Denotation: Nass

Of the different types of denotation, the most common and frequently used is the explicit denotation (nass). Quite predictably, nass was also divided into two primary types. In the first type the explicitness of the individual meaning-laden vocable (lafz) and the arrangement of the discourse (manzum) leaves one in no doubt as to its meaning. For example: “Do not kill yourselves (Q. 4:29).” The second type of explicit denotation gains its explicit content via the clarity of the meaning (fahwā) and comprehension (mafhum) of the statement. Examples are: “Do not say to them [parents] fie! (Q.17:23); “None of you shall be wronged by as much as a hair’s breadth (faiila) (Q. 4:77); “Whoever does good the weight of a mustard seed (Q. 99:7).”; “From among them are those that if you entrust them with a dinār they will not return it to you (Q. 3:75).”

Al-Ghazālī maintained that sentences that were partially autonomous in their denotation and those that required circumstantial clues, should have had something more than simply the associative relationship (idāfa) between the signifier and the

68Mu, 1:336.
signified (*madlül*). They had to fulfil the condition of being free from any inference of uncertainty (*iḥtimal*) in order to be called an explicit denotation (*nass*). If the uncertainties could not be resolved then the signification would have to be labelled indefinite discourse (*mujmal*) or obtuse (*mubham*). If one of the many probabilities were found to be preponderant, it would be called apparent (*zāhir*), and if the preponderant probability were found to be a distant one, then it would be called an interpreted (*muʿawwal*) statement. Hence a completely signifying vocable can be one of three denotations: explicit (*nass*), apparent (*zāhir*) or indefinite (*mujmal*).

Al-Ghazālī then provides three definitions of explicit denotation (*nass*), because, according to him, *nass* in itself is an equivocal noun or a homonym (*ism mushtarak*). *Nass* is thus a division of language in terms of an economy of certainty.

(1) Al-Shāfiʿī applied the definition of the apparent (*zāhir*) to that of *nass*. According to al-Ghazālī, there was no harm in applying this general definition to the legal (*sharʿ*) understanding of the term. This definition conformed to several usage’s of the Arabs. The Arab say "*nassat al-zabya,*" which literally means "the gazelle lifted her head", thus "exposing" and making it "apparent" (*zahar*). A chair is called a *manassa* when a bride "appears" on it. The Prophet was described as: "*kāna al-rasul ṣallallāhu ʿalayhi wa sallam idha wajada furjatan nassa,*" (When the Prophet (peace be upon him) experienced delight, he made "expressed" it or made it "evident").) According to this definition of al-Shāfiʿī, when one of many probabilities became preponderant with certainty (*qaṭ*) it was called an explicit denotation similar to "evident" or "apparent" (*zāhir*). This means that the "exposure of the head," the "appearance on the chair," and the "evident" delight of the Prophet were implicit and

---

*Mu*, 1:385.

Ibid.
become explicit through the preponderant acts of ‘lifting,’” “sitting,” and “expressing.” These acts did not cease to have these latent properties simply because the preponderant act had not been performed. Here *nass* was defined in terms of the usage of the Arabs and the ability of the term to clearly denote its meaning.

(2) The second definition does not rely on linguistic usage. When a word or sentence is *ab initio* free from any instance of uncertainty (*iḥtimāl*) and its signifying meaning is certain (*qa‘f*) then it is an explicit denotation. For example, the word “five” does not signify “six,” nor does the word “horse” signify “donkey.” It would be considered a *nass* in terms of both the affirmation of the signified and the negation of the non-signified. In so doing, the sense generated from such a word or statement would be certain. Al-Ghazālī points out that a word can be an explicit denotation, which is also apparent and indefinite, (*nassan zāhiran mujmalan*).

(3) The third definition of *nass* relies on associative factors. When there is an absence of an indicant (*dalīl*) which will introduce “reasonable uncertainty” (*iḥtimāl maqūbūl*) in signification then such a sentence can also be called an explicit denotation. The difference between the second and the third definition is one of degree. The second definition requires freedom from uncertainty *ab initio* (*ašlan*), whereas the third definition demands freedom from a particular type of uncertainty (*iḥtimāl maḥṣūs*), namely “reasonable uncertainty,” and not freedom from negligible uncertainty. Al-Ghazālī showed a strong approval for the second sense of *nass*, which sets it apart from being confused with the apparent (*zāhir*). Explicit denotation (*nass*), then, is the measurement of the vocables in terms of the presence of certainty.

---

Hermeneutics: Ta'wil

Signifying speech (mufid) does not only occur in the form of explicit, apparent and indefinite denotation where the linguistic register measures the extent of certainty in denotation. Signifying speech can also be uncertain and open to approximation. When meaning is measured in terms of the absence of certainty in legal theory it is called hermeneutics (ta’wil). Hermeneutical statements (mu’awwal), measure vocables in terms of an economy of uncertainty. A ta’wil interpretation occurs when an uncertainty is reinforced by an evidentiary indicant (dalil). The preponderance of this uncertainty has the effect of grossly undermining the apparent (zāhir) meaning of the vocable and destabilising the essential meaning of the word or sentence. Al-Ghazālī suspected that every ta’wil was a deflection of a word from its literal meaning (haqiqa) to a figurative (majāz) one. Similarly, the restriction (takhfīs) of a general word also meant a switch from literal to figurative. If it had been established that a word’s original positing and literal meaning were both comprehensive (istighraq), then its concise (iqtisār) meaning should be understood to be in the figurative sense. In the case of ta’wil an exception would arise, according to al-Ghazālī, on occasions when the reasons for uncertainty (i’timal) are obvious (yaqrubu) to the mind, but on other occasions the uncertainty may not be so self-evident (yab’udu). It is the strength of the indicant (dalil) that would determine the degree of uncertainty. The indicant capable of introducing an element of uncertainty, could be a contextual indicator (qarīna), an analogy (qiyaṣ), or another stronger apparent statement (zāhir). In fact, al-Ghazālī points out that it would have been difficult to resolve some interpretations without assuming the presence of an elliptical contextual indicator (illa bi taqdir qarīna), even

\[2\] Mu, 1:387.

\[^3\] Ibid.
though the latter sign had not been transmitted authoritatively. If a hermeneutical interpretation (\textit{ta\'wil}) stood to clash directly with an explicit denotation (\textit{nass}), then it would be preferable to generate a non self-evident hermeneutic (\textit{al-ta\'wil al-ba\'id}) in order to avoid a clash with the \textit{nass}.

In rational matters, only a \textit{nass} free of any possibility of uncertainty is acceptable. A strong or weak sense of uncertainty are both equal for the simple reason that a rational indicant does not tolerate any contradiction. The strength of an indicant would to a large extent be determined by the degree of uncertainty. It is therefore compulsory for jurists to direct their attention to those elements which would generate the strongest probability of certainty or uncertainty. This proves that every hermeneutical interpretation is not acceptable purely on the strength of an arbitrary indicant, since people will differ as to whether an indicant is strong or weak, says al-Ghazālī.

In the case of textual uncertainty accompanied by several contextual (\textit{qarā\'in}), only the collective force of these contextual indicators is capable of ending a particular interpretative uncertainty. Singular and isolated \textit{qarā\'in} on their own are not of sufficient strength to eliminate any uncertainty. An example of this is the interpretation of two statements of the Prophet. One was addressed to Ghaylān who embraced Islam having at the time 10 wives. The Prophet said: "Take four and leave the others." In the other statement he ordered Fayruz al-Daylamī who accepted Islam.

\textit{Mu}, 1:388.

\textit{Mu}, 1:389.
while married to two sisters (a marriage forbidden in Islam): “Take one [sister] and leave the other”!76

The Kufan jurist, Abū Hanīfa interpreted these statements to mean a performative, a command to initiate marriage. He explained that “take four” meant “marry four” and only marry one sister. The phrase “leave the other(s),” according to Abū Hanīfa meant you cannot marry them all, only four, or one of the two sisters. Abū Ḥanīfa’s interpretation followed the non-apparent meaning of these statements requiring new marriages ab initio, the implication being that the pre-Islamic marriages of Ghaylān and Fayrūz were invalid.

Al-Ghazālī disagrees with the Kufan jurist. Contrary to Abū Hanīfa, he believes that preference should be given to the apparent (zāhir) sense of the word “take four” or “take one” as presuming the continuity of the marriages. In other words, the command allowed the husbands the option to continue with marriages of their choice, up to four in the one case and one sister in the other. At best Abu Hanifa’s reading of the statement was ambiguous (muhtamal) and supported by an interpretation based on analogy, said al-Ghazālī.77 On the other hand, all the contextual indicators (qarāʾ in) supported the apparent meaning of the statement in a more compelling manner.

There were several contextual indicators which supported al-Ghazālī’s reading of the case. The main one was the understanding of the Companions of the Prophet

76Mu, 1:390.

77Ibid.
and the subsequent practice of generations of Muslims. Further, if the intention of the statement was to invalidate all the marriages there were no additional indications of eliciting the consent of the prospective bride or teachings regarding marriage, especially when the persons involved were recent converts. Abū Ḥanīfa’s preference of the non-apparent meanings was unacceptable to al-Ghazālī because the contextual circumstances clearly contradicted such an interpretation. Al-Ghazālī does concede on a valid point though at the end of this polemic with Abū Ḥanīfa: that these differences in interpretation would change, given the varying conditions that could affect the thinking of a master-jurist (mujtahid).78

In another case al-Ghazālī is prepared to depart from the apparent (zāhir) meaning of the statement in favour of a non apparent interpretation. In doing so he defends the practice of a hermeneutical procedure (tawil) seemingly abolishing (raf) the entire explicit denotation (nass) or part thereof.79 The case in point here is the instance when Abū Ḥanīfa was charged by some theorists, especially al-Shāfi`i, for abolishing part of the nass when he ruled that the tax levy (zakāt) on animals could be substituted by its equivalent in other commodities or cash. The prophetic tradition rules that for every 40 sheep, one sheep should be given in zakāt - annual tax.80 Al-Shāfi`i and his followers interpreted the rule literally, saying that the payment could only be in the form of sheep for sheep-tax, goats for goat-tax and camels for camel-tax. They did not see the tax as being exchangeable. Abū Ḥanīfa, however, argued that it was the value of the tax that was obligatory, not the sheep per se. The

78 Mu, 1:392.

79 Mu, 1:394.

80 Mu, 1:395.
specification of a sheep was only the measurement. Al-Ghazâlî defended Abû Hanîfa's position saying that the

vocable (lafz) is an explicit denotation (naṣṣ) in so far as it established the principle of obligation. It is not a naṣṣ, in so far that it specifies and describes [how the obligation should be fulfilled].

In an apology for al-Shâfî'i's rigid view, al-Ghazâlî said that the founder of his school understood the specification of sheep to be a devotional (taʿabbud) command for two reasons: firstly, because the subject matter was related to a devotional matter such as zakāt, and secondly, the semiotic strength of the indicant was too weak (qusūr al-dalîl) to justify a more liberal interpretation on the grounds of an apparent meaning.

In a veiled critique of "some legal theorists" (usūliyûn), no doubt aimed specifically at Abû Hanîfa, al-Shâfî'i and some of their followers, al-Ghazâlî offered an explanation for their incorrect hermeneutical expositions on occasions. It was, he said, due to their inability to understand that:

...all these matters are in the realm of juristic discretion. Those who are not intimate with the discursive latitude of the Arabs will obviously adopt a dislike [for such interpretations] and assume that whatever the vocable immediately brings to mind is an explicit denotation (hādhîhî kulluhû fi mahâl al-ijtihâd, wa innama tashmaʾizzuʾ anhu tibâʾu man lam yaʾnas bi tawassûʾ al-ʿarab fi al-kâfâm wa zanna al-lafza nassan fi kullî ma yasbaqu ila al-fahm minhu).

In articulating this explanation, al-Ghazâlî also indirectly criticised fellow Shâfî'i's for their rigidity and inflexibility towards language, and as a result, their

---

81Mu, 1:396.

82Mu, 1:394.

83Mu, 1:398-99.
misreading of the intentions of the revelatory and prophetic phrases. He cited other examples where he defended the restriction of the ambit of the explicit denotation (nass) by hermeneutical (ta'wil) expositions. For example, several categories of recipients are entitled to the zakāt-tax levy in Islām. However, to give all one's zakat to one category of entitled recipients was permissible and would not be contrary to the nass. The verse in question (Qur'ān, 9:60) could well have been a nass in terms of two of al-Ghazālī's three definitions of nass, where an apparent (zāhir) categoric meaning (definition one) and an absence of uncertainty (definition three) could qualify a statement as a nass, but it might not have qualified as nass in terms of his preferred definition (definition two) where the text must be free from uncertainty ab initio.

Following the same rationale, al-Ghazālī believed that the Qur'ānic verse which called for sixty needy persons to be fed once, could legitimately be construed as feeding one needy person for sixty days. This verse, he argued, did not comply to the ideal definition of explicit denotation (nass) due to/semiotic uncertainty. Therefore, the number "sixty needy ones" could have meant to indicate the amount of food which was to be disbursed rather than the number of people. This verse, according to al-Ghazālī, is an example of the vagueness leading to ambiguity and uncertainty. However, and this point should be carefully noted, he goes on to say that the feeding of one person for sixty days was not the object of the penance. It was feasible, al-Ghazali believed, in keeping with al-Shāfi'i's views, for the intent of the verse to have been to give life to sixty deserving souls thus ensuring for the penitent the blessings of

---

84Mu, 1:399; The verse in question is Q 9:60: “The offerings given for the sake of God are [meant] only for the poor and the needy, and those who are in charge thereof, and those whose hearts are to be won over, and for the freeing of human beings from bondage, and [for] those who are overburdened with debts, and [for every struggle] in God's cause, and [for] the wayfarer: [this is] an ordinance from God - and God is all-knowing, wise.”

85Mu, 1:400; See Q. 58:4: “And he who is unable to do it shall feed sixty needy ones...”
the poor. In support of his argument of benediction, he argued that no gathering of Muslims is free from a saint (wali) and the opportunity to gain the benediction of feeding a poor saint should not be missed. In this last example, al-Ghazālī reveals his Sufi inclinations explicitly and literally. His overall interpretation, however, did not conflict with the verse but grasped the essence and objective of the verse.

**Grammatology of Lughā**

Language carries a legal tradition, a tradition embedded in our very speech and of which our speech and phrases are unwitting witnesses. Language is the trace of the past in which we live, the unwritten writing which Derrida calls “arché-writing.” In grammatological terms language is always marked, cut, re-cut, re-marked and its signs articulated prior to speech or any phonic linguistic substance.

The language of legal theory has an “arché-writing” and traces of al-Shāfi‘ī, the founding fathers of the law schools and juristic traditions. Al-Ghazālī pointed out some of those traces in the nass and ta‘wil. Even statements that fulfilled the requirements of an explicit denotation (nass) allowed ample scope for interpretation due to semiotic uncertainty. In the instances where al-Ghazālī disagreed with his schoolmen or other scholars, the dispute was premised on different definitions of nass itself. A statement was deemed a nass by one of his definitions, but did not have qualify in terms of his ideal definition. By means of the techniques of hierarchy, juxtaposition and epistemological transgression, al-Ghazālī allowed himself the opportunity to make subjective choices within the confines of a rigidly defined

---

86 *Mu*, 1:401.

87 Goodrich, *Languages of Law*, 120.
theoretical discourse of language and legal theory. A similar observation was made by Frank regarding al-Ghazālī in another context. "He is not trying to deceive the reader," says Frank after a close reading of one of al-Ghazālī's theological texts, "but rather, in a way that conforms to the convention of the traditional manuals, to offer to each that which he is most apt to receive with understanding." 88

Indirectly though, al-Ghazālī did indicate that the reason for his elimination of certain interpretations was that they did not fulfil certain objectives (maqāsid) which he had set for them. These objectives are not supported by explicit textual authority but by inferences and implication. Unlike the later Andalusian jurist al-Shāṭibī, who developed an entire metatheory of the objectives of the revealed law (sharīʿa), al-Ghazālī did not declare that his legal philosophy was based on ethical goals and public interest concerns. He was content, rather, to engage in minor epistemological transgressions, such as inventing or privileging certain definitions acceptable to his taste. Indeed, he contended that juristic disagreements were largely a matter of "taste" or "faculty". His introduction of "taste" in his legal discourse bears scrutiny. He repeatedly reminded his readers that all his proposed interpretations were open and discretionery issues. His euphemism for openness was his repeated statement that these were matters for independent reasoning and juristic discretion (ijtihiād) and an instance where the Arabic language itself allows for discursive latitude (tawassūṭ fī kalām al-ʿarab). 89 Over and above these, but also in the form of an unobtrusive esoteric sentence, he informed his readers 'that every controversy (masʿala) has a particular faculty or taste (dhāwq).’ 90 Few statements in the classical and scholastic


89 Mu, 1:408.
legacy of jurisprudence can be so forthright in admitting the subjective element in legal
judgement and interpretation.

There is also a larger story that unfolds which can be traced on the pages of al-
Mustasfa. Al-Ghazali held al-Shafii in high esteem as an Arab and as an expert in
Arabic language, especially his mastery of the Arabic idiom and its application. At
the same time, in a dialectical irony as shown by his veiled criticism of al-Shаfī’s
interpretation, he implies that the latter’s literal interpretations were due to a lack of an
appreciation of the semiotic latitude of the Arabic language. One wonders whether al-
Ghazali’s search for semiotic latitude stemmed from language-use itself or whether it
was not a product of his inscription - grammatology - of the language. For surely, al-
Shаfī ought to have been aware of the flexibility of the language?

Al-Shafī himself had made a strong case for the preservation of the Arabic
language, especially his insistence on the learning of the language of revelation for
devotional purposes. The Arabism of al-Shafī was perhaps the ideological factor
which compelled him to insist that zakāt on animals could only be given in animal
equivalents, and to insist on the Arabic reading of the chapter called “The Opening”
(al-Fātihā) in prayers. The non-Arab Abū Ḥanīfa, on the other hand, allowed non-
Arabic speakers to recite the Qur’an in its various translated forms in ritual prayers if
they did not know the Arabic version, and allowed the tax on animals to be given in
any form.

---

90Mu, 1:410.

91Mu, 2:194.
Al-Shāfī‘ī’s ideology of primitive Arabicity also became the foil whereby he could frustrate the attempts of the, mainly Kufan non-Arab law school known for promoting informed judicial opinion (al-ra’y), kalām and the rational disciplines. Al-Shāfī‘ī’s aim was to maintain a counterbalance in order to neutralise the hegemony that quarters sympathetic to rational and foreign sciences might establish within law. When studying his writings, one can virtually see al-Shāfī‘ī’s discourse being generated in a polemical code against the Kufan rationalists. To limit the scope of rationalism in law for instance, al-Shāfī‘ī considered the vocable (laž) and signification (ma‘nā) as inseparable. In other words, the very texture of the revelatory language had - in al-Shāfī‘ī’s view - to be accepted as an intrinsic and substantive part of the explicit denotation (nass) itself. Conversely, Abū Ḥanīfa perceived revelation as primarily signification (ma‘nā) alone, and the question of the vocable was a secondary issue. In this latter scenario, the modalities of interpretation had greater latitude much to the chagrin of al-Shāfī‘ī, whose own ideological ends were well served in promoting a philosophy of language that did not permit the separability of word and meaning.

In this larger debate al-Ghazālī found himself trapped between two competing loyalties. The one was his loyalty to the Shāfī‘ites born of the patronage he enjoyed from Shāfī‘ite/Ash‘arite quarters. The other was his loyalty as a Persian - akin to a foreigner-status in the Arabic world at the time (like Abū Ḥanīfa) - which made him repudiate some of the views of the founder of his school as well as certain purist tendencies of the Shāfī‘ī school.

---

92 See chapter on biography of al-Ghazālī.

93 In the al-Munqidh, al-Ghazālī says that if there are any shortcomings in his language use people should feel free to correct it. His insecurities as a non-Arab certainly surfaces.
In his discussion of *bayān*, al-Shāfi‘ī limited the role of discursive reason and tried to generate a logic of rhetoric. In his reflections on *nass* and *ta‘wil* al-Ghazālī does something similar where he lavishly develops his rhetoric. The terms: *nass*, *zahir*, *mu‘awwal* are in reality tropes, in which words and phrases are used in such a way as to effect a conspicuous change to their standard meaning. Instances where al-Ghazālī demonstrated the shades of interpretation are perhaps better seen as a rhetoric of tropes or a rhetoric of ambivalence. The effect of this rhetoric is the unconscious subversion of utterances couched in seemingly straightforward constative terms into ambiguous and inconclusive discourse even though the entire project was to create certainty.

**Conclusion**

From al-Shāfi‘ī to al-Ghazālī, and perhaps to this very day, the debate on the nature and function of language is far from settled. We have seen that legal theory (*usūl al-fiqh*) is both a kind of rhetoric and a particular form of discourse with its own history. Moreover, legal theory deals with the rhetoric and discourse of religious language expressed as the speech of God.

An examination of the linguistic topoi of a section of al-Ghazālī’s language debate - *nass* and *ta‘wil* - shows that these linguistic categories function as tropes. There exists both an economy of certainty (*nass*) and an economy of uncertainty (*ta‘wil*) in the discourse. *Nass* and *ta‘wil* have pretensions of being regulated by objective rules, but the subjectivity and linguistic arbitrariness in their function is evident. These tropes function within a linguistic system or grammar of law, destabilising the precise meanings of posited utterances and rendering them undecidable in constative terms. Their meanings are suspended between performatives and constatives. These tropes themselves were the products of a specific type of language use at a particular time. They became tropes because of the way they gave
effect to a conspicuous change in meaning. The subsequent use of these tropes and others, as part of a way of languaging about law, was arrived at by metalepsis, as past effects of present causes. The intention is clear: to linguistically reproduce the past.

A close reading of the Ghazalian text shows that the language of Islamic legal theory has a grammatology, a history of systems of inscription and signs. The "arche writing" and "trace" of ideological, political and discursive inscription cannot be denied.

The legal language of al-Ghazali is, to a large extent, apodictically predetermined in order to fit the theological requirements of al-Ghazali's ideology. Utilising the themes of original positing, al-Ghazali succeeded in arguing a position of determinism within language in the same way that determinism was supported in theology. Al-Ghazali's conclusion on the origins of language, neither entirely revelatory nor entirely conventional, illustrates this point. However, there is also a part of legal language which is not apodictically predetermined and allows for the play and influence of social meanings. This then produces a creative tension between apodicticity and the evolution of usūl-linguistics.

Despite ceaseless effort on the part of al-Ghazālī to create typologies, definitions and micro and macro structural hierarchies of language, they have not been seen to play any substantial role in constructing and constituting the language of legal theory. They appear to be purely for the purposes of the "external" management of language. This reveals that al-Ghazālī held tenaciously to the binary distinction between the inner and outer dimensions of language, the distinction between vocable and signification. In short this was a kind of linguistic dualism. Al-Ghazālī unfailingly wavers between the binary relations of theology and discursivity, objectivity and
subjectivity, certainty and uncertainty, linguistic nominalism and the materiality of language.
Chapter 5

*Meaning and the Metaphysics of Presence*

**Introduction**

The French philosopher, Jacques Derrida, has argued that the metaphysics of presence pervades Western philosophy.\(^1\) It is his contention that philosophers rely on the assumption of an immediately available area of certainty, a search for that which is immediately present. Derrida denies this presence in that there is no present in the sense of a single definable moment which is "how." The realm of the independent signified does not exist and we are unable to escape a system of signifiers. It is this presumption of presence that has given priority to speech (phonocentrism) over writing, because of the erroneous belief that it implies immediacy. Writing is considered to be hopelessly mediated. Derrida's ambition to deconstruct the opposition between speech and writing is linked to uncovering the metaphysics of presence.

These presuppositions of a metaphysics of presence can also be detected in the Muslim philosophical tradition. Al-Ghazālī's relentless effort in legal theory was to create a language which could guarantee the delivery of both truth and certainty. He felt that the Arabic language was a key factor in facilitating these goals, but admitted an Islamised version of Aristotelian logic inserted into the surface of language. What he did not account for was that language itself was mediated, both through speech and writing. It was a constellation of signs that referred to each other and differed from each other in a process of signification.\(^2\)

---

\(^1\)Derrida, *Of Grammatology*.

I will examine some of those elements in al-Ghazālī’s legal theory that disclose that language is mediated by a variety of techniques and assumptions. I will first examine al-Ghazālī’s treatment of contextual semes (qarīna), figurative language (majāz) and perspicuous declaration (bayān), and explore how these signify meaning. Thereafter, I will attempt to uncover the metaphysics that underpin the notions of discourse (khīṭāb), inner speech (kalām al-nafs) and the relationship between law and writing in juridical language.

**Contextual Semes: Qarīna**

Hermeneutical interpretation in Islamic legal theory relies heavily on meanings that are not necessarily apparent but may be intended. Therefore contextual semes (qarāʾin) play such an important role and warrant some reflection to uncover whether al-Ghazālī believed that language was mediated.

A contextual seme or contextual indicator (qarīna) is a verbal or non-verbal element clarifying a part of speech extraneous to itself. The contextual indicator (qarīna) is in effect, a contextual seme in legal hermeneutics. It is the semiotic sense that directs the attention of the hermeneut to an appropriate semantic meaning. Al-Ghazālī stated quite categorically that:

there is many an interpretation (taʿwil) that does not avail itself except by the ellipsis of an contextual indicator (qarīna), even if such a sign is not reported. Al-Ghazālī held that a contextual seme could be:

---


²Mu, 1:388.

³Mu, 1:388.
Al-Ghazzālī provides several illustrations in support of his assertions. An exposed vocable (laţf makshūf) is the verse: "And give [unto the poor] their due on harvest day (Q. 6:141)." An example of a rational indicant (dalīl al-‘aql): "And the heavens will be rolled up in His right hand (Q 39:67)." Another is the statement of the Prophet which says: "The heart of the believer is between the two fingers of the Compassionate One." In al-Ghazzālī’s view, these statements were understandable within the context of their utterance without having to resort to a figurative interpretation.

Contextual semes of condition (ahwāl) are endless as indicators (ishārāt), symbols (rumūz), movements (ḥarakāt), precedents (sawābiq) and antecedents (lawāhiq). They were perceived by observers, the Companions of the Prophet and their Successors, who communicated with these contextual indicators in mind. If the sense of these indicators was implicit, then necessary knowledge (‘ilm ādarū) compels us to understand the intended meaning. Contextual indicators are applicable to those instances where there are no lexical prescriptions. Even those theological and legal schools who do not accept the validity of a general statement (‘ām) or that of an imperative (‘amr), manage to arrive at such a sense by means of contextual indicators.

There are also occasions when the contextual indicators compete with legal syllogism (qiyyās) as evident in the case of Abū Ḥanīfa who gave preference to the latter. Whenever the resultant meaning of an analogy is in conflict with the obvious

"Mu, 1:340."
meaning of a text, it is the collective meaning of contextual indicators that plays the
decisive role, according to al-Ghazālī. Contextual indicators are capable of producing
a meaning favourable to the obvious meaning of the text, in opposition to that of legal
syllogism (qiyās). This is an allusion to the opinions of jurists on the differences in the
value of a determinant indicated through analogy and a determinant indicated through
words. One can infer that al-Ghazālī the jurist seemed to favour the semantic and
semiotic dimension of legal theory above the logical, in spite of his stated claim that
logic was the key to the understanding of legal theory.

Metaphor: (Haqiqa) Literal and (Majāz) Figurative Expressions

Some contextual semes have over time developed specific peculiarities and
uses. The most prominent is the use of metaphor. In an earlier work al-Mankhūl, al-
Ghazālī dealt with literal (haqiqa) and figurative (majāz) discourse. In al-Mustasfā he
limited himself to a brief overview of his earlier views and admitted to the role of
majāz-expressions in the study of legal language. Its opposite, haqiqa, was a
homonym (mushtarak) which could convey the essence of something (dḥāt al-shay')
or the proper sense of speech (haqīqat al-kalam).

With reference to words, a haqiqa expression is one where the vocables are
used to convey an assigned meaning at origin. When the Arabs do not use a word in
the sense of the original coinage, it is a figurative or majāz expression. Majāz-

\^Mu, 1:392.
\*Abū Ḥāmid al-Ghazālī, al-Mankhūl min Taʾlīqat al-Uṣūl, (ed) M. Haytu, (Damascus: Dār al-
Fikr, 1980/1400) 85.
\*Mu, 1:341.
expressions generally appear in three primary forms, according to al-Ghazali. The first form results from a 'borrowing' (isti’āra) of meaning as a result of a resemblance and similarity of qualities between two things, for example, referring to a brave person as a 'lion,' or to a stupid person as a 'donkey.' These are also called tropes, meaning 'turns' or 'conversions.' The second form is the result of an 'excess or surplus' (ziyāda) of meaning, which is not utilised for the purpose of signification. If the word is used in a context where it does not signify, then it is contrary to its original positing. For example the Arabic preposition "ka" denotes the signification of a simile, 'like' or 'similar.' But with reference to God, in part of the verse "laysa kamithlihi shay' (there is nothing like unto Him, Q. 42:11), the letter "ka" does not denote the meaning of a simile, since comparing and creating similarities with God and non-God would be considered to be theologically offensive. The word "ka" denoting 'like' in this instance, has therefore surplus meaning. The third form originates from a verbal economy (nuqṣān) which does not invalidate understanding. An example is the verse: "Ask the village," meaning, 'ask the people of the village (Q. 12:82)." The Arabs are accustomed to this type of verbal ellipsis. An inanimate object or an abstract concept is spoken of as though it were endowed with life or human attributes or feelings, as the "village" in the above example. This figure is related to the metaphor of personification and is known by the Greek term, prosopopeia. Majāz-expressions are also identifiable by their linguistic uses, forms and grammatical compositions."

On the question of majāz, the Ash'arites tried to adopt a middle position between the Mu'tazilites who espoused it, and the Jabarites who rejected it. The Ash'arites agreed to use majāz as a substantive instrument of interpretation. The point of departure between the Ash'arites and the Mu'tazilites was their disagreement on the

---

10 Mu, 1:341-2.
11 Mu, 1:342.
extent to which the \textit{majāz}-expression could be legitimately employed in the 
interpretation of divine revelation.\textsuperscript{12}

An assessment of al-Ghazālī’s works on interpretation, especially esoteric 
interpretation such as in \textit{Jawāhir al-Qur’ān} (Gems of the Qur’ān) and \textit{Mishkāt al-
Anwār} (Niche of Lights), would reveal that the referential notions of \textit{haqīqa} and \textit{majāz} 
had been subjected to a particular intellectual undertaking. In these works the 
terminology is inverted from the general use of these terms. A \textit{haqīqa}-expression is 
considered to be that which refers to the non-sensory world (\textit{ālam al-malakūt}), 
whereas this world is signified as the ‘prison of \textit{majāz}.’\textsuperscript{13} Ormsby concludes that a 
scrutiny of al-Ghazālī’s original Persian writings on Sufism discloses his perception 
that everything else enjoys a figurative (\textit{majāzī}) existence, only the existence of God is 
real (\textit{haqīqī}).\textsuperscript{14}

The fact that al-Ghazālī did not continue in this vein in his penultimate work 
raises the question as to whether or not he had abandoned his previous views on 
\textit{majāz}.\textsuperscript{15} A possible explanation for this dissonance here between al-Ghazālī the jurist 
and the \textit{sūfī} may be quite simple. A \textit{sūfī} approach is probably inappropriate in the 
study of the law, where precise definition of both the meaning and interpretation of the 
words is paramount. To imply in the very practical study of law that the world was


\textsuperscript{14}Eric Ormsby, \textit{Theodicy}, 55 citing Abbas Iqbal ed. \textit{Makālib-i farzi-yi Ghazzālī bi-nām-i} 
\textit{Faḍā’il al-Anām min Rasā’il Ḥujjat al-Īslām} (Tehran: 1954/1333), 20.

\textsuperscript{15}Ormsby notes that Louis Massignon claimed that al-Ghazālī had abandoned his 
controversial position on the “perfect rightness of the world” for instance, offering the works, \textit{al-Iqtiṣād} fi al-Ī tiqād and \textit{al-Mustasfa} as evidence, \textit{Theodicy}, 61.
Chapter 5

not ‘real” but figurative, would have paved the way to antinomianism which al-Ghazālī wanted to avoid.

Nevertheless, *if majāz* was perceived as a problematic notion in legal discourse, knowledge of the nature of ambiguity, and how this ambiguity could be removed would have been welcomed by jurists who were positivistically inclined. Al-Ghazālī did indeed wish to remove ambiguity and to achieve this end he used the notion of perspicuous declaration, *bayān*.

**Perspicuous Declaration (Bayān):**

**Indeterminate (Mujmal) and Determinate (Mubayyān)**

Ambiguity and indeterminacy is the supreme problem for the jurist in order to discover God’s rule. Therefore, the a perspicuous declaration is required to dispel such ambiguity. A statement can be rendered ambiguous by several instances such as a homonym, ambiguous antecedents to ambiguous non-literal meanings. In order to dispel ambiguity, al-Ghazālī makes a binary distinction between nouns that have an assigned meaning and nouns which have an acquired meaning through customary usage. Where an assigned meaning creates ambiguity he would use a customary sense of the word to dispel the ambiguity and arrive at the intended sense of the word, and vice versa.

Al-Ghazālī used this binary distinction to rebut the arguments of his theological opponents. The Qadarites argued that substances (*āyān*) *per se* cannot have the attribute of prohibition (*tahrīm*). They believed that it was the actions related to the abuse of a substance, which were declared prohibited.¹⁶ Al-Ghazālī avoids this

¹⁶Muṣ, 1:346.
perfectly legitimate argument, which distinguishes between substances and attributes, and draws for the purposes of his own defence on the customary determination of language. When a customary usage of the language conflicts with the assigned and semiotic use of the word, then custom trumps all other meanings. He did not justify why custom should gain precedence over epistemological concerns. This is not only an arbitrary method of dismissing a legitimate refutation of his stance; it could also be viewed as an attempt to insert the customary determination of language into the structure of language. One can only speculate that the pre-eminence of custom in language, as in several other instances of Islamic law, is justified on the grounds that it is an instance of material reality and pragmatism which could be tolerated as long as such reality does not conflict with revelation. The following verse is a useful illustration: 'Prohibited for you is carrion..." The Qadarites argued that this verse was indeterminate since it was not clear whether the prohibition referred to the eating, selling or handling of carrion. While al-Ghazālī indirectly admitted that it was the action, and not the substance which was prohibited, he argued that the customary use of the word made the intended sense clear, that eating was prohibited and nothing else.

Similarly, al-Ghazālī invokes custom in the use of language in explaining the tradition: 'Error and forgetfulness has been eradicated from my community." The phrase of the tradition (ḥadīth) in question is not a universal statement which provides indemnity from all errors of omission. What this phrase meant and how it was understood in the customary usage (ṣurf al-istiṣ'āl) prior to the "arrival of the revelation" (qabla wurūd al-sharī'ah) would be the criterion for understanding this phrase. According to al-Ghazālī, it was understood that the effect of certain action(s) will be excused in religion. But this phrase was never meant to give carte blanche

\[13^{Mu}, 2:173.\]
\[18^{Mu}, 1:347-8.\]
indemnity to all possible contingent acts of omission. To understand certain phrases, said al-Ghazālī, one had to search for an appropriate contextual indicator that makes the intended sense clear and should therefore treat elliptical statements as having several possible senses. For example, in the verse: 'Prohibited to you are your mothers (Q. 4:23)” the only appropriate intended sense was that “intercourse” with one’s mother was the prohibited action.

Al-Ghazālī also used the category of perspicuous declaration to address the crucial issue of negation. By way of illustration, he cited some of the many prophetic statements which says : ‘No prayer except with the Opening of the Book”, “No prayer for the neighbour of the mosque except in the mosque.” This negation of prayer and other acts had been the subject of considerable controversy among jurists. The question was: does it mean that if prayers were performed in a house close to the mosque, or without the Opening chapter being recited, that these acts ceased to be acceptable acts? It was to know what type of negation had taken place that was of interest to al-Ghazālī. Statements of the order of ‘No salāḥ except by...,” “no action...,” “no error...,” were in his view partially indeterminate. The negation was not a negation of the “form” (sūra) of these acts but more a negation of their objectives (maqāṣid), especially the objectives of the shari‘a terms. The approved view, according to al-Ghazālī, is that the negation is evident (zāhir) in the negation of soundness (siḥha) of acts with the possibility of the negation of perfection of these acts in terms of an interpretation. It does not matter to what extent legal fasting had been obtained, if it was not sound in terms of its objectives of virtuosity and perfection, then there was no fast. Al-Baqillānī takes an extreme view and says that these statements of negation are indeterminate (mujmal). That means that an absence of virtue and

"Mu, 1:351-52."
perfection in the stated acts of fasting and prayer, for example, was tantamount to the negation of the act itself.

There is a dispute among the experts whether a general statement (‘umūm) is an evident statement (zāhir) or indeterminate (mujmal). These statements "No prayer..." "No marriage..." are general and involve the negation of both the cause (mu‘atthir) and effect (athar). Even if the negation only extended to the cause, then the effect would disappear with the cause.

It becomes clear that al-Ghazālī did not make a distinction between the form (ṣūra) and effect (hukm) of utterances, in the same way that the Mu‘tazilites did in order to create equivocation. For him the technical conventions of the revelation (‘urf al-shar‘), the conventions of language-use (‘urf al-istiṣā‘ māl) and the conventions of language (‘urf al-lugha) can all be effective at different levels. Terms like prayer (salāt), fasting (ṣawm), ablution (wudu‘), marriage (nikāh) had their meanings defined by the revelation (shar‘). Hence, there was no uncertainty about the meaning of these revelatory terms (al-asāmi‘ al-shar‘ iyya). Therefore, when statements of a negative order were uttered it meant the very act of prayer (salāt) or marriage (nikāh) was denied. For this reason al-Ghazālī said it was absurd (khalfan) to assume that only the form (ṣūra) of acts were denied, and not the act per se.20 In taking this stance, he clearly wished to rebut the equivocation created within language by the Mu‘tazilites.

Such a linguistically determined reading certainly suited al-Ghazālī’s ṣūfī tendencies. It clearly promoted the idea within the structure of the revealed law (shar‘i), that a religious act which failed to fulfill its objectives (maqāṣid) had implicitly ceased to be a recognised religious act.

20Mu, 1:352.
Al-Ghazālī also made the point that in some instances a word having a defined meaning (*hukm mutahaddid*) was not necessarily superior to a word which might have been subjected to several registers of meaning even if it had an authentic meaning (*al-*hukm al-ʾastī), a rational meaning (*al-*ḥukm al-ʾaqli) or a lexical meaning (*al-*ism al-lughawi). In other words, some instances are simply pregnant with ambiguity, and he believed, that the very fact of their ambiguity was a virtue. To say that the revealed (*sharī*) meaning should gain priority in signification is an arbitrary preference, as there is no evidence that the Prophet did not use words in a rational or lexical meaning in order to explain things. Al-Ghazālī gave several examples to show that a word could be ambiguous in several respects at the same time. Surprisingly, al-Ghazālī did not wish to obviate these ambiguities. The example he cited was the statement of the Prophet: ‘Two and above constitutes a gathering (*jamāʿa*).” There are several possible interpretations. It could have meant that more than two is called a gathering; a *jamāʿa* had a minimum of two; or that the virtue of a *jamāʿa* was acquired with more than two persons. In his discussion of ambiguous statements (*muḫmal*), al-Ghazālī attempted to prove that the Prophet did not make frivolous and ineffectual statements. But, when faced with a statement which said: “circumambulation (*tawilf*) around the *kaʾba* is prayer (*ṣalāḥ*),” he explained that *ṣalāḥ* in this context was an ambiguous (*muḫmal*) statement since it did not signify the normal ritual prayer.

Al-Ghazālī’s treatment of contextual semes, figurative language and perspicuous declaration was straightforward with no real departures from the standard positions on these issues. In dealing with indeterminate words he did, however, develop the meaning of the negation to coincide with his concerns as a ʾṣūfī. When prayer and other acts of worship are negatived in texts, then al-Ghazālī reads these as

---

22 *Mu*, 1:357.
the denial of the essence of even though the forms may legally still be present. Thus when one reads al-Ghazālī carefully, one cannot but notice that there is something more than the materiality of meaning. There is also, I believe, a metaphysics of meaning which is the referent of the material world, characteristic of logocentric discourse. The description and examination of this metaphysics will be pursued in the rest of this chapter.

Method of Understanding the Intention of Discourse (Khīṭāb)

According to al-Ghazālī we can only understand the meanings of letters, sounds and invented languages because of our prior knowledge of the primordial positing of language (bi sабāb taqaddum al-mā' rīfa b'il muwaḍa' a). Al-Ghazālī said that the communications prophets or angels hear from God and from angels were not in the form of letters, sounds, or a conventional language. Therefore, the recipient of such messages was not required to be familiar with the conventions of language. In normal speech one understands the intentions of speech only when God creates within the recipient immediate knowledge (ʿilm darūrī) by three means:

(1) through a speaker
(2) hearing from His speech;
(3) understanding the intentions of His speech

Speech and sound of a revelatory nature are, however, not comparable to what is normally understood by these terms. It is similar, said al-Ghazālī, to expecting a blind person to imagine the perception of colours and forms. What prophets hear of divine speech (kalām Allāh) via angels is probably carried in 'treated' voices as part of the

---

21 Mu, 1:337.
22 Mu, 1:337-38.
23 Mu, 1:338.
work of angels “without the essence of speech” (dīna nafs al-kalām) being created. 26 Al-Ghazālī illustrates his point with an example. When one says “I heard the speech of Allah” (kalām allāh) it is similar to saying “I heard the poetry of al-Mutanabbi.” The fact is that one did not actually “hear” the voice of al-Mutanabbi but did hear the voice of someone else who recited his poetry, or heard the mind’s voice, or one’s own voice if one read the poetry oneself. In other words, the “essence of speech” is attributed to al-Mutanabbi the poet, while the utterances were created by the reader of his poetry.

In addition to the theological contortions, al-Ghazālī’s discourse was hopelessly phonocentric in that speech was assumed to create immediate and certain knowledge. It also created a binary distinction between an essence of speech and a non-essence. Al-Ghazālī introduced the notion of the essence of speech and created sounds and words. Superficially, it may sound convincing, but the relationship between an essence and a non-essence of speech has to be mutually interdependent; the one is inherent in the other. In al-Ghazālī’s example, this mutuality is precisely intended to eliminate one type of speech for theological purposes.

Psycho-linguistics:

Inner Speech (Kalām al-nafs)

The nature of the speech that we hear raises the crucial issue of the nature of the original divine speech. Al-Ghazālī’s discussion of the latter makes it possible for us to interrogate the metaphysical assumptions he holds on divine speech. The nature of God’s speech had been the subject of extensive theological debate between the Mu’tazilites and the Ash’arites. The latter held that God’s speech and revelation emanated from His eternal attribute of speech, without beginning and end. Hence, the

26*Mu, 1:339.*
speech of God (kalām Allāh), according to the Ashʿarites, was eternal and uncreated. On the other hand, the Muʿtazilites held that God’s speech stood entirely within the created order. They often asked the Ashʿarites whether the letters and sounds that made up God’s speech in a recitation also had the quality of eternity. In response to these very cogent ideas, the Ashʿarites developed the notion of “internal speech,” “speech of the heart or psyche” (kalām al-nafs) in opposition to “phonic speech,” (kalām al-lafz) or, “speech of the tongue” (kalām al-lisān). This duality of speech, echoing the duality of the essence and non-essence of speech corresponded to the duality present in all languages: the duality of meaning (maʿnā) and the emitted sound (lafz), signified and signifier.

Al-Ghazālī also supported the notion of psychic or inner speech, kalām al-nafs, in effect conceding to the Muʿtazilite critique that language is not absolutely transparent.

It is a speech which is located (al-qaʿīm) with the essence of Allah (bi dhāt allāh) the Sublime. It is an eternal attribute from amongst His attributes. And al-kalam is an equivocal or homonym (mushtarak) noun. It could mean those words that signify what is in the mind/soul (nafs). Like you would say: “I heard the speech of someone and his eloquence.” Or, it could mean the signified (madīl) of expressions (ḥabārāt), which are significations (maʿānī) located in the mind/soul. As it was said by (the poet):

Speech lies in the heart (fuʿād)
And surely the tongue has been made a sign
of what is in the heart ...”

Admitting the notion of “inner speech” (kalām al-nafs) as a characteristic of the word of God, opens up the discursive space for the theological reception of God’s speech in Ashʿarite and later Sunni religious discourse. As the contemporary Egyptian

---


28 Mu, 1:100.
scholar Abū Zayd points out, the Muʿtazilite insistence on the createdness of the word involved an ideological project. For them it was not so much a matter of the createdness of the divine word but what concerned them was the ends and consequences of such a notion. The rationalist trend viewed the human being as the object of revelation, whereas in the Ashʿarite belief in the uncreatedness of the divine word, the human subject disintegrated in the face of revelatory discourse.

The Ashʿarites admitted in the end that revelation was essentially "the discourse of the soul" (kalām al-nafs). "The attribute of the Word, subsisting in the divine Essence, is first and foremost this internal Word of God, which is eternal and uncreated, without future or past, without multiplication or division." God then made this manifest ad extra by created sounds and letters. The inference to be drawn from such a conclusion was that the revelation at hand, in the form of created words, was a signified of the psychic speech. In this way, Ashʿarism opened for itself a small window to admit the role of the created dimension of revelation, namely "phonic speech" (kalām al-lisan). By means of a sleight of hand al-Ghazālī tells us that the phonic speech of revelation is not actually the revelation, but that the "real" speech is the "inner speech" which is the essence of the phonic speech. In other words, when one says the Qurʾān is the word of God one says so figuratively and not literally. Otherwise, one has to bear in mind the essence/non-essence duality of all speech not admissible in reference to God. In this way the revealed text is exposed to its worldliness in legal theory. The irony was that despite Ashʿarite protestations against the notion of the createdness of the divine word, all their subsequent methodologies, both hermeneutics and epistemology, appreciated the worldliness of the text. From time to time, however, there was a relapse into the apodicticity of the theological.

29Abū Zayd, Maḥfūm al-Nasṣ, 277.
Al-Ghazālī then introduced another, but important, distinction between “speech of God” (kalām allah) and “inner speech” (kalām al-nafs). The “inner speech” or “the speech inherent in the mind,” in other words the “meanings” of phonic words are mirrored by predicates, inquiries, commands, prohibitions and admonitions. The meanings were the mimesis of the phonic words, or depending what came first, the phonic words were the mimesis of the “mind words,” to coin a neologism, or “idea words” as Rahman preferred to call it. If the speaker of revelation is God, then the internal speech also belongs to the realm of eternity. But al-Ghazālī was compelled to explain the difference between “inner speech” and the “speech of God.”

The speech of God is one. And in addition to its unicity, still comprehensively contains the multiple “entities of discourse” (mā‘āmi kalām), which is similar to His knowledge being one. Yet, he still comprehends the infinite to the extent that not an atom’s weight can escape His knowledge in the heavens or the earth. It is a complex understanding, and the task of explaining this is that of the theologian, not the legal theorist (usūlī).

“Inner speech” is variegated and multiple. Each human being has a peculiar inner speech which is not communicable except via letters and signs. God’s inner speech is something different. The difference is that God can communicate inner speech without the mediation of letters and signs. Divinity creates within the recipient the necessary knowledge (ʿilm darūrī) which constitutes the communication. Similarly, “hearing” is also created without sound, letters or signification. Whoever hears such a communication has “certainly heard the speech God” and it is this communication which we call prophetic revelation. When that very speech is heard from the mouth of a Prophet, or an angel, it would still be correct to call it speech of God.

\[^{31}\text{Mu, 1:100.}\]
\[^{32}\text{Rahman, Islam, 31.}\]
\[^{33}\text{Mu, 1:101.}\]
\[^{34}\text{Mu, 1:101.}\]
\[^{35}\text{Mu, 1:101.}\]
The distinction drawn by al-Ghazālī between *kalām al-nafs* and *kalām allāh* was significant. Contrary to the belief of the Muʿtazilites, who stated that the speech of God was created within bodies, al-Ghazālī argued that it was indeed God who spoke, but through sounds and letters belonging to the world of creation which was manifested in His single and immutable word. Al-Ghazālī makes the point that internal speech, “according to us [humans],” is multiple. We then have to assume that God’s inner speech is multiple. The singularity of the “speech of God” (*kalām Allāh*) signifies universal volition (*irāda*), whereas the multiplicity of “inner speech” (*kalām al-nafs*) signifies the multiple cognitions (*ʿulūm*). In other words, the universal speech of God allows for variations of cognitions and different times and places.

Al-Ghazālī introduced this interesting debate on the “inner speech” in a legal text without overtly making the connection to phonic speech (*kalām al-lafz*). Law is virtually exclusively the realm of the latter. The sources of law in the form of phonic speech are constantly constrained by the hidden operations of the inner speech which theologises language.

**Law and Writing**

From the earliest times, law has been inscribed and codified, be it chiseled on stone, scratched on vellum or written in books. The nature of the relationship between law, writing and power is a very complex relationship. Writing serves several
functions." It suggests the availability of law but also acts as a restraint on its interpreters. But writing also creates the need for interpreters, a priestly and professional class of interpreters and commentators. As a written text, it requires a special pedagogy and authoritarian mode of teaching. And so writing makes it possible to encode and veil legal rules.

"Whoever does not wish to write down this introduction [on logic] should instead start this book from the first axis (al-quṭb al-awwal)," said al-Ghazali in the opening parts of al-Mustasfa. Is writing the transparent and neutral transmission of words? If writing was as indifferent as it is assumed, why offer your audience the choice to write down the introduction to logic? These questions seek answers especially when the sentence prior to that warned that a failure to comprehend logic would impair one’s understanding of legal theory.

Clearly, al-Ghazali intimated that writing was a form of languaging and imagining the world, even if in this instance he only meant the writing of logic. His theoretical attempt to separate the controversial introduction to logic from his repertoire on legal theory, but in practice insist on its inclusion, in itself discloses what he was hiding. He was trying to suppress an admission, that the nonverbal signs - location of the introduction, giving students of law a choice to take down the dictation of the section on logic as well as the hidden context - would all contribute to the reader's understanding of the world of controversy in which he lived. He was concerned that his espousal of Aristotelian logic and engagement of kalām, would reveal his motives and fears. In addition, it was an indirect admission that language

40Mu, 1:10.
41Mu, 1:10.
was a series of gestures or performances that encoded and veiled the context of utterances.

What was al-Ghazālī's understanding of writing? If we take into account that according to him, the primal form of revelation was 'inner speech,' then there is much to say about the native unity of voice and writing. Legal theory, or the language of law in general, carries the legal tradition and becomes the grammar of a juristic community and the rule of their speech. But preceding that grammar of law, is an unwritten writing or pre-given script of the inner speech doctrine affecting the revealed word. This unwritten writing, known as 'arche writing' or 'trace' acts as an imprint of the past on the present. In grammatological terms language is always marked by the past even if this was not strictly written. This language has been articulated prior to any phonic linguistic substance. This metaphor, termed as God's writing, inner speech or speech of the heart, is the 'good writing' which then 'founds the 'literal' meaning subsequently given to writing. It is 'a sign signifying a signifier itself signifying an eternal verity, eternally thought and spoken in the proximity of a present logos.' The nontemporal writing is named by metaphor and the sensible and finite is described as writing in the literal sense.

Of course, this metaphor remains enigmatic and refers to a 'literal' meaning of writing as the first metaphor... It is not, therefore, a matter of inverting the literal meaning and the figurative meaning but of determining the 'literal' meaning of writing as metaphoricity itself...

The various tropes employed by al-Ghazālī in 'harvesting the fruits' from its sources were the equivalent of the 'literal' meaning of the metaphoricity of language itself. Contextual semes, figurative language and perspicuous declaration produce

---

42 Derrida, Of Grammatology, 17.
43 Ibid., 15
44 Ibid.
meaning using a variety of tropes. These tropes - *naṣṣ, taʾwil, kināya-* pretend to have a propositional character, but in effect they are rhetorical tropes of the metaphoricity of language itself. They stood as testimony to the struggles over meaning in the “text of Islam” whether those be the Qurʾān and Sunna texts, or legal, theological and philosophical texts.

The medieval opposition between signifier and signified cannot be maintained without calling into play its metaphysico-theological roots of distinguishing between the sensible and the intelligible. To end this distinction is to end the very idea of the sign, and is, at least for the present necessary, since nothing is conceivable without them: “The sign and divinity have the same place and time of birth. The age of the sign is essentially theological. Perhaps it will never end.” So when al-Ghazālī wrote about the language of law in *al-Mustasfa*, it is the exteriority of writing, the debased and vulgar form of writing to which he referred. For all the rhetorical tropes had inwardly pointing referents to meanings and sequences of meanings that were not immediately visible at the level of the sensible, only at the level of the intelligible.

**Conclusion**

A crucial component of legal theory is the interaction, reception and interpretation of revealed speech. The theological trail of this debate is not inconspicuous in the presumptions of al-Ghazālī when he dealt with language issues. While the revelatory discourse is primarily the “inner speech” (*kālam al-nafs*), there is also the possibility of it being “the speech of the tongue” (*kālam al-lisan*) or phonic speech, in another sense. The result is that the revealed language, Qurʾān and Prophetic speech, are subjected to theologised methodologies, the arche-writing

"Derrida, *Of Grammatology*, 14"
predetermined by the past. According to al-Ghazālī these dynamics were visible from
the very origins of language and ended with the binary opposition of phonic speech
(kalām al-lafz) and psychic speech (kalām al-nafs).

Beyond the sleight of hand of supplements, there also seemed to be a clear
binary play in al-Ghazālī's approach. One can make the case that al-Ghazālī, in his
search for innovation, creativity and renewal was constantly faced by boundaries and
limitations of different kinds. In the larger picture of his life, he was faced with the
dilemma of choosing between order and disorder, stability and instability. These
formed the parameters of his dualistic world and the binary semiotic world. This
binary opposition manifests itself doggedly in a close reading of the section on
language in al-Mustaṣfā. One can enumerate them as perspicuous declaration vs
indeterminacy; original positing vs conventional and technical usage; explicit
denotation vs interpretation and contextual semes; literal vs figurative; and, phonic
speech vs psychic speech. The parts of the binary pairs inheres in each other and are
not rigidly separated, in the same way that life cannot be compartmentalised. This
was well demonstrated al-Ghazālī's metaphysics where the same speech can be phonic
speech in one instance, and by making an imaginary move it can also be psychic
speech.
Chapter 6

The Dialogics of the Determinant (Hukm) and Discourse (Khīṭāb): The Poetics of Goodness, Detestability and Liability

Introduction

According to Ibn Sālāḥ: 'The [Shāfi‘ī] school to which he [al-Ghazālī] belonged did not approve of several things in his writings, as well as his idiosyncratic practices.'

He added:

Especially his remark about logic that, 'it is the introduction to all knowledge and whoever fails to grasp it their knowledge should not be trusted.' This stands completely rejected. Every person of sound mind is naturally endowed with logic anyway. And how many a leading scholar (imām) did not even raise their head to the discipline of logic?

Al-Māzārī, one of al-Ghazālī’s sharpest critics said: ‘al-Ghazālī mixed the beneficial with the harmful.’

Al-Ghazālī attempted to assimilate a melange of ideas and doctrines into his work and, unwittingly, may have camouflaged his originally intended ideas with the result that his readers deduced something resembling their opposite from this synthesis. Possibly, he was not in a position to notice the ambivalences which seemed to erode the very assertions he was making. If this is the case with al-Ghazālī, then it is the task of the commentator to untangle the web of significant misinterpretation by a process of deconstruction to bring to light what remained imperceptible to the author and his followers. The commentator must

---

2Ibid.
3Ibid., 19:330.
therefore focus on the ambivalent knowledge discovered in *al-Mustasfā*, as already examined in the previous section on language.

This chapter will interrogate the ambivalence and tensions that are noticeable in al-Ghazālī’s epistemology as a result of his attempted synthesis of disciplines and the diversity of his intellectual sources. It will deal with the *raison d’être* of legal theory, namely the discovery of the determinant/assessment/rule of law (*hukm*). For, indeed, legal theory provides the theoretical and methodological framework that will direct the jurist to the primordial determinant (*hukm*) which emerges from the detailed sources of the law.\(^5\)

As critical as the discussion of the *hukm* is, there is very little reflection on what it is and how it becomes discernable. It is assumed that once the method of legal theory is applied to a body of sources the output is automatically the *hukm*. In this sense the *hukm* is treated as a ruling of positive law, whereas it may be more than that. On closer investigation, the *hukm* is intimately related to the nomothetic discourse (*khītāb al-sharī‘*), a theologically complex concept which alludes to the material with which the jurist works. The dialogics of the *hukm* and *khītāb* in al-Ghazālī’s work will be examined. *Dialogics* for the purposes of this thesis, is used in the Greek etymological sense of ‘dia-logue’ or cross-play between arguments. It is also used in the sense of juxtaposition of points of view in the struggle for the hegemonic control of interpretation as to how the world should be seen.\(^6\)

Once the *hukm* has been identified, the question of how and why one should be compelled to comply with that determinant arises. The answer should be, at the very least, that it would be desirable to view and shape the world in that particular way. This,


\(^6\)Fischer and Abedi, “Texts, Con-Texts, and Pre-Texts,” in *Debating Muslims*, 95-149 passim.
however, leads to the crucial question of how things are identified as being either good or detestable in Muslim theology. Having decided one way or another, the question of establishing liability imposes itself. In the discussion of juridical ethics, which includes the debate on the goodness and detestability of things, and the notion of liability, there is a tension between human freedom and intellect when these concepts come into any sort of conflict with divine determinism and revelation.

The ethics of Muslim jurisprudence exhibit qualities which are both poetic and enigmatic. A survey of this debate in the al-Mustasfa, will clarify al-Ghazali’s understanding of how humans should be held liable to divine injunction via texts and other sources of religious authority.

On Hukm and Khiṭāb: Determination and Discourse

Al-Ghazālī, in keeping with the views of al-Ashāri, said:

... a determination, according to us, expresses the nomothetic discourse in its relationship with acts of those made responsible (inna al-hukm ‘indana ‘ibāra ‘an khiṭāb al-shar‘ iḥdā ta‘allaqa bi ʿafī al-mukallafln).

In general Islamic legal theory (usūl al-fiqh) a hukm is concerned with establishing and authorising those indicants that provide access to the primordial assessment (ḥukm). In Islamic discourse, the word hukm is used in two senses. Firstly, it is used in the sense of the primordial hukm, the divine determination. Its second usage is in the sense of positive law, where hukm means a decision or ruling of a judge.

---

1Muhammad b. al-Hasan al-Badakhshi, Manāḥij al-ʿUqūl (Beirut: Dār al-Kutub al-ʿIlmiyya, 1405/1984), printed with Nihāyat as-Sú‘l, 1:40, says that the sharī‘i meaning of hukm according to al-Ashāri is khiṭāb Allāh.

2Mu, 1:55.
Khiṭāb, is a "dictum," "speech," "discourse," "voice" of the revelation (ṣaḥīḥ). In the second qūṭb al-Ghazālī wrote:

Know that once we have realised by speculative reasoning (al-naẓar) that the source (aṣl) of determinations (aḥkām) is only one, namely, the statement of Allah the Sublime, then the statement of the Messenger of Allah is not a determination (ḥukm) [on its own], nor [is such a statement] binding in any sense. [More accurately] he [the prophet] is an informant from Allah the Sublime, that He determined this or that. The determination [of things] belong to Allah alone.⁹

The term nomothetic discourse (khiṭāb al-ṣaḥīḥ) encompasses linguistic as well as non-linguistic conceptual elements of language. The nomothetic discourse constitutes five positive commands which govern the actions of those who are made morally responsible (mukallafūn): interdiction (ḥarām), duty (wājib), permission (mubah); exhortation or recommendation (nadb) and disapprobation (istikrāh).¹⁰ These commands are indispensable, according to al-Ghazālī, who adds: "If there is no such nomothetic discourse by the Lawgiver (ṣaḥīḥ) then there is no determination (ḥukm)."¹¹

Like so many other concepts, such as ṣaḥīḥ, the terms khiṭāb and, to a lesser extent the term ḥukm do not seem to have precise definitions.¹² It appears that they did not

⁹Mu, 1:100.

¹⁰Mu, 1:55. Al-Ghazālī only mentioned the first three commands in his main discussion on the topic, but later acknowledged the function of nadb and istikrāh.

¹¹Mu, 1:55. In places I have used the translation of Kevin Reinhart, "Before Revelation: The Boundaries of Muslim Moral Knowledge" (Ph.D. diss., Harvard University, 1986) of a section of al-Mustasfā.

¹²Al-Ghazālī says that if there is no nomothetic discourse there will be no command. He then says: "Therefore we say:

(1) reason does not commend (yuḥassin) nor detest (yuqabbīḥ)
(2) nor does it make thanking the benefactor obligatory
(3) nor is there a determination (ḥukm) for an act before the arrival (wurūd) of the revelation
arouse any significant controversy and extensive debates on these topics.\textsuperscript{13} Al-Ghazālī, himself, is extremely cryptic and offers no explanation of either \textit{hukm} or \textit{khiṭāb}. Therefore a necessary digression would be to place these concepts in perspective.

In Arabic, \textit{hukm} literally signifies "prevention" or "restraint." \textsuperscript{14} In the technical sense it came to mean a "judgement" or "judicial decision" and also signified "judgement with equity or justice."\textsuperscript{15} "So \textit{hukm} comes to mean," says Schacht, "the authority, imperium, of the Islamic government and, on the other hand, the judgement of a kāfīr on a concrete case."\textsuperscript{16} Reinhart says that depending on the context, the term \textit{hukm} has been used in at least four senses:

1. the commonplace sense of the word
2. the sense in logic
3. the positive law (\textit{fiqh}), or syllogistic (\textit{qiyās}) sense
4. the legal theory (\textit{usūl al-fiqh}) meaning\textsuperscript{17}

In the general sense of the word, \textit{hukm} is plainly "the linking of one thing with another."\textsuperscript{18} In other words, any predication is a determination or judgement. In logic, it is used in the English sense of "to determine," the categorization of a thing. \textit{Hukm} in the logicians'
sense is not conceptual, but real: "hukm reflects reality, and does not make it." In the positive law (fiqh) meaning a hukm is effectively A or B. Here it means judging or judgement. Reinhart argues that in this sense a hukm is both a determination of fact and a categorization of an act.

It is interesting to note that hukm, in the sense of legal theory has a slightly different meaning to those discussed above. Al-Juwayni described al-hukm as, huwa al-ījāb, "rendering or declaring something binding, decided, effectual, determined." Al-Juwayni added: "and that is permissible in reason (al-ʾuqūl) and the revelation (al-sharīʿa)." Al-Badakhshī (d. 716/1316) gave the literal meaning of hukm as 'relating or connecting (isnād) one thing to another, positively or negatively.' This is also al-Ashʿarī's definition that al-Ghazālī adopted, which is that a hukm was the nomothetic discourse of God (khītāb Allāh) which is related to actions of human beings. It also signified the contact between the divine and the temporal. Al-Isnawi (d. 772/1370) expressed this connection by stating that nomothetic discourse meant the ‘inner speech’ (al-kalām al-nafsānī), which constituted the revealed determinant (al-hukm al-sharīʿa). An important dimension of khītāb is that there must be an element of interactive appellation (al-takhāṭub). The reason for this is that making someone apprehend (iṣfām) or making someone understand is not attained in isolation, but through dynamic interaction.

19Ibid., 279.
20Ibid.
22al-Juwaynī, al-Kāfiya, 70.
23al-Badakhshī, Manāḥīj, 1:40.
24Ibid.
25Ibid.
26Ibid., 1:41.
Al-Juwaynī said that determinations (ahkam) could be known by two means: al-khabar (transmission or reports) or, al-nazār (discursive reasoning). 27 He also substituted these two terms - khabar and nazār - with qalb khitāb ("essence" or "heart" of the discourse) and ma'nā (intention/meaning). Khitāb has several synonyms like speech (kalām), conversation (takallum), talk (takhāṭub), utterance (nuqt), which all mean the same thing in terms of the ‘real nature of the lexicon’ (haqīqat al-lughā). 28 Khitāb, said al-Juwaynī, was ‘that by which the living becomes a speaker.’ 29 It was also reported (qila) that its

... real nature is that from which the command (amr), prohibition (nahy) and the nominal (khabar) is understood. If one of these [three] are understood, all is assumed to have been understood. 30

Al-Juwaynī expanded on this by adding that nominality, a command or prohibition could not be understood from writing (kitāba) and verbal expressions (iḥāra), even though the content of each was comprehended by means of writing and verbal expression. 31 He was explicit in pronouncing that writing and verbal expressions were not speech (kalām), but were only figuratively (majāzan) considered to be speech, since they are the means to understanding speech. 32 In other words, khitāb, is more than just writing or expressions. From al-Juwaynī’s explanation, it becomes clear that khitāb is a “living speech,” where the phonic is privileged above the graphic. Part of its polysemy are the elements of “voice” (takallum/nuqt) and “mutual discoursing” (takhāṭub).

27 al-Juwaynī, al-Kāfiya, 88.
28 Ibid., 32.
29 Ibid., al-Juwaynī says “wa huwa ma bihi yasiru al-ḥayyā mutkalliman.”
30 Ibid., 32 al-Juwaynī explained that every amr is also a nahy and khabar; every nahy is an amr; and every khabar is an amr and nahy.
31 Ibid., 33.
32 Ibid., al-Juwaynī says “liyannahu yuḥṣamu bihimu al-kaḥām.”
Authorities of legal theory make a distinction between *khitāb* and *kalam*. *Khitāb* requires an addresser (*mukhātib*) and addressee (*mukhātab*), as opposed to *kalam*, where the expression on its own is sufficient. *Khitāb* can only occur when there are voices which construct the discourse to an addressee capable of understanding it. Literally, discourse (*khitiib*) means “directing speech towards the other in order to communicate” (*tawjiḥ al-kalām nahw al-ghayr li al-ifham*). Al-Isnawi defined *khitāb* as the “discourse which directs” (*al-khitāb huwa al-tawjiḥ*). He added, that the nomothetic discourse, (*khitāb Allāh*) “directed that which was instructive to a listener, or one who substituted a listener” (*tawjiḥ ma afāda ila al-mustamī‘ aw man fī nukmihi*).

Al-Qashwānī correctly noted that the definition: “a determinant is the nomothetic discourse of God” (*al-ḥukm huwa khitāb Allāh*) was circular because each element of the definition was predicated and contingent on the understanding of the other. In Piercian terms this would be regarded as an enthymeme. An enthymeme is a term from classical rhetoric which describes an argument that presupposes, (i.e. does not make explicit) both the major and minor premises, and the conclusion. These presuppositions are part of the public knowledge and as community property form the foundation for conventional meaning. In fact, it was Peirce’s genius which discovered that, in essence, all arguments are hypothetical and that all arguments are enthymemic. This enthymemetic inquiry necessitates our investigation of the presuppositions of *khitāb* and *hukm*.

---

34 al-Isnawi, *Nihāya*, 1: 42.
37 Ibid., 1: 45.
A summary of al-Baydawi (d. 685/1286) and al-Isnawi’s discussions will illuminate the relationship between *hukm* and *khitab*. Al-Isnawi made use of al-Baydawi’s notion of a *hukm* as “the discourse of Allah which is related to the acts of those who have been made responsible in terms of requirement or choice” (*al-*hukm khitāb Allāh ta’ālā al-mu‘āallaq bi af‘āl al-mukallafīn bi al-iqtidā awi al-takhīr*). Al-Baydawi further explained that the primordial *hukm* attached itself to the act of a person. Irrespective of whether the act of attachment (*al-tacalluq*) is deemed to be temporal (*ḥadīth*), the *hukm* itself is not temporal, but primordial. At the same time he emphasised that the *hukm* is attached (*yata‘allaq*) to the acts of persons and is not a temporal *description* of the acts. This clarification is designed to remove the confusion which had arisen in trying to establish judicial acts such as marriage (*nikāh*) and repudiation (*talāq*) as being *ahkām*. In effect, they are “disclosers” (*mu‘arrifat*) of the *hukm*, analogous to the proposition that the existence of the world discloses the existence of the Creator. Similarly, words that indicate the obligatoriness (*al-mawjibiyya*) and impediment (*al-mancīyya*) of things and acts, are actually signs (*al-ṭām*) of the presence of a determinant, not identical to the determinant.

Al-Isnawi argued that the primordiality of the *hukm* is proved via the following example. It is understood, for instance, that intercourse with a woman becomes permissible after marriage (*nikāh*), since prior to that intercourse is not permissible. The primordial *hukm* in this statement was God’s word in eternity which said: ‘I permit such a man to have intercourse with such a woman if there is a marriage (*nikāḥ*) between them.” In other words, the primordial *hukm* is arrived at by ellipsis. That *hukm* becomes operative and effective when the parties mutually declare their offer (*ijāb*) and acceptance (*qabūl*) in

---

40 Ibid.
41 Ibid.
42 Ibid., 1:50.
a marriage contract. At that moment, the *hukm* is attached to the act, bearing in mind the earlier clarification that only the *act of attachment* is characterised to be temporal, and not the *hukm*. There is therefore no harm in a temporal act giving effect or providing visibility to a primordial *hukm*, in the same way that temporal "signs" (al-īlām) and "disclosers" (muʿarrifāt) serve as indicators of the primordial *hukm*. Similarly, legal causes (īlāl) such as marriage, repudiation, buying, hiring etc. are "disclosers" (muʿarrifāt) of the primordial *hukm*, and not identical to the *hukm*. This was the basis for al-Isnawi's comment that a *hukm* is not the discourse in itself, but is the indicant of the discourse (anna al-hukma ghayru al-khitābi al-mawsūfī, bal huwa dalīlahū). For example, the divine discourse: "Establish prayer!" (Q. 17:78) is not in itself the obligation to prayer, but is the signifier/indicator (dāll) of obligation.

What then is the substantial difference between a determinant (*hukm*) and an indicant/signifier (dāll)? Al-Badakhshi offered an explanation. A determinant, he said, was that 'inner speech" which coincided with the infinitive meaning, (al-ḥukm: al-qawl al-nafsi ′alā ma yunāsibu al-māʾnā al-maṣdarī). An indicant or signifier is a verbal statement which is appropriate to the meaning of the object, (al-dāll: al-qawl al-lafzi al-munāsib li maʾnā al-mafūl). This confirms the earlier observation that the *hukm* was somewhat hidden and elliptical. It is discovered by a search, but there is no confirmation that the search had been correct, according to the prevailing view among Ashʿarites, except the general assumption that consensus would guarantee some amount of rectitude.

Reinhart says that in the *uṣūl al-fiqh* sense, a *hukm* "means the categorization of the act in relation to the actor by reference to another source of information; it is not, in the *shariʿa* system, a categorization of the act per se...", at least not in the view expressed

---

43Ibid., 1:44.
45Ibid.
by the Ashārites. The ḥukm is the primordial saying that "this is permissible," "this is prohibited." More specifically, it is actually the determinant and knowledge of the fact that God had said in eternity: "Let this be permissible," or "let this be prohibited." There is a difference between saying: "serving your fellow human being is good," and saying "let service to your fellow man be a good thing." In the first statement service *per se* is declared a good thing. If service could speak it would say: "I am good." In the second statement the act of serving is declared a good thing from the perspective of the one saying it is good. In this case service cannot declare itself to be good; someone must declare it. It admits the possibility that the speaker (God) could on another occasion say that service is not a good thing. In other words, the voice behind the statement is privileged. The goodness or detestability of a thing is determined by an assessor by making reference to another source. This means that the status of a thing is dictated by the hidden and elliptical divine voice. Reinhart calls it the dictation of status.

The reason why *khīṭāb* should take the form of a "verbal speech" *al-kalām al-lafzī* is that the primary objective is to make the communication understood (*ijhām*) to the addressee. And, because of this it is imperative to make the discourse manifest (*ibraz*). The verbalization of the discourse is necessary for it to be understood in human, or, more correctly, in phonological terms. However, the proper discourse is the inner speech (*al-kalām al-nafsi*) which, in addition to being God's uncreated and primordial speech, provides the interactive and dialogic sequence. In a broad sense, *khīṭāb* must be characterized by certain features of cohesion and unity to distinguish it from other forms of communication, as well as other types of *khīṭāb*. The search for the ḥukm is restricted to the textual space, known as the *khīṭab*, wherein the ḥukm dwells. The *khīṭāb*, to borrow a phrase from Kevelson,
... is a unified discourse held together by a ruling theme, by a nonambiguous system, of cross-reference, and by certain implications, or presuppositions, which permit deleted verbal phenomena to be recovered in so-called deep structure analysis.\footnote{Kevelson, \textit{Law as Signs}, 59.}

\textit{Khitāb} is that communication of God to human beings which enables them to understand (\textit{iʃām}). The \textit{khitāb} and \textit{ḥukm} of God are brought into a relation of "meaning equivalence" through an argument of equivalence. The divine rule (\textit{ḥukm}) is not to be identified \textit{simpliciter} with the Qur'ān or the Sunna.\footnote{The modern 'Iraqī Shīte scholar Bāqir al-Ṣadr (d. 1980) had adopted a revisionist position on \textit{usul al-fiqh}. Al-Ṣadr pointed out that \textit{khitāb} "discloses" (\textit{kāshiʃ}) or signifies the \textit{ḥukm}. In turn, the \textit{ḥukm} is the signified (\textit{mādīl}) of the \textit{khitāb}. In other words, the \textit{khitāb} is the signifier (\textit{dālī}) and the \textit{ḥukm} is the signified (\textit{mādīl}). See \textit{al-Mā'ālim al-Jadīda li al-Usūl}, (Beirut: Dār al-Taʻāruf li al-Maṭbū‘āt, 1401/1981), 99.} It is the function of the epistemological methodology of legal theory to attempt to grasp the message of the communication. When this message is known, God's determinant (\textit{ḥukm}) is discovered. The discovery of the \textit{ḥukm} is the discovery of the non-verbal primordial statement of God. In this sense it is an ongoing revelation or disclosure that God makes to the reader in general, and the jurist in particular.

Ash'arite legal theorists went to great lengths to prove the primordiality of the \textit{ḥukm} and \textit{khitāb}. Only the "attachment" or "linkage" of the \textit{ḥukm} to the human act is a temporal one. In other words, there is an immediacy and timeliness of divine intervention or revelation of the \textit{ḥukm} at every moment when a moral act is undertaken by those who had been made morally responsible. When one speaks of \textit{ḥukm} as a \textit{khitāb}, one is describing it in terms of its timeliness. On the other hand, the divine determinant is also characterised by a timelessness. It is when one describes the \textit{ḥukm} as the "inner speech," that the timelessness of the \textit{ḥukm} is described. \textit{Khitāb} is then the contextual, interactive discourse whose primary function is to search for indicators (\textit{adilla}) and declarations (\textit{bayānāt}) in their right order. If the above is accepted, then there is a metaphysical
argument which supports the notion that *khīṭāb*, is the nomothetic communication of God. How this discourse manifests itself to the addressee remains one of the most understudied areas of legal theory.

**Khīṭāb as Speech Event**

It would be instructive to consider the proposition that *usūl al-fiqh* is a high register of Islamic legal language in terms of Roman Jakobson’s framework for speech events, or any verbal communication. The fundamental axis of this framework is that an “addresser” sends a message to an “addressee.” In order to be operable, the message firstly requires a “context” to which it refers - the physical and social world in which the speech event is located spatially and temporarily. Secondly, the addressee must grasp that verbal “message” or be capable of verbalizing it - both the addressee and the addresser must share the same “code,” language or signs, at least partially. And finally, there has to be a “contact,” the physical channel or psychological connection between addresser and addressee which enables the communication to take place. (See diagram for the illustration of the constituent elements of communication.)

It must be pointed out that the meaning of the communication does not have existence independent of the constitutive elements described above. In fact, the meaning is discursively determined by these elements. So the *hukm* the jurist searches for involves all the elements of an addresser, addressee, the message, context, code, and contact. Together these elements make manifest the *hukm*, the divine signified, which is greater than the individual elements in themselves.

---

Jakobson's Framework for Speech Events

- **Context**
- **Message**
- **Addresser** → **Addressee**
- **Contact**
- **Code**
Jakobson says that while the six elements in communication are not isolated, the function of language or communication depends on the preponderant function. If the emphasis of the communication is on the context, then the function is referential. The emotive function or expressive function occurs when the focus is on the addressee. When the focus is on the addressee, such as by use of the imperative: “drink!,” the function becomes conative. The emphasis on contact, especially in dialogue, such as: “Are you listening”? or “Well”! is an endeavour to sustain the conversation and is called the phatic function. Whenever the addressee or addressee have to check whether they use the same code, the speech is focused on the code and then the function becomes metalingual - e.g.: ‘I do not follow you, what do you mean?” or ‘Do you know what I mean”? The focus on the message for its own sake is the poetic function of language, which is the dominant function in verbal art. The nomothetic discourse (khitàb) of Islam, be it in the form of the Qur’ān or hadīth, will involve a variety of these functions.

Ever since the English jurist, John Austin (d. 1859) held that law is the command of the sovereign, many scholars of Islamic law have been tempted to emphasise the primacy of the conative function, given the role of the imperative in Islamic jurisprudence. But to describe Islamic law as the command of the Divine Sovereign, as is often done, would be an oversimplification. When speech acts are combined with a type of Austinian reading of law there is a tendency to analyse legal discourse from a deontic position, where law is only a series of commands and where the logic of obligation and permission applies. In our exploration of al-Mustaṣfa it was clear that legal speech is not simply a catalogue of commands, but rather a complex mix of interactions and of various subjects, loci of commands, and elements, which together constitute the legal communication. Legal discourse can also be erotetic when it follows a communicative or, question and answer logic, and not a deontic logic of commands only. While some elements of legal discourse may be deontic, other propositional elements, such as a determinant or obligation, are signs of certain verbal structures which convey meaning through their rhetorical force.
Legal Theory as a Speech Event

- **Context**: Referential Function
- 7th Century/20th Century

- **Message**: Poetic Function
- *Khitab/Nonnthetic Discourse*

- **Addresser**: Emotive/Expressive Function
- *Allah*

- **Addressee**: Conative Function
- *Prophet/Reader/Jurist*

- **Contact**: Phatic Function
- *Revelation/Inner Speech/Verbal Speech*

- **Code**: Metalingual Function
- *Classical Arabic/Modern Languages/Linguistic Principles of Usul al-Fiqh*
Hence, the legal discourse involves a combination of these functions and not necessarily the poetic or conative functions alone. Given the insights gained regarding the discovery of the ḥukm, it is inevitable that the referential function provided by the context will play an equally significant role as that performed by the poetic function.

Ferdinand de Saussure drew our attention to the distinction in language itself between langue and parole, translated as language and speech, respectively. Langue is the abstract and implicit system of elements, sounds and rules which are shared by a language community independent of time. Parole is any particular utterance, spoken or written, as it exists in time.51 In relation to the langue of usūl, the parole of revelation (khiṭāb al-shar') includes the signifier (dāll) and signified (dalīl) to constitute the uncreated and primordial determinant (ḥukm), the langue of the revelation.

Al-Ghazālī stated that, 'the determinant expresses the dictum of the shar' (al-ḥukm 'ibāra 'an khiṭāb al-shar'), meant that the nomothetic discourse alone is the source of the determinant. Not even the verbal statement of the Prophet constitutes the khiṭāb al-shar', which he pointed out, was the equivalent of information about the nomothetic discourse, but not coterminous with it. Therefore, al-Ghazālī was quite clear that the determinants in themselves were completely independent from the choice of the master-jurist (mujtahid).52 The determinants (ahkām) pre-exist the choice of the jurist. What does coincide with his choice is that the determinants make themselves visible at the point of choice. Whether one's choice determines the status of an act as good or detestable is a totally different question, to which our discussion now turns.

52 Mu, 1:315.
Goodness and Detestability

Al-Ghazālī’s notion of the good and detestable was consistent with the dominant Ashʿarite position on this doctrine, evidently developed through polemics with Muʿtazilite opponents. His position on this doctrine must be discussed in the context of the views of the contesting groups.53

The Basran Muʿtazilites believed that the good and the detestable are the essential attributes of some goods or things. Some things were seen to be either good or detestable by virtue of their essential properties. Properties, such as truth, justice and honesty which were categorised as good, and oppression and dishonesty categorised as detestable were so because reason and necessary knowledge (ʿilm ʿdārūrī) encompassed these without proof. They were independent of anyone’s will, even God’s and did not need to be commanded nor prohibited by God: this view is classed as objectivism.54 However, there is another class of properties which vacillate between being beneficial and harmful in an ambiguous manner, and so their goodness or detestability become relative attributes. These become good or detestable by virtue of the command of revelation.

Another group of Muʿtazilites and the Imāmiyya Shiʿites, argued that reason only decreed things to be good or detestable if these two properties were essential to them. The latter two groups differed from the Basran Muʿtazilites, in that they believed that liability (taklīf) became effective with the advent of revelation and prophecy. On those issues on which revelation was silent, reason would dictate the good or detestable attributes of the things.

The third position, that of the scholars of kalâm headed by Abū Mašûr al-Maṭrûḏî (d. 333/945), posited that some things had essential attributes of goodness and detestability and that God did not command or prohibit such acts or goods, respectively. This was also believed to have been the jurist, Abū Ḥanīfa’s position. The scholars of kalâm differed from the Muʿtazilites in that they held that liability, reward and damnation could not be established by reason alone, but should be decided by revelation and prophetic authority. Whenever revelatory authority was absent they would resort to syllogistic analogy. Some scholars have objected to this position, saying that by conceding to the limitations of reason, and associating reward and punishment with good and bad acts does not in itself amount to anything. There is no inherent relationship between the essential properties of things and their being linked to reward or punishment. At best, it could be said that someone who did good was praised, and one who did the opposite was condemned.

The fourth position is that of the traditionalists (ahl al-ḥadīth), including al-Ashʿarī. According to this group, things did not have any essential properties of good or bad. All things were seen to be relative and relational predicates (nisbiyya wa idāfiyya): this will be called theistic subjectivism.55

The central thesis of the Muʿtazilites was based on three arguments:

1. detestability is an essential predicate
2. detestability is something that compotes mentis (uqalā) know necessarily (bi al-ḍarūra)
3. if compotes mentis agree upon something then it constitutes decisive proof (ḥuija maqtiʿ an bihā) and is of necessity an indicant of [knowledge]56

55Ibid.
56Mu, 1:57.
Al-Ghazālī rebutted the Mu'tazilite arguments by illustrating his point with 'hard' cases. In his reply to the allegation of detestability being an essential predicate, he used the act of killing as an illustration. While the killing of animals, or the judicial execution of a criminal were viewed as justified the killing of an innocent person was clearly seen as an offence. If killing was inherently detestable, its status should not vary in accordance with differing circumstances, since killing in its essence had a 'single real nature' (ḥaqīqa wāḥida). The only explanation as to how the status of killing could change, would come from relating the act to certain benefits (fawā'id) and goals (aghrād).

Responding to the question whether compotes mentis would axiomatically know the goodness and detestability of things, al-Ghazālī said that if it was as obvious as the Mu'tazilites alleged, then there would have been no dispute over such matters in the first instance. The fact that people disputed these facts was sufficient proof that knowledge about such ethical matters required inquiry. If and when compotes mentis did agree on issues, it did not necessarily follow that the agreement had been axiomatic. There were indeed instances when they did agree on matters which were not necessarily axiomatic for there may have been other reasons for such agreement. Al-Ghazālī said:

On the whole, the approval (istiḥsān) of [acts of] good character (makārim al-akhlaq) and liberality (ifādat al-nā'am) is among the things no compotes mentis would deny, except on the grounds of sheer obstinacy. We do not deny the widespread [recognition] of these judgements among humankind and their being generally thought praiseworthy. Yet the ultimate source [of these judgements] is either religious commitment to revelational stipulations (tadayyun bi-sharā'i) or [conformity to one's] objectives (al-aghrād).

Not content with his own explanations, al-Ghazālī animated his discussion with three psychological responses. Firstly, he argued, that one applied the term detestable to something when it contradicted one's objectives. In other words, goodness and

---

57 Ibid.
58 Mu, 1:58.
detestability were subjective experiences. His second illustrative argument was that human beings judged things on the basis of their preponderant experiences and accepted these as facts. In doing so, they tended to overlook the merits of other experiences and the possible benefits emanating from these. There may be exceptional cases, in which telling a lie in order to save the life of an innocent person may be considered to be a meritorious act. His final example supported his argument that one obeys and follows illusions of a Pavlovian type. Illusions (āwhām) may dominate one’s experience to such an extent that persons who had suffered snakebite would impulsively recoil whenever they saw a speckled rope, mistaking it for a snake. Sometimes a people’s prejudice to a particular race or religion may result in them failing to appreciate the beauty or attractiveness of a man or woman. The detestability associated with a religion or ethnicity from the point of view of one’s own religious or ethnic perspective, dominates one’s experience of human interaction. In these observations al-Ghazzālī made the point that human beings are so actuated by their subjective needs, egotism and false judgements, that they are essentially driven by their personal objectives. For human beings to attain felicity in life they need to be commanded by that which is free from personal objectives. Therefore he said:

We deny the [objectives] with respect to God only in order to repudiate [the attribution of] objectives to Him. As for people’s application of these phrases (al-fāz) to what takes place among them (yadur baynahum) there remain [other] objectives. But, objectives may be subtle or hidden and none may be aware of them except those who know the truth (al-muhaqqiqūn). 59

Al-Ghazālī maintained that even things, which appear to be “axiomatic principles of assessment are in fact affective projections of self-serving calculations of interest.” 60 He actually rejected any form of knowledge as fully reliable. This rejection excluded revelational knowledge, which he regarded as privileged knowledge. Acts, in themselves, were viewed as not being morally significant, as was knowledge of these acts. In fact, only

59Ibid.
knowledge of what God had said about acts or things was seen as significant. There was nothing, he contended, in the ontic character of acts which could determine its goodness or detestability. Such a determinant (hukm), he believed, lay exclusively with God, and is thus transcendent. Al-Ghazālī could not discern any mental concept of what that determinant was, since he perceived an utter separation between the material and transcendent worlds.

Given the fact that, according to al-Ghazālī and the Ash'arites, good and detestable could only be established by privileged knowledge of revelation (theistic subjectivism), the analysis of hukm and khitāb leads to the concept of human liability.

**On the Discourse of Liability**

Among the topics treated with great skill by al-Ghazālī was the notion of liability (taklīf). There were four component parts to the notion of liability: the determinant (hukm), the assessor (hākim), the one/thing who/which was being determined (mahkūm alayhi) and the act which was being determined (mahkūm bihi). Only the addresser, God, could oblige. In al-Ghazālī's words, only "the one to whom belongs creation and command," could impose liability.61 The basis of liability for any subject, be he/she king, prophet, parent or spouse, stemmed from God's mandate to elicit obedience. There was dispute whether sanctions were a corollary of obligations. While al-Ghazālī believed that sanctions were the 'real nature of obligation' (haqīqat al-wujub), al-Bāqillānī did not believe that they were a requirement.62 Al-Ghazālī favoured the threat of sanctions, especially sensate punishment, and considered it to be the drive behind all liability. We will

---

61 Mu, 1:83.
62 Ibid.
now consider the status of three interrelated issues which have a vital bearing on liability. They are reason, the actor and acts of liability.

Reason (‘aql), in al-Ghazālī’s opinion, was not a source for revealed determinants (al-ahkām al-shar‘iyya), since reason was not part of the nomothetic discourse. The role that reason did play, was in signifying the absence of any determinant. Reason would be able to determine those issues in which revelation, or nomothetically transmitted authority was non-existent. 63 When reason was called a “source” (āsl), this was done in a figurative manner in so far as it indicated the presence/absence of source material, said al-Ghazālī. If reason could judge the absence or presence of determinants, could it then judge whether something was good or detestable and so play a direct role in liability?

It was on this point - whether reason was a source for determining the goodness or detestability of a thing - that Ash‘arites and al-Ghazālī parted company with the Mu‘tazilites. The same argument also applied to liability. So, for instance, when he referred to reason (‘aql), as the “permitter” (mubīh), or the “obliger” (mūjiban), these terms should be considered in a figurative manner. 64 ‘For indeed, reason only discloses (yu’arrīf) the preference (tarijih) and discloses the absence of preference.” 65 Understanding its role in “being obligatory” (wujūb) indicated the role that reason played in preferring to do something rather than shunning it. All this is to be taken figuratively. The actual meaning of something being “permitted” (mubāh) in effect meant the disclosure that there is no preference. ‘Reason (‘aql),’ al-Ghazālī said in an aphorism, ‘is the discloser (al-mu`arrīf) not the permitter (mubīh).” 66

---

63 Mu, 1:100.
64 Mu, 1:63-64.
65 Mu, 1: 63-64.
66 Mu, 1: 63-64.
According to al-Ghazālī, liability was the product of a nomothetic discourse (khīṭāb) of an onerous kind (bihi kulfā). Liability materialised when it generated active compliance (imṭīthāl) stemming from obedience (taʿāra). Both obedience and compliance were not possible without an intention (qāṣā) to comply. The pre-condition for such an intention was to have knowledge of what was intended (al-ʿilm bi al-maqṣūd) to be a liability and also to comprehend the liability involved (al-faḥm li al-taklīf).

The locus of liability or the human actors (mukallaj) were required to exhibit two essential attributes: they had to be sane and be capable of comprehending a nomothetic discourse. The classical Muslim philosophers described the human being as a “rational being,” (ḥayawān al-naʿīq) which literally meant the ‘uttering or speaking animal.” The philosophers thus used the essential attribute of speech to define the human being and, by definition, also signified human intelligence. Al-Ghazālī continued in this tradition and predicated moral and legal liability on sanity and the comprehension of discourse. Liability was viewed as being coterminal with the very “humanity” (al-ʿinsāniyya) of the one made liable (mukallaj). Humanity was fully realised only with the evidence of actual sanity and comprehension of discourse. Children and those who lacked sanity were not subject to moral liability. The capacity to understand the revealed discourse was imperative to the notion of liability.

Al-Ghazālī asserted that the commander and commanded did not have to be present for the effectiveness of liability. He was then confronted with the theological question: how could one hold the non-existent to be liable? For if the non-existent can be

\[67Mu, 1:88.\]
\[68Ibid.\]
\[69Ibid.\]
\[70Ibid.\]
\[71Mu, 1:84.\]
held liable, then by way of *argumentum a fortiori*, the insane, children and the amnesiac are technically more liable since they are existent. Liability in the state of non-existence, he explained, was impossible. What then did al-Ghazālī mean by the statement, 'the non-existent is commanded'?\(^{72}\) He believed that the non-existent was commanded with liability pending the materialisation of its existence (*alā taqdīr al-wujūd*).\(^{73}\) In other words, all creation was potentially liable to mandatory obedience in a primordial sense pending their post-primordial existence. Once they came into existence, the actualisation of that obedience became a requirement. Or put another way, they were under a charge to perform the acts subsequent to coming into existence. This primordial charge could not have been called a discourse (*khīṭāb*). A charge only became a *khīṭāb* once it had an actual addressee to whom the command was directed.\(^{74}\) It was also doubtful whether such a primordial charge could be called a command (*amr*). According to the correct view, said al-Ghazālī, it could be called a command. The example he presented to meet the theoretical intricacies of this problem, was that of people making out a testament in favour of their children. At the time of making the will some of the children may not have been born. Yet the testament had effect in the absence of the testator and even if some of the beneficiaries had not been born at the time of making the will. Similarly, Muslims are obliged to fulfill the commands of the Prophet even though he is no longer in existence. Generations of addressees of the prophetic message were not yet in existence when the Prophet announced his teachings, yet they are liable, said al-Ghazālī.

Al-Ghazālī argued this polemic of commanding the non-existent on the presumption that speech inheres in the mind or "inner speech" (*kālām al-nafs*). He said:

---

\(^{72}\) *Mu*, 1:85.

\(^{73}\) Ibid.

\(^{74}\) Ibid.
Liability (takliḥ) is a special type of inner speech. Since there is a certain amount of obscurity in understanding the principle of inner speech, then it is inevitable that understanding its details and explanations would be even more obscure ... 75

It is quite clear that al-Ghazālī rejected the nominalist view of language by frequently referring to the notion of "inner speech."

The acts of the one made liable should be voluntary, not coerced. For a voluntary act to turn into one of compliance, and then obedience, requires that the acting subject be charged with liability by the issuing of a command, and not by compulsion.76 A threat does not turn an act into compulsion. What distinguished a coerced act from a voluntary one, was whether its motivation was in response to the call of the shari‘a, or whether it was a response to any other extrinsic non-shari‘a motivation. There are four conditions attached to an act of liability.

(1) It must conform to the sound rules of temporality. This condition excludes things which are primordial, everlasting, denatured genera or combined contradictions, from being acts which are subject to liability.77

(2) An act must not only be in existence but it must also be attainable.78

(3) It must be known to the commanded and be distinct from other commands.79

(4) It must be in existence so that willing its performance as obedience is valid.80

In enumerating these conditions, al-Ghazālī parted company with al-Ashei‘a by rejecting the doctrine of "liability beyond one’s capacity" (takliḥ ma la yutāq). Those Ash‘arites who accepted the doctrine of liability beyond one’s capacity believed that an act of liability did not have to be contingent on existence (mumkin al-hudūth).81 If one accepts this

75Mu, 1:88.
76Mu, 1:91.
77Mu, 1:86.
78Ibid.
79Ibid.
80Ibid.
81Ibid.
Chapter 6

In terms of the verse of the Qur’ān, “Make us not bear burdens which we have no strength to bear (Q.2:286),” al-鞍山 argued that one did not need to pray for the removal of an impossible task since it would be removed by itself. In other words, the task would not be realisable since the burden of liability would cause the destruction of the subject anyway. For example, the verses, “Slay yourselves...or leave your habitations...(Q. 4:66),” would have been tantamount to imposing a liability beyond one’s capacity. Al-Ghazālī argued that liability required certainty of signification and an “interpreted evident statement” (al-zāhir al-mu‘awwal). The verse cited lacked the countervailing power of signification.
Al-Asfārī argued that revelation charged the unbeliever, Abū Jahl, to believe in the messengership of the Prophet Muḥammad, while the same revelation also acknowledged that his arrogance and obstinacy would prevent him from faith. Al-Ghazālī in turn viewed this proposition by al-Asfārī as absurd (muḥallī) and rebutted it as a weak argument. It was tantamount to a self-fulfilling prophecy, where Abū Jahl had to go through the motions of demonstrating that he did not attest to the Prophet’s messengership when he had already been prevented from belief by Divine decree in the first place! Al-Ghazālī argued that Abū Jahl was charged with faith, since the evidence of his capacity for liability was tangible in that he could reason and demonstrated sanity. The fact that Abū Jahl chose to reject the imperatives of reason and sanity was the subject of a separate debate. Al-Ghazālī went on to explain that although God in his divine wisdom had foreknowledge that Abū Jahl would reject faith, it still did not lessen his liability to believe.

Al-Ghazālī’s analogy in this case was that new knowledge was a consequence of what was already known, but it did not change what was already known. For example, if people were quite capable of performing an act and then abandoned it of their own accord, claiming that it was impossible to fulfill, then it did not mean that the performed act had ceased to be. It would be similar to the claim that knowledge turned into ignorance, when one was no longer in a position to attain it. Failure to acquire it does not mean that whatever knowledge was attained prior to it had ceased to exist or had been turned into ignorance. Similarly, though it was possible for God to bring about Resurrection immediately, He informed us that He would set it aside despite having the power to implement it immediately. Therefore, it is impossible for God to go against His own statement for it would be tantamount to turning His promise into a lie. The impossibility of God bringing about Resurrection immediately did not affect the event itself.

86 ibid.
Al-Ghazālī argued that “making one liable for the impossible” (taklīf al-muhALL) was invalid. His Ash'arite opponents argued that if the case was that taklīf al-muhALL was impossible, then how could it be found to exist in four forms. It would be difficult to deny the existence of the liability of the impossible, in terms of

(1) linguistics;
(2) hermeneutics;
(3) the actual harm associated and emanating from the liability of the impossible, and
(4) the material contradiction of conventional wisdom which was evident.87

Linguistically, they said, an example was found in the Qur'ān where God, addressing human beings, said: “Be as apes despicable (Q. 2:65).”88 Other examples were those of a master commanding his blind slave: “Look!” or saying to an invalid: “Walk!” From the point of view of meaning, it was not impossible for a master to demand that his slave be in two places at the same time to take care of his property or business in two cities. Furthermore, to argue that the liability of the impossible is not valid on the grounds that it could result in harm or that it contradicted conventional wisdom was no argument at all, asserted al-Ghazālī's opponents. Attributing such criteria to the Divine was absurd, since nothing detestable could emanate from Him and nor was the Divine compelled to act in terms of what is “best” (al-aṣlah).

Al-Ghazālī conceded that all of the above arguments may not have successfully disproved the doctrine of the liability of the impossible. In his view the doctrine was soundly rejected on grounds of the human “incapacity” (ta'jīz) to fulfill such an impossible liability. The doctrine was not rejected on the grounds that it was impossible for human

87 Ibid.
88 Ibid.
beings to "demand" or "request" (talāb) such a liability.\textsuperscript{89} Nothing prevented a human being from making imaginative demands which cannot be realised in actuality. So for instance, there was a difference between instructing a normal and healthy person with the performative to "enter the house" and asking the same person to "climb to the heavens." The same applied to asking someone to change a tree into a horse.\textsuperscript{90}

Al-Ghazālī explained the underlying philosophy of this argument by suggesting that the definition of liability (taklīf) was "a requisition of that which is onerous."\textsuperscript{91} This meant that before a person could be charged with a liability it would be necessary for the charge to be understood. So while the object of the Arabic word "taharrak!", meaning "Move!" is quite clearly understood, the object of the meaningless utterance "tamarrak!" has no sense at all and cannot enjoin any liability. Let us assume, for the purpose of argument, that this word does have a meaning in some other language, even then it still would not evoke liability. A prerequisite of liability is that the addressee should understand the directive. It is not enough that only the addresser or commander understand the phrase. Indeed, the purpose of any address of this kind is to make it understood, in order to allow the addressee to conceptualise (tasawwur) the element of obedience it demands. In the final instance "liability requires obedience."\textsuperscript{92} Al-Ghazālī went further to argue that even a notion such as obedience or compliance had to be "conceivable" (muṭaṣawwar) in the mind before it could materialise in reality.\textsuperscript{93} Any requisition (talāb) must be concretely objectifiable and intelligible before liability could be enforced and therefore the dictum, "that which has no model in the psyche, has no image in reality" (ma lā mithāl lahu fī al-
naṣṣ lā mithāl lahu fī al-wujūd) was so crucial in the charging of liability. For instance, the notion of originating the primordial (iḥdāth al-qadīm) is not conceivable in the mind. Therefore, the demand (tašab) for the “origination of the primordial” is not possible since there is no mental frame of reference for such a notion.

Al-Ghazālī was fully aware that the notion of liability was extremely complex and many of his responses to the doctrine of “liability beyond one’s capacity” begged the question. His response was that the verse in the “Make us not bear burdens which we have no strength to bear (Q. 2:286)” opposed that doctrine. Knowing full well that he had not really answered the issue at hand, al-Ghazālī attributed the obscurity of his reply was due to the fact that liability (taklīf) was a special type of speech inherent in the mind. Given the difficulty of understanding “inner speech” it is even more difficult to grasp the special type of speech which affects liability, he concluded.

It is interesting to note how al-Ghazālī reverted to semantics, and took refuge in notions of “human capacity” and “ability” instead of divine omnipotence. In opposing the doctrine of liability beyond one’s capacity, al-Ghazālī had turned in favour of human capacity. According to al-Ghazālī, making one liable for that which is beyond one’s capacity (taklīf mā lā yuţağ) was not permissible. Earlier, it was noted that in matters regarding the goodness and detestability of things, he would not allow the argument of human capacity to make judgements of good and bad to trump divine omnipotence. Effectively, al-Ghazālī made a damning statement in rebuttal of his theological schoolmen, especially Abū al-Ḥasan al-Ashtarī. Al-Ghazālī said:

\[\text{94 Ibid.} \]
\[\text{95 Ibid.} \]
\[\text{96 Ibid.} \]
Whoever rationally permits the liability of that which is beyond one's capacity, is [actually] negating [liability] by revelation (shar'`an) on the grounds of God's word: Allah does not make a soul liable for greater that what it can bear.97

Conclusion

The determinant (hukm), nomothetic discourse (khitāb), the juridical ethics of the goodness and detestability (tahsin wa taqbih) of things, and liability (taklif), are discursive formations mediated by language and rhetoric.

Al-Ghazālī did not adopt a nominalist approach to language. Language for him signified other things and pointed in the direction of metaphysics. This was illustrated in his understanding of the determinant (hukm) as being tantamount to the nomothetic discourse (khitāb). While the hukm was the signified of the khitāb, the khitāb was not the signifier, but merely served as its pretext. The real signifier is the 'inner speech' (kalām al-nafs). This understanding of the primordial determinant, the very raison d'etre of Muslim jurisprudence, implies the tentativeness of every determination made. It makes it possible for the human agent to interact and 'dia-logue' with the revelation in a creative and dynamic manner.

The overall picture that emerges is that in the debate on hukm and khitāb al-Ghazālī attempted epistemological closure by resorting to the architectonic religious discipline of theology in order to establish the sovereignty of the divine speech and primordial determinant. Despite his attempt to establish epistemological order the notion of 'inner speech' opened up the domain of the subjective and speculative, causing instability. Language continuously manifests itself as the most subversive element in al-Ghazālī's legal theory.

97Mu, 1:89.
In the debate on juristic ethics al-Ghazālī established epistemological stability by anchoring ethics to the will of the sovereign. Here he allowed divine omnipotence to trump human capacity to make ethical decisions. However, in the discussion of liability, human freedom was given greater scope. He seemed to veer extremely close to a voluntarist position on liability and gave human freedom greater discursive space, by rebutting al-Ash'āri’s deterministic arguments on liability and firmly entrenching human choice and human capacity. He opposed the doctrine of “liability beyond one’s capacity” which was his most eloquent statement in favour of human capacity. Here too, he resorted to a verse, the linguistic sign of the khitāb, to shore up his rational and realistic juristic forays.

Al-Ghazālī’s legal philosophy continue to show consistent signs of binary opposites which created a tension between stability and instability, order and disorder, determinism and free will.
Chapter 7

The Jurist Working in the Public Interest

Introduction

In this chapter I will investigate the practical application and consequences of al-Ghazâlî's contribution to Islamic legal philosophy. In the previous chapter I explained that, at a theoretical level, there was a creative tension between the determinant (hukm) and nomothetic discourse (khîtab) on the one hand, and juristic ethics (tahsîn wa al-taqbîh) and liability (taklîf) on the other. I will now examine the role of the master-jurist (mujtahid) and the exercise of independent and creative juristic discretion (ijtihâd) in search of the determinant in the service of public interest. By looking at these aspects from al-Ghazâlî's viewpoint, we will be able to determine to what extent he saw himself as being restrained by the theoretical limitations imposed on him by the juristic tradition, and to what measure he was prepared to engage in subjective interpretation of legal theory. I will first explore the concept of independent juristic discretion (ijtihâd) and public interest (maslaha) and then examine the illustrations provided by a study of al-Ghazâlî's al-Mustasfâ.

Independent Juristic Discretion (Ijtihâd)

Ijtihâd is defined as 'the effort expended by a jurist (mujtahid) according to his [her] capacity in search of knowledge pertaining to the determinants of the revelation.'

The antithesis of juristic discretion (ijtihâd) is to follow the opinions of established juristic

---

1 Interestingly, al-Ghazâlî illustrates one of his cases of a male master-jurist (mujtahid) marrying a female mujtahid(ah), Mu, 2:368.

2Mu, 2:350.
authorities (taqlid), which according to al-Ghazālī was 'to accept an opinion without a proof-argument' (hujja).

Al-Ghazālī acknowledged that scholars could, theoretically and realistically, reach the status of supreme master-jurist (mujtahid muṭlaq), whose proficiency in law allowed them the liberty to develop a legal theory and methodology independently. This meant that a master-jurist of the highest order did not necessarily follow a particular law school (madhhab) but could, in fact, personally become the founder of a law school. Master-jurists, according to al-Ghazālī, would have to had to attain two essential qualifications. Firstly, they ought to have a comprehensive grasp of the sources of the revealed law (shar‘). Such a person would have been capable of eliciting probable knowledge (zann) from these sources by discursive means (nazar) and would have been able to make a learned and informed evaluation thereof. Secondly, the probity (adāla) of the jurist would have had to be beyond reproach, a status which could have been achieved by abstaining from sinful deeds. While probity itself was not, according to al-Ghazālī, a precondition for the soundness of ijtihād, the credibility of jurists was, in his opinion, was a crucial factor for the public reception of their juridical opinions (fatāwā).

Al-Ghazālī said that by examining the juridical responsa (fatāwā) issued by a jurist one would be able to judge whether the person had mastered the sources of law or not. A proficient jurist (mujtahid) would have been able to demonstrate expertise in eight disciplines (‘ulūm). Four of these disciplines, in al-Ghazālī’s words, dealt with “how to harvest the fruits” and knowledge of the “productive sources” of law. The four disciplines on method were:

3Mu, 2:387.
4Mu, 2:350.
5Ibid.
(1) The discipline of exegesis of the Book, meaning the Qur’ān as the main source of revealed knowledge. Al-Shāfi‘ī for instance required a master-jurist (mujtahid) to commit the Qur’ān to memory, or at the very least those verses dealing with determinants (aḥkām). Al-Ghazālī believed that the requirement of memorisation could be waived. All that was required from the master-jurist is to demonstrate familiarity with the some 500 verses related to law and be able to access them whenever required.⁶

(2) Ḥadīth studies: a master-jurist should have comprehensive knowledge of the discipline of ḥadīth studies, especially those materials related to juridical matters. Again al-Ghazālī made the concession that the memorisation of ḥadīth materials was not a sine qua non. It would have been sufficient for the jurist to have, for reference purposes, an authorised collection of ḥadīth materials.⁷

(3) The third discipline dealt with precedent. Again memorisation was waived. It was sufficient if the jurist demonstrated knowledge of previous instances of juristic consensus. This was to ensure that the jurist was aware of case precedents so that a fatwā is not issued on a topic where a decision already existed.⁸

(4) Finally, al-Ghazālī proposed the fourth discipline called “reason” (ʿaql). Reason was the prime informant of the jurist on matters of original innocence from liability. It was also reason which declared, when there was no prescription from the law and hence no liability, and that original innocence applied in such an instance.⁹

The second set of disciplines which served as the “means of harvesting” (turūq al-istithmār) had an auxiliary function.¹⁰ They were four disciplines.

---

⁶Ibid.
⁷Mu, 2:351.
⁸Ibid.
⁹Ibid.
¹⁰Ibid.
Chapter 7

(1) Logic, which was defined as the discipline of knowing how proofs and indicants were produced and how they functioned, and under which conditions and arguments they would have applied. The master-jurist would have had to know that the valid arguments (adilla) in law are of three kinds:

(a) rational (aqliyya) arguments which were self evident

(b) legal (shariyya) arguments prescribed by the revelation

(c) conventional (waṣṣiya) arguments, which relied on linguistic usage.

Al-Ghazâlî placed special emphasis on the discipline of logic since it was vital in dealing with the four sources of the law. Nothing short of the introduction to logic as outlined at the beginning of al-Mustasfa would have satisfied al-Ghazâlî's minimum qualification of proficiency in this discipline. In the strongest motivation for the need for logic, he said:

... for surely whosoever does not know the conditions for arguments would be unable to know the essential reality (haqqa) of a determinant (hukm), nor grasp the essential reality of the revealed law (shari'), and [for that matter] not know the presumption (muqaddima) of the Lawgiver (Shari'), and would not have known who the Lawgiver had sent ...

Under the rubric of the discipline of logic, al-Ghazâlî said it was necessary that a master-jurist have an elementary knowledge of theology. The pretext for this precondition was that the jurisconsult (mufî) ought to be a Muslim and therefore by implication should know something about dogma. However, he conceded that the master-jurist need not have been an expert in the arguments, methods and rhetoric of theology. The Companions of the Prophet and the Successors, al-Ghazâlî said, had not mastered the discipline of theology (kalam). After ostensibly making half-hearted concessions on the requirement of kalam, al-Ghazâlî could not suppress his own predilection for the discipline by stressing the importance of theology in an indirect manner. He asked, for instance, whether it was a

11 Ibid.
13 Mu, 2:352.
14 Ibid.
Chapter 7

pre-condition for a master-jurists to avoid following authority (*taqlīd*), and instead arrive at their theological conclusions independently. While he answered that it was not a precondition for a master-jurist to be an independent expert in *kalām* matters, al-Ghazālī’s reply deserves attention. To have been an authority in *kalām*, he said, was

... not a condition in itself, but it stemmed from the imperative of the status of *ijtihād*. For surely, the [aspirant] master-jurist (*mujtahīd*) cannot claim to have attained the status of independent juristic discretion and still not have heard the [theological] arguments about the creation of the world, the attributes of the Creator, the sending of messengers and the inimitability of the Qur’ān? For indeed, all these [arguments] are found in the Book of God. It is the attainment of true knowledge that allows its bearer to go beyond following authority (*taqlīd*), even though such a person may never have practised the art of *kalām*. This [knowledge of *kalām*] is among the concomitant (*lawāzim*) requirements of the status of being an independent jurist.  

The detailed and extensive attention al-Ghazālī gave to this point bears testimony to his passion for theology. While he admitted that there was no formal requirement for a master-jurist (*mujtahīd*) to display excellence in *kalām*, the work of the jurists should have, invariably, made them proficient in the discipline of theology.

Even lay persons were obliged to follow their personal convictions in theology, but not in the law! Towards the end of the discussion on logic, al-Ghazālī said:

In so far that one who follows authority can conceptually apprehend the verification of the Messenger and the sources of belief, it will be permissible for such a person to engage in individual discretion in secondary matters [of theology].  

---

15 *bid.*  
This view emerged from his understanding that any reasonable amount of knowledge rendered imitation of authority (taqlid) invalid. "Following authority," he said, "is not a path to either knowledge of principles, or secondary issues."\(^{17}\)

(2) The second auxiliary discipline required by a master-jurist was a working knowledge of the Arabic language and grammar. A master-jurist would have to be, at least, capable of "comprehending the discourse of the Arabs and their use of language."\(^{18}\) Again, al-Ghazālī conceded that the master-jurist needed not have become an expert in grammar to the level of the master grammarians and philologists like al-Khalīl b. Ahmad al-Farāhīdī (d. 175/791) and al-Mubarrad (d. 286/900).\(^{19}\) The yardstick for language-proficiency would have been a clear indication that the jurist could grasp the "range of discourses and the meanings of the intentions contained therein."\(^{20}\)

(3) The master-jurist, according to al-Ghazālī, would have needed specialised knowledge of the instances of abrogation in the Qur’ān and the Sunna. While the topic of abrogation, a sub-section of the discipline of Qur’ān and hadīth proper, would have been included in the disciplines proper, al-Ghazālī considered it crucial for separate listing. The topic of abrogation is vital in so far as a jurist could make a cardinal error of judgement in considering portions of the source-texts as being valid, whereas these may have been abrogated and, therefore, no longer part of the law. The jurist did not need to know the abrogated materials by heart, but would have had to ensure that his judgements were not invalidated by using abrogated source materials.

\(^{17}\) Mu, 2:387.

\(^{18}\) Mu, 2:352.

\(^{19}\) Since there is uncertainty over al-Khalīl’s date of death, other dates given are: 170/786 and 160/776.

\(^{20}\) Mu, 2:352.
(4) Finally, al-Ghazālī dealt with the topic of reporters of traditions (ahādīth), which was an ancillary topic to hadīth studies. He singled out this sub-section on reporters for special mention. Proficiency in this sub-section would enable the jurist to distinguish sound and acceptable reports from faulty and rejected ones. He conceded, yet again, that the jurist could accept those hadīth reports which were generally accepted by the community of believers without having to investigate the chain of transmission (īsnād), even though some scholars may oppose their validity. Al-Ghazālī felt that these eight disciplines - the qualifying criteria to become a supreme master-jurist (mujtahid mutlaq) - were frequently ignored. If jurists could not fulfill all the above requirements then they could opt for a lesser status in the ranks of a master-jurist, by becoming specialists in one or a few selective areas of the law only. Such a person would then be a master-jurist in a specific area or specific issues. Al-Ghazālī adds, that a master-jurist (mujtahid) could also not have been required to answer every question posed. The Companions of the Prophet and later personalities like the Madīnan jurist, Mālik b. Anas (d. 179/795) as well as al-Shāfi`ī, did not hesitate to declare their

21 Ibid.
22 Mu, 2:353.
ignorance on certain issues. The golden rule, according to al-Ghazālī, was that the jurist would have to have an

... insight (bašira) in that in which one gives a ruling (yuftti). So he should only give rulings in terms of what he knows and should ensure that he knows what he [claims to] know. And, he should be able to distinguish between that which he does not know and what he knows. He should stop at that which he does not know and rule in terms of what he knows... 23

In discussing the qualifications of the supreme master-jurist (muqtahid-muqlaq), one observes that al-Ghazālī was keen to ensure the perpetuation of an open juristic tradition by lessening the burden of qualification for the attainment of the status of supreme master jurist. Al-Ghazālī’s ideal jurist was the one who was also an expert in theology, but one may have to attribute this preference to his personal obsession with theology. There are no indications, in this work of al-Ghazālī, that the “doors of juristic discretion (ijtihād)” had been closed. If this had been the case, he would, at least, have made the burden of qualification so difficult to attain, that juristic discretion would have been indirectly limited. On the contrary, he debated the theses on the validity of juristic discretion, whether there could only be one correct juristic judgement (infallibilist position), or many correct rulings (fallibilist position).

The Validity of Juristic Discretion (Ijtihād):
One or Many?

Al-Ghazālī restricted his discussions, mainly, to the scope of juristic discretion (ijtihād) itself and the epistemological status and validity of discretionary judgement. “Any legal determinant not supported by a decisive indicant falls in the realm of juristic discretion” (wa al-mujtahad fīhī kullu hukmin shar’īyin laysa fīhī dalīlun qaṭfī), said al-

23Mīr, 2:354.
Ghazālī. In other words all matters that fell within the epistemological category of probable (zannī) was subject to juristic discretion and interpretation. Excluded from the realm of juristic discretion (ijtihād) were those matters that were categoric and decisive (qaṭīyyāt) in terms of epistemology and signified epistemological certainty. They were theological matters (kalamiyya), foundational matters (usūliyya) and some matters of positive law (fiqhiyya). In these matters there could only be one correct answer and the person in error would be considered to be sinful.

Theological matters included rational (aqliyāt) and theological (masāʿīl al-kalām) issues of a categoric and decisive type such as fundamental questions of dogma. Under foundational matters (usūliyya), al-Ghazālī dealt with issues such as the proof-value (hujja) and authority of the various sources of the law which were considered to be decisive and categoric. These included the categoric proof-value of juristic consensus, analogy and solitary reports. Those decisive and categoric issues of positive law, which al-Ghazālī called the “sure issues of the law” (jāliyāt al-sharʾ) included the mandatoriness of five-times daily prayers, fasting, the prohibition of theft, fornication and drinking of wine among others. Rejection of those things that are known to be true by necessity (bi al-cīriira) would be considered to be tantamount to infidelity (kufr). All matters, other than these, were in the realm of the probable (zann).

There were two main schools of thought on the determination of matters of juristic discretion. The infallibilist (taṣwīb) position, according to al-Ghazālī, stated that every jurist could be “correct” in arriving at a decision in cases which were epistemologically

---

24Ibid.
26Mu, 2:354; 2:357.
27Mu, 2:354.
28Mu, 2:358.
probable (kullu mujtahidin fi al-żanniyyāt muṣīb) - this was also the majority position.29

The fallibilist (takhtī‘a) position, on the other hand, maintained that there was only one correct answer.30

Each of these positions centred around a common theological assumption or question: did God have a specific determinant (ḥukm mu‘ayyan) which should be the target of a jurist’s effort in cases where there was no textual legislation (nass)?31 Al-Ghazālī’s view - where he claimed to be following the lead of al-Bāqillānī - was that God did not have a specific determinant for non-legislated (ghayr mansūs) cases. In fact, the determinant (ḥukm) had to be the dominant probability (ghalabat al-zann) in the mind of the jurist.32 In fact, he said, the determinant followed the probable. A slightly different infallibilist view held that God did have a specific determinant to be sought after, and every search had to have an objective (maṭlūb).33 The only difference between this view and the previous one is that the jurist is not compelled to find the correct answer. Therefore, even if he is wrong in identifying the determinant, he will still have “hit” the correct answer in a manner of speaking, since he had fulfilled the obligation of searching for the specific determinant.

The fallibilists (takhtī‘a) believed that there was only one correct answer in non-legislated cases and events.34 They also believed that God had provided a specified determinant (ḥukm mu‘ayyan) worthy of juristic search. The fallibilists were, however, divided into two camps on the question of the indicant (dalīl) which guided the jurist to

29Mu, 2:358-9; 2:363.
30Mu, 2:363.
31Ibid.
32Ibid.
33Ibid.
34Ibid.
the specified determinant. One group maintained that there was no indicant, and that the search for the determinant was equivalent to accidentally stumbling across a buried treasure. The one who discovered the treasure got two rewards; the one who failed to find it, got one reward in terms of the famous prophetic dictum that a jurist that arrives at a correct decision gets two rewards and the one who errs gets one. The group who held that there was an indicant, disagreed on whether the guiding indicant was categoric (qatl) or probable (zanni). Those who claimed that the guiding indicant (dalil) was categoric said that the failure of the errant jurist was excused because of the subtle and concealed character of the indicant. The Murji'ite theologian, Bishr al-Marisi (d. 218/833), in al-Ghazâlî's opinion, went to extremes in saying that the errant jurist had sinned for violating a categoric determinant.

Those among the fallibilists who held the view that the indicant was probable, also adopted differing stances on the subject. One view was that the jurist was decisively commanded to arrive at the "correct" guiding indicant (dalil) which would lead to the correct determinant. The other view was that the command was only to search for the indicant. In other words, jurists were not compelled (lam yukallaf) to identify the indicant correctly, given its concealed character, and therefore they were excused and rewarded for the effort expended in the search. Those who believed that the command was only to search for the guiding indicant said there was no reward for arriving at the wrong answer, but at the same time the expected sin was also diminished by way of concession.

Al-Ghazâlî's concluding view on the debate between the infallibilists and the fallibilists on the validity of juristic discretion was the following:

35Ibid.
36Mu, 2:363-4.
37Mu, 2:364.
Our approved view with which we will categorically fault any opponent, is that in probable issues every jurist is correct and that God the Supreme had not specified any determinant in these [issues].

Al-Ghazālī was adamant that juristic discretion was only permissible in cases where there was no decisive ruling or text. He, nevertheless, opened up a vast area in jurisprudence for diversity and multiplicity of opinion. The diversity of juristic paths and methods may have stemmed, partly from abstract theological assumptions, but was located, to a large extent, in language.

Between Indicants and Signs: Language and the Relativity of Juristic Discretion

Al-Ghazālī made a vital point in his discussion of juristic discretion which is frequently overlooked. He presented it in terms of the epistemological status of probable indicants (al-adilla al-żanniyya), but it was perhaps more a question of languaging. He stated that probable indicants were not really epistemological, namely logical indicants, but actually linguistic signs (amārat). While everything could be viewed as a sign in postmodern discourse, in the context of al-Ghazālī, the distinction between epistemological indicants and linguistic signs was significant. When probable indicants were designated as indicants (adilla), said al-Ghazālī, it was in a figurative (majāz) manner. Signs (amarāt) in themselves did not have the properties of signification, but acquired signification through their associative relations (iḍāfāt). Probability was an extremely subjective category, said al-Ghazālī:

---

38Ibid.
39Mu, 2:365.
40Mu, 2:376.
A probable [sign] is tantamount to the inclination of the self to a thing, or preferring certain interests, like approving pictures. If one's disposition approves of a picture, one will incline towards it and describe it as beautiful. That very thing may disgust the disposition of another, who will describe it as detestable.\(^{41}\)

Al-Ghazālī illustrated this point by saying that a thing which was probable for Zayd may not have been so for 'Amr. Moreover, the same thing may have been probable for Zayd in one instance, and not so in another. A concrete illustration of how signs had varying influences on people was the difference of opinion between Abū Bakr, the first caliph and the senior Companion 'Umar b. al-Khaṭṭāb, on the question of the distribution of the military stipend (\(\text{\textasciitilde ata}'\)) to the soldiers. Abū Bakr’s opinion was that all soldiers should receive an equal stipend while 'Umar favoured a differentiated stipend based on merit.

Neither of them could convince the other. The reason for this, al-Ghazālī maintained, had to do with their circumstances (\(\text{\textasciitilde hal}\)). Abū Bakr was absorbed in divine (\(ta'ālluh\)) and in afterworldly pursuits (\(ta'jīd al-nazār fī al-akhirah\)).\(^{42}\) 'Umar's disposition was towards politics (\(al-iltifāt ilā al-siyāsa\)) and guarding the public interest (\(wa rī'āyatū masālihi al-khalq\)).\(^{43}\) While each of them comprehended the other's argument, 'the differences in character, circumstances, and experiences inevitably produced differences of opinions (\(zumūn\)).'\(^{44}\)

This insight of al-Ghazālī's, within the context of juristic discretion, illuminated the relativity of the permissible (\(halāl\)) and the prohibited (\(harām\)) in matters for which there were no decisive rulings. A thing which could be permissible in one set of circumstances could be prohibited under different conditions. Superficially, this may seem to be a contradiction, because of a flaw in analysing the distinction between categoric and

\(^{41}\)Ibid.
\(^{42}\)\textit{Mu.}, 2:365.
\(^{43}\)Ibid.
\(^{44}\)Ibid.
probable propositions. Contradictions were, however, characteristic of probable propositions but were disallowed in categoric propositions.\textsuperscript{45}

Confusion stems from an understanding of the signification of a determinant (\textit{ḥukm}). Determinants (\textit{ahkām}) are attributes of actions or signifiers of certain acts (\textit{wāṣf al-afāl}) undertaken by those made responsible (\textit{mukallafūn}). Permissible and prohibited on the other hand are attributes of acts and not attributes of substances (\textit{wāṣf al-ṣiyān}). The determinant regarding a particular act or substance is determined in terms of relativity and associations. The confusion arises when the status of an \textit{act}, deemed permissible or prohibited, is figuratively transferred to the \textit{substance}. For instance in terms of legal theory, the \textit{act} of eating pork is prohibited. But figuratively one says ‘pork is prohibited,’ where the status of the \textit{act} (eating=prohibited) is transferred to the substance (pork).

From the above one can summarise, that according to al-Ghazālī, juristic discretion (\textit{ijtihād}) was allowed in the realm of the probable - the realm of signs - therefore the bulk of juristic activity is exposed to the free-floating instability of linguistic signs. Juristic syllogism (\textit{qiyyās}) became one of the most approved forms regulating the language of the law. In the more specialised, but controversial forms of juristic discretion, such as public interest (\textit{maṣlaḥā}) and preference (\textit{istiḥsān}), attempts were made to further regulate the linguistic instability.

The differences between the infallibilists and fallibilists were rooted in their theological presuppositions. The infallibilists' point of departure did not rule out the fact that, theoretically, there may have been only one correct answer. However, they argued that the jurist's obligation - a theological issue - was only to \textit{search} and expend effort in pursuit of the correct answer, since there was no obligation to find it. Here al-Ghazālī’s

\textsuperscript{45}Ibid.
position was consistent with the mainstream Ash'arite position since the limitations of human capacity featured prominently in Ash'arite theology. The fallibilist position, on the other hand, was based on the theological assumption, that not only did God provide a specified determinant in probable propositions, but that God also held humans responsible for finding the correct determinant. The Mu'tazilites valorised this view and gave human capacity a far greater esteem than the Ash'arites ever did. The theistic relativity of the Ash'arites and the rationalist objectivity of the Mu'tazilites, clearly impacted on the different genres of legal theory and our appreciation of their respective applications in positive law. However, it is important to note that this relativity-objectivity debate was not only based on abstract theological assumptions, but also on language usage.

Legal theory was primarily developed in order to regulate the free-floating signs (amārāt) which were often confused as being indicants (adilla). The probable indicants (adilla żanniyya) were signs and formed the major part of the juristic enterprise. The language debate proved to be the most important component in legal theory, and on a par with theological debate as evidenced in the work of al-Ghazālī. The observation about the centrality of language in legal theory was also underlined by the celebrated jurist and philosopher, Ibn Rushd (d. 595/1198).46

The Doctrine of Public Interest (Maṣlaḥa)47

Although the concept of maṣlaḥa per se only surfaced in the work of al-Ghazālī's teacher, al-Juwaynī (d. 478/1058) and then in al-Mustasfā, the notion of public interest can be traced to the judicial decrees of the second caliph, ʿUmar ibn al-Khaṭṭāb.48 ʿUmar, 


47Literally maṣlaḥa means interest, benefit. But in the technical use of the term it is translated as a public interest(s) (al-maṣāliḥ al-ʿamma), given its role in public affairs jurisprudence.

for instance, argued that public welfare (al-khayr and na/) considerations demand that the Sawâd land in southern Iraq could not be distributed among the warriors, but that these should remain state land. Up to that time the practice of the Prophet had been to distribute the land among the warriors in military action (jihâd). "Umar's reasoning was that if the land was divided among the warriors "what would be the position of the believers as a whole and their descendants?" Placing the land under state control, "Umar argued, would bring about greater welfare and utility for the believers (al-khayr li-jami' al-muslimin...wa 'umûm al-naf li-jamâ'ihim).'' Although the word maslaha (benefit, interest) was not used at the time, other terms such as khayr (public welfare) and 'umûm al-naf (public utility), provided the approximate sense.\(^5{0}\)

The Madīnan jurist, Mālik b. Anas developed the notion of istislah, through which maslaha is considered a basis for legal decisions. Although no evidence can be found in Malik's writings, his disciples cited cases where maslaha was used as a concept of law.\(^5{1}\) Says Khadduri:

As a method of legal reasoning, however, istislah was developed later and used by jurists who claimed that Malik was the first to initiate the use of it. No clear evidence has yet come to light indicating that Malik had used maslaha as a concept.\(^5{2}\)

Later Mālikī jurists, like Abū Ishāq al-Shāṭibi (d. 790/1388) pointed out that there had been a theological debate about whether the determinants of God (aḥkām allâh) were subject to rational analysis (ta'īl).\(^5{3}\) He raised this point in the context of whether revealed dispensations (sharâ'ī) were designed to meet the public welfare of people

---

\(^{49}\) Ibid.

\(^{50}\) al-Shāṭibi, al-I'tisam, 2:115 for 'Umar's statement of khayr.

\(^{51}\) Khadduri, "Maslaha."

\(^{52}\) Ibid.

(maṣāliḥ al-ibād) or not. It was the Muʿtazilites, he said, who held that the determinants of God were subject to rational analysis in consideration of human welfare (bi riʿāyat maṣāliḥ al-ibād).  

Al-Shaṭibi acknowledged the debt of Islamic jurisprudence to the Muʿtazilites when he added that the “moderns (mutaʿakkhirūn) among the jurists adopted that [Muʿtazilite] position,” of subjecting the determinants to rational analysis.  

This explicit acknowledgement, made centuries after the death of al-Ghazālī, was significant in that it recognised that the concept of maṣlahā partly emerged out of the ashes of the theological polemics between the traditionalists and their rationalist opponents. This also possibly accounted for the continuous indecision regarding the status of maṣlahā in Muslim jurisprudence. While most of the traditionalist schools held tenaciously to the fidelity of the revealed word and law above reason, maṣlahā was acceptable to more moderate traditionalist positions within the Mālikī, Shāfiʿī and Ḥanafī schools who accommodated the role of discursive reason. The effect of this accommodation was that in both legal theory (uṣūl) and positive law (fiqh), another path was opened for the horizontal insertion of reason into the juridical discourse via the concept of maṣlahā. Given the intellectual discord at the time, the inclusion of maṣlahā may have been spurned among the more traditionalist elements within the law schools. Therefore, it is not at all surprising to observe al-Ghazālī’s cautious approach to this topic.

54Ibid.
55Ibid.
al-Ghazālī on Maṣlaḥa

Istiṣlāḥ, seeking to make rulings on the basis of maṣlaḥa, was in al-Ghazālī’s view among the “imaginary sources” (al-ʿusūl al-mawḥūma) of law. In other words, subjective and therefore controversial.57 According to al-Ghazālī, jurists resorted to the doctrine of maṣlaḥa only when none of the approved sources provided relief.58 Technically, he did not consider maṣlaḥa as a fifth source of the shari‘a. In fact maṣlaḥa, for him, had to be linked to the intentions (maqāṣid) of the law (sharī‘a) which are in turn derived from the Qur‘ān, Sunna and consensus. Any determinant (ḥukm) arrived at in the service of public welfare (maṣlaḥa) had to protect the normative intentions (maqāṣid) of the law as revealed by the three primary sources. Al-Ghazālī accepted the concept of maṣlaḥa only if the intentions of the revealed law (al-muhāfaẓa ʿalā maqṣūd al-sharī‘a) were preserved and promoted at all times.59 In terms of their conduct, those who had been made liable (mukallafūn), were required to preserve: (1) religion, (2) life, (3) sanity, (4) lineage and, (5) property.

Any notion of public welfare which was not related to the sources of the law was deemed to be ’specious’ (al-maṣātiḥ al-ghariba).60 Such notions were invalid and did not coincide with the disposition of the shari‘a, al-Ghazālī said. Furthermore, he said, that whoever enforced invalid notions of public welfare assumed the role of a ‘legislator.” Recalling that al-Shāfi‘ī had said that the practitioner of legal preference (istiḥsān) had actually unlawfully legislated, al-Ghazālī concluded, that invalid derivations of public welfare were condemned.61 Seeking to legislate purely on the basis of public interest

---

57 Mu, 1:284.
58 Mu, 1:294.
59 Mu, 1:287.
60 Mu, 1:310.
61 Mu, 1:311.
would have been tantamount to arbitrary legislating.\textsuperscript{62} However, any public interest (\textit{maṣlaha}) ruling that secured a \textit{sharī} intention (\textit{maqāsid}) and ensured that such an intention was derived from the Book, Sunna and consensus, would not stand accused of personal legislation.\textsuperscript{63} Having linked \textit{maslaha} to the objectives of the \textit{sharī}, al-Ghazālī added:

... there is no manifest aspect of dispute in following it [\textit{maṣlaha}]; in fact it becomes mandatory to decisively consider it as an authoritative proof (\textit{ḥujja}).\textsuperscript{64}

Superficially, it may seem that al-Ghazālī was narrowing the scope of \textit{maslaha}, for he explicitly deprived it of any status as an independent source of law. However, if we examine his views in terms of the dialogical sequence in the text, another picture may emerge. He asked the rhetorical question:

If it is asked: In almost all the issues [discussed] you have inclined to the concept of public interest (\textit{al-maṣālīḥ}), yet you categorise it among the imaginary sources. Why not attach it to the sound sources so that it can become a fifth source after the Book, Sunna, consensus, and reason?\textsuperscript{65}

Al-Ghazālī’s reply to that question is not only interesting but also provided an insight into the extensive role \textit{maslaha} played in his juristic thought. He told his reader that \textit{maslaha} in his view was about securing the intentions (\textit{maqāsid}) of the \textit{sharī} which were derived from the “sources of the law.” Upon careful observation, he said, you would note that every ordinary derivation of determinants (\textit{ahkām}) from the Qur’ān, Sunna and consensus was nothing short of securing the intentions of the law. So effectively, he regularly gives effect to considerations of public interest (\textit{maṣlaha}) whenever he dealt with the sources of law outside the specific method of juristic syllogism (\textit{qiyyās}). If one were to criticise him for not making \textit{maṣlaha} a fifth source, then his response was that \textit{maṣlaha} was implicit in the mainstream methodology of legal theory anyway! The only difference would be that of

\textsuperscript{62}\textit{Mu}, 1:315.
\textsuperscript{63}\textit{Mu}, 1:311.
\textsuperscript{64}\textit{Ibid}.
\textsuperscript{65}\textit{Mu}, 1:310.
nomenclature. Public benefit derivations not formally derived via juristic syllogism was called “an unregulated benefit” (maṣlaha mursala). In these assertions of al-Ghazālī we can see a mitigated version of the later Najm al-Dīn al-Ṭūfī (d. 716/1316) who with the exception of devotional matters, subjected everything in law to the test of human welfare and public interest.  

His assertions of seeing public interest at the core of law aside, al-Ghazālī limited the search for the intentions of the law to the first three of the four accepted sources of Islamic law. By doing so, he introduced a mechanism of restraint against unfettered subjectivity in law. His method limited arbitrary and invalid citations of maṣlaha, but at the same time also allowed ample space for creative jurisprudence. Once a talented jurist could illustrate, in cases where there were no decisive guidance, that a determinant complied with an intention(s) of the law, it became a valid ruling on the grounds of maṣlaha, provided it also passed other tests.

Typology of Maṣlaha

Al-Ghazālī divided maṣlaha into three types:

(1) permissible: supported by evidence of the revealed law (sharā')
(2) void: not supported by the revealed law
(3) acceptable: because the revealed law is indifferent on the matter.  

An example of the permissible type would determine the public interest by means of juristic analogy (qiyās). So for example, the prohibition of intoxicants based on the prohibition of wine, was in support of the sound public interest consideration of protecting

---

66 Ibid.

67 Mu, 1:284.
reason and sanity. Reason and sanity were the causes of legal liability (*manāt al-taklīf*) and disturbing these faculties could lead to the obsolescence of the *sharī‘a*. 68

An illustration of the void type is the juridical response (*fatwā*) by some jurists, especially Yahyā b. Yaḥyā al-Laythī (d. 234/848), the student of Mālik who ordered a king to fast for two consecutive months in expiation for intentionally breaking his fast by indulging in sex while fasting in Ramadān. 69 Expiation by fasting was only meant for the one who could not afford to free a slave. This ruling was specially designed by the jurists on the grounds of public interest for kings and aristocrats. The intention was to provide a harsh deterrent for wealthy persons for whom freeing a slave would not serve the purpose of deterrence, but fasting would. Al-Ghazālī rejected such rulings on two grounds. Firstly, that the public interest doctrine went contrary to the decisive textual legislation. Secondly, if and when the kings and rich discovered that the ruling was the making of juristic opinion, they were bound to question the integrity and credibility of the learned scholars of religion (*ulamā‘*) at large. As a consequence, people would lose confidence in the validity of the responsa (*fatwā*) which the *ulamā‘* might issue in future, since they would suspect it to include personal distortions of the *sharī‘a*. 70 Al-Ghazālī raised a dire warning about such practices saying that this type of reasoning “will lead to changes to all the limits (*hudūd*) of the revealed laws (*sharī‘a*) and their textual sources (*muṣūs*) because of the [ongoing] changes in circumstances.” 71

The difference between a *maslaha*-ruling based on juristic syllogism and one based on “unregulated benefits” (*al-maṣāliḥ al-mursala*) is that the former has a textual source as analogue and point of reference. In the case of the latter (unregulated benefits), a jurist

---

68 Mu, 1:285.
70 Mu, 1:285.
71 Ibid.
arrives at the intended meanings of the *sharīʿ* by means of induction preceded by a comprehensive summary of the relevant indicants (*adilla*), the circumstantial evidence (*qarāʿīn*) and divergent signs (*tafārīq al-amārāt*) from the sources. 72 In addition, an unregulated benefit (EEDED 8A s 3EL3 4) must pass three rational tests:

1. the test of necessity (*darūra*)
2. the test of decisiveness (*qarīf*)
3. the test of universality (*kullī*) 73

While *maslaha* becomes operative in instances of an absence of an explicit regulation (*mursal*), or as a result of necessity (*darūra*), the criteria of decisiveness and universality were included to provide epistemological certitude and eliminate arbitrariness in the law.

*Maslaha* of the third type is where the law is indifferent and the search for the determinant is thus open to discussion (*fi maḥall al-naẓar*). Al-Ghazālī preferred to demonstrate this type of *maslaha* by dividing its “intrinsic properties” (*bi ʿtibār qunwawathā fi dhātihiū*) into three levels or orders of benefits:

1. essentials (*al-darūrāt*)
2. supplementary (*al-ḥājāt*)
3. embellishments (*al-taḥsināt and al-tazyīnāt*)

First order benefits, essentials, were designed to protect and promote the five objectives of the revelation: religion, life, sanity, lineage and property. According to al-Ghazālī:

72 *Mu*, 1:311.
73 *Mu*, 1:296.
Chapter 7

Everything that involves the preservation of these five principles (al-uṣūl al-khamsa) is a utility (maslaha) and everything that forfeits these principles is an injury (mafsada), the avoidance of which will be tantamount to a public interest. 74

In the case of first order benefits, a jurist could reach a conclusive determinant (ḥukm) without reference to a specific source. 75 Second and third order benefits (necessities and supplements) could not generate compelling determinants (aḥkām) on their own without the justification of a source, even though theoretically a master-jurist could arrive at an individual opinion. The only caution al-Ghazālī offered was that if the revelation does not provide an opinion (al-raʿy) it would be tantamount to preference (istihsān). 76 If however, the opinion was derived from a source, then it would become an analogy.

For al-Ghazālī these five principles were not only desirable in the objectives of Muhammadan jurisprudence but were also applicable to other religious dispensations. 77 In a major leap al-Ghazālī makes the objectives of public welfare the somum bonum of all religion. He said:

It is prohibited to alienate these five principles and suppress these, [a fact which is] impossible [to conceive, to the extent] that any community among communities (milla min al-mi/al) and any revealed dispensation among dispensations (shari`a min al-sharai`) could be without them, [especially] if the intention is to reform creation. [It is precisely] for this very reason that all the revealed dispensations (sharā`i`) did not differ in their prohibition of infidelity, manslaughter, fornication, theft and the consumption of intoxicants. 78

74 Mu, 1:287.
75 Mu, 1:294.
76 Mu, 1:293-4.

77 By Muhammadan I mean the specific jurisprudence which developed out of the revelation received by the Prophet Muhammad.

78 Al-Ghazālī has an awkward way of putting this. The Arabic text reads: wa tahrīm tafwīḥ hādhīhi al-uṣūl al-khamsa wa al-zajar anha yastaẖīlu an la tashtamila al-ālayhi millatun mina al-mi/al, wa sharī` atun min al-sharai` allālī urīda bihā istīhā al-khālq. The sense is easily derived from this sentence, that al-Ghazālī says it is impossible to conceive any revealed legislative dispensation to be free from public interest considerations. But the sentence following it, “wa tahrīmu tafwīḥ hādhīhi al-uṣūl...” does not
By stating his case in such emphatic terms it became clear that al-Ghazālī placed a premium on public welfare considerations in legal theory. Not only did he view it as a universal consideration in juristic ethics, but this universalism provided the grounds for the ratiocination as to why certain acts were prohibited in Islām. Once this point had been made he projected as fact that other religions also prohibited infidelity, manslaughter, fornication, theft and the use of intoxicants. Al-Ghazālī interestingly anticipated the strength of his argument being derived from the comparative dimension of his reasoning, by invoking the notion that “all religions” share in the concerns of public interest. Although his argument was sweeping and to an extent unsupported by evidence, it did disclose that religious comparisons of some sort were part of an intellectual repertoire in the fifth/eleventh and sixth/twelfth centuries.

**Analogy and Maslaha**

_Maslaha_ can also take the form of juristic analogy. In al-Ghazālī’s schema, juristic analogy (_qiyyās_) as a basis of juristic deduction, especially the “relevant reason” (_munāṣib_) and imagined meaning (_al-ma‘na al-mukhayyal_), were the equivalent of public interest (_maslaha_). The essence of analogy for al-Ghazālī was “adopting a determinant [on the basis of] the intelligibility of a textual source and consensus” (_huwa iqtibās al-ḥukm min ma‘qu al-nass wa al-ijmā‘_). Every determinant (_ḥukm_) was precipitated by a legal cause or legal sign (‘_illa_'). Inference (_instinbāt_) was one of the approved methods of finding the ‘_illa_'. There were two valid types of inference:

---

79. Mu, 1:287.

80. Mu, 1:284. Perhaps the “_wa_” meaning the “and” should have read “_aw_” meaning “or”. For surely an analogy based on any textual source or a consensus ruling would be sufficient grounds. It does not require both a textual source and consensus to validate the analogue.
(1) observation and classification (sabr wa taqsim); and
(2) relevancy or affinity (munāsaba).

According to al-Ghazālī, in order to demonstrate the relevance of the reason (munāsib) with the determinant (hukm), analogical inference would suffice.\(^8^1\) Al-Ghazālī admitted that analogy on the grounds 'relevance' was a controversial (mukhtalaf fihī) proposition, similar to the doctrine of public interest (masālīh). Defining the basis of analogy by relevancy, he said: "When the determinant (hukm) is associated to a relevant reason (munāsib) it is [rationally] regulated (intaṣama)."\(^8^2\)

**Munasib**, according to al-Ghazālī could be divided into three main types:

1. Effective (muʿāthir)
2. Appropriate (mulāʿīm)
3. Specious (gharīb).\(^8^3\)

Relevance of the 'effective' type was when the impact (taʿthīr) of the determinant was evident in the consensus decision or textual evidence (naṣṣ). For instance in the ruling that "whoever touches his pudendum must take ablution" the impact of touch is so self-evident that on the basis of the analogy of affinity the act of touching someone else's pudendum would have the same ruling.

Relevance of the 'appropriate' type (mulāʿīm) would be when the impact of the relevance is not identical, but of the same genus (jins). A small amount of a date or raising beverage (nabīdīh), even if it does not inebriate, was prohibited on the analogy of the prohibition of wine. The underlying reason was that a small amount of nabīdīh would lead

\(^{8^1}\) *Mu*, 2:296.
\(^{8^2}\) *Mu*, 2:297.
\(^{8^3}\) Ibid.
to the consumption of a larger amount. In this argument of relevance, the genus of the rule, namely inebriation was considered. Another example was that it was not compulsory for a menstruating woman to compensate for prayers missed during her periods, but she would have to compensate for the fasts missed as a result of her menses. The hardship of having to compensate several days of lost prayers was the grounds for prayers being excused.

Relevance of the specious (gharib) type would occur when the effective and appropriate affinities were not manifest. An example was the prohibition of wine because of its intoxicating qualities. For this reason all intoxicants were prohibited even though the effect of intoxication may not have manifested itself in another instance. 84

Al-Ghazâlî admitted that the relevance (munâsaba) of analogy differed to the extent that it depended on the judgement of the individual jurist. 85 At times it may have generated a level of probability that was persuasive but not at other times. "It is not possible to exactly define the levels of relevance since every case which the jurist (mujtahid) will investigate has a special flavour." 86

There are four categories of an relevant reason (munâsib) in terms of it being supported by a specific source: 87
(1) A munâsib supported by a specific source and which is categorically accepted by analogists;
(2) A munâsib not supported by a specific source and which is rejected by analogists.
This, according to al-Ghazâlî was tantamount to preference (istihsân) and making law

84Ibid.
85Mu, 2:305.
86Ibid.
87Mu, 2:306.
according to personal opinion (\textit{wad` li al-shar` bi al-ra`y}). An example of this would be denying a murderer a share in the inheritance of the murdered victim. There was no specific textual source supporting such a ruling, but it was designed to thwart the intention of the murderer.

(3) A \textit{munāsib} which is supported by a specific source, but it is not suitable and falls in the realm of \textit{ijtihād}.

(4) A \textit{munāsib} not supported by a specific source. This was known as unregulated reasoning (\textit{al-istīdāl al-mursal}).

\textbf{Applications of \textit{Maṣlaḥa}: Illustrations}

Issues of public interest are clearly "hard cases" Al-Ghazālī posed questions about certain cases to demonstrate the complexity of public welfare considerations of a sensitive nature. This was especially true when there were no regulated jurisprudential guidelines, as in the case of \textit{maṣlaḥa} and yet the jurist had to provide a judgement which expressed the essence of the legal tradition in a convincing and non-arbitrary manner.

\textbf{Killing a Human Shield}

If a non-Muslim enemy used Muslim captives as human shields in order to ward off an attack by a Muslim army, was it permissible to assault the enemy and in the process take the life of the innocent persons used as shields? The context was such, that if the enemy was not conquered, this defeat would expose the entire Muslim community to either death or captivity. Note, that al-Ghazālī did not enter into discussion as to whether our knowledge of the enemy's capacity to exterminate the Muslims is decisive or probable knowledge - a point to be raised later.

\[88\text{Ibid.}\]
The crucial ethico-legal question was whether an innocent person can be killed for the sake of the greater good when there is an explicit and decisive injunction prohibiting the taking of innocent life? The argument which justified taking the lives of the human shields went as follows: the prisoners would probably be killed, whether the Muslim army attacked or not. If the entire Muslim community were to be saved from sure death and destruction but at the expense of the death of a limited number of Muslim hostages, then “saving the majority of Muslims is closer to the intention of the revelation.”

We know categorically, said al-Ghazâlî, that the intention of the *sharâr* is to decrease the amount of killing, if it could not prevent the taking of human life. This intention of the *sharâr* was known from several indicants. On the other hand, the death of the few is known to be in the public interest by way of necessity. This was clearly a case of an unregulated public interest (*mašlaha mursala*) type of decision for which there was no specific source or text as basis. This case of *mašlaha* passed the rational test of being necessary, decisive and universal. The killing of the few hostages was necessary since there was no other viable alternative. Sparing the lives of the entire community was not speculatively known, but definitively known. This ruling did not serve the interest of a small group, but served everyone’s interests and was therefore acceptable in terms of a universal imperative.

A crucial point in the human shield case, was the situational analysis which was pivotal to public interest consideration. The analysis must have suggested decisively that failing to attack the non-Muslim enemy, and by implication saving the innocent human shields, would have resulted in the extermination of the entire Muslim community. As noted above, al-Ghazâlî did not examine whether the threat of defeat was based on decisive or probable knowledge, which was also one of his rational tests. He quickly

---

89 *Mu*, 1:295.
conceded that this was a debatable point, and therefore the jurists of 'Iraq had produced two views. Even if the threat was not viewed as being based on decisive knowledge, knowing the level of probability to be closer to certainty was also acceptable to him as a test. The actual threat had to be judged as not only affecting a limited number of people, but many, and, therefore, it would become universal. Moreover, the epistemological value of the indicant (decisive or probable) would take a secondary role. It appears that al-Ghazālī placed a higher value on universality in his three-point test of maṣlaḥa cases.

When there was a clash between two public interests (maṣlaḥatān) or two intentions (maqṣūdatān) of the revelation, one must choose the stronger intention and public interest. Put another way, one should avoid the greater of two evils. In the case of killing the human shield two intentions of the law clashed: the public interest to defeat the enemy because of the grave threat they posed, on the one hand, and the consideration that life was sacred and should not be taken without a just cause. The killing of the human shield was not in itself a just cause. In the case of such a choice there was a need to give preponderance to the universal (kullī) over the particular (juz 7). Al-Ghazālī's anonymous interlocutor disagreed with him on two scores. First, to avoid going to war with the enemy in such dire circumstances were not in contravention of the intention of the revelation. Second, one could not just dismiss the particular (juz 7) without sound textual evidence (nass). In his reply al-Ghazālī said that not to fight would lead to the extermination of Islam, and by implication the continuance of the religion must be viewed as an intention of the revelation. Devaluing the particular could be proved from more than one textual source, he said.

---

90Mu, 1:313.
Chapter 7

Human Shield at a Fort

In a second case an opposing army makes an enemy fort impregnable by using an individual Muslim as a human shield. The situation was such that no serious threat to the safety and security of the Muslims at large emanated from the occupation of this fort. In such a case, it would not be permissible to take the life of the human shield in order to overrun the fort, said al-Ghazali. The reason for this was that such an action would not have passed the rational test. There was no “necessity” to conquer the fort, nor was there any “decisive” assurance of victory, in his view. Although he did not address the test of “universality,” it was self-evident that the conquest of the fort did not fulfill any of the “essential” needs of the Muslim community.

Emergency at Sea

The third case involved an emergency at sea, where an endangered ship had a few persons on board. For some reason it was decided that one or some passengers had to be thrown overboard in order to assure the safety of the rest. If this did not happen everyone on board would be endangered. Would it be permissible to identify those person(s), even if it meant drawing lots, and allow them to drown? While this case may have resemblances with the human shield case, it remained different in one main aspect. It did not involve the universal interests of the entire Muslim community, but only affected the fate of a few persons at sea. The objective of saving a few did not warrant the sacrifice of one person and therefore it was not permissible.91

Amputating a Gangrenous Hand

Did the terms of maslaha permit one to amputate a gangrenous hand in order to save one’s life? There were precedents in law which permitted a limited amount of injury to oneself if this brought benefit, such as phlebotomy and cupping. In an emergency, one

91 Mu, 1:296.
was permitted to eat the flesh of one’s thigh if faced with the threat of starvation, which could be viewed as analogous to amputating a gangrenous hand. But al-Ghazālī argued, to the contrary, that amputation itself could become the main reason for the subsequent fatality, since there was no certainty of remedy in amputation, and hence the benefit was not a decisive one.

**Torturing a Suspect**

Al-Ghazālī was asked if he viewed torturing a person suspected of theft in order to recover the stolen property to be a matter of public interest. Al-Ghazālī said that, although the view of torturing a suspect was attributed to the Madīnan jurist Malik. b. Anas, the Shāfiʿīs did not accept it. His rejection was not because he did not see any public interest being served, but because it conflicted with a competing interest, the duty not to harm an innocent person. The danger of possibly indemnifying the guilty was less harmful than wrongfully torturing the innocent. On the basis of competing public interests, al-Ghazālī favoured the path causing least harm.

**Executing a Repentant Heretic (Zindiq)**

Al-Ghazālī was asked if he agreed with the view that it was in the public interest to execute one who had concealed his unbelief (zindiq), even though he had repented. The execution of a repentant heretic conflicted with the statement by the Prophet, on whom be peace: “I have been commanded to fight people until they say there is no other deity except Allah.” In terms of this statement, the heretic could not be executed. Al-Ghazālī admitted that this case was open to juristic discretion (ijtihād). One could agree to the execution of a zindiq, he said, since the statement on the profession of faith addressed Jews and Christians, since it indicated their conversion. A heretics on the other hand,

---

92 Mu, 1:297.
93 Mu, 1:298.
would find dissimulation and concealment to be the very basis of their heresy. If one favoured execution, then from the point of view of legal theory, it was a notion of maṣlaḥa that entailed specifying (takhsīṣ) the generality of the prophetic statement, which would then mean that only certain people would be protected by conversion and confession, thereby excluding the application of the Prophet’s statement to heretics. Maṣlaḥa, in terms of this illustration could then mean reverting to an interpretative method.

Al-Ghazālī was pressed to explain his inconsistency in allowing the killing of human shields under necessity, on the one hand, but disallowing the execution of a repentant heretic. This was after he had established a rule that maṣlaḥa cannot contradict a decisive textual authority (naṣṣ). He was also reminded of his strong disapproval of Yaḥya b. Yahya al-Laythī’s fatwā for going beyond the explicit textual authority. In the case of the execution of the repentant heretic he clearly violated a decisive textual authority. He conceded that his ruling fell within the realm of juristic discretion (maḥall al-ijtihād) in which a ruling to the contrary was not unlikely.94

Executing an Agitator

In the case of an agitator who engaged in public incitement to disorder, pillage, loss of life and heresy, the doctrine of maṣlaḥa could not be used to justify the execution of such a person, al-Ghazālī said. If the crime did not fit the death penalty, he said, then life imprisonment - not execution - should be the sentence. In his view, the public interest in this case was not a “necessary” one. Al-Ghazālī stated that his view would remain the same even if it was argued that the government was weak and unable to deter such agitators, and that if they were imprisoned a new government would grant them amnesty. These were imaginary scenarios, al-Ghazālī said, for there was no assurance that the

94 Mu, 1:302.
regime would change and the prisoners would be released. Executing people on grounds of imagined public interest was not allowed.

**Taxation**

If taxation (*kharāj*) was considered to be among issues of public welfare, could it be imposed? Al-Ghazālī said that new funds could only be levied if the army did not have sufficient funds to defend the Islamic borders. If the security of the state was threatened leading to social disorder as a result of a shortage of money, then a tax on the wealthy which would satisfy the needs of the armed forces could be imposed. Al-Ghazālī here advocated an unregulated benefit (*maṣlaḥa mursala*) since there was no specific established precedent for such a ruling. Faced with choosing between two evils - taxes or social disorder, the purpose of the law was to avoid the worse of two evils.

**Discretionary Punishment for Consumption of Wine**

Al-Ghazālī was asked if the stipulated penalty (*hadd*) for drinking wine was prescribed, and if so, on what grounds of *maslaha* did the Companions of the Prophet have increase the penalty to 80 lashes? If it was not prescribed, but was a discretionary penalty (*taʿżīr*), then on what grounds did they find drinking to be analogous to slander to implement that ruling for the consumption of intoxicants?

The correct position, he said, was that it was not a prescribed penalty. The penalty for drinking during the Prophet’s time an arbitrary number of beatings with shoes and garments. Later that sentence was approximated and settled at 40 lashes. After that, the community felt the need to increase the number of lashes on the basis of public interest,

---

95 *Mu*, 1:303.
96 *Mu*, 1:305.
given the fact that the ruler had the liberty of jurisdiction in discretionary penalties. This liberty, said al-Ghazālī, would support the claim that the rulers had been empowered by consensus to be the guardians of public welfare. However, the rulers felt constrained by the precedent penalty set by the Prophet on drinking and did not wish to transgress the Prophetic ruling. Therefore, they felt more comfortable in issuing a punishment which was in keeping with an explicit and decisive ruling, namely slandering. Consuming wine was considered to share some features in its consequences with slandering, and therefore fell within the presumption (maṣṣāna) of slander. The reasoning underlying the analogy was that the inebriated person became irrational, and that an irrational person was prone to slander. Therefore 40 lashes, as a penalty, for slandering was adopted by analogy as the prescribed punishment for drinking wine. The increase in the penalty from 40 to 80 lashes took place on grounds of public interest.

From the reasoning applied to the maṣlaḥa-ruling on wine drinking, al-Ghazālī said, the law considered the presumption of something as being equivalent to the materialisation of the thing itself. He cited several examples: sleeping was presumed to be the equivalent of ritual impurity (ḥadath) of the minor kind, since one’s ablution had to be redone; puberty was considered to be the same as attaining reason. Causes such as sleeping, and puberty, fell within the presumption of the materialisation of the actual acts of minor ritual impurity or mental maturity. Therefore, the ruling of increasing the penalty for drinking from 40 lashes to 80 was not contrary to the textual evidence (naṣṣ), if one followed the reasoning of presumption.

97 Mu, 1:306.
Conclusion

In trying to get a picture of al-Ghazālī's jurist working in the public interest I examined three aspects. Firstly, I explored and described al-Ghazālī's views on the qualification of the master-jurist. Secondly, I explored the validity of juristic discretion. Thirdly, I described at some length al-Ghazālī's notion of public interest (maslaha), its types, conditions, and the tests he provided for the validity of maslaha. More importantly, I examined some of the seminal cases of maslaha used by al-Ghazālī.

The pattern that emerges is that on the one hand al-Ghazālī commits himself unambiguously to an open juristic canon by liberalising the qualification of the master-jurist (mujtahid). If there was a move to restrict and proscribe juristic discretion (ijtihād) in al-Ghazālī's day there was no evidence of it in al-Mustaṣfa. One indication that there was no such move, was the absence of any polemical and dialectical arguments in the section on ijtihād when al-Ghazālī proposed reducing the standard of qualification to become a master-jurist. If there was opposition to ijtihād, then al-Ghazālī would have undoubtedly engaged his interlocutors. It is however, most likely that he viewed himself as a master-jurist (mujtahid) albeit within the Shāfiʿī school, since he qualified in terms of the criteria proposed. One can thus deduce that for al-Ghazālī the openness of the juristic canon was certainly a positive move. He surely must have been aware of the risks and instability an open-ended legal system could pose, given the ideological and sectarian competition of his time, yet he felt it necessary to advocate openness.

On the topic of maslaha where the juristic brilliance of any master-jurist is tested, al-Ghazālī's views of juristic discretion were demonstrated by the restrictions he imposed in response to the subjective nature of public interest debates. We see al-Ghazālī's jurist as an objectivist trying to restrict maslaha to rigid tests by developing a hierarchy of needs. Maslaha arrived at by juristic syllogism (qiyās) and a suitable (munāsib) analogy was his
preferred choice. On the other hand, he also asserted that any ordinary deduction from the three main sources of law - Qur'an, Sunna and consensus - was actually nothing other than a deduction which gave effect to public interest considerations. His only caveat was that public interest considerations should not conflict with an explicit and decisive rule of the shari'ah. Overall, al-Ghazālī implied that all the sources of law were intrinsically related to the needs of maṣlaha. He found it too radical to explicitly declare maṣlaha as the fifth source of law, but implicitly succeeded in saying so. Although he was not explicit about the universality of public interest concerns in religious law, the difference between al-Ghazālī and the famous but controversial Ḥanbalī jurist, al-Tūfī, who held that all laws were subject to the criteria of public interest, can only be deemed marginal.

Even though some scholars believe that al-Ghazālī treated maṣlaha with reservation and rejected human utility, I believe that I have demonstrated that his efforts had far-reaching consequences. Al-Ghazālī's reasonably complex treatment of maṣlaha opened the way for later scholars to amplify the doctrine. Al-Shāṭibi for instance, reverted to some of al-Ghazālī's views to further his study of maṣlaha, even though al-Shāṭibi's treatment was much more elaborate. If it were not for the qualified approval of maṣlaha by such leading lights of the Islamic intellectual tradition as al-Ghazālī, al-Shāṭibi's task of expanding and elaborating on the role and function of maṣlaha in law would have been all the more difficult.

Al-Ghazālī demonstrated that the sources of legislation were connected to revealed intentions (maqāṣid) of the law, which were in themselves rationally derived. The five intentions or meta-principles of the law were identical to public welfare considerations. This aspect of al-Ghazālī's legal theory which appeared to have confidence in rationality

---

98 Muhammad Khalid Masud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1977), 156.
and human capacity was perhaps at variance with his theological determinism that the
good and detestable could only be determined by nomothetic discourse, and not by reason.
Reason, previously considered to be an aid to understanding revelation, in the context of
maslaḥa, along with discretion, even had the capacity to determine the moral value of
unregulated forms of public interest, known as maslaḥa mursala. The debate on maslaḥa
highlights a tension underlying al-Ghazālī’s legal philosophy. On the one hand he
acknowledges the capacity of human beings to discern utilities and benefits on those issues
where the law had not provided any clear guidelines. Elsewhere, I have shown that al-
Ghazālī believed that reason had no capacity to make ontological judgements of good and
bad. Al-Ghazālī thus tried to hold on to two ends: a form of moral rationalism, on the one
hand, and Ashʿarite determinism on the other.

When al-Ghazālī connected the law to the service of five universal meta-principles,
there was clearly an admission of human utility. One cannot avoid the observation that at
times al-Ghazālī actually became crudely utilitarian and morally relativistic. This can be
viewed from his analysis and judgement of killing the hostages in case of the human shield.
His relativism does not stem from the instability of language, but also the inscription of
theology in the language of law. Therefore, he is consistent with the “incurable relativism”
to be found in Sunni theology, especially as a consequence of the rational moral
relativism.99

Clearly, the most important part of the discipline of legal theory deals with
language. Legal language constituted signs and not oracles, as it was sometimes wrongly
presumed. Probable indicants, said al-Ghazālī, were signs (amārāt) which have no volition
of their own but were constantly shifting given the location of the language-user. Al-
Ghazālī as we know tried to stabilise language by inscribing on language certain

99Fazlur Rahman, Islamic Methodology in History, 162.
theological assumptions. In the discussion of *maslaḫa* and *ijtihād*, it was the linguistic component that was largely responsible for the semiotic openness of juristic debates.

Al-Ghazālī here found himself on the horns of a dilemma between the openness of juristic discretion and the method of arriving at public interest decisions which were seemingly inclined to closure. At the same time the shifting linguistic signs make stable and rigid interpretations difficult. Al-Ghazālī thus had to navigate these complex contradictions in his legal theory.
Conclusion

Despite being an influential figure of middle of Islam, al-Ghazālī's role as jurist and theorist had been underplayed in the Muslim intellectual tradition. Well known for his innovative contributions to theology, Sufism and philosophy, his equally valuable contributions to Islamic jurisprudence and legal theory had gone unappreciated for centuries. This investigation suggests that one of the reasons why his role as a jurist had remained uncelebrated for so long was because of his controversial intellectual style, his pragmatic politics and his honest public self-appraisal in his autobiography.

Al-Ghazālī's intellectual style was innovative and bold. This thesis has shown that he transgressed the accepted boundaries of disciplines and conventions on numerous occasions. For this, he earned the opprobrium of many of his contemporaries. What caused more outrage than anything else was the fact that he accepted and integrated elements of "foreign knowledge," such as logic and dialectical theology into his study of legal theory. His autobiography bears testimony to the fact that he experimented with mysticism and some of its practices which were considered to be eccentric and antinomian. This unconventional profile was viewed as contrary to the conservative juristic conventions, which demanded consistency, formality and stability. The Shafi'i school, to which al-Ghazālī claimed allegiance, honoured him as one of their foremost intellectual lights, but always in his capacity as the defender of the faith Huqjat al-Islām (Authority of Islam), as a theologian - never as a jurist. Though reference is made to his juristic works, little real credence is given to his seminal contributions in this field. His juristic writings were neither mediocre nor pedestrian. If they had been so, the Shāfi'i jurist, al-Rafi'i would not have considered them worthy of commentary. Al-Rafi'i acknowledged al-Ghazālī as a critical link between al-Shāfi'i and later Shafiite jurists. Ibn Rushd, despite his repudiation of al-Ghazālī's critique of philosophers, admired his legal theory in al-Mustasfi'a and deemed it worthy of an abridgement as al-Daru'ī fi 'Usūl al-Fiqh (The Requisite in the Science of Principles).
Al-Ghazālī's interventions in legal philosophy, as evident in *al-Mustasfā*, demonstrated his ability to present legal theory as a meta-theory of an inter-disciplinary nature. He also provided a lucid and rational structure for the discipline - applying to it the framework of the four pivotal axes. In doing so, he attempted an integration of law, language and theology into one seamless garment of legal theory. On their own, these disciplines, especially theology and law, were the subject of intense rivalry within legal schools.

Al-Ghazālī realised that legal theory, given the primacy of law in Muslim culture, was the key discipline and as such could not be allowed to be exposed to the vagaries of controversy and tensions. He perceived the necessity for the resolution of disputes in order to harmonise legal theory with his reforms and innovations in theology and philosophy. In *al-Mustasfā* al-Ghazālī espoused the role of a public reformer. It was his legal theory designed to synchronise with his grand project of individual reform by means of Sufism, and his renewed political-theology as an ideologue in the Saljūq period.

He attempted a synthesis of the various Islamic disciplines. In doing so, he found himself in the maelstrom of contending ideological conflicts. At the official level, he was a Shāfi’i Ash’arite scholar recognised in the influential intellectual and political circles of his time. But, after his conversion to Sufism, al-Ghazālī underwent a philosophical shift and became more bold and innovative. Some of his pronouncements, especially on Sufism were viewed as subversive, as the criticisms of al-Mażārī, al-Dhahabī, Ibn al-Jawzī and Ibn Șalāḥ suggested. These criticisms were not unfounded, for, if viewed from the conservative position of the time, then the later al-Ghazālī was undoubtedly subversive, and demonstrated great creativity, courage and brilliance as a *bricoleur*. His general approach to the Islamic disciplines, seeing himself as a synthesiser of various disciplines, was too subversive for the intellectual mood of the sixth/twelfth century. Were it not for his masterly contribution to Islamic mysticism in his *Ihya’ ulūm al-Dīn* and the refutation
Conclusion

of some of the views of the philosophers in the Tahafut al-Falasifa, one could say, without too much fear of contradiction, that al-Ghazâlî may not have been immortalised in the Islamic tradition.

My close reading of al-Mustaṣfa reveals that, as a bricoleur, he tried to integrate the antinomies within the Islamic discourse. On the one hand, he tried to retain the traditional expression of religion and projected the supremacy and finality of the nomothetic discourse of the revelation (khitaab al-sharî'ah). On the other hand, he found himself compelled to employ ideas and methods which were considered to be outside the Islamic tradition, such as logic, philosophy, and Sufism. For example, he was aware that the rational and speculative discourses of kalâm could provide stability to the first premises of legal theory beyond contention. He recognised that language was the most important component of legal theory. Here again he was caught between the stable pretensions of language set by metaphysical decree and the reality of changing language-use. In his explication of the determinant (hukm), liability (taklîf) and juristic ethics (tahsîn wa taqbih), al-Ghazâlî demonstrated that as commonplace as these notions may have been, their conceptual framework rested on a particular understanding of language. Grasping what constituted a determinant (hukm) relied on a unique understanding of inner speech (kalâm al-nafs). To understand liability (taklîf) demanded a more conventional understanding of language. Juristic ethics related to liability in turn required a complete submission to the sovereignty of the nomothetic discourse (khitaab al-sharî'ah). The notion of the hukm depended an epistemological framework that had the ability to shift from a metaphysics of language (kalâm al-nafs) to a nominal view of language (kalâm al-lafz), in one instance. Al-Ghazâlî accomplished this through a variety of rhetorical strategies, employing linguistic tropes and metaphors that continuously masked the obvious discontinuities and contradictions.
In the application of law, he attempted to achieve a balance between fidelity to the revealed text, by emphasising the proper use of the sources, on the one hand, whilst also allowing a significant amount of subjectivity, relativity and human discretion, on the other. This was evident in his implicit statement about the openness of the juristic canon, and the omnipresence of public interest \( (\text{maṣlaḥa}) \) considerations in human transactions. I believe that al-Ghazālī's implicit statements about the role of public interest in law set the scene for later jurists like al-Ṭūfī and al-Shāṭībī to elaborate and stress its crucial role in Islamic law.

The tensions and antinomies spawned by al-Ghazālī's attempts at achieving a synthesis of the disciplines had parallels in his own life. Questions on such taxing subjects as certainty, the essence of religion, the conflict between religion and philosophy, revelation and reason, power and ideology, conformity to authority and individual discretion were some of the antinomies that recurred continuously. As an intellectual reformer, al-Ghazālī was caught up in the vortex of antinomies and contradictions, but was determined to give stability and consistency to the intellectual edifice of Islām.

In his bid to stabilise both the edifice of the meta-theory of law, namely legal theory, and the Islamic disciplines in general, al-Ghazālī vacillated between binary and polar opposites. His grand philosophical narrative for stability exhausted itself. Language itself, and theology - another type of language - continuously undermined the pursuit of stability, for narratives are actually forms of social interaction which involved making moves in the language game, be it \( \text{kālām}, \, \text{uṣūl} \) or \( \text{falsafa} \). The self, here the Ghazalian self, was the shifting intersection, a moving nodal point, which created the instability. The pursuit of stability was not woven with a single thread, but contained as many threads as there were social bonds. Participation in the pursuit of stability and the maneuvering within language involved an agonistics. It involved a polemical and rhetorical athletics, making moves with the imagination as in a game, discovering new rules and making up the
game as al-Ghazālī went along. Juxtapositioning, sleight of hand and multiple definition of terms were some of the key features in these rhetorical moves. In one instance al-Ghazālī wished to keep juristic discretion (*ijtihād*) alive but in its application he proposed a method of control over such discretion.

Finally, it must be said that al-Ghazālī was an intellectual who constantly searched for the permanent and the stable in order to end doubt and uncertainty, but that ideal proved to be as illusive as it was real.
Bibliography

European Language Sources


_______. "al-Ghazali's Supreme Way of Knowing God." Studia Islamica. 77 : 141-68.


Bibliography


________. *Tahāfūt al-Falāsīfā [Incoherence of the Philosophers]*. Translated by Sabih Ahmad Kamali. Lahore: Pakistan Philosophical Congress, 1963.


Bibliography


Bibliography


Bibliography


Bibliography


Masud, Muhammad Khalid. *Islamic Legal Philosophy*. Islamabad: Islamic Research Institute, 1977.


Arabic and non European Languages


Bibliography


