that ᶜĀ'ishah apparently acted once in the capacity of a guardian [walī] in the marriage of one of her kinsmen when the girl's father--the legal walī--was out of Madīnah travelling. Ibn al-Qāsim does not doubt the authenticity of the 'athar but tells 'Asad, "We do not know what the explanation [tafsīr] of it is, but believe that she appointed [wakkalat] someone else to act as her representative in contracting the marriage." But even so, 'Asad returns, the marriage would be irregular [fāsid] according to Mālik. Ibn al-Qāsim replies:

> This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct [ḥaqq] to follow it. But it is only like other ḥadīth that have not been accompanied by ᶜamal.
>
> [A ḥadīth] has been transmitted from the Prophet (ṣ), [for example], regarding the use of scent during the rites of pilgrimage, and also among that which has come down from him (ṣ) are [the words], "the fornicator ceases to be a believer when he fornicates" and ". . . when he commits theft", but God has revealed [in the Qur'ān] the punishment of the fornicator and the cutting off [of the thief's hand] on the basis of [his being] a believer. Other things have been transmitted from other Companions as well that have no support [lam yastanid] and are not strong [lam yaqwi] and regarding which the ᶜamal that was established is contrary. [Indeed], the generality of the people and of the Companions followed something contrary to them.
>
> [Ḥadīth such as these] remained [in the state of being] neither rejected as fabricated [ghair mukadhdhab bihī] or put into practice. Rather ᶜamal was established in accordance with those [ḥadīth] that were accompanied by the practices ['aᶜmāl] [of the earlier generations] and which were followed by the Companions of the Prophet, who were his followers; and similarly the Successors followed them likewise without regarding that which had come down and been transmitted to have been fabricated or rejecting them outright ["min ghair takdhīb wa lā radd

limā jā'a wa ruwiya"].

Thus, that is passed over which has been passed over in ^c^amal ["fa-yutraku mā turika 'l-^c^amal bihī"], and it is not regarded to have been fabricated ["wa lā yukadh-dhabu bihī"]. But ^c^amal is practiced in accordance with that which has been practiced as ^c^amal, and it is regarded to be certainly authentic [wa yuṣaddaqu bihī].

[In this matter we have been discussing], the ^c^amal which is firmly established and is accompanied by the practices ['a^c^māl] [of others] is the Prophet's statement (ṣ), "A woman shall only be married through a guardian" and the statement of ^c^Umar [ibn al-Khaṭṭāb], "A woman shall only be married through a guardian." Furthermore, ^c^Umar separated a husband and wife who had been married without a guardian.[1]

According to Mālikī legal theorists, Mālik also rejects isolated ḥadīth by reference to sources of law other than ^c^amal and by reference to definitively established precepts and principles of law. An illustration sometimes cited of this is Mālik's rejection of an irregular, isolated ḥadīth, which is regarded as formally authentic, that stipulates that one should wash a pot from which a dog takes a drink seven times before using it again and discard the contents. Ibn al-Qāsim says that he asked Mālik about this ḥadīth, and Mālik replied, "This ḥadīth has come down to us, but I do not know what the reality [ḥaqīqah] of it is." Ibn al-Qāsim indicates that Mālik regarded the domestic dog to be an exception on the basis of istiḥsān to other canines [sibā^c^] that live in the wild, because such dogs live in man's company and are like members of the household ["ka'annahū min 'ahl al-bait"]. Thus, it would be severe to expect people to wash their pots seven times every time their dog takes

[1] Mudawwanah, 2:151-152 (28).

a drink from them. Ibn al-Qāsim continues to say that Mālik also held that people should still consume the cooking butter [samn] or milk that might have been in the pot, even though their dog have eaten some of it while they were not attending. Mālik would say, "I regard it as preposterous [ᶜaẓīman] that one throw out to a dog sustenance that God has provided merely because the dog has licked it."[1] Ibn al-Qāsim had added earlier that Mālik had once been asked how he could hold this opinion concerning dogs and contrary opinions concerning other types of animals. Mālik would reply, "Each thing has its own standpoint [from which it must be considered]"["wa li-kulli shai' wajh"].[2]

According to the famous Andalusian Mālikī legal theorist 'Abū Bakr ibn al-ᶜArabī,[3] this opinion regarding the domestic dog is an example of Mālik giving priority to qiyās based upon definitive precepts of law over an isolated ḥadīth that is not supported by other definitive precepts or principles. The ḥadīth about washing the pot seven times and discarding its contents, Ibn al-ᶜArabī points out, is contrary to the Qur'ānic verse that declares the catch of

---

[1]Mudawwanah, 1:5 (8). [2]Ibid., 1:4 (7).

[3]'ABŪ BAKR Muḥammad ibn ᶜAbd-Allāh ibn Muḥammad IBN AL-ᶜARABĪ (468-543/1076-1148) was one of the greatest Mālikī fuqahā' and legal theorists. He was a ḥāfiẓ of ḥadīth and had extensive knowledge of all Islamic religious sciences and Arabic literature. He became the qāḍī of his native Seville. Ibn al-ᶜArabī wrote numerous valuable works on legal theory, fiqh, ḥadīth, Qur'ānic commentary, literature, and history. He died in Morocco near Fez, where he was buried. Many of his works are still available. Ziriklī, 7:106-107.

hunting dogs to be permissible for eating: ". . . and eat of the catch that they apprehend for you."[1] For hunting dogs seize the catch in their mouths and sometimes carry it in their mouths for a considerable time before the hunter gets it from them.[2]

'Abū Bakr ibn al-ᶜArabī also discusses the question of when it is permissible to accept an isolated ḥadīth that conflicts with a definitive precept [qāᶜidah] of Islamic law. 'Abū Ḥanīfah, he states, holds that it is not permissible to put such ḥadīth into practice, while ash-Shāfiᶜī holds that one is required to put them into practice. As for Mālik, Ibn al-ᶜArabī claims, he does not take either position, rather Mālik holds that the precept indicated by such a ḥadīth may be regarded as valid, despite the fact that it is contrary to a well-established precept, if there is another precept [qāᶜidah] of law that supports it. If there is no other precept to support it, however, the contrary isolated ḥadīth will be rejected.[3] It should be pointed out that 'Abū Zahrah believes, on the basis of statements of al-Karkhī and ᶜĪsā ibn 'Abān regarding 'Abū Ḥanīfah's legal theory, that 'Abū Bakr ibn al-ᶜArabī is mistaken about 'Abū Ḥanīfah's method of reasoning in this matter and that there is no essential difference between 'Abū Ḥanīfah and Mālik on it.[4]

---

[1]Qur'ān, 5:4. [2]Cited by ash-Shāṭibī, Al-Muwāfaqāt, 3:24.

[3]Ibid. [4]'Abū Zahrah, Mālik, p. 303, note 1.

The Concept of cUmūm al-Balwā

"cUmūm al-balwā" [lit., general affliction or necessity] is a Ḥanafī legal term; it is especially useful, however, in analyzing Mālik's legal reasoning and especially his concept of c*amal*. Ibn Rushd, for example, regards Mālik's conception and application of Madīnan c*amal* to be cognate to 'Abū Ḥanīfah's concept of c*umūm al-balwā* in rejecting isolated *ḥadīth*, as I will discuss later.[1]

Things are said to be of the nature of c*umūm al-balwā* when they pertain to the members of society in general. They are matters of which people generally have definite need, that afflict people in general, and recur relatively frequently in peoples' lives. Hence, matters of the nature of c*umūm al-balwā* are so commonplace or general that they can be expected to be part of the knowledge or experience of the majority.[2]

According to 'Abū Ḥanīfah, valid legal precepts that pertain to matters of the nature of c*umūm al-balwā* must be parts of the well-known *sunnah*. Hence, when the only source of knowledge of precepts that pertain to c*umūm al-balwā* is that of isolated *ḥadīth*, 'Abū Ḥanīfah regards the validity of those precepts to be suspect. Such isolated *ḥadīth* may have

---

[1]See below, pp. 481-484.

[2]Al-Kawtharī, p. 37, note 1; cf. Zakī-ad-Dīn Shacbān, *'Uṣūl al-Fiqh al-'Islāmī* (Egypt: Maṭbacat Dār at-Ta'līf, 1964-65), pp. 63-65.

been fabricated, abrogated, or may be for some other reason erroneous. For example, 'Abū Ḥanīfah regards criminal penalties [al-ḥudūd] and required acts of atonement [kaffārāt] to be of the nature of ᶜumūm al-balwā. Hence, he does not regard those penalties and required acts of atonement to be valid that are supported only by isolated ḥadīth.[1] (For other stipulations that 'Abū Ḥanīfah puts upon isolated ḥadīth, see appendix 1.)

According to 'Abū Zahrah, there is consensus among Mālikī legal theorists that isolated ḥadīth will be rejected when they are the only means of establishing precepts that pertain to matters of the nature of ᶜumūm al-balwā, such as the requirements pertaining to the five required daily prayers, the payment of zakāh--a savings tax required annually on the savings and earnings of those whose combined wealth exceeds a certain minimum--the performance of pilgrimage, and the required fasting during the ninth lunar month of Ramaḍān. 'Abū Zahrah also believes that Mālik's characteristic of rejecting ḥadīth that were unusual or which no one

---

[1]Al-Kawtharī, p. 37, note 1; and Zakī-ad-Dīn Shaᶜbān, pp. 63-65.

Al-Qarāfī cites a comical illustration of the concept of ᶜumūm al-balwā and its applicability to rejecting isolated ḥadīth. If the mu'adhdhin [the one who makes the 'adhān (call to prayer)] falls from the minaret while calling the 'adhān for the Friday community prayers, one would expect to hear several reports of the incident. If one heard of the incident, however, only from a few, isolated reporters, one would doubt the validity of their report. See al-Qarāfī, 1:113.

was said to transmit but he, even though they had sound 'is-nād's, is also similar to 'Abū Ḥanīfah's rejecting certain types of isolated ḥadīth that pertain to matters of ᶜumūm al-balwā.[1]

The statement attributed to Mālik in the "ᶜUtbīyah" which I referred to earlier[2] contains a fairly explicit articulation of application of what the Ḥanafīs call "ᶜumūm al-balwā" in the rejection of irregular, isolated ḥadīth and elucidates Mālik's concept of ᶜamal. The question is brought to Mālik about whether one should perform the so-called "sajdat ash-shukr" [prostration of gratitude] when something takes place which one likes. When Mālik states his position that one should not, the argument is brought forward that 'Abū Bakr, "according to what they say," performed the sajdat ash-shukr after his armies were given a vital victory. The questioner then asks Mālik if he has ever heard that. Mālik replies that he has not and that he regards it to be a lie which has been attributed to 'Abū Bakr falsely. He then adds:

> It is a type of misguidance ["hādhā min aḍ-ḍalāl"] that one hear something and then say, "This is something regarding which we have heard nothing to the contrary." . . . Many victories came to the Messenger of God (ṣ) and to the Muslims after him. Did you ever hear about a single one of them prostrating himself?
>
> When something like this comes down to you that has been part of the experience of the people and took place right in their midst ["mimmā kāna fī 'n-nās wa jarā ᶜalā 'aidīhim"] and yet you have heard nothing about it from

[1] 'Abū Zahrah, Mālik, p. 294. [2] See above, p. 172, n. 2.

> them, then let that be a sufficient indication for you ["fa-ᶜalaika bi-dhālik"]. For if it had taken place it would have been mentioned, because it is part of the experience of the people ['amr an-nās] which took place among them. So have you heard that anyone prostrated himself? Well, then, that is the 'ijmāᶜ.
>
> When something comes down to you that you do not recognize, put it aside ["'idhā jā'aka 'l-'amr lā taᶜrifuhū, fa-daᶜhū"].[1]

Ash-Shāṭibī comments on this statement that it is an explicit indication that it is the general ᶜamal of the many upon which one is to rely, whatever type it might be and to whatever it may pertain. No regard at all is to be paid, he continues, to the rarities and the unusual actions that have been handed down [qalā'il mā nuqila wa nawādir al-'afᶜāl] when this general and widespread ᶜamal contradicts them.[2]

One should keep in mind, however, in assessing Mālik's application of the concept of ᶜumūm al-balwā with regard to isolated ḥadīth that Madīnan ᶜamal plays a most important role for him in its application. For if an isolated ḥadīth is supported by Madīnan ᶜamal, it ceases to be regarded as isolated.[3] Rather the combination of Madīnan ᶜamal with an isolated ḥadīth, as I shall discuss later, makes for one of the most authoritative types of Madīnan ᶜamal, namely, what some legal theorists call "al-ᶜamal an-naqlī", which is regarded to be a definitive part of the Prophet's sunnah.[4]

---

[1] Cited by ash-Shāṭibī, Al-Muwāfaqāt, 3:66-67.

[2] Ibid., 3:67. [3] See 'Abū Zahrah, Mālik, p. 305.

[4] See below, pp. 410-415.

Mālik's reliance upon Madīnan ᶜamal in his application of the concept of ᶜumūm al-balwā distinguishes him somewhat from 'Abū Ḥanīfah. It remains to be seen, however, whether or not 'Abū Ḥanīfah too--as al-Kawtharī affirms--relied upon the ᶜamal of Kūfah in evaluating ḥadīth and, if he did, to what extent.[1] But, even though there may not have been much conceptual difference between the methods of Mālik and 'Abū Ḥanīfah in this regard, they differed at least in that they relied upon the ᶜamal of different cities, which leads to differences on some specifics. Mālik, for example, regards guardianship to be a fundamental part of the marriage contract, as witnessed by Ibn al-Qāsim's lengthy citation, and the ḥadīth in this matter are supported by Madīnan ᶜamal.[2] 'Abū Ḥanīfah, however, does not regard guardianship to be a fundamental part of the marriage contract, because the stipulation of guardianship pertains to ᶜumūm al-balwā and has only been transmitted in isolated ḥadīth.[3]

The Ambiguity of Isolated Actions and Specific Rulings

The following concept pertaining to the ambiguity of isolated reports (in ḥadīth and āthār) of actions people did or of judgments that were handed down in special cases

---

[1]Al-Kawtharī, p. 35. [2]See above, pp. 180-181.

[3]See Zakī-ad-Dīn Shaᶜbān, p. 64.

is a useful preliminary to analysis of Mālik's Muwaṭṭa'. For many of the controversial judgments of Mālik in the Muwaṭṭa' pertain to ḥadīth and āthār that come under the category of reports of isolated actions or special legal judgments.

Ash-Shāṭibī treats this concept at several points in his Muwāfaqāt and mentions at one point that this concept has been discussed by the legal theorists ['ahl al-'uṣūl] in general.[1] I have also found the concept in the works of some other Mālikī legal theorists, whom I shall mention in this discussion.

Ash-Shāṭibī refers to what I have called "isolated actions" as "ḥikāyāt al-'aḥwāl" [lit., the narrations of circumstances or situations], and he refers to specific legal decisions as "qaḍāyā 'l-'a^c^yān" [judgments for special cases or persons]. Reports of this nature are always ambiguous in isolation and, hence, ash-Shāṭibī reasons, cannot be valid legal proofs until they have been corroborated by reference to other sources and principles of law. Because of the nature of the ambiguity of such reports, ash-Shāṭibī observes, it is possible that they only appear to be contradictory to the continuous ^c^amal [al-^c^amal al-mustamirr], whereas they are not in fact.[2]

It should also be noted that ash-Shāṭibī holds that

---

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58. See also ibid., 1:118, 3:166, 4:58-59.

[2]Ibid., 3:58.

the ambiguity that pertains to reports of actions and specific legal decisions applies as well to certain types of statements ['aqwāl] in ḥadīth and āthār. These are statements that are parts of discussions, conversations, or other types of situational dialogue of the Prophet or his Companions. Statements of this type, ash-Shāṭibī holds, are not legal statements ['aqwāl], properly speaking. Rather they should be classified under reports of deeds and actions ['afcāl], and the ambiguity that pertains to isolated reports of actions pertains to them. Those statements are legal statements ['aqwāl], properly speaking, that define [tucarrif] specific rulings or set down ordinances,precepts, commands, and prohibitions.[1] Furthermore, Drāz observes in his commentary upon the Muwāfaqāt that isolated types of camal and the camal of a limited number would be considered also to fall in this category of isolated actions and special judgments.[2]

Ibn Rushd refers to this concept on occasion in Bidāyat al-Mujtahid. For example, he alludes to it in his explanation of why Mālik does not regard it to be obligatory that one raise his hands and say "Allāhu 'akbar" [God is the greatest of all] more than once at the beginning of the required prayers, although Mālik cites ḥadīth in the Muwaṭṭa' that report that the Prophet was observed doing it

---

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:59.

[2]Drāz, ibid., 3:58, note 1.

several times during the course of the prayer. Mālik, according to Ibn Rushd, does not regard such reports of actions to be sufficient to indicate that those actions are obligatory until they are supported by an explicit proof [dalīl wāḍiḥ] by way of an authentic legal statement or a general consensus ['ijmāc] to that effect.[1] Elsewhere, in discussing a matter of Islamic ritual that has only been reported in ḥadīth and āthār as an action performed by the Prophet and his Companions on different occasions, Ibn Rushd observes again that reports of actions are not sufficient to establish legal obligation [al-wujūb] until those actions are supported by more explicit proofs.[2]

Ibn al-Ḥājib[3] has this concept in mind when he states in his discussion of the legal implications of the deeds ['afcāl] of the Prophet that reports which relate actions the Prophet was seen doing are ambiguous legal arguments until the legal status of those actions has been clarified. He continues to observe that, until the legal status of those reported actions has been clarified, one cannot validly lay

---

[1]Ibn Rushd, 1:79 (1). [2]Ibid., 1:133 (7).

[3]Jamāl-ad-Dīn cUthmān ibn cUmar (570-646/1174-1249), known as "IBN AL-ḤAJIB" [the chamberlain's son], was a notable Egyptian Mālikī faqīh and legal theorist of Kurdish background. He was born in Upper Egypt, grew up in Cairo, and lived in Damascus. He died in Alexandria. His father was a chamberlain,and, hence, his name. Ibn al-Ḥājib is noted for his work on legal theory, "Muntahā 's-Sūl", and for his abridgement of it. He had extensive knowledge of Arabic, wrote works on grammar and commentaries on the philological works of az-Zamakhsharī. Ziriklī, 4:374.

claim to be imitating the Prophet merely because one is imitating those actions. One must first determine under what circumstances those actions were done, what the degree of obligation or desirability behind them is, whether they were done regularly, and so forth.[1]

Although reports of actions are regarded as insufficient evidence in themselves to establish that others are legally bound to imitate that act, reports of contrary actions by the Prophet or Companions and Successors whom Mālik regards as authoritative are regarded to be a sufficient indication that, indeed, those actions are not obligatory. The assumption in such cases is that, if the act in question were obligatory, these authoritative persons would not have failed to have done it.[2] There are several instances in the Muwaṭṭa' in which Mālik appears to be using reports of contrary actions to indicate that the actions in question are not obligatory. For example, Mālik seems to be using this principle in the Muwaṭṭa' to demonstrate that it is not obligatory for a Muslim to renew wuḍū' [ritual ablutions] after having a nosebleed. In one short chapter entitled "Mā Jā'a

---

[1]See Ibn al-Ḥājib, pp. 51-52.

[2]Cf. Sulaimān ibn Khalaf AL-BĀJĪ, Sharḥ Muwaṭṭa' 'Imām Dār al-Hijrah, Sayyidinā Mālik ibn 'Anas, 7 vols. (Egypt: Maṭba^cat as-Sa^cādah, 1331/[1912]), 1:350-351.

fī 'r-Ruᶜāf" [that which has come down regarding nosebleeds], Mālik cites three āthār which report that ᶜAbd-Allāh ibn ᶜUmar, ᶜAbd-Allāh ibn ᶜAbbās, and the prominent Madīnan Successor Saᶜīd ibn al-Musayyab were observed to have had nosebleeds while praying. They broke off the prayer, renewed wuḍū', returned, and completed the prayer. In the chapter that follows, entitled "Al-ᶜAmal fī 'r-Ruᶜāf" [the ᶜamal regarding nosebleeds], Mālik cites an 'athar that reports that Saᶜīd ibn al-Musayyab and the son of ᶜAbd-Allāh ibn ᶜUmar, Sālim ibn ᶜAbd-Allāh, were observed to have had nosebleeds while praying and did not break off their prayers or renew their wuḍū'.[1] All of the āthār in these two chapters are reports of actions. Yet, while the reports of the actions being performed are not regarded in Mālikī legal theory to be a sufficient indication of obligation, the reports of contrary actions are regarded to be an indication that the actions are not obligatory. The conclusiveness of the contrary reports in this case is increased by the fact that they are supported by ᶜamal.

Similarly, although some isolated ḥadīth have been transmitted relating that the Prophet prohibited drinking while standing, Mālik indicates that it is not obligatory that one sit down while drinking and that it is not reprehensible to drink while standing, by citing āthār which re-

---

[1]Muwaṭṭa', 1:38-39.

port that cUmar ibn al-Khaṭṭāb, cUthmān ibn cAffān, cAlī ibn 'Abī Ṭālib, cAbd-Allāh ibn az-Zubair, and cAbd-Allāh ibn cUmar used to drink while standing. He cites another 'athar which reports that neither cĀ'ishah, the wife of the Prophet, or Sacd ibn 'Abī Waqqāṣ held that there was any harm in drinking while standing.[1]

Finally, Mālik appears to be applying this principle in a chapter, which I shall discuss in more detail later,[2] in which Mālik states that it is not obligatory that one prostrate oneself after reading certain verses of the Qur'ān, although āthār in the same chapter report that 'Abū Hurairah, cUmar ibn al-Khaṭṭāb, and cAbd-Allāh ibn cUmar were observed prostrating themselves after having read some of these verses. In the same chapter, Mālik cites an 'athar that reports that cUmar ibn al-Khaṭṭāb once recited such a verse while speaking to the people from the minbar [pulpit] during the Friday congregational prayers. He descended from the minbar, prostrated himself, and the people prostrated themselves after him. The next Friday, according to the report, cUmar recited the same verse on the minbar, but, when the people prepared to prostrate themselves, he prohibited them from doing so, telling them that it was not obligatory. This 'athar illustrates well the principle of Mālikī legal theory that reports of actions are not sufficient in themselves to establish legal

---

[1]Muwaṭṭa', 2:925-926; see Zurqānī, 5:306-307.

[2]See below, pp. 629-631.

obligation, while reports of the contrary actions of authoritative persons are regarded to be a sufficient indication that those actions are not obligatory. In this case, ᶜUmar ibn al-Khaṭṭāb has indicated himself that that is the conclusion which one is to draw from his contrary actions.[1]

Preliminary Reflections on 'Ijmāᶜ

Mālik uses a type of '*ijmāᶜ* frequently in his *Muwaṭṭa'*, which he refers to variously as "al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā" [that matter upon which there is consensus among us], "al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā" [that matter regarding which there is no difference of opinion among us], and so forth. This Madīnan type of '*ijmāᶜ*, which Mālik uses, is part of the ᶜ*amal* of Madīnah. Therefore, I will discuss it further in the chapter pertaining to the concept of ᶜ*amal*.[2] Nevertheless, it is worthwhile to consider briefly prior to that how the concept of '*ijmāᶜ* may have evolved historically and how *fuqahā'* like Mālik may have conceived of it prior to ash-Shāfiᶜī.

Ash-Shāfiᶜī conceives of '*ijmāᶜ* as consensus on the validity of matters of Islamic law that is total and without exception. It is a consensus of the '*ummah*, as it were, a consensus such that wherever in the Islamic realm one should

---

[1]*Muwaṭṭa'*, 1:205-207; cf. al-Bājī, 1:349-353; Ibn Rushd, 1:132 (13).

[2]See below, pp. 424-428, 691-730.

travel one would not find Muslims ignorant of such matters or doubting their validity. Hence, '*ijmā*ᶜ for ash-Shāfiᶜī pertains primarily to matters like the basic obligations [*farā'iḍ*] of the religion, which are well-known and universally agreed upon.[1] Such a definition of '*ijmā*ᶜ, as Ahmad Hasan has pointed out, limits greatly the practical utility of the concept, since matters which have such universal agreement are relatively few and are generally well-established in the textual sources of Qur'ān and *ḥadīth*, such that it is not necessary to depend upon '*ijmā*ᶜ to establish their validity.[2]

Although al-Qāḍī ᶜIyāḍ argues that Mālik did not reject the '*ijmā*ᶜ of the '*ummah*,[3] this appears to me to be an academic question. Since Mālik regarded Madīnan '*ijmā*ᶜ to be authoritative, it is not conceptually possible that he could have rejected the validity of an '*ijmā*ᶜ of the '*ummah*, which must necessarily include the '*ijmā*ᶜ of Madīnah, since Madīnah is part of the '*ummah*.[4] The question remains,

---

[1]See Muḥammad ibn 'Idrīs ASH-SHĀFIᶜĪ, "Kitāb Jimāᶜ al-ᶜIlm," in *Kitāb al-'Umm* by Muḥammad ibn 'Idrīs ash-Shāfiᶜī, 7 vols. (Egypt: Al-Maṭbaᶜah al-Kubrā al-'Amīrīyah bi-Būlāq, 1325/[1907]), 7:250-265; pp. 255 (26), 256 (26), 257 (24); and idem, *Ar-Risālah*, ed. 'Aḥmad Muḥammad Shākir (Cairo: Maṭbaᶜat Muṣṭafā al-Bābī al-Ḥalabī wa 'Awlādihī, 1358/1945), pp. 531-535; and 'Abū Zahrah, *Ash-Shāfiᶜī*, pp. 293-295.

[2]Ahmad Hasan, p. 56. [3]ᶜIyāḍ, 1:72-73.

[4]Another question, however, is whether or not '*ijmā*ᶜ was ever reached among non-Madīnan *fuqahā'* on questions regarding which there were differences of opinion in Madīnah. With regard to this question, it is reported that the Egyp-

however, as to whether or not Mālik would have regarded a concept of the total consensus of the '*ummah* to have had enough practical merit to be a valid and viable principle of law. Certainly, Mālik would not have been willing to cease following his own Madīnan '*ijmā*^{c} in matters on which there were differences of opinion outside Madīnah, since Mālik often relies on Madīnan '*ijmā*^{c} in matters regarding which he knows well that there were *fuqahā*' outside Madīnah who disagreed, especially some of the *fuqahā*' of Kūfah.[1] Ma^{c}rūf ad-Dawālībī has suggested, furthermore, that Mālik relied upon Madīnan '*ijmā*^{c} largely because of the practical consideration that, in addition to whatever merits it had as an authoritative legal argument, the content of Madīnan '*ijmā*^{c} could be established and verified. The content of the '*ijmā*^{c} of the '*ummah*, on the other hand, ad-Dawālībi reasons, would have been virtually impossible to establish and verify.[2]

According to one *ḥadīth*, which is said to have been

---

tian *muḥaddith* and *faqīh* Sa^{c}īd ibn 'Abī Maryam (144-224/761-838) [for data see above, p. 87 , note 4] held that there was not a matter pertaining to the *sunnah* upon which '*ijmā*^{c} had been reached that was contrary to what is in Mālik's *Muwaṭ-ṭa*' (cited by ^{c}Iyāḍ, 1:191). One might take this statement to be an indication, perhaps, that, according to Ibn 'Abī Maryam, consensus had not been reached outside Madīnah on matters regarding which there had not been '*ijmā*^{c} in Madī-nah or, for that matter, regarding which there had been differences of opinion in Madīnah.

[1]See below, pp. 691-730.

[2]Ad-Dawālībī, p. 336.

transmitted by Mālik from ᶜAlī ibn 'Abī Ṭālib, ᶜAlī asked the Prophet what should be done when questions arise that have no precedent in Qur'ānic legislation or the Prophet's sunnah. The Prophet is said to have answered:

> Gather together those of the believers who have knowledge and let it be a matter of consultation [shūrā] among yourselves. But do not judge [in such matters] on the basis of the opinion of just a single one [of you].[1]

Whether authentic or not, this ḥadīth portrays a method of reaching legal decisions in unprecedented matters that is said to have characterized the reigns of 'Abū Bakr, ᶜUmar, and the other "rightly guided caliphs". Especially 'Abū Bakr and ᶜUmar are reported to have brought together the prominent Companions in Madīnah for consultation in such matters and to have made their decisions on the basis of that consultation.[2] Such decisions were made at times, however, in the absence of some prominent and knowledgeable Companions who were not in Madīnah at the time. Nevertheless, once decisions were made on the basis of consultation with those who were present in Madīnah, those decisions were ex-

---

[1]Ibn Qayyim, 'Iᶜlām, 1:73-74, cited by az-Zarqā, 1:192.

[2]See az-Zarqā, 1:170, 192; ad-Dawālībī, pp. 49-88; 'Abū Zahrah, Mālik, p. 103; ᶜAlāl al-Fāsī, Maqāṣid ash-Sharīᶜah al-'Islāmīyah (Casablanca: Maktabat al-Waḥdah al-ᶜArabīyah, [1967]), pp. 116-117; and Ignaz Goldziher, Die Ẓāhiriten: Ihr Lehrsystem und ihre Geschichte; ein Beitrag zur Geschichte der muhammedanischen Theologie (Leipzig: n.p., 1884, reprint ed., Hildesheim: Georg Olms Verlagsbuchhandlung, 1967), p. 8.

ecuted, put into law, and, hence, became part of the <u>camal</u> of their contemporaries.[1]

According to cAlāl al-Fāsī and Muṣṭafā az-Zarqā the concept of '<u>ijmāc</u> grew out of this consultative legislative method of the early caliphs. It was not, however, the type of total consensus which later legal theorists conceived to be the definition of '<u>ijmāc</u>. Nevertheless, it was a workable concept. Its authoritativeness did not rest, according to al-Fāsī, in the absolute, theoretical conclusiveness which later legal theorists attributed to the total consensus of the '<u>ummah</u>, but rather on the soundness of the consultation of the prominent Companions reinforced by the authority of executive order. In this sense, therefore, early '<u>ijmāc</u> would have been to a considerable extent a function of the political and legal authority of the Islamic caliph. Hence, whenever the caliph reached agreement on a matter with his consultative committee, that matter of consensus became a matter of law which the people were required to follow by virtue of the political authority of the caliph who proclaimed it. Although, according to al-Fāsī, it was still permissible for those who had not been present in the consultation to express opinions to the contrary, their contrary opinions did not effect the application of the law.[2]

Az-Zarqā refers to this type of early caliphal '<u>ijmāc</u>

---

[1]Al-Fāsī, pp. 116-117; Az-Zarqā, 1:170, 192.

[2]Al-Fāsī, pp. 116-117; Az-Zarqā, 1:170, 192.

as "ijtihād al-jamā^cah" [group ijtihād].[1] It was prominent Companions [ru'asā' an-nās] only who made up that group. Companions of lesser stature and the common people were not included but, on the contrary, were bound legally to follow the conclusions of the group. Furthermore, such decisions were taken in the absence of some prominent Companions, and the early caliphs are not reported to have suspended making consultative decisions in matters until they could assemble all of the prominent Companions or collect their opinions.[2] ᶜUmar ibn al-Khaṭṭāb, however, is reported to have prohibited the Companions during his caliphate from settling outside Madīnah, and 'Abū Zahrah believes that one of his reasons in doing that was to have them available for consultation.[3]

This "group ijtihād" was not free from the possibility of error. Its value, nevertheless, was that it provided the caliph with a sound and practical method for solving problems and executing decisions. Al-Fāsī holds, furthermore, that this early type of 'ijmāᶜ ceased to be a reality during what he describes as the "despotism" that came about after the end of the early caliphate. Consultative bodies like those of the early period no longer had the importance they had had once they were forced to function in the presence of despotic rulers. Thus, al-Fāsī reasons, the original type of 'ijmāᶜ ceased to be a reality, and the conception

---

[1]Az-Zarqā, 1:192.

[2]See 'Abū Zahrah, Mālik, p. 327; ad-Dawālībī, pp. 86-87; al-Fāsī, p. 117.

[3]'Abū Zahrah, Mālik, p. 103.

of 'ijmā^c deteriorated into "futile" discussions about the authoritativeness of a total 'ijmā^c of the 'ummah, which could rarely if ever occur.[1]

The Madīnan 'ijmā^c to which Mālik subscribes may be a reflection of this "group ijtihād" or limited 'ijmā^c of the caliphal period. It is notable in that regard that a large number of those matters of ijtihād in the Muwaṭṭa' that Mālik describes as being part of Madīnan 'ijmā^c go back to the caliphal period, especially to the caliphate of ^cUmar ibn al-Khaṭṭāb.[2]

Furthermore, the question should be asked whether or not Mālik means by 'ijmā^c--or, more properly speaking, "ijtimā^c", since that is the form which he uses--the sort of total consensus that ash-Shāfi^cī means by that term, even if that be a total consensus of the fuqahā' of Madīnah. Ash-Shāfi^cī claims, for example, that Mālik sometimes uses the terms "al-'amr ^cindanā" [that matter which we regard to be correct; symbol: AN] and "al-'amr al-mujtama^c ^calaihi ^cindanā" [symbol: AMN] for matters concerning which there were differences of opinion even in Madīnah.[3]

As far as the term AN is concerned, I do not believe that it ever refers to a consensus of the fuqahā' of Madīnah. On the contrary, my analysis of Mālik's use of that term is

---

[1]Al-Fāsī, p. 117. [2]See below, pp. 691-730.

[3]Ash-Shāfi^cī, "Ikhtilāf Mālik," pp. 202-203, 267; idem, Ar-Risālah, pp. 531-535.

that Mālik uses it for matters regarding which there had been significant differences of opinion in Madīnah. Sometimes, he will state in the Muwaṭṭa' what those differences of opinion were and who the Madīnan fuqahā' were who held them.[1]

As far as the term AMN is concerned, however, I have not found examples in the Muwaṭṭa' of Mālik's using that term regarding a given matter and then citing contrary opinions of other Madīnan fuqahā' as he has sometimes done in the case of AN's. It is conceivable that those dissenting Madīnan ᶜulamā' to whom ash-Shāfiᶜī is referring were among those ᶜulamā' of Madīnah whose opinions Mālik did not regard to be worthy of consideration.[2]

However, it is also conceivable that Mālik did not mean by this "ijtimāᶜ" the one hundred percent consensus that ash-Shāfiᶜī had in mind when referring to 'ijmāᶜ. Rather by ijtimāᶜ Mālik may have had in mind an extensive or even overwhelming general consensus of the Madīnan fuqahā', which would not have excluded the possibility of the dissension of a few. If this were true, then Mālik's term AMN, the second most common term in the Muwaṭṭa', would be somewhat akin to Mālik's most common term, AN. The difference between them, in that case, might have been one of degree.

---

[1]See below, pp. 731-760.

[2]See above, pp. 75-76.

I believe this hypothesis to be worthy of consideration for two reasons. First of all, the word "ijtimā^c" is not semantically restricted to refer to a one hundred percent consensus, although it can carry that meaning. Indeed, the adjectives "jamī^c" and "'ajma^c", which mean "all", come from the same root and are part of the semantic background of *ijtimā^c* and especially '*ijmā^c* which make them suitable terms for the concept of total consensus. Nevertheless, words like "jam^c" and "jamā^{c}ah" and other nouns referring to general groups and groupings are also part of the semantic background of *ijtimā^c* and do not give the same unambiguous indication of totality as in the words *jamī^c* and '*ajma^c*. Thus, there is latitude in the semantic scope of the word *ijtimā^c*, and it could be used to include the concept of preponderant as opposed to total consensus.[1] Furthermore, as I pointed out earlier, the relationship between concepts and the terms which stand for them is potentially arbitrary, and the proper methodology for determining what Mālik himself meant by the term *ijtimā^c* is not to look in an Arabic dictionary only but, more importantly, to study how Mālik used the word in his *Muwaṭṭa'*.[2]

Secondly, this hypothesis seems worthy of consideration because Mālik uses some terms in his terminology to indicate absolute consensus quite explicitly, by affirming that there were no contrary opinions in Madīnah. This is the case,

---

[1]Cf. Lane, 2:455-459. [2]See above, pp.14-20.

for example, with the terms "as-sunnah al-latī lā 'khtilāf fīhā ^{c}indanā" [that *sunnah* in which there is no difference of opinion among us; symbol: S-XN], "al-'amr al-ladhī lā 'khtilāf fīhi ^{c}indanā" [that matter concerning which there is no difference of opinion among us; symbol: A-XN], and "al-'amr al-mujtama^{c} ^{c}alaihi ^{c}indanā wa 'l-ladhī lā 'khtilāf fīhi" [that matter upon which there is *ijtimā^{c}* among us and regarding which there is no difference of opinion; symbol: AMN-X]. It is noteworthy, therefore, in light of these explicit terms of total consensus, that the term AMN does not deny that there were any differences of opinion in Madīnah regarding it. Hence, AMN may refer to matters of preponderate but not necessarily total consensus in Madīnah.

Al-^{c}Urf wa 'l-^{c}Ādah: Local Customs and the Law

'Abū Zahrah believes that the Mālikī school gives local customs a more extensive role to play in determining the content and application of Islamic law than any of the other major *sunnī* schools, even the Ḥanafī, which is also noted for the extensive role it gives to local customs.[1] Consideration of local customs, however, is a part of the legal theory of each of the major *sunnī* schools of law, including the Shāfi^{c}ī.[2] 'Abū Zahrah contends that local cus-

---

[1] 'Abū Zahrah, *Mālik*, p. 420.

[2] See al-Qarāfī, 1:143, 87-88; Zakī-ad-Dīn Sha^{c}bān, pp. 176-178; 'Abū Zahrah, *Mālik*, pp. 420-424. Sha^{c}bān and

toms play a more extensive role in the Mālikī school, however, because of the generally strong connection between local customs and the maṣāliḥ of the people. Hence, 'Abū Zahrah reasons, the authority that the Mālikī school gives local customs is a function of the high regard it gives to maṣāliḥ in general.[1] As I will show, istiḥsān, which is very common in the Mālikī school, is often done on the basis of local customs. Mālik also is known to perform istiḥsān on the basis of maṣlaḥah only.[2] According to 'Abū Zahrah, however, when Mālik performs istiḥsān on the basis of local customs it is cognate to his performing it on the basis of maṣlaḥah, because he regards those local customs to be instances of maṣāliḥ.[3]

Similarly, ash-Shāṭibī holds that local customs are given consideration in Islamic law out of regard for the maṣāliḥ they embody. Much of Islamic law as set forth by the Prophet, he observes, was an affirmation of pre-Islam-

---

'Abū Zahrah cite references that show that "sound local customs" [al-ᶜurf aṣ-ṣāliḥ] are regarded to be legitimate in each of the four major sunnī schools. Ash-Shāfiᶜī's attitude toward local customs, according to 'Abū Zahrah, is that they are valid as long as they pertain to matters of law for which there are no textual directives in the sources of Islamic law to which ash-Shāfiᶜī subscribes. Shāfiᶜī reasoning in the matter, he states, is that, since the people have grown accustomed to their local customs, it is not permissible to prohibit them except on the basis of a clear legal text; ibid., pp. 420-421. Nevertheless, local customs have a much more extensive role in the Mālikī school, for example, since Mālikīs draw exceptions to texts on the basis of local customs; see ibid., p. 421 and the above discussion.

[1] 'Abū Zahrah, Mālik, pp. 420-421. [2] See below, pp. 250-251.

[3] 'Abū Zahrah, Mālik, p. 421.

ic Arab customs. The pre-Islamic Arabs like human societies in general, ash-Shāṭibī reasons, developed even in the absence of Prophetic guidance many sound customs that were well-suited for the environment and the circumstances in which they were living. Thus, the Prophet abolished those customs of the pre-Islamic Arabs that were detrimental, but he affirmed and perfected those that were beneficial. Similarly, ash-Shāṭibī continues, the Prophet is reported in various ḥadīth to have described his purpose as one of perfecting the customs and excellent manners of the people, not of obliterating them. The high regard that Mālik gives local customs, ash-Shāṭibī concludes, is in keeping with the Prophet's approach to the customs of the pre-Islamic Arabs.[1]

There are several illustrations in the Muwaṭṭa' and Mudawwanah of Mālik's applying Islamic law with reference to local customs. I have already referred to Mālik's performing istiḥsān on the basis of local customs. Since the fundamental characteristic of Mālik's concept of istiḥsān is that it draws exceptions to general precepts of law, which would be extended by way of qiyās, Mālik's performing istiḥsān on the basis of local customs indicates that, in many instances at least, local customs are more authoritative for him than qiyās.[2]

---

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 2:213, cited by 'Abū Zahrah, Mālik, pp. 374-375.

[2]See below, pp. 245-254.

Mālik relies upon local customs, for example, to determine in cases of slander whether the words that were used were actually slanderous. Unlike the majority of non-Mālikī <u>fuqahā</u>', Mālik is not primarily concerned with the literal meaning of the words. Rather he is concerned with the connotations they carry in the local linguistic usages of the persons in question. For, although the literal meaning of the words may be harmless, the connotations that they evoke in the linguistic usage of those who employed them may be slanderous.[1]

Mālik holds that payment of <u>zakāh</u> is due on the harvests of pulse [<u>al-quṭnīyah</u>]. However, he defines pulse by reference to the customary knowledge of the people of what the different varieties of pulse are. Thus, he states, pulse include chick-peas [<u>al-ḥimmaṣ</u>], lentils [<u>al-ᶜadas</u>], kidney beans [<u>al-lūbiyā</u>], the common vetch [<u>al-julbān</u>], and all other types of legumes that "the people know well to be of the variety of pulse" ["wa kull mā thabata (<u>sic</u>) maᶜrifatuhū ᶜinda 'n-nās 'annahū quṭnīyah"]. Mālik continues to point out that it is this customary knowledge of the people regarding what pulse is,upon which one is to rely, regardless of how much the names and colors of the different varieties of pulse may vary.[2]

Local customs also play a significant role in Mālikī

---

[1]Ibn Rushd, 2:266 (13). [2]<u>Muwaṭṭa</u>', 1:275.

laws of what words and actions constitute agreements to buy, sell, rent, and other types of contractual agreements. By reference to the local customs of each region, Mālik defines what words and acts shall be regarded to be sufficient indication that such a contractual agreement has been concluded by persons of those regions.[1] Thus, if it is the local custom of a people to agree to buy or sell without shaking hands, which is an Arab custom, a person of that region who makes an agreement to buy or sell according to his local customs, for example, would not be able to declare the agreement he made to be void on grounds of the technicality that he did not shake hands. Similarly, Mālik defines gift giving according to the local customs in terms of which the people of a region give gifts to each other.[2]

According to the Islamic law of theft, a thief's right hand will be cut off if he is of age and is sane when he commits the act and is not under compulsion to steal because of persons who force him to or because of circumstances, like poverty. Furthermore, the goods he steals must have a certain minimal value, and, finally, he must have removed those goods from a _ḥirz_ [a protective enclosure].[3] Thus, for example, if a thief who fell within the first of these categories were to steal a purse that had been abandoned

---

[1]Ibn Taimīyah, p. 50. [2]Ibid.

[3]See, for example, Ibn Rushd, 2:269.

on the street, his punishment for that crime would not include his hand being cut off--regardless of the value of the purse--because he had not removed it from a ḥirz. The definition of ḥirz, therefore, is a very important part of the Islamic law of theft. Mālik defines ḥirz by reference to local custom; a ḥirz for him is that which people customarily regard as serving to protect their property. One result of this definition is that Mālik regards graves to be a ḥirz for the contents of graves. Thus, he rules that the hands of grave robbers, who dig up graves to sell again the shrouds of the dead, should be cut off. 'Abū Ḥanīfah, however, disagrees because he defines the ḥirz differently.[1]

Analogical Reasoning: Qiyās

Introduction

Analogical reasoning is part of the legal reasoning of each of the four major sunnī schools.[2] Although one encounters the term "qiyās" in pre-Shāfiᶜī Ḥanafī writings and there are other indications that the term had been used before the time of ash-Shāfiᶜī,[3] I have found no examples of Mālik's using that term. Nevertheless, there are many

---

[1]Ibn Rushd, 2:271 (17).

[2]See 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325, 336-339; idem, Ash-Shāfiᶜī, pp. 298-301, 309-310; at-Turkī, pp. 434, 559, 561-562, 573-576.

[3]See, for example, above, pp. 174-175.

examples in the Muwaṭṭa' and Mudawwanah of Mālik's using analogical reasoning. Probably, as 'Abū Zahrah has suggested, analogical reasoning is a natural part of the human thought process, which thinks in terms of comparisons and contrasts. He cites a quotation attributed to al-Muzanī,[1] one of ash-Shāfiᶜī's most important students:

> From the times of the Messenger of God, peace be upon him, until our own day, the fuqahā' have reasoned by analogies [al-maqāyīs] in all matters of law that pertain to our religion. There has been consensus among them that the likeness of that which is true is [also] true and the likeness of that which is false is [also] false. Thus, it is not permissible for anyone to deny the validity of qiyās; for it is [only] a matter of drawing likenesses between things and applying similar [rulings] to them [on that basis] ["at-tashbīh bi-'l-'umūr wa 't-tamthīl ᶜalaihā"].[2]

The issue of primary importance, however, is that of how each of these schools understood analogical reasoning, what stipulations they put on its application, and what authority they gave it in the hierarchy of the sources of law and principles of legal reasoning to which they subscribed. In this regard, there are some notable differences between the schools.

I referred earlier to reports from 'Abū Yūsuf in which he advises his opponent to do qiyās ["qis"] only on the basis of the Qur'ān and the well-known sunnah.[3] Ash-Shaibānī in-

---

[1]Ismāᶜīl ibn Yaḥyā AL-MUZANĪ (175-264/792-877) lived and died in Egypt and was one of the most important proponents of the Shāfiᶜī school. Al-Muzanī frequently disagrees with ash-Shāfiᶜī, however, and for that reason some have spoken of a distinctive school of al-Muzani. See Sezgin, 1:492.

[2]Cited by 'Abū Zahrah, Mālik, p. 344.

[3]See above, pp. 174-175.

sists that "qiyās" is to be done in matters for which there are no reported precedents, on the basis of those precedents [āthār] which have been reported.[1] Similarly, ash-Shāfi^c^ī affirms that ash-Shaibānī's basic position ['aṣl] in fiqh was that one must base one's opinions either on a binding legal text [khabar lāzim] or qiyās.[2] In "Jimā^c^ al-^c^Ilm" ash-Shāfi^c^ī's opponent states that "qiyās is a firmly established type of knowledge regarding which the people of knowledge have reached consensus that it is valid" ["al-qiyās al-^c^ilm ath-thābit al-ladhī 'ajma^c^a ^c^alaihi 'ahl al-^c^ilm 'annahū ḥaqq"].[3]

Instances in the Muwaṭṭa' and Mudawwanah where Mālik employs analogical reasoning are often introduced by or include expressions that indicate that they are analogies. Although he uses some expressions more commonly than others, there is considerable diversity among them. For example, he will say, "This is like [such and such] . . . ["wa hādhā mithl . . ."];[4] or "This is of the same status as [such and

---

[1]Muḥammad ibn al-Ḥasan ASH-SHAIBĀNĪ, Kitāb al-Ḥujjah ^c^alā 'Ahl al-Madīnah, ed. Mahdī Ḥasan al-Kīlānī al-Qādirī, 2 vols. (Haidarabad: Al-Maṭba^c^ah ash-Sharqīyah, 1385/1965), 1:43-44.

[2]Muḥammad ibn 'Idrīs ASH-SHĀFI^c^Ī, "Kitāb ar-Radd ^c^alā Muḥammad ibn al-Ḥasan," in Kitāb al-'Umm by ash-Shāfi^c^ī (Būlāq ed.), 7:277-302; p. 280 (20); cf. Zafar Ishaq Ansari, "Islamic Juristic Terminology before Šāfi^c^ī: A Semantic Analysis with Special Reference to Kūfa," Arabica, 19: 255-300; pp. 288-292.

[3]Idem, "Jimā^c^ al-^c^Ilm," p. 258 (6).

[4]See Muwaṭṭa', 2:494, 647, 648, 795, 841; and Mudaw-

such]. . ."["hādhā bi-manzilat . . ."];[1] or, "That which will make this clear to you is that . . . "["wa mā yubayyinu laka hādhā 'anna . . ."];[2] and similar expressions.[3]

A General Analysis of Analogical Reasoning

Before considering the different stipulations that sunnī schools of law put upon the use of analogical reasoning, I would like to present briefly John Maynard Keynes's analysis of the nature of analogical reasoning, since his analysis and the terminology he uses are of use in discussing the treatment of analogical reasoning in Islamic law.

According to Keynesian terminology, any set of things will be said to be analogous to each other with regard to all characteristics and properties that they have in common, whether relevant or irrelevant. Keynes calls this set of

---

wanah, 1:188 (21); 2:361-362 (30).

[1]See Muwaṭṭa', 1:252, 272, 276, 355; 2:509, 568, 646, 668, 673, 706, 709, 741, 742, 765, 775, 794; and Mudawwanah, 1:188 (21), 293 (10), 294 (24); 2:361-362 (30).

[2]See Muwaṭṭa', 2:768, 775 (occurs four times here); and Mudawwanah, 1:294 (24); 2:155 (3), 156 (27), 198 (20), 394 (5); 3:111 (5), 111 (20), 129 (13), 210 (19), 211 (4), 214 (7), 216 (2).

[3]The following expressions are sometimes followed by analogies: "This is because . . ." ["wa dhālika 'anna . . ."], Muwaṭṭa', 2:611; "this is of [the same]guise as . . ." ["wa hādhā ka-hai'at . . ."], Muwaṭṭa', 2:636; "the explanation for that is . . ." ["wa tafsīr dhālika 'anna . . ."], Muwaṭṭa', 2:666, 796; "the proof that this is [such and such] is . . ." ["wa 'd-dalīl ᶜalā 'anna . . ."], Muwaṭṭa', 1:254; "the basis of all these [matters] is that . . ." ["wa 'aṣl hādhā kullihī 'anna . . ."], Mudawwanah, 2:183 (13); "also

all common characteristics and properties the "known positive analogy" of the members of that set. But those common characteristics of the known positive analogy are said to be "relevant" which are inseparably connected to other common characteristics and properties of the members of the set. Keynes refers to these relevant analogies as "signifying analogies". The common characteristics and properties that always follow from them are called "signified analogies". For example, in the universal proposition, "All humans are mortal," "being human" is the signifying analogy, and "being mortal" is the signified analogy. Thus, anything that has the signifying analogy of being human will always have the signified analogy also of being mortal. Those parts of the total positive analogy of a set that are not signifying analogies are said to be "irrelevant". Hence, in this example, the analogies of having a certain range of weights or certain varieties of colors, for instance, are irrelevant analogies.[1]

The purpose of empirical science, according to this Keynesian terminology, is to discover the signifying and the

---

similar to this is . . ." ["wa ka-dhālika 'aiḍan . . ."], Muwaṭṭa', 2:734; analogies are sometimes set forth without any introductory expressions, as, for example, in Mudawwanah, 3:118 (10). In explaining one instance of Mālik's use of analogical reasoning, Ibn al-Qāsim says, "And Mālik's ᶜillah [signifying analogy] in this case is . . ."["wa ᶜillat Mālik hāhunā . . ."], Mudawwanah, 2:198 (19).

[1]Cohen and Nagel, pp. 286-288.

signified analogies in the total positive analogy of any set of observed things. Similarly, it is important to observe that sound analogical reasoning--that is, analogical reasoning that discovers the true signifying and signified analogies in any set of things--must be based on fair sampling and an adequate enumeration of examples.[1]

What Keynes calls the "signifying analogy" is an accurate description, I believe, of what Islamic legal theorists have referred to as the "ᶜillah" [occasion] of a qiyās. Similarly, what Keynes refers to as the "signified analogy" corresponds to the ḥukm [ruling, precept] of the legal precedent, which is applied to an unprecedented matter by virtue of its sharing the same ᶜillah as the precedented matter. According to the Islamic definition of qiyās, the ḥukm, i.e. the signified analogy, will be applied to any matter in which the ᶜillah, i.e. the signifying analogy, is present.[2]

A key issue in the application of qiyās in Islamic law is that of discovering the correct signifying analogy for any precedent of law. I will discuss this in greater detail in my treatment of the concept of qiyās in different sunnī schools of law. The terms used for this process

---

[1]Cohen and Nagel, pp. 287-288.

[2]Cf. al-Qarāfī, 1:66, 124-126; Ibn Rushd [al-Jadd], 1:23; Zakī-ad-Dīn Shaᶜbān, pp. 103-104, 126-129; al-Fāsī, p. 120.

in Islamic legal theory, however, are takhrīj al-manāṭ [lit., extracting the point of suspension, i.e. the signifying analogy] and tanqīḥ al-manāṭ [clarifying the point of suspension, i.e. the signifying analogy]. The term takhrīj al-manāṭ is generally applied to the extraction of the signifying analogy of a precept by some means of ijtihād in cases when that signifying analogy has not been indicated in a legal text or some other authoritative source of law. Tanqīḥ al-manāṭ, on the other hand, is used to designate the process of elimination whereby the mujtahid determines what the signifying analogy of a precept is, in cases when authoritative legal texts have set forth various analogies for a precept without specifying which of them is the signifying analogy. An example often given of tanqīḥ al-manāṭ is that of interpreting a well-known ḥadīth that reports that a bedouin informed the Prophet that he had had sexual relations with his wife during the fast of Ramaḍān. The Prophet then gave him the option of three types of atonement. According to Islamic legal theorists, this text sets forth several analogies. One, for example, is that the man was a bedouin, another that he had sexual relations with his wife, a third that he had sexual relations with his wife during the fast, or, more broadly, that he violated the fast of Ramaḍān. By the process of tanqīḥ al-manāṭ, the mujtahid eliminates those of these analogies which are irrelevant until he arrives at the signifying analogy. One of the methods by which this is done is

that of finding examples in the authoritative sources of law where those analogies were present but the ruling, i.e. the signified analogy, was not applied.[1]

Finally, the term taḥqīq al-manāṭ [verification (of the presence) of the signifying analogy] is used in the terminology of Islamic legal theorists to describe the process of ijtihād whereby one determines whether the signifying analogy, which has been established earlier in a given precedent, is actually present in an unprecedented matter. For example, if in the case of the prohibition of wine, it were determined that the signifying analogy of prohibition, which is the signified analogy, is that wine is an intoxicant, one would have to determine whether or not another type of beverage were an intoxicant before one could apply the signified analogy of prohibition. The process of determining whether another type of beverage is an intoxicant is taḥqīq al-manāṭ.[2]

Ash-Shāfiᶜī's Concept of Qiyās

Ash-Shāfiᶜī differs notably from 'Abū Ḥanīfah and Mālik 1) in the stipulations he places on how and from what sources the signifying analogies of qiyās will be arrived at

---

[1]Cf. Zakī-ad-Dīn Shaᶜbān, pp. 146-147; 'Abū Zahrah, 'Abū Ḥanīfah, p. 336; al-Qarāfī, 1:123; al-Fāsī, p. 120.

[2]See above citations and ash-Shāṭibī, Al-Muwāfaqāt, 3:89.

(i.e. in matters pertaining to takhrīj and tanqīḥ al-manāṭ), 2) in the authority that he gives qiyās, and 3) in the attitude he takes regarding qiyās and other modes of ijtihād.

Regarding the first point of difference, ash-Shāfiᶜī holds that the signifying analogies upon which qiyās is based must be deduced from explicit, authoritative legal texts. Furthermore, an even more fundamental difference between him and 'Abū Ḥanīfah and Mālik in this regard is that ash-Shāfiᶜī regards isolated ḥadīth with sound 'isnād's to be a valid basis from which to deduce signifying analogies.[1] 'Aḥmad ibn Ḥanbal is much like ash-Shāfiᶜī in this regard, with the exception that Ibn Ḥanbal expands greatly the number of textual sources that he regards to be valid sources from which to deduce signifying analogies--including, for example, the āthār of the Companions, mursal ḥadīth, and ḥadīth with 'isnād's that are less than sound [ṣaḥīḥ]. Furthermore, 'Aḥmad ibn Ḥanbal does not resort to qiyās except when he is unable to find a directly applicable ruling in any of these numerous textual sources to which he subscribes.[2]

As I mentioned above in the brief analysis of analogical reasoning, conclusive analogical reasoning--that is, which is based on true signifying analogies--requires fair

---

[1]See Ash-Shāfiᶜī, Risālah, pp. 39, 25; idem, "Jimāᶜ al-ᶜIlm," pp. 252 (10), 253 (17, 23), 254 (3), 256 (30, 34), 258 (6); idem "Kitāb 'Ibṭāl al-Istiḥsān," in Kitāb al-'Umm by idem (Būlāq ed.), 7:267-277, pp. 270-271 (34), 272 (14); 'Abū Zahrah, Ash-Shāfiᶜī, pp. 299-301.

[2]See at-Turkī, pp. 434, 559, 561-562, 573, 576.

sampling and an adequate enumeration of examples. This same requirement can be applied to the use of analogical reasoning in law, especially when--as is the case in much of Islamic law--many precepts are arrived at on the basis of historical reports of the application of those precepts to earlier precedents. For one cannot arrive at the true signifying analogy of a ruling until one has understood the full scope of the precept to which it pertains. This creates a special problem in the case of analogical reasoning that is based on precepts of law that have been constructed only on the basis of a few isolated ḥadīth, because of the possibility that the full scope of the precepts may not have been fully or adequately reflected in those reports, even if they are authentic.[1]

It is worthy of note in this regard that ash-Shāfiᶜī is aware of the conjecture implicit in reasoning on the basis of isolated ḥadīth. He indicates in "Jimāᶜ al-ᶜIlm", for example, that the distinctive position of "'ahl al-ḥadīth" [the proponents of ḥadīth] is that they accept isolated ḥadīth [khabar al-khāṣṣah] as a valid basis of analogy and legal reasoning, which places them in opposition, he continues, to those who would have only definitive knowledge [al-'iḥāṭah] in their reasoning. Ash-Shāfiᶜī then continues to say that his opponent regards 'ahl al-ḥadīth to be

[1]See earlier discussion above, pp. 137-140.

mistaken because of their acceptance of isolated ḥadīth, and he continues to say:

> The most knowledgeable of people in fiqh in our opinion [ᶜindanā] and in the opinion of most of them [i.e. 'ahl al-ḥadīth] are those who adhere to ḥadīth most closely. Yet [in your opinion] these are the most ignorant [of people in fiqh]['ajhaluhum], because ignorance [al-jahl] in your opinion is tantamount to accepting isolated ḥadīth [khabar al-infirād].[1]

It is also significant that ash-Shāfiᶜī in this same discussion states that there are theoretical differences of this nature within every city; he cites examples of such differences within Makkah, Madīnah, and Kūfah.[2]

Ash-Shāfiᶜī does not claim that following isolated ḥadīth and making qiyās on the basis of them will lead to definitive knowledge [al-'iḥāṭah and ᶜilm al-'iḥāṭah]. Rather he draws a distinction between ᶜilm aẓ-ẓāhir [knowledge based on apparent meanings], which is the type produced by isolated ḥadīth, and ᶜilm al-'iḥāṭah.[3] ᶜIlm al-'Iḥāṭah is possible, he holds, however, when the signifying analogies of precepts are set forth explicitly in authoritative legal texts or when a ruling in an authoritative legal text is applied directly to matters that fall within the scope of the text itself.[4]

Ash-Shāfiᶜī's position, rather, is that despite the conjecture implicit in following isolated ḥadīth it is a

---

[1]Ash-Shāfiᶜī, "Jimāᶜ al-ᶜIlm," p. 256 (30).

[2]Ibid., p. 256 (34).

[3]Abū Zahrah, Ash-Shāfiᶜī, pp. 298-299. [4]Ibid., p. 310.

matter of religious duty that one follow them in the absence of stronger and more explicit legal texts. It is part of man's duty to obey God, Who has not left him at liberty to follow his personal whims, and, as it were, a matter of worship. Similarly, for ash-Shāfiᶜī, to reach a legal decision on the basis of something other than an explicit legal text [*khabar*] or *qiyās* upon a *khabar* is much closer to sinfulness ["'aqrab 'ilā 'l-'ithm"] than erring on the basis of following conjectural texts. Legal reasoning, he asserts, must always be based directly or indirectly by *qiyās* on an "ᶜain qā'imah" [a standing or conspicuous source], and he defines the *ᶜain qā'imah* as a legal text in the Qur'ān or *ḥadīth*.[1]

Ash-Shāfiᶜī's reasoning in this regard is tied closely to his rejection of *istiḥsān*, *sadd adh-dharā'iᶜ*, and other types of legal reasoning that are not based on explicit legal texts but, as I will show, on principles of law.[2] (In fact, the conclusions of such types of reasoning tend to be contrary to explicit legal texts.) Ash-Shāfiᶜī describes such reasoning as arbitrary and impermissible. He describes *sadd adh-dharā'iᶜ*, which he refers to as "adh-dharā'iᶜ", as forbidden [*ḥarām*] because it contradicts the apparent [*ẓāhir*] meaning of legal texts.[3] Reasoning of this nature is imper-

---

[1]See 'Abū Zahrah, *Ash-Shāfiᶜī*, pp. 298-301.

[2]See below, pp. 245-279.

[3]See Ash-Shāfiᶜī, "Ibṭāl al-Istiḥsān," pp. 269 (15), 270 (10). One should take note of the fact that these parts of "Ibṭāl al-Istiḥsān," like much of that work, are directed

missible, ash-Shāfiᶜī reasons, because it amounts to following something "which one devises that has no earlier precedent" ["fa'inna 'l-qawl bi-mā 'staḥsana shai' yuḥdithuhū lā ᶜalā mithāl sabaqa"].[1] He describes <u>istiḥsān</u> and similar types of reasoning as following "what comes to one's mind" ["mā khaṭara ᶜalā qulūbinā"], and, hence, because it is utterly subjective,it provides no objective criterion--such as are provided in the case of explicit legal texts--in terms of which others may differentiate between which of such opinions are right and wrong.[2] Thus, ash-Shāfiᶜī reasons, if permission is given to one person to perform this type of purely subjective reasoning in matters of law, permission must also be extended to others to arrive at opposite conclusions on the same basis.[3]

---

against the Mālikīs, who rely heavily upon both <u>sadd adh-dharā'iᶜ</u> and <u>istiḥsān</u>. Hence, the work clearly is not directed exclusively against the Kūfans, as the title of the work with its attention on <u>istiḥsān</u> might lead one to expect.

The examples of <u>sadd adh-dharā'iᶜ</u> that ash-Shāfiᶜī refers to, especially in matters of buying and selling, where Mālik applies <u>sadd adh-dharā'iᶜ</u> extensively, are distinctively Mālikī. It is also noteworthy that ash-Shāfiᶜī cites elsewhere ash-Shaibānī's arguments against <u>sadd adh-dharā'iᶜ</u>. Although ash-Shāfiᶜī concedes that he cannot agree with Mālik ["ṣāḥibinā"] on that principle, he adds that ash-Shaibānī's argumentation can also be used against him; idem, "Ar-Radd ᶜalā Muḥammad ibn al-Ḥasan," p. 300 (20).

[1]Ash-Shāfiᶜī, <u>Risālah</u>, p. 25.

[2]Idem, "Jimāᶜ al-ᶜIlm," p. 253 (12); cf. idem, "Ibṭāl al-Istiḥsān," pp. 272 (14), 273 (4).

[3]Idem, "Ibṭāl al-Istiḥsān," p. 273 (31).

On the one hand, ash-Shāfiᶜī's insistence that all legal reasoning must be based on explicit legal texts and his rejection of other types of legal reasoning is, as ad-Dawālībī has observed, interestingly parallel to the later theological doctrine of al-'Ashᶜarī,[1] which later gained wide acceptance among Shāfiᶜīs, that good [<u>al-ḥusn</u>] and evil [<u>al-qubḥ</u>] are known only through revelation and revealed law [<u>ash-sharᶜ</u>], not through reason [<u>al-ᶜaql</u>].[2] On the other hand, it reflects a type of strict, deductive reasoning--as opposed to inductive reasoning--that seems to characterize ash-Shāfiᶜī's thought and which later made the legal theory of his school, I believe, especially well-suited for being treated in terms of the type of syllogistic reasoning exemplified in the works of the most renowned Shāfiᶜī legal theorists like al-Juwainī, al-Ghazālī, al-Āmidī, and Fakhr-ad-Dīn ar-Rāzī.[3]

---

[1] 'Abū 'l-Ḥasan ᶜAbd-Allāh ibn 'Ismāᶜīl AL-'ASHᶜARĪ (260-324/874-935) was born in Baṣrah and was one of the main students of the famous Baṣran <u>muᶜtazilī</u> al-Jubbā'ī. Around the age of forty, however, al-'Ashᶜarī turned against the teachings of al-Jubbā'ī and <u>muᶜtazilī kalām</u> in general; he then began to use his skills as a dialectician to defend, as he claimed, the theological positions of '<u>ahl as-sunnah</u>, as reflected, for example, in the teachings of 'Aḥmad ibn Ḥanbal. Contemporary and later Ḥanbalīs in general, however, did not accept 'Ashᶜarī <u>kalām</u> as valid. The 'Ashᶜarī school, which spread widely among Shāfiᶜīs, became one of the most influential intellectual traditions in the <u>sunnī</u> community. See Sezgin, 1:602.

[2] Ad-Dawālībī, p. 174; see also below, p. 270.

[3] 'IMĀM AL-ḤARAMAIN ᶜAbd-al-Malik ibn ᶜAbd-Allāh AL-JUWAINĪ (419-478/1028-1085), one of the most renowned Shāfiᶜī legal theorists and <u>mutakallim</u>'s, was born near

With regard to the systematically deductive manner of ash-Shāfiᶜī's thought, it is worth pointing out that ash-Shāṭibī, himself a strong advocate of inductive as opposed to rigorously deductive thinking, holds that the earliest fuqahā' tended to reason in what is essentially an inductive manner, arriving at an understanding of the overall scope and purpose of the precepts and principles of Islamic law by contemplating the meanings of its combined sources in their totality. Only by such inductive thinking, ash-Shāṭibī reasons, can one discover and prove conclusively the precepts and principles of Islamic law. There are no explicit texts, he observes, for many of the most fundamental principles of Islamic law. Thus, one would be at a loss

---

Nīsāpūr; moved later to Baghdād; then spent several years teaching in the sanctuaries [ḥaramain] of Makkah and Madīnah; and finally returned to Nīsāpūr. Niẓām-al-Mulk, the famous Ghaznavid administrator, admired al-Juwainī greatly and is said to have built the Niẓāmīyah academy in his honor. Al-Juwainī was a teacher of al-Ghazālī. See Ziriklī, 4:306.

'Abū Ḥāmid Muḥammad ibn Muḥammad AL-GHAZALĪ (450-505/1058-1111) hailed from Khurāsān but travelled extensively, living in Baghdād, the Ḥijāz, Syria, and Egypt. He is regarded highly as a Shāfiᶜī legal theorist and compiled numerous works in a wide variety of fields, including philosophy, logic, and kalām. See Ziriklī, 7:247-248.

Saif-ad-Dīn ᶜAlī ibn 'Abī ᶜAlī AL-AMIDĪ (551-631/1156-1233) was born in Āmid in Turkey; moved later to Baghdād; travelled to Syria and Egypt; and died in Damascus. Initially a Ḥanbalī, al-Āmidī adopted the Shāfiᶜī school; his 'Iḥkām is among the most highly regarded Shāfiᶜī works on legal theory. He was noted also as a logician, philosopher, and mutakallim, like al-Juwainī, al-Ghazālī, and ar-Rāzī. See Kaḥḥālah, 7:155-156.

FAKHR-AD-DĪN Muḥammad ibn ᶜUmar AR-RĀZĪ (544-606/1150-1210) was born in Ray; travelled to Khurāsān, Khwārazam, and Transoxiana; and died in Afghanistan. He is noted as a Qur'ānic commentator and Shāfiᶜī legal theorist and mutakallim; he also had excellent knowledge of Persian literature; See Ziriklī, 7:203.

to try to arrive at them deductively and to prove them by that manner of reasoning to be conclusive. They are borne out clearly by inductive thinking, however, which combines the explicit and implicit meanings of a wide variety of textual references and early precedents. Later fuqahā', he holds, lost this inductive method. In the rigorously deductive literalism that followed, they would often seek, for example, to establish and prove by deduction from explicit texts the precepts of principles of Islamic law. Because of the conjecture, however, that is attached to isolated texts, it became impossible for them to deduce conclusively the validity of even some of the most fundamental precepts and principles of Islamic law. Finally, in light of this, ash-Shāṭibī recommends to his readers that they seek out and study the earliest works of law, since he believes that one finds in them a much clearer understanding of the overall principles of Islamic law and a sounder application of it in terms of its ultimate objectives.[1]

It remains to consider the last two differences which I have mentioned between ash-Shāfiᶜī's concept of qiyās and that of 'Abū Ḥanīfah and Mālik, namely, the authority he gives it and the attitude he takes regarding qiyās and other modes of ijtihād. For ash-Shāfiᶜī, qiyās is the least authoritative of the sources and principles of law to which he

---

[1]See ash-Shāṭibī, Al-Muwāfaqāt, 1:42-61.

subscribes. In the absence of a directly applicable legal text, one must resort, according to ash-Shāfiᶜī, to qiyās on the basis of the most analogous text, but one does not perform qiyās in contradiction to a legal text that is directly applicable.[1] In this regard 'Aḥmad ibn Ḥanbal is much like ash-Shāfiᶜī, for Ibn Ḥanbal resorts to qiyās only when it is absolutely necessary and prefers to follow the text of a ḥadīth the 'isnād of which is less than sound rather than resort to qiyās.[2]

It is a significant point of difference, however, between ash-Shāfiᶜī and 'Abū Ḥanīfah and Mālik. One of the distinctive features of the concepts of qiyās of 'Abū Ḥanīfah and Mālik, about which more will be said shortly, is that they perform qiyās on the basis of well-established legal texts and precepts of law. They give priority to the conclusions of qiyās of this sort over isolated ḥadīth. Furthermore, both draw exceptions to qiyās on the basis of istiḥsān, and, for Mālik, the principles of sadd adh-dharā'iᶜ and al-maṣāliḥ al-mursalah also take priority over qiyās. Mālik also performs qiyās on the basis of earlier conclusions of qiyās, without regarding it as necessary to go back to the original analogy. He also regards it as valid to render general statements in the Qur'ān specific by

---

[1]See 'Abū Zahrah, Mālik, p. 273, and idem, Ash-Shāfiᶜī, pp. 298-301.

[2]At-Turkī, pp. 573, 576.

means of qiyās.[1]

Finally, ash-Shāfiᶜī makes it quite clear that he regards qiyās to be the only valid mode of ijtihād, as has been indicated to some extent already by the preceding discussion.[2] This sets him apart from 'Abū Ḥanīfah, who also relies upon istiḥsān, and it makes him very distinctly different from Mālik, who relies on istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah along with qiyās and apparently regards them to be more authoritative than qiyās as well.

Mālik and 'Abū Ḥanīfah: Reasoning on the Basis of Legal Precepts

Mālik and 'Abū Ḥanīfah, like ash-Shāfiᶜī and Ibn Ḥanbal, also will reason directly and by way of analogy from authoritative legal texts such as ḥadīth and Qur'ānic verses.[3] But, what is more distinctive about their legal

---

[1]See below, pp. 241-245.

[2]See ash-Shāfiᶜī, Risālah, pp. 39, 25; idem, "Jimāᶜ al-ᶜIlm," pp. 252 (10) [here ash-Shāfiᶜī refers to a more extensive treatment of qiyās of his in "his book", which is probably a reference to his Risālah, indicating that "Jimāᶜ al-ᶜIlm" was written afterwards.], 253 (12, 17, 23), 254 (3), 258 (6) [here ash-Shāfiᶜī's opponent asks him on what basis he has prohibited others to use anything but qiyās.]; idem, "Ibṭāl," pp. 270-271 (34), 272 (14); and 'Abū Zahrah, Ash-Shāfiᶜī, pp. 298-301.

[3]See, for example, Muwaṭṭa', 2:772, 789 [In the second example, p. 789, Mālik reasons analogically on the basis of a ḥadīth pertaining to the emancipation of slaves that he has cited in the first example, p. 772.]; 1:105 [Mālik reasons directly on the basis of a ḥadīth.]; 2:541 [Mālik ex-

reasoning, I believe, is that they often formulate statements of general precepts of Islamic law and then reason directly or by analogy from those precepts.[1] In the case of 'Abū Ḥanīfah, these general precepts are often authoritative legal texts themselves, such as ḥadīth, which are

---

tends the application of a Qur'ānic verse by explaining the implications of the word "'iḥṣān" [the state of being married], which the verse contains.]; and 'Abū Zahrah, 'Abū Ḥanīfah, p. 325; Zakī-ad-Dīn Shaᶜbān, pp. 149-153.

[1]It is important for me to distinguish here between what I mean by "legal precepts" and "legal principles". The distinction which I have in mind is that which is drawn in Islamic legal theory between "qāᶜidah fiqhīyah" [principle of fiqh], for which I use "legal precept", and "qāᶜidah 'uṣūlīyah" [principle of legal theory], for which I use "legal principle".

Legal precepts [i.e. al-qawāᶜid al-fiqhīyah] are general statements of the principles, stipulations, pre-conditions, regulations, and so forth that pertain to the application of specific branches of law, such as the laws of inheritance, marriage, contracts, punishments, and so forth. An example of a precept, then, is Mālik's position, which I will discuss later in this chapter, that "inheritance is to be distributed only on the basis of certainty."

Legal principles [i.e. al-qawāᶜid al-'uṣūlīyah], on the other hand, are more general statements that pertain to the application of Islamic law in general and are not limited to particular branches of law. A principle, for example, is the statement, "lā ḍarar wa lā ḍirār" [there is no validity in a ruling that brings excessive harm to oneself or to others] and, similarly, the principle of "rafᶜ al-ḥaraj" [lit., removing excessive difficulty], by which is meant that regulations must not be imposed upon people that are beyond their capacity to observe.

The words "qāᶜidah" and "'aṣl" are often used in works of fiqh and legal theory to stand for both precepts and principles. The word "ḍābiṭ", however, is generally applied to precepts. "Qānūn" and "qawānīn" are used in this sense in the work of the Mālikī faqīh Muḥammad ibn 'Aḥmad ibn Juzaiy (693-741/1294-1340), Al-Qawānīn al-Fiqhīyah. Similarly, ᶜIzz-ad-Dīn ibn ᶜAbd-as-Salām's famous work Qawāᶜid al-'Aḥkām, al-Qarāfī's Furūq, Ibn an-Nujaim's Al-'Ashbāh wa 'n-Naẓā'ir, and Ibn Rajab's Al-Qawāᶜid are devoted to legal precepts, not legal principles, although they may touch on them. See Muṣṭafā Saᶜīd al-Khinn, 'Athar al-Ikhtilāf fī 'l-Qawāᶜid

part of the well-known sunnah and are those sorts of ḥadīth which 'Abū Yūsuf describes as having been recognized as valid by the fuqahā'.[1] In the case of Mālik, such precepts are sometimes set forth with no reference to ḥadīth or other textual sources of law. Generally, the non-textual source of Madīnan ᶜamal plays a conspicuous role in Mālik's determining the content and scope of the precepts to which he subscribes, and it is also in terms of Madīnan ᶜamal often that he establishes the authoritativeness of those precepts. In the example given earlier of Mālik's precept regarding how the harvests of date oases are to be sold, the ḥadīth in question provided only a small part of the overall precept.[2] It is also to be noted that the statements in the Muwaṭṭa' in connection with which Mālik uses his terms are usually set forth as such general legal precepts and often provide considerably more information than can be deduced from the textual references Mālik cites. Mālik reasons directly and by analogy from these precepts even within the Muwaṭṭa'.[3] In the case of his sunnah terms, however, they

---

al-'Uṣūlīyah fī 'Khtilāf al-Fuqahā' ([Egypt]: Mu'assasat ar-Risālah, 1392/1972), p. 37, note 2; and Mahmassani, p. 151.

[1]See above, pp. 174-175; and 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325, 337-339; Zakī-ad-Dīn Shaᶜbān, pp. 149-153.

[2]See above, pp. 135-144.

[3]See below, pp. 619-621, 673, 693-694, 703, 740, 743-744, 750-751.

often stand for precepts that Mālik regards not to be analogous to related matters and, hence, are to be restricted to the matters to which they originally pertained, without being extended to other matters by analogical reasoning.[1] Because of the nature of the general precepts it contains, the Muwaṭṭa' is, as I suggested earlier, a source book of the basic precepts of the Madīnan school upon which ijtihād is to be done.

Reasoning on the basis of legal precepts is not different in essence from reasoning on the basis of specific legal texts in the original sources, although it may have several practical advantages over reasoning on the basis of original texts, if the legal precepts are set forth accurately, comprehensively, and unambiguously. Those who reason from specific original texts--ash-Shāfiᶜī's ᶜain qā'imah--regard the texts themselves to be adequate reflections of the legal precepts to which they pertain, such that the information presented in those texts does not need to be complemented by reference to additional sources of law. This involves presumptions--such as ash-Shāfiᶜī makes--that legal texts in the Qur'ān and ḥadīth will be presumed to be unabrogated until shown to have been abrogated in other textual sources; that they will be presumed to be of general applicability until proof of specification has been established in other textual sources; and--perhaps most impor-

---

[1]See below, p. 423.

tant of all--that the textual sources upon which one relies provide in themselves a sufficiently authentic, comprehensive, and unambiguous portrayal of the original precepts to which they pertain.[1]

When a precept has been set forth, however, the faqīh reasons from it deductively in the same manner one would reason from a specific legal text in the original sources. He applies it directly; that is to say, he applies it to matters that fall directly under the general provisions of the text of the precept. Similarly, he may apply the precept indirectly by analogy to other matters that, although similar to the precept, do not fall directly under its general provisions.

Thus, in evaluating the difference between legal reasoning based on precepts which the faqīh himself sets forth and legal reasoning based directly on specific texts of law in the original sources, the key considerations, on the one hand, are how authentically and accurately the faqīh has arrived at his precepts--i.e. how authoritative they are--and, furthermore, how comprehensive and unambiguous the language is in which he has stated the precept. And, on the other hand, one would have to consider the question of the adequacy of the legal texts of the original sources to meet these same considerations.

---

[1]See above, p. 140.

Thus, for example, whenever the original precepts of Islamic law are not adequately reflected in the original sources, as in the case of some isolated ḥadīth which are ambiguous or have other textual deficiencies, the elaboration of those precepts on the basis of the well-known sunnah, the ᶜamal of the Companions and prominent fuqahā' of the early generations, and a variety of textual and non-textual sources of law provides a broader, more inductive basis, as it were, upon which to establish the original content of the law. There is an immense practical advantage, furthermore, in setting forth such precepts in comprehensive and clear legal language, since that insures that other fuqahā' will apply the precept correctly. A good illustration of this is the example I cited earlier of Mālik's elaboration of the precept pertaining to ruling on the basis of the testimony of a single witness. The legal texts Mālik cites provide none of the important details of the precept, which Mālik himself provides on the basis of Madīnan ᶜamal, namely, what procedure is to be followed and the stipulation that this precept pertains exclusively to matters of buying and selling and not to questions of marriage, divorce, libel, criminal punishments, and so forth.[1]

Another practical advantage that comes from the full elaboration of legal precepts, as long as they are elaborated accurately, is that the signifying analogies of those

---

[1]See above, pp. 141-143.

precepts are sometimes articulated clearly, whereas they may only be hinted at in the original sources or there may be no indication of them at all. Such articulation of the signifying analogies behind precepts, of course, facilitates the application of analogical reasoning greatly. For example, Mālik cites in the Muwaṭṭa' a report that ᶜAlī ibn 'Abī Ṭālib sold a male camel of his named ᶜUṣaifīr for twenty other camels [baᶜīr]. Similarly, another report has it that ᶜAbd-Allāh ibn ᶜUmar once bought a riding camel [rāḥilah] for four camels [baᶜīr] which he was to deliver at a certain place on a later date. Mālik then explains the pertinent precept on the basis of Madīnan ijtimāᶜ [AMN]; such transactions are permissible--i.e. they are not contrary to the Islamic prohibition of ribā [usury]--if the uses of the animals which are exchanged are clearly different, such as between war camels and pack camels, even though they be of the same species. Similarly, he continues, such exchanges are prohibited if the uses of the animals exchanged are similar, even if their species be different.[1] Having articulated the signifying analogy of this precept, Mālik points out elsewhere in the Muwaṭṭa' that that same signifying analogy holds in the case of the exchange of various types of metals, different agricultural products, and so forth, many of which transactions are also part of Madīnan ᶜamal.[2]

---

[1]Muwaṭṭa', 2:652-653. [2]Ibid., 2:661, 662, 610.

One of the clearest examples I have found of Mālik's reasoning on the basis of legal precepts is that of his reasoning on the basis of the precept, which he sets forth in the *Muwaṭṭa'* and takes from Madīnan '*ijmā*ᶜ, that inheritance is never to be distributed on the basis of doubt but only on the basis of certain knowledge ["lā yanbaghī 'an yaritha 'aḥad 'aḥadan bi-'sh-shakk, wa lā yarithu 'aḥad 'aḥadan 'illā bi-'l-yaqīn min al-ᶜilm wa 'sh-shuhadā'"].[1] Mālik cites various applications of this principle in Madīnan ᶜ*amal* regarding matters like the inheritance of relatives killed in battle and the rights and limitations of illegitimate children to inherit from their fathers when their real fathers are not known.[2] Ibn al-Qāsim refers to this precept repeatedly in the *Mudawwanah* in accounting for Mālik's reasoning on a number of directly related questions and also in arriving at answers himself on other questions. In fact the particulars of some chapters on inheritance in the *Mudawwanah* virtually revolve around this precept.[3]

---

[1]*Muwaṭṭa'*, 2:521. The certainty in question here pertains to matters like certainty of kinship and the order of death of one's kinsmen. According to Islamic law, inheritance is distributed according to set formulas to marital partners and kinsmen, beginning with marital partners and the nearest of kin. Since kinsmen have mutual rights of inheritance and since they receive different proportions according to their nearness in kin, the order in which kinsmen die--say, for example, on the battle field--can effect the size of the proportions of their estates the remaining kinsmen ultimately receive.

[2]Ibid., 2:520-522, 741. [3]*Mudawwanah*, 3:81-85.

The precept Mālik has set forth in this example is in fact the signifying analogy behind the procedure followed on several occasions in the ᶜamal of Madīnah, which he cites in the Muwaṭṭa', according to which the people of Madīnah distributed inheritance to the survivors of various early battles in which they took part.[1] It should be noted that once this signifying analogy has been articulated in the universal manner in which Mālik has articulated it, one can solve numerous questions by direct reference to the precept itself--as Mālik and Ibn al-Qāsim do--without having to refer back to the original analogy. Although its conclusions are analogical to the original precedent, such reasoning is not, strictly speaking, analogical reasoning. Rather it is direct application of the precept in question. This is an illustration, I believe, of how the universal wording of precepts facilitates the practical application of the law.

Some Special Characteristics of Mālik's Concept of Qiyās

The specification of Qur'ānic verses by qiyās

As I mentioned earlier, general statements in the Qur'ān are regarded in Mālikī legal theory to be of the same nature as ẓāhir statements, which Mālikīs regard as being of conjectural meaning. One of the implications of this position is that Mālikīs regard it as valid to render

[1] Muwaṭṭa', 2:520.

the general meanings of Qur'ānic verses specific by a wide variety of legal sources and principles.[1]

According to Mālikī legal theory the dictates of those types of qiyās which are based upon well-established precepts of law take priority over the conjectural meanings of Qur'ānic verses of general or otherwise ambiguous wording. Thus, such Qur'ānic statements may be rendered specific or otherwise clarified by reference to these types of qiyās.[2]

Mālikī legal theory differs in this regard from Ḥanafī and Shāfiʿī legal theory. As I pointed out earlier, Ḥanafī theory regards general statements in the Qur'ān to be of definitive meaning, which leads to the unique Ḥanafī position on the specification and abrogation of Qur'ānic verses. Hence, according to ʿĪsā ibn 'Abān and al-Karkhī, 'Abū Ḥanīfah does not permit general Qur'ānic verses to be specified by qiyās. However, once the specification of such verses has been established by other sources of law, he permits the full extent of the specification to be elaborated by means of qiyās.[3] As for ash-Shāfiʿī, qiyās always is secondary to specific legal texts; hence, he does not re-

---

[1]See above, pp. 151-154.

[2]'Abū Zahrah, Mālik, pp. 345, 272-274 [where he cites from al-Qarāfī on this matter.]

[3]See above, pp. 149-151.

gard it to be legitimate to use *qiyās* as a means of rendering general Qur'ānic texts specific.[1]

The following example, according to Ibn Rushd, is an illustration of Mālik's specifying the meaning of a Qur'ānic verse by reference to *qiyās* made on the basis of other well-established precepts of law. According to the Islamic law of divorce, a husband has the right to initiate the divorce of his wife twice, on which occasions he also has the right to take her back as his wife during the waiting period [ᶜ*iddah*], which is usually three menstrual cycles. If, however, he has not taken her back during this period, she will be formally divorced from him upon its conclusion. A pertinent Qur'ānic verse says that when wives have neared completion of their waiting periods their husbands should either take them back or separate from them in an equitable manner. It adds, "And call to witness two just [ᶜ*adl*] [men] from among you . . .".[2]

The *ẓāhir* meaning of this verse, Ibn Rushd holds, would indicate that it is required for the husband to call two just witnesses whether he takes the wife back or separates from her. If the man takes his wife back, however, Mālik regards it not obligatory but recommended that he call witnesses. Mālik concludes that the calling of witnesses is not obligatory, Ibn Rushd states, by analogy with

---

[1] Abū Zahrah, *Mālik*, p. 273. [2] Qur'an, 65:2.

other precepts of Islamic law according to which a person who reclaims something that is rightfully his is not required to call witnesses.[1]

Rejection of isolated ḥadīth on the basis of qiyās

Another distinctive characteristic of Mālik's conception of qiyās, according to both Mālikī and non-Mālikī legal theorists, is that he rejects isolated ḥadīth with sound 'isnād's, when their meanings are contrary to the implications of qiyās made on the basis of well-established precepts of law and there are no other well-established precepts to which they conform.[2] According to the Mālikī legal theorist 'Abū Bakr ibn al-ᶜArabī, Mālik's rejection of the ḥadīth about washing seven times the pot in which a dog has

---

[1]Ibn Rushd, 2:51 (17).

[2]See 'Abū Zahrah, Mālik, p. 345; al-Qarāfī, 1:119-120; Ash-Shāṭibī, Al-Muwāfaqāt, 3:24; Muḥammad ibn 'Aḥmad AS-SARAKHSĪ, Kitāb al-'Uṣūl, ed. 'Abū 'l-Wafā' al-'Afghānī, 2 vols. in 1 (Haidarabad: Lajnat 'Iḥyā' al-Maᶜārif an-Nuᶜmānīyah, 1372/1953), 1:338-339; ᶜUbaid-Allāh ibn ᶜUmar AD-DABŪSĪ, Ta'sīs an-Naẓar (Cairo: Zakarīyā ᶜAlī Yūsuf, 1972), p. 65; Muḥammad ibn ᶜAbd-al-Wāḥid IBN AL-HUMĀM, At-Taḥrīr fī 'Uṣūl al-Fiqh al-Jāmiᶜ bain Iṣṭilāḥai 'l-Ḥanafīyah wa 'sh-Shāfiᶜīyah, in Taisīr at-Taḥrīr by Muḥammad 'Amīn 'AMĪR BĀDISHĀH, 4 vols. in 2 (Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1350-1351/[1931-1932]), 3:116; Āl Taimīyah [i.e. ᶜAbd-as-Salām ibn ᶜAbd-Allāh IBN TAIMĪYAH, ᶜAbd-al-Ḥalīm ibn ᶜAbd-as-Salām IBN TAIMĪYAH, and 'Aḥmad ibn ᶜAbd-al-Ḥalīm IBN TAIMĪYAH], Al-Musawwadah fī 'Uṣūl al-Fiqh, ed. Muḥammad Muḥyī-ad-Dīn ᶜAbd-al-Ḥamīd (Cairo: Maṭbaᶜat al-Madanī, 1964), p. 239; 'ABŪ 'L-ḤUSAIN Muḥammad ibn ᶜAlī AL-BAṢRĪ, Kitāb al-Muᶜtamad fī 'Uṣūl al-Fiqh, ed. Muḥammad Ḥamīd-Allāh, 2 vols. (Damascus: Al-Maᶜhad al-ᶜIlmī al-Fransī li-'d-Dirāsāt al-ᶜArabīyah, 1384/1964), 2:655; Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 211-212.

licked is an instance of Mālik's application of this principle, as pointed out earlier.[1]

This principle is clearly contrary to the legal theory of ash-Shāfiᶜī, who regards isolated ḥadīth with sound 'isnād's to be a valid independent source of law regardless of how anomalous their meanings may appear to be in the light of other well-established precepts. It is interesting, however, that the Ḥanafī legal theorists ad-Dabūsī, as-Sarakhsī, and Ibn al-Humām,[2] despite 'Abū Ḥanīfah's attitude toward isolated ḥadīth, regard this principle also to be a point of difference between Mālik and 'Abū Ḥanīfah.[3]

---

[1]See above, pp. 182-183.

[2]'ABŪ ZAID ᶜAbd-Allāh ibn ᶜUmar AD-DABŪSĪ (367 [?]-430/977[?]-1039) was a very significant Ḥanafī faqīh and legal theorist from Dabūsīyah in Transoxiana and died in Bukhārā. He is said to have been the first to bring ᶜilm al-khilāf [the science of the theoretical bases of the differences of legal opinions among the schools] into existence; his Ta'sīs an-Naẓar is devoted to this subject. Ad-Dabūsī's Taqwīm al-'Adillah and Al-'Asrār are among the most important Ḥanafī works on legal theory. Ziriklī, 4:248.

SHAMS AL-'A'IMMAH Muḥammad ibn 'Aḥmad AS-SARAKHSĪ (d. 483/1090) was a famous Khurāsānian Ḥanafī faqīh and legal theorist and qāḍī. His thirty volume Mabsūṭ is one of the most renowned compendia on Ḥanafī fiqh and legislative method [tashrīᶜ]. Similarly, his 'Uṣūl is among the greatest Ḥanafī works on legal theory. He did much of his compendious writing while in prison. Ziriklī, 6:208.

Muḥammad ibn ᶜAbd-al-Wāḥid IBN AL-HUMĀM (790-861/1388-1457) was born in Alexandria and grew up in Cairo. He lived for sometime in Ḥalab in Syria but died in Cairo. Ibn al-Humām was one of the greatest Egyptian Ḥanafī fuqahā' and legal theorists. He also had extensive knowledge of logic, mathematics, music, Arabic language and literature, and Qur'ānic commentary. Ziriklī, 7:134-135.

[3]Ad-Dabūsī, p. 65; as-Sarakhsī, 1:338-339; Ibn al-Humām, 3:116.

Ad-Dabūsī, in fact, singles this out as the principle difference between Mālik and 'Abū Ḥanīfah.[1] This is somewhat perplexing in light of the position of Ḥanafī legal theorists, as set forth by al-Kawtharī and others, that 'Abū Ḥanīfah rejects isolated ḥadīth when they are contrary to the well-established precepts of law to which he subscribes.[2]

I am not sure how to account for this contrariness. It could be, of course, that it is simply a contradiction. However, I believe that it can be accounted for in terms of the general principles of Ḥanafī qiyās as set forth by 'Abū Zahrah and the closely related Ḥanafī concept of istiḥsān as-sunnah, both of which merit further research. According to 'Abū Zahrah, 'Abū Ḥanīfah does not reject all isolated ḥadīth that are contrary to well-established precepts. Rather, he will give them limited acceptance, if he regards their 'isnād's to be sound. What this means is that he will accept such ḥadīth but limit their application strictly to the specific subject matter to which they pertain. He will regard them to be exceptions from qiyās and, hence, invalid as the basis of qiyās in matters related to them. He will continue to do qiyās on the basis of the pertinent well-established principles. For example, 'Abū Ḥanīfah accepts the isolated ḥadīth of 'Abū Hurairah that the Prophet stated that one has not broken one's fast by eating or drinking

---

[1]Ad-Dabūsī, p. 65. [2]See appendix 1.

during the fast out of forgetfulness. This ḥadīth is contrary to 'Abū Hanīfah's precept that the fast is broken by sexual relationships during the fast or by anything reaching one's stomach. In light of this ḥadīth he makes an exception only in the case of one's breaking one's fast out of forgetfulness but not when one breaks one's fast by virtue of other types of mistakes.[1] It is reported that 'Abū Ḥanīfah stated, regarding this ḥadīth, "Were it not for [this ḥadīth's] having been transmitted, I would have followed qiyās [in the matter]" ["law lā 'r-riwāyah, la-qultu bi-'l-qiyās"].[2]

'Abū Ḥanīfah's limited acceptance of isolated ḥadīth in such instances is very similar, if not identical, to a concept of Ḥanafī istiḥsān which Ḥanafī legal theorists call "istiḥsān as-sunnah". According to this type of istiḥsān, 'Abū Ḥanīfah draws exception in some matters to the strict application of qiyās where the application of qiyās would be inappropriate but cites isolated ḥadīth as the references or ancillaries for such istiḥsān.[3]

---

[1] 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325-326; cf. Zakī-ad-Dīn Shacbān, pp. 149-150, 153.

[2] Cited by Zakī-ad-Dīn Shacbān, p. 153.

[3] 'Abū Zahrah, Mālik, p. 355; az-Zarqā, 1:92. See further discussion of istiḥsān as-sunnah below, pp. 255-258.

Performing qiyās on the basis of earlier instances of qiyās

Another interesting and distinctive characteristic of Mālik's conception of qiyās is that he regards it as valid to make qiyās on the basis of the conclusions of earlier applications of qiyās. Ibn Rushd [al-Jadd] states that it is a matter of consensus among Mālikīs, according to what they have written in their books, that this type of qiyās is valid.[1] It is, however, another point of difference between the Mālikī concept of qiyās and the concept of the Ḥanafīs and Shāfiᶜīs, who, although they may differ on what shall constitute the bases for qiyās, hold that one must always return to the original basis of the qiyās.[2]

Those types of qiyās upon which Mālik regards it as legitimate to perform qiyās, according to Ibn Rushd [al-Jadd], however, are only those that are conclusively sound. Hence, according to him, Mālikīs do not regard the conclusively sound conclusion of a qiyās to be a farᶜ [lit., branch; i.e. a derivative conclusion that has no independent validity in isolation from the basis from which it was derived]. Rather, Mālikīs regard the conclusions of a

---

[1]Ibn Rushd [al-Jadd], 1:22-23; 'Abū Zahrah, Mālik, p. 348.

[2]See 'Abū Zahrah, Mālik, p. 348; idem, 'Abū Ḥanīfah, pp. 325, 337-339; cf. Zakī-ad-Dīn Shaᶜbān, p. 118. (Shaᶜbān claims mistakenly here that it is a point of consensus among all fuqahā' that, in performing qiyās, one must always return to the original analogy.)

conclusively sound qiyās to be an 'aṣl [lit. root or trunk; i.e. the basis for further deductions]. He continues to say that the term "far^{c}", from the Mālikī point of view, is applied only to those results of legal reasoning that lack conclusiveness and are still somewhat doubtful. Qiyās would not be permissible on the basis of the conclusions of inconclusive qiyās. Nevertheless, Ibn Rushd [al-Jadd] regards the position of non-Mālikī legal theorists to be mistaken, that qiyās can be performed only on the basis of precepts firmly established in the original sources of the Qur'ān, sunnah, and 'ijmā^{c}.[1]

A practical advantage of this method of qiyās, according to 'Abū Zahrah, is that it multiplies greatly the number of concrete precedents and parallels to which the mujtahid may refer in solving a given problem.[2] Although theoretically such conclusions of qiyās should share a signifying analogy with a well-established precept of law, the full implication of that signifying analogy as pertains to the case in question may not be readily apparent in the original precedent or precept. Nevertheless, its implications for the case in question may be quite clear in other analogical deductions. Similarly, Euclid's axioms imply the theorems of Euclidean geometry, and all sound geometric

---

[1] Ibn Rushd [al-Jadd], 1:22-23.

[2] 'Abū Zahrah, Mālik, p. 348.

formulations, however complex, can be accounted for in terms of this handful of axioms and theorems. Nevertheless, the complex formulations are not readily apparent in the axioms and theorems themselves; rather, they emerge gradually, as it were, by reference to other systematic deductions and closer parallels. Given the limitations of human imagination, it is unlikely that the more complex formulations could even be arrived at at all by reference only to the axioms and theorems.

The following is, I believe, an illustration of Mālik's application of qiyās on the basis of an earlier qiyās, which is based on the legal precept that it is not valid to make rulings contradicting rights due one's legal status as partner, wife, free, slave, etc. A polygamous husband, according to Mālik, must treat his wives equally in material things, and he must alternate the nights he spends with each of them on a regular and equal basis, spending only one night at a time with each. Each wife must have the husband's company for the night that is regularly hers whether she be free or slave, menstruating--in which case sexual intercourse would not be permissible--or not, whether she be healthy or sickly, whether she be sane or insane. If, for example, a man should make a marriage contract with a woman that he will not treat her equally in marriage with her co-wives, the contract will be annulled if brought to light before consummation of the marriage. If, however, the marriage

is consummated before the contract is brought to light, the marriage shall be valid, but the stipulation of unequal treatment, void. A wife may agree with her husband, however, that she not be given equal treatment. It can never be a contractual agreement, however. Thus, Mālik states that she has the right to retract that agreement at any time.[1]

Once Mālik was asked, however, whether the co-wives of a polygamous husband have the right to demand of their husband, upon his return from a journey during which he has taken one of his wives as his sole marital companion, that he now spend an equal amount of time with each of them to the exclusion of the wife who had accompanied him. Mālik reasons by analogy that they have no right to such a demand. Ibn al-Qāsim states that Mālik likened the demand of the co-wives to the case of a master who owns a slave who is half-free and has run away. Under usual circumstances the half-free slave would work alternately one day for himself and one day for his master until he earned his freedom. Upon the slave's return, however, his master demands that the slave be required to work continuously for him until he has compensated for the days of his absence. Mālik holds that the master has no right to make such a demand, for if it were executed it would be inconsistent with the half-slave's legal status. Rather, Mālik states, he would be in that case a full slave ["huwa 'idhan ᶜabd kulluhū"].

---

[1] Mudawwanah, 2:195-199, 198 (25).

This, Ibn al-Qāsim states, is Mālik's ᶜillah [sic]; to deprive the wife who accompanied the husband of her right of equal cohabitation with her husband in his presence would be inconsistent with her legal status as his wife.[1]

Istiḥsān

Whereas a distinctive feature of Mālik's application of qiyās is that he bases it on well-established legal precepts, the type of reasoning Mālik follows in istiḥsān, sadd adh-dharā'iᶜ, and al-maṣaliḥ al-mursalah is based on principles of law to which Mālik subscribes.[2] Al-Qarāfī uses the term "istidlāl" [inference] to describe these types of ijtihād and to distinguish them from qiyās.[3] It is also noteworthy that these three types of Mālikī istidlāl are not only a common, if not the predominant, feature of Mālik's ijtihād; they are also more authoritative than qiyās. For, as will be seen, they take priority over qiyās whenever the conclusions they lead to are contrary to qiyās.

As indicated by earlier references, ash-Shāfiᶜī regards each of these principles of legal reasoning to be invalid and arbitrary.[4] 'Abū Ḥanīfah clearly rejects sadd

---

[1]Mudawwanah, 2:198 (19).

[2]For the distinction between precepts and principles of law, see above, note 1, p. 227.

[3]Al-Qarāfī, 1:147-148.

[4]See above, pp. 220-222, p. 226, note 2.

adh-dharā'i^c.[1] Istiḥsān is a common feature of 'Abū Ḥanīfah's legal reasoning. It appears, however, that there may be a significant difference between the concept of Ḥanafī istiḥsān and that of Mālikī.[2] 'Abū Ḥanīfah's position on al-maṣāliḥ al-mursalah is not altogether clear. Although some hold that he did not subscribe to the principle, it may be, as Muṣṭafā az-Zarqā has suggested, that the Ḥanafī concept of istiḥsān aḍ-ḍarūrah [istiḥsān made on the basis of absolute necessity] is essentially the same thing.[3] At-Turkī claims that Ibn Ḥanbal subscribed to types of istiḥsān, sadd adh-dharā'i^c, and al-maṣāliḥ al-mursalah. His concept of sadd adh-dharā'i^c is quite strong and similar to the Mālikī. The Ḥanbalī concept of istiḥsān, however, is one of the least authoritative of the principles of law to which Ibn Ḥanbal subscribes, and, hence, notably different from the Mālikī concept. Similarly, the Ḥanbalī concept of al-maṣāliḥ al-mursalah is considerably less authoritative than the Mālikī, because it too may not take priority over explicit legal texts.[4]

---

[1]See above, pp. 220-221, note 3, and below, pp. 264-265.

[2]See below, pp. 254-258. [3]See below, pp. 257-258.

[4]See at-Turkī, pp. 515, 461, 474, 414-416, 419, 424, 430-431, 434-436; cf. 'Abū Zahrah, Ibn Ḥanbal, pp. 297-328. See also below, pp. 262, 269.

Mālikī istiḥsān is a type of equity. It draws exception to the strict application of general legal precepts--directly or by analogy--whenever, because of special circumstances, the strict application of those precepts would lead to excessive difficulty, harm, or injury. Thus, the principle of istiḥsān overrules the application of general precepts in specific situations and marks off, as it were, the limits within which those general precepts were intended to be applied.[1] 'Abū Bakr ibn al-ᶜArabī defines Mālik's concept of istiḥsān as "putting aside the necessary consequences of a legal directive by way of making an exception to it or granting special licences [tarakhkhuṣ] because of the contradiction [muᶜāraḍah] of special circumstances."[2] Similarly, Ibn Rushd--ash-Shāṭibī does not specify which Ibn Rushd he is quoting--defines istiḥsān as "that principle which repudiates [ṭarḥ] qiyās whenever the strict application of qiyās will lead to excess [ghulūw] and exaggeration [mubālaghah]."[3] In Bidāyat al-Mujtahid, Ibn Rushd [al-Ḥafīd] defines Mālik's istiḥsān as "the consideration of maṣlaḥah and justice ["al-iltifāt 'ilā 'l-maṣlaḥah wa 'l-ᶜadl"]."[4]

According to the prominent early Egyptian Mālikī faqīh 'Aṣbagh,[5] Mālik used to say that istiḥsān constitutes

---

[1]See ash-Shāṭibī, Al-Muwāfaqāt, 1:40; 4:205-206.

[2]Cited by idem, Al-Iᶜtiṣām, 2:320-321.

[3]Ibid., 2:321. [4]Ibn Rushd, 2:112 (15).

[5]'AṢBAGH ibn al-Faraj ibn Saᶜīd (d. 225/840) was one

nine tenths of knowledge.[1] In another report, Ibn Rushd--again unspecified--states that istiḥsān is more common than qiyās.[2] There can be no doubt to one who studies Mālik's legal opinions, especially in the Mudawwanah, where one finds most of the examples of Mālik's ijtihād, that he subscribed to the concept of istiḥsān and relied upon it heavily.[3]

Ash-Shāṭibī justifies istiḥsān on the grounds that it is a principle of Islamic law to make things as easy for the people as possible, while staying within the general dictates of the law, and that only those legal requirements can be valid which are within the capacity of the people to carry them out without undue difficulty. (This principle is known as "raf^c al-ḥaraj" [removing excess difficulty].) Hence, whenever, because of the circumstances of a special case, the strict application of a general precept will lead to unnecessary difficulty or harm or for other reasons will become legally and rationally impossible, the general precept must not be applied to those circumstances. According

---

of the prominent Mālikī fuqahā' of Egypt in his generation. Ibn al-Mājishūn is reported to have said of him that Egypt had never brought forth the likes of 'Aṣbagh. Like 'Ashhab, he was one of the personal secretaries of Mālik's student Ibn Wahb. Ziriklī, 1:336.

[1]Cited by ash-Shāṭibī, Al-I[c]tiṣām, 2:320.

[2]Cited ibid., 2:321.

[3]See citations below, pp. 258-261.

to ash-Shāṭibī, the special licenses provided for in the Qur-'ān and sunnah ['aḥkām ar-rukhaṣ]--such as the exemption of travellers from the obligation of fasting the fast of Ramaḍān while they are travelling--are manifestations of the principle that underlies istiḥsān.[1]

Ash-Shāṭibī repudiates the arguments of those who claim that istiḥsān is arbitrary because it constitutes a departure from the textual sources of Islamic law, and he argues that istiḥsān is no less a valid legal argument than qiyās.[2] The principle of istiḥsān, he holds, is necessary to insure that Islamic law is applied with fairness and justice and in a manner that is consistent with its overall purpose. He regards istiḥsān as "granting priority to a limited maṣlaḥah [maṣlaḥah juz'īyah] over a universally absolute legal directive [dalīl kullī]."[3] A policy of rejecting istiḥsān and adhering strictly to the dictates of general texts and precepts would lead necessarily, he holds, to the obliteration of many of the maṣāliḥ which it is the purpose of Islamic law to secure and would bring about mafāsid instead, which it is the purpose of Islamic law to obliterate.[4]

---

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 1:102. [2]Idem, Al-Iᶜtiṣām, 2:320.

[3]Idem, Al-Muwāfaqāt, 4:205-206; cf. 'Abū Zahrah, Mālik, p. 357.

[4]Ash-Shāṭibī, Al-Muwāfaqāt, 1:100-102; 4:205-206.

According to 'Abū Bakr ibn al-ᶜArabī, Mālik performed istiḥsān on the basis of four considerations: 1) local customs [al-ᶜurf], 2) maṣlaḥah, 3) 'ijmāᶜ, and 4) the principle of rafᶜ al-ḥaraj and of making things easy for the people.[1] It would appear, however, that there is overlapping in this definition. As I mentioned earlier, 'Abū Zahrah believes that istiḥsān made on the basis of local customs is essentially the same thing as istiḥsān made on the basis of maṣlaḥah, since sound local customs, from the Mālikī point of view, are instances of maṣlaḥah.[2] Similarly, the principle of rafᶜ al-ḥaraj is closely connected with maṣlaḥah, from the Mālikī point of view; to create unnecessary difficulties for the people in the application of the law creates an aversion in them to the law and defeats its purpose.[3] Furthermore, 'ijmāᶜ would not appear to be a basis of istiḥsān, properly speaking; rather it is consensus that the basis for a given application of istiḥsān, whatever that basis was, was valid. Hence, it relates to the authority of given applications of the principle.[4]

---

[1]Cited by ash-Shāṭibī, Al-Muwāfaqāt, 4:207-208; idem, Al-Iᶜtiṣām, 2:320-321. Note: the citation in Al-Iᶜtiṣām is not complete; although it speaks of four considerations, it cites only three, omitting 'ijmāᶜ, which is mentioned in the citation in Al-Muwāfaqāt. Ash-Shāṭibī cites an example of istiḥsān on the basis of 'ijmāᶜ in Al-Iᶜtiṣām, 2:324-325.

[2]See above, p. 205.

[3]See ash-Shāṭibī, Al-Muwāfaqāt, 3:60-76; 4:233-243.

[4]Cf. idem, Al-Iᶜtiṣām, 2:324-325.

There is also another basis upon which Mālik does istiḥsān, as ash-Shāṭibī points out and as is borne out by examples in the Mudawwanah.[1] Mālik also does istiḥsān on the basis of the contrary opinions of other prominent fuqahā', Madīnan and non-Madīnan. In such cases, Mālik will sometimes modify his own position out of deference for the contrary opinions of others.[2]

To the extent that istiḥsān is based on principles of Islamic law like raf^c al-ḥaraj, maṣlaḥah, fairness, justice, and so forth, it can be argued--as ash-Shāṭibī and others have done--that it is not arbitrary. The legal principles upon which istiḥsān is based constitute an objective criterion of sorts, such that application of istiḥsān is not purely subjective. Nevertheless, the application of principles like istiḥsān, which draw exception to and sometimes contradict well-established general precepts of law, also calls for a considerable amount of personal judgment on the part of the faqīh or qāḍī who applies it. In the myriad of circumstances that present themselves before him, he must determine at which point strict application of the general precept becomes excessive and unwarranted.

Perhaps, it is this element of personal discretion that ash-Shāfi^cī sought to remove by his insistence upon

---

[1]See below, pp. 259-261.

[2]Ash-Shāṭibī, Al-I^ctiṣām, 2:329-330.

strict adherence to literal texts of law or qiyās on the basis of them. Ash-Shāfiᶜī's stance, however, requires a further position that strict application of legal texts and general precepts will not lead to excess and undue harm and will not obliterate maṣāliḥ which it was the purpose of the precepts and of the law in general to secure. Such a position, as pointed out earlier, would be close to the 'Ashᶜarī theological position, for it would hold that man cannot know what is in his best interest without reference to specific revealed texts, and it would probably conclude that it is unthinkable that strict application of these texts could lead to excess and injustice, inequity and undue harm.

On the other hand, those like ash-Shāṭibī and Mālikī legal theorists in general, who hold that strict application of precepts directly or by qiyās will lead to excess and injustice, inequity and undue harm in some circumstances, hold that the principle of strict application of legal precepts without regard to specific circumstances is in violation of the ultimate purposes of Islamic law. Apparently the conclusion of their position would be that in the application of the law there can be no mechanical substitute for sound personal judgment, discretion, and integrity. Later legal theorists attempted to set down stipulations upon the application of principles of istidlāl that would safeguard the danger of their being used to annul well-established precepts altogether or violate the purposes of Islamic

law.[1] One could also devise various institutional checks and balances to minimize such arbitrariness in the administration of justice. Nevertheless, as long as one subscribes to principles of istidlāl, some degree of interpretation and personal discretion is inescapable. Thus, from a moral standpoint, the application of the law and the administration of justice is inevitably a trust and a trial. From the standpoint of Islamic law, therefore, principles of istidlāl contain both maṣāliḥ and mafāsid. On the one hand, they enable the faqīh or qāḍī of integrity a vehicle by which to apply the law to new and changing circumstances with equity and justice and in a manner consistent with the ultimate purposes of Islamic law. On the other hand, they enable those who lack such integrity a means to justify abuses, annul general precepts, and defeat the purposes of the law.

In this regard, principles of istidlāl are akin to other things in man's experience--such as modern technology--that can be put to constructive and destructive ends. Thus, from the standpoint of Mālikī legal theory, steps must be taken to insure as far as possible that the maṣāliḥ brought about by such principles are greater than the mafāsid they bring about.[2]

---

[1]See below, pp. 271-273.

[2]See below, p. 263.

Ḥanafī Istiḥsān

'Abū Zahrah concludes on the basis of his comparative studies of Mālik and 'Abū Ḥanīfah that Mālik used istiḥsān more frequently than 'Abū Ḥanīfah. He holds, furthermore, that there are some significant differences between the type of istiḥsān which 'Abū Ḥanīfah uses most frequently and Mālikī istiḥsān, the consistent characteristic of which is to draw exception to qiyās and the direct application of precepts on the grounds of principles like rafᶜ al-ḥaraj.[1]

According to 'Abū Zahrah, the most common type of istiḥsān in the Ḥanafī school is what Ḥanafī legal theorists call "al-qiyās al-khafī" [unobvious qiyās], as opposed to al-qiyās al-jalī [obvious qiyās]. In this type of istiḥsān the faqīh finds a signifying analogy in another legal precept which he believes to be more appropriate, although at first its applicability is not as readily apparent as the signifying analogy of another precept, i.e. al-qiyās al-jalī. The istiḥsān of the faqīh is his decision to follow al-qiyās al-khafī instead of al-qiyās al-jalī.[2] Thus, this

---

[1] 'Abū Zahrah, Mālik, p. 453.

[2] Ibid., p. 355; see az-Zarqā, 1:83-84, 92. Az-Zarqā refers to this type of istiḥsān as "al-istiḥsān al-qiyāsī" [istiḥsān that is like qiyās]. Istiḥsān in such examples, he explains, is a matter of preferring a stronger and sounder qiyās that is more appropriate to the situation over other types of qiyās that are more far-fetched. Thus, it pertains only to those legal questions to which more than one type of qiyās are potentially applicable; ibid., 1:83-84.

type of istiḥsān is essentially a type of qiyās, for it is a matter of the faqīh determining which analogy is the most appropriate. According to 'Abū Zahrah, the prevalence of al-qiyās al-khafī in Ḥanafī istiḥsān reflects the dominant role that analogical reasoning plays in the Ḥanafī school.[1] In the Mālikī school, he holds, al-qiyās al-khafī is not regarded to be a type of istiḥsān at all but only another type of qiyās.[2]

In addition to al-qiyās al-khafī, Ḥanafī legal theory speaks of four other types of istiḥsān: 1) istiḥsān al-'ijmā^c [istiḥsān supported by 'ijmā^c], 2) istiḥsān as-sunnah [istiḥsān supported by the sunnah], 3) istiḥsān aḍ-ḍarūrah [istiḥsān made on the basis of absolute necessity],[3] and 4) istiḥsān made on the basis of local customs.[4] Istiḥsān al-'ijmā^c is a matter of setting aside the strict requirements of qiyās in matters in which 'ijmā^c has been reached on the validity of rulings contrary to qiyās.[5] This and the fourth type of istiḥsān are clearly parallel to types of Mālikī istiḥsān.

Istiḥsān as-sunnah is a type of istiḥsān whereby 'Abū Ḥanīfah sets aside the strict application of qiyās and cites

---

[1]'Abū Zahrah, Mālik, p. 437. [2]Ibid., p. 355.

[3]Az-Zarqā, 1:92, 87. [4]'Abū Zahrah, Mālik, p. 355.

[5]Ibid.; az-Zarqā, 1:92.

isolated *ḥadīth* as references or ancillaries.[1] Az-Zarqā holds that it is incorrect to consider *istiḥsān as-sunnah* as a type of *istiḥsān* and that it should simply be regarded as part of the *sunnah*.[2] I doubt, however, that his opinion is valid. First of all, the term "istiḥsān as-sunnah" is misleading. A term like *istiḥsān khabar al-wāḥid* [*istiḥsān* on the basis of an isolated report] would be more appropriate, because of the distinction in Ḥanafī legal theory between the authoritativeness of well-known *ḥadīth* that conform to the well-known *sunnah* and isolated *ḥadīth* that are contrary to it. Secondly, as pointed out in the discussion of 'Abū Ḥanīfah's concept of *qiyās*, his acceptance of isolated *ḥadīth* that are contrary to well-established precepts is significantly different from his acceptance of well-known *ḥadīth*. Such isolated *ḥadīth* have only limited acceptance; he regards them to be anomalies, restricts them to the specific provisions of their texts, and does not permit *qiyās* to be done on the basis of them.[3] Finally, it would be worth knowing whether in *istiḥsān as-sunnah* it is the isolated *ḥadīth* which is the source of authority or rather the logic of *istiḥsān* to which the isolated *ḥadīth* happens to conform. For if it is the logic of *istiḥsān* that is authoritative,

---

[1] 'Abū Zahrah, *Mālik*, p. 355; az-Zarqā, 1:92.

[2] Az-Zarqā, 1:93. [3] See above, pp. 239-240.

the citation of the isolated ḥadīth--which otherwise would have been rejected--is somewhat perfunctory, for it would not be the basis of the istiḥsān but, at best, only an ancillary witness to the validity of the istiḥsān.

Istiḥsān aḍ-ḍarūrah, according to az-Zarqā, is the only type of Ḥanafī istiḥsān that is clearly contrary to qiyās and cognate to Mālikī istiḥsān. (He does not consider Ḥanafī istiḥsān on the basis of local customs, and, although I disagree with his analysis of istiḥsān as-sunnah, it is distinctive in that it refers back to a legal text, even though there is some question about the authority of that text.) Istiḥsān aḍ-ḍarūrah is made on the basis of the need to fulfill a necessity [sadd li-'l-ḥājah] or to remove an undue harm [dafᶜ li-'l-ḥaraj].[1]

'Abū Zahrah holds that the Ḥanafī concept of istiḥsān aḍ-ḍarūrah is identical to Mālikī istiḥsān but is not the same as the Mālikī concept of al-maṣāliḥ al-mursalah. 'Abū Ḥanīfah, according to him, did not regard anything similar to al-maṣāliḥ al-mursalah to be an independent source of law, and rarely does 'Abū Ḥanīfah make the consideration of maṣāliḥ the sole basis of his reasoning without reference to specific texts and legal precepts. Furthermore, istiḥsān aḍ-ḍarūrah is much less common in the Ḥanafī school than its counterpart in the Mālikī school.[2] Az-Zarqā disagrees

---

[1] Az-Zarqā, 1:87.

[2] 'Abū Zahrah, Mālik, pp. 355, 368, 391, 436-438, 453.

with 'Abū Zahrah and holds that Ḥanafī istiḥsān aḍ-ḍarūrah is an equivalent of al-maṣāliḥ al-mursalah. Nevertheless, he adds that the Mālikīs developed the concept of al-maṣāliḥ al-mursalah more fully and, thus, came to regard it as an independent source of law, while istiḥsān aḍ-ḍarūrah remained a branch of istiḥsān.[1]

Illustrations of Mālikī Istiḥsān

Mālik states that the produce of patches of watermelons, cucumbers, melons, carrots, and similar agricultural produce may be sold completely once the first fruits [ṣalāḥ] of the crop have appeared. The buyer will have rights over the patch during the remainder of the growing season until the patch dries up. Mālik states that no specified period has been set for the time during which the buyer has rights over the patch, because the people know well the periods that apply to such matters. He discusses further what legal provisions exist for compensating the buyer if the crop is destroyed during the course of the growing season.[2] This ruling is an exception to the general precept of Mālikī fiqh and Islamic law in general that transactions of buying and selling are to be made for set quantities of goods to

---

[1]Az-Zarqā, 1:89, note 1, 1:123-124.

[2]Muwaṭṭa', 2:619; cf. ibid., 2:631, where Mālik describes a certain transaction as "khafīf" [light, i.e. trivial and excusable or insignificant], apparently on the basis of istiḥsān.

be sold at set periods of time at set prices. In this case, neither the quantities or periods are known exactly; it appears to be an example of istiḥsān made on the basis of local customs.

Ibn al-Qāsim regards a certain common type of transaction among the people in accordance with which they buy and sell women's ankle bracelets [khalkhālain] to be permissible on the basis of istiḥsān and adds that 'Ashhab held the same opinion. The qiyās in this matter, he states, is that such contracts of buying and selling should be void because of an irregularity they contain. He regards them as valid, however, since they are something that the people cannot get around ["hādhā mimmā lā yajid an-nās minhu buddan"].[1] Local customs may be part of the consideration here also; it is, furthermore, an instance of the application of rafᶜ al-ḥaraj, since to prohibit the people from doing something which they cannot get around doing would be to cause them excessive hardship.

Mālik holds that no one coming from another land or city should enter Makkah unless he is wearing the pilgrim's garb. He does not agree with a contrary opinion of Ibn Shihāb az-Zuhrī that there is no harm in one's entering Makkah without wearing pilgrim's garb. Mālik adds, however, that there is no harm in the case of people living in areas around

---

[1] Mudawwanah, 3:102 (2).

Makkah--like aṭ-Ṭā'if and Jaddah--entering Makkah without wearing the pilgrim's garb who come there frequently in order to bring fruits, other food stuffs, firewood, and so forth. Mālik's istiḥsān in this case is clearly based on the principle of rafᶜ al-ḥaraj, since, as he states, it would be burdensome upon them ["yakburu ᶜalaihim"] if they were required to don the pilgrim's garb in such cases.[1]

In this same example, Ibn al-Qāsim is asked if a Muslim from a distant land like Egypt who enters Makkah without being in the pilgrim's garb either intentionally or out of ignorance and then returns home ought to be required to make some compensation for his erroneous behavior. Although Ibn al-Qāsim disapproves strongly of such behavior, he states that he would not require the man to make any compensation because of Ibn Shihāb's contrary opinion that there is no harm in one's entering Makkah without wearing the pilgrim's garb.[2] This is an example of istiḥsān made out of deference to the contrary opinions of other fuqahā'.[3]

In the following instance, Mālik applies this type of istiḥsān. He regards certain types of irregular marriage contracts to be unconditionally invalid. Whenever such a type of marriage occurs, Mālik holds that it should be render void [mafsūkh] without going through the formality of

---

[1]Mudawwanah, 1:303 (12). [2]Ibid.

[3]See above, p. 251.

making the husband divorce the wife, in which case the husband and wife would retain rights of mutual inheritance during the waiting period. There are other types of marriage contracts, however, which Mālik regards to be invalid but which other fuqahā'--Ibn al-Qāsim refers to them as the "Easterners" ["'ahl ash-sharq" and "'ahl al-mashriq"], i.e. the Kūfans--regard to be valid. Mālik modifies his position in the case of such marriages, as Ibn al-Qāsim states, out of deference to the contrary opinions of the Easterners. Hence, he rules that such marriages must be ended by requiring the husband to divorce the wife. The woman retains her right to the dowry, and both wife and husband retain rights of mutual inheritance during the waiting period.[1]

---

[1]Mudawwanah, 2:185 (5), 153 (18); cf. ash-Shāṭibī, Al-I^{c}tiṣām, 2:329-330.

For additional illustrations of istiḥsān see: Mudawwanah, 1:193 (12); ibid., 1:90 (11), regarding the permissibility of seeking shelter from rain and snow in churches; ibid., 1:50 (9), that one should not pay excessive prices for water with which to perform ritual ablutions even when there is no other water available; ibid., 3:92 (19), Mālik does not prohibit a certain transaction, despite the fact that he disapproves of it, because to prohibit it would be to cause the people great hardship; see also Muwaṭṭa', 2: 709, 636, 661, which are discussed below, pp. 618-622. Ash-Shāṭibī regards the opinion of the Prophet's Companions that public baths should be permissible although they are contrary to some points of Islamic precepts of buying and selling to be an example of istiḥsān, Al-I^{c}tiṣām, 2:318; similarly, the fuqahā' hold that rooming and boarding are permissible, although the boarder pays in advance for his meals and the number of meals he will eat and the quantity of the meals are not specified, see ibid., 2:328-329. Ibn Rushd discusses several provisions of Mālikī fiqh regarding the liability of the buyer that are derived on the basis of istiḥsān; see Ibn Rushd, 2:112 (15), 108 (17). According to Ibn Rushd, Mālik's opinion that women may read the Qur'ān during the

Sadd adh-Dharā'i[c]

Sadd adh-dharā'i[c] [lit., the obstruction of means (to illegitimate ends)] is a distinctive feature of the Mālikī and Ḥanbalī schools.[1] It is a principle of legal reasoning whereby ostensibly permissible acts are prohibited [i.e. obstructed] whenever they become means [dharā'i[c]] to impermissible ends.[2] It is used primarily for invalidating legal fictions [ḥiyal], and Ibn Taimīyah praises Mālik highly for the consistency with which he applies sadd adh-dharā-i[c] to that end.[3]

According to ash-Shāṭibī, the principle of sadd adh-dharā'i[c] is consistent with the view that one of the ultimate purposes of Islamic law is to secure maṣāliḥ, which can only be done by guarding against the encroachment of mafāsid, which it is the purpose of sadd adh-dharā'i[c] to do. He holds, furthermore, that it is a principle of Islam-

---

days of their menses is istiḥsān, ibid., 1:29 (27). Similarly, Mālik does not extend full rights of guardianship to a woman's relative other than her father, on the grounds that other relatives are not as likely to have the woman's interest at heart, ibid., 2:5 (8).

[1]'Abū Zahrah, Mālik, p. 405; idem, Ibn Ḥanbal, pp. 314-328; al-Fāsī, p. 156; Ibn Rushd [al-Jadd], 2:198; az-Zarqā, 1:106-108; at-Turkī, pp. 461, 474. The Ḥanbalī legal theorist Ibn Qayyim regards sadd adh-dharā'i[c] as constituting a fourth of the obligations [taklīf] of Islamic law; he treats the principle thoroughly and cites ninety-nine illustrations of it; cited by al-Fāsī, p. 156 and 'Abū Zahrah, Mālik, p. 409. 'Abū Zahrah gives a good treatment of Ibn Qayyim's presentation.

[2]See above references.

[3]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 51-53.

ic law that the obstruction of mafāsid takes priority over the acquisition of maṣāliḥ, whenever the two come into conflict. Hence the maxim of Islamic law:

> Whenever a mafsadah gains the upperhand over ['arbat ᶜalā] a maṣlaḥah, the legal judgment will be handed down with a view to the mafsadah. Mafāsid are prohibited; hence, prohibition [al-manᶜ] becomes required clearly of both [the mafsadah and the maṣlaḥah in the given matter].[1]

According to az-Zarqā and 'Abū Zahrah, it is not the purpose of the faqīh or qāḍī in applying sadd adh-dharā'iᶜ to establish the intent of the person in question to attain illegitimate ends by his ostensibly permissible act. Rather, one looks only to the act itself and the potential results it could lead to.[2] Nevertheless, expressions used in the Muwaṭṭa' and Mudawwanah indicate that one who applies sadd adh-dharā'iᶜ suspects the one against whom he applies it of having intended to attain illicit ends. Ibn Rushd refers to this presumption, which underlies sadd adh-dharā'iᶜ, as "'iᶜmāl at-tuhmah" [application of suspicion].[3] Az-Zuhrī is reported to have said, for example, that in the early period there was no suspicion [tuhmah] involved when a father gave witness on behalf of his son; later, however, when the morals of the people began to deteriorate the witness

---

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:272; 1:174.

[2]Az-Zarqā, 1:106, 108; 'Abū Zahrah, Mālik, pp. 406-407.

[3]Ibn Rushd, 2:50 (8); 17-18 (29); 45 (15); 85 (4); 84 (18); 85-86 (25).

of a father for his son and similar types of witness were prohibited because of the suspicion [ittihām] that they were not trustworthy.[1] I referred earlier to the example of sadd adh-dharā'i^c in which Mālik regards the motive of a man to be suspicious [yuttaham] who marries a woman while she is critically sick.[2] There are other examples in the Muwaṭṭa' and Mudawwanah of his speaking about tuhmah and ittihām in connection with the application of sadd adh-dharā'i^c.[3]

According to ash-Shāṭibī, 'Abū Ḥanīfah and ash-Shāfi^cī reject sadd adh-dharā'i^c because of their rejection of this presumption of motive that it involves. They hold that there must be clear indication of the intent of the person in question to use outwardly permissible actions as a means to impermissible ends before it is legitimate to prohibit those actions.[4] In so far as 'Abū Ḥanīfah's rejection of sadd adh-dharā'i^c is concerned, it would be interesting to explore whether or not there is any connection between it and his murji'ī theological position. For, ac-

---

[1]Mudawwanah, 4:80. [2]See above, pp. 130-131.

[3]See Muwaṭṭa', 2:868 and Mudawwanah, 4:105 (24), 110 (4).

[4]Ash-Shāṭibī, Al-Muwāfaqāt, 4:200-201. This is also 'Abū Zahrah's assessment of the position of 'Abū Ḥanīfah and ash-Shāfi^cī; see idem, Mālik, p. 412. See also above, pp. 220-221; ash-Shāfi^cī, "'Ibṭāl al-Istiḥsān," pp. 269 (15), 270 (10); idem, "Ar-Radd," p. 300 (20), where he cites ash-Shaibānī's arguments against sadd adh-dharā'i^c.

cording to J. Meric Pessagno, 'Abū Ḥanīfah's murji'ī theological position is essentially a voluntaristic and not a rationalistic philosophy. It holds that human acts can only be evaluated when the motive behind them has been discovered, for "the direction of the will determines the nature of the human act."[1] Thus, it may have been for this reason that, in the absence of knowledge of the motive, the Ḥanafīs refused to question the legitimacy of ostensibly legitimate acts, even though those acts could be used as means to illegitimate ends.

Illustrations of Mālik's Application of Sadd adh-Dharā'i[c]

It is part of Madīnan ijtimā[c] that one may hire out one's male slaves and animals. The same Madīnan ijtimā[c], however, prohibits such transactions in the case of slave women. The reason for this, Mālik explains, is because slave women might be exploited for the sexual gratification of those to whom they are hired out. The people of learning in Madīnah, he continues, have always forbidden such transactions to all people on the grounds that to permit them would provide a means ["dharī[c]ah"] for making permissible [ḥalāl] that which is forbidden [ḥarām].[2] Here Mālik has set forth explicitly the concept of sadd adh-dha-

---

[1] J. Meric Pessagno, "The Murji'a, Īmān, and 'Abū [c]Ubaid," JAOS, 95 (1975):390.

[2] Muwaṭṭa', 2:682; Mudawwanah, 3:130 (6).

rā'i[c] as an explanation for a traditional Madīnan legal opinion. It is also noteworthy that he has used the word "dharī-[c]ah". Furthermore, since the ruling is a traditional legal opinion and the reasoning Mālik sets forth to account for it is said to be traditional Madīnan reasoning, it would appear that the concept of sadd adh-dharā'i[c] was a traditional part of the legal reasoning of Madīnah.

Mālik states that it is Madīnan ijtimā[c] that a murderer will not be permitted to inherit any part of the diyah [indemnity] of a relative whom he has murdered or any part of that relative's estate. Furthermore, the murderer cannot stand in the way of other relatives inheriting in his place who are more distant than he from the victim in kinship. There has been a difference of opinion, Mālik points out, however, among the fuqahā' of Madīnah as to whether or not a man who kills a relative by accident should be permitted to inherit his share of the victim's estate. Some have held that he should be prohibited from inheriting any part of the victim's estate because of the tuhmah [that he may have designed the relative's murder for that purpose and made it appear accidental]. Mālik states that his position is that one who kills a relative accidentally should be permitted to inherit his share of the relative's estate.[1] Here again Mālik's articulation of the concept of sadd adh-dharā-

[1]Muwaṭṭa', 2:868.

'i^c is clear. As in the preceding example, this illustration indicates that sadd adh-dharā'i^c was a traditional part of Madīnan legal reasoning; in fact, in this case, those with whom Mālik disagrees were more rigorous in their application of the concept than he.

It is part of Madīnan ijtimā^c that a father may repossess a gift [nuḥl or ^caṭā'] that he gives his son or daughter, as long as he has not given it to them by way of charity [ṣadaqah]. If, however, the child to whom the gift was given has entered into a social or economic transaction of consequence by virtue of possession of the gift, the father is no longer permitted to repossess it. Mālik clarifies the precept by citing the example of a child's having been loaned a considerable amount of money by creditors on the grounds that the child's gift could be claimed in lieu of failure to repay the loan. He cites another example of a child's having entered into a very favorable marriage contract, one of the attractions to the other party having been the child's possession of the gift. He cites the example also of a daughter's dowry having been increased by virtue of her possessing such a gift. In cases similar to these, Mālik states, it is impermissible for the father to take back what he has given.[1]

---

[1]Muwaṭṭa', 2:755. For additional illustrations of sadd adh-dharā'i^c: Mālik's rejection of certain claims of merchants that they cannot repay debts because the money has been invested abroad, Mudawwanah, 4:105 (24); his rejec-

Al-Maṣāliḥ al-Mursalah

Al-Maṣāliḥ al-mursalah [absolute maṣāliḥ that are not "tied down" to specific texts] is a principle of legal reasoning whereby new rulings are made which are without precedent or earlier rulings are suspended, out of consideration of the best interests and welfare of society.[1] As mentioned

---

tion of the claim of a dying man that one of his heirs has repaid a debt which that heir owed him, ibid., 4:110 (4); Ibn al-Qāsim's stern policy against merchants who use counterfeit coins and coins of false weight, which he justifies as a means of preserving the Muslim markets from corruption ['ifsād], ibid., 3:115 (28); cf. Muwaṭṭa', 2:635-636. According to Ibn Rushd [al-Jadd], the chapters in the Mudawwanah pertaining to contracts of buying and selling ["Al-Buyū^c"] are predicated upon sadd adh-dharā'i^c, Ibn Rushd [al-Jadd], 2:198. Ibn Rushd [al-Ḥafīd] reiterates this view and gives numerous illustrations, Ibn Rushd, 2:85-96. See also Mālik's prohibition of nikāḥ al-muḥallil--in contrast to 'Abū Ḥanīfah and ash-Shāfi^cī--which is a type of marriage whereby a person [the muḥallil] marries a woman with the intent of divorcing her after consummation, so that she may remarry a former husband who has divorced her three times, ibid., 2:36 (2). See Mālik's position regarding the impermissibility of guardians in marriage making stipulations in the marriage contracts of the women who are entrusted to their supervision from which the guardians receive remuneration or other personal benefits from the groom, ibid., 2:17-18.

[1]For definitions see, 'Abū Zahrah, Mālik, p. 390; az-Zarqā, 1:97-98; al-Fāsī, pp. 138-144; ad-Dawālībī, p. 99.

Ad-Dawālībī explains that the adjective "mursal" used in this term means "muṭlaq" [absolute, not tied down]. Such maṣāliḥ, he continues, are regarded as being consistent with the general dictates and ultimate purposes of the sharī^cah, although they have not been specified, i.e. "tied down" [muqayyad] in legal texts; ibid.

Some legal theorists use the term "istiṣlāḥ" [making or seeking to make rulings on the basis of maṣlaḥah] for this concept. According to az-Zarqā, it was al-Ghazālī who coined this term in his work on legal theory, Al-Mustaṣfā. Az-Zarqā prefers al-Ghazālī's term, because it articulates the concept of "making rulings" on the basis of maṣlaḥah, which is missing in the other; az-Zarqā, 1:97, note 2.

Nevertheless, it should be noted that al-Ghazālī's

earlier, both the Mālikī and Ḥanbalī schools subscribe to al-maṣāliḥ al-mursalah; the Ḥanbalī concept, however, is not as authoritative.[1] According to the view that the consideration of maṣāliḥ is the central theme of Mālikī legal theory, the concept of al-maṣāliḥ al-mursalah represents, as it were, the high point of Mālikī theory. It regards all courses of action in which there are maṣāliḥ to be potentially valid parts of Islamic law, regardless of whether or not they are witnessed in specific legal texts, as long as the mafāsid of those courses of action do not outweigh the maṣāliḥ that they bring.[2]

---

term is one that, unlike "al-maṣāliḥ al-mursalah", suits his own theoretical position. For it omits the notion of "'irsāl" [i.e., of maṣāliḥ that are not tied down to specific legal texts], which is the fundamental part of the Mālikī conception. Perhaps a better term would be al-istiṣlāḥ al-mursal.

[1]See 'Abū Zahrah, Mālik, pp. 368-369, 398; idem, Ibn Ḥanbal, pp. 297-312; az-Zarqā, 1:126-129, 136-137; at-Turkī, pp. 414-416, 419, 430-435. The chief difference between the Mālikī and Ḥanbalī positions on al-maṣāliḥ al-mursalah pertains to the question of whether or not the mere consideration of maṣāliḥ can take priority over--i.e. render specific or temporarily suspend--contrary legal texts. From the Ḥanbalī point of view, legal texts always take priority, whereas they do not always from the Mālikī point of view. Ḥanbalīs follow al-maṣāliḥ al-mursalah, however, in the absence of pertinent texts, i.e., in completely unprecedented matters (see az-Zarqā, 1:136).

The Ḥanbalī Sulaimān aṭ-Ṭūfī (d. 716/1316) regards al-maṣāliḥ al-mursalah to be most authoritative; however, his position is generally considered extreme among Ḥanbalīs and non-Ḥanbalīs alike. (Az-Zarqā and 'Abū Zahrah claim that aṭ-Ṭūfī was a shīʿī; at-Turkī [p. 424] cites information according to which aṭ-Ṭūfī refers to himself indirectly as a Ḥanbalī.) See 'Abū Zahrah, Ibn Ḥanbal, pp. 312-313; az-Zarqā, 1:129; at-Turkī, pp. 415, 424, 436, note 1; Mahmassani, p. 89.

[2]'Abū Zahrah, Mālik, p. 369; for further stipulations on al-maṣāliḥ al-mursalah, see below, pp. 271-273.

The question of to what extent a concept like that of al-maṣāliḥ al-mursalah exists in the Ḥanafī school depends, as pointed out earlier, on analysis of the Ḥanafī concept of istiḥsān aḍ-ḍarūrah, which may be cognate to al-maṣāliḥ al-mursalah.[1] According to 'Abū Zahrah, ash-Shāfi^{c}ī holds that maṣāliḥ are a priority in Islamic law; he differs fundamentally with the Mālikī concept of al-maṣāliḥ al-mursalah, however, by virtue of the premise that all maṣāliḥ are set forth in the textual sources of Islamic law. Thus, ash-Shāfi^{c}ī discerns no maṣāliḥ that are mursal, that is, which are not testified to in explicit texts or are contrary to explicit texts.[2] It is worth pointing out again that such a position, as ad-Dawālībī has pointed out, is strikingly parallel to the later 'Ash^{c}arī theological doctrine, which became widely accepted among Shāfi^{c}īs, that good and evil are not to be perceived by reason and can only be discerned by means of revealed law.[3]

Mālikī legal theorists hold that the concept of al-maṣāliḥ al-mursalah--and this would apply to the concepts of sadd adh-dharā'i^{c} and istiḥsān as well--is based on the consideration that the ultimate purpose of Islamic law is to secure what is in man's best interest in this and the next life. Ash-Shāṭibī and al-Qarāfī, for example, oppose

---

[1]See above, pp. 257-258. [2]'Abū Zahrah, Mālik, p. 368.

[3]Ad-Dawālībī, p. 174; see above, pp. 222-223.

Fakhr-ad-Dīn ar-Rāzī and other scholastic theologians who have concluded, on the basis of their theological positions, that the purpose of attaining maṣāliḥ cannot be attributed to God. They argue that they have determined instead that the attainment of maṣāliḥ is an ultimate purpose of Islamic law on the basis of inductive study [istiqrā'] of Islamic law.[1] Ash-Shāṭibī observes that the signifying analogies and the points of wisdom [ḥikam] that lie behind rulings of Islamic law pertaining to social and economic transactions [al-muᶜāmalāt] are often set forth with clarity in the textual sources of the law, which he takes to be an indication that the faqīh is expected to concern himself with following the purposes of those rulings when applying them and not to concern himself only with adhering to the form of the ruling.[2]

One of the dangers of concepts like al-maṣāliḥ al-mursalah, however, as Ibn Rushd points out, is that they can be manipulated to defeat the purposes of the law and to introduce detrimental innovations.[3] To minimize this danger, Mālikī legal theorists set down stipulations upon the application of them. One of these stipulations, which ash-Shāṭibī believes Mālik followed strictly, is that of

---

[1]See ash-Shāṭibī, Al-Muwāfaqāt, 2:6, 1:148; al-Qarāfī, 1:142-143, 72-73. See also ash-Shāṭibī, Al-Iᶜtiṣām, 2:295-297; Ibn Rushd, 2:5 (17), 38 (29).

[2]Ash-Shāṭibī, Al-Muwāfaqāt, cited by 'Abū Zahrah, Mālik, pp. 374-375.

[3]Ibn Rushd, 2:28 (17).

applying them in the area of social and economic transactions [al-muᶜāmalāt] and not in the area of worship [al-ᶜibādāt].[1] Thus, ash-Shāṭibī states, Mālik was so strict in not permitting modifications to be made in acts of worship out of consideration for maṣāliḥ that some of his critics who have evaluated him from this standpoint alone have reached the conclusion that Mālik was no mujtahid at all but, rather, a strict adherent to Madīnan tradition. But, on the other hand, ash-Shāṭibī continues, Mālik gives such extensive consideration to maṣāliḥ in other types of acts and transactions that some of his critics have accused him of having gone too far and having taken the liberty to set down new legislation ["fataḥa bāb at-tashrīᶜ"].[2]

There are also extensive discussions in Mālikī legal theory about the degree of immediate need that is required before principles like al-maṣāliḥ al-mursalah can be resorted to. Whereas instances of analogical reasoning are evaluated in terms of their signifying analogies [ᶜilal], the application of concepts of istidlāl is evaluated in terms of the nature of the "munāsib's" [appropriate reasons] that underlie them.[3]

---

[1]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:314, 283-287, 307-312.

[2]Ibid., 2:311-312.

[3]Ibid., 2:282-287, 307-313; al-Qarāfī, 1:120-122, 142-143; see also ash-Shaṭibī, Al-Muwāfaqāt, 4:27-32.

Rulings established or suspended on the basis of al-maṣāliḥ al-mursalah, sadd adh-dharā'i[c], or istiḥsān, furthermore, are not regarded as having intrinsic permanence, like well-established precepts of Islamic law. Al-Qarāfī's explanation for this is that precepts and rulings of law are divided into two categories: 1) those that are ends in themselves [maqāṣid] and 2) those that are means to ends [wasā-'il]. Rulings made on the basis of al-maṣāliḥ al-mursalah, for example, are only means to ends. Thus, he reasons, they are legally valid only as long as they continue to secure the ends for which they were established.[1]

Illustrations of al-Maṣāliḥ al-Mursalah

Some of the clearest illustrations of al-maṣāliḥ al-mursalah are decisions of the early caliphs. 'Abū Bakr's decision to compile the Qur'ān, for example, is a good illustration. It had not been done during the Prophet's lifetime, and when [c]Umar ibn al-Khaṭṭāb first brought the suggestion to 'Abū Bakr, it is reported that he replied: "How can I do something which the Messenger of God did not do?" He later decided, however, that compilation of the Qur'ān was necessary and, therefore, ordered that it be done.[2] Similarly, the second caliph, [c]Umar ibn al-Khaṭṭāb, established public registries [dawāwīn] according to Persian mod-

[1]Al-Qarāfī, 1:145-146; cf. Ibn Rushd, 1:162 (18).

[2]Ash-Shāṭibī, Al-I[c]tiṣām, 2:287-288.

els, which had not been done earlier, and he instituted imprisonment as a type of punishment for certain crimes for which the Prophet had not set down punishments.[1] Although it had been the policy of the Prophet to distribute among the soldiers the fruits of their conquests, ᶜUmar ibn al-Khaṭṭāb suspended this policy in the cases of the conquests of Iraq and Egypt. His decision not to distribute these lands as private property among the conquering soldiers is regarded to be an illustration of al-maṣāliḥ al-mursalah.[2]

Although the Qur'ān states that zakāh may be given to those whose hearts are to be won over to Islam [al-mu'allafah qulūbuhum],[3] Mālik holds that this is only to be done when the Islamic state is weak and in need of such allies and that it is to be suspended under other circumstances.[4] Mālik makes exceptional stipulations on travelling merchants to insure that they will not escape the payment of zakāh altogether.[5]

Ash-Shāṭibī holds, on the basis of al-maṣāliḥ al-mursalah that it is legitimate for a just Muslim ruler to levy taxes upon the wealthy and upon agricultural produce, when the proceeds from zakāh prove to be insufficient to support the army or meet other essential needs of the state.[6] Mā-

---

[1]See at-Turkī, p. 416. [2]Ibn Rushd, 1:236 (19).
[3]Qur'ān, 9:60. [4]Ibn Rushd, 1:162 (18). [5]Ibid., 1:159 (10).
[6]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:295-298.

likī fuqahā' have regarded it legitimate on the basis of al-maṣāliḥ al-mursalah, furthermore, to convict thieves and criminals on the basis of substantial circumstantial evidence or other evidence that is not conclusive in situations in which it is extremely difficult to produce conclusive evidence.[1] Similarly, Mālik states in the Muwaṭṭa' that it is part of Madīnan ijtimā^c to accept the testimony of boys, whose testimony would not otherwise be acceptable, when they inflict wounds upon each other in fighting, which is an exception to the general precepts regarding testimony. Mālik makes the stipulation, however, that their testimonies must be taken immediately, that is, before they have a chance to break up and to speak with adults.[2] (The ruling pertains to cases in which no adults are present.)

The Distinction between al-Maṣāliḥ al-Mursalah and Sadd adh-Dharā'i^c and Istiḥsān

Istiḥsān and sadd adh-dharā'i^c are fairly easy to distinguish between because they have opposite effects. The fundamental characteristic of Mālikī istiḥsān is to make exception to well-established, general precepts. Hence, application of istiḥsān tends to make permissible, actions or transactions that would be impermissible, were the general precept to be applied rigorously. Sadd adh-dharā'i^c, on the other hand, makes prohibited, actions and transactions that

---

[1]Ash-Shāṭibī, Al-I^ctiṣām, 2:293-295.

[2]Muwaṭṭa', 2:726.

otherwise would be permissible.

In this regard, *istiḥsān* and *sadd adh-dharā'i^{c}* are easy to distinguish from those types of *al-maṣāliḥ al-mursalah*, such as 'Abū Bakr's decision to compile the Qur'ān or ^{c}Umar ibn al-Khaṭṭāb's decision to establish the public registries, that have no precedent and, hence, do not contradict other well-established precepts, although they do alter the existing state of affairs. But the distinction between *istiḥsān* and *sadd adh-dharā'i^{c}*, on the one hand, and *al-maṣāliḥ al-mursalah*, on the other, is not as clear in those examples of *al-maṣāliḥ al-mursalah* that suspend earlier precepts. In this regard, *al-maṣāliḥ al-mursalah* may be like *istiḥsān* in that it permits things that otherwise would not be permissible, such as the example above of accepting circumstantial evidence. Or it may be like *sadd adh-dharā'i^{c}* in that it prohibits earlier precepts or policies, such as ^{c}Umar ibn al-Khaṭṭāb's decision to prohibit the soldiers of the armies that conquered Egypt and Iraq from dividing the conquered lands among themselves as private property, although the Prophet's policy had been one of giving the soldiers the fruits of their conquests.

In such cases, there does not appear to be an essential difference between *istiḥsān* or *sadd adh-dharā'i^{c}* and *al-maṣāliḥ al-mursalah*. It would appear, however, that the contention of later Mālikī legal theorists was that *al-maṣāliḥ al-mursalah* differed from the other concepts in such

cases in that al-maṣāliḥ al-mursalah pertains to matters that are essential needs of society as a whole and not just individual members of society,[1] one of the principles of al-maṣāliḥ al-mursalah being in this regard, according to ash-Shāṭibī, that the general interests of society [al-maṣlaḥah al-ᶜāmmah] always take priority over the limited interests of individuals [al-maṣlaḥah al-khāṣṣah].[2]

Furthermore, in some instances of the application of al-maṣāliḥ al-mursalah, especially those instances that suspend well-established precepts of law, there is a sense of emergency that does not characterize the application of istiḥsān and sadd adh-dharā'iᶜ. The application of al-maṣāliḥ al-mursalah in such cases constitutes an emergency measure which one would not expect to be taken under other circumstances. In such cases, furthermore, there is a real contradiction between the policy that is followed and the precept that is suspended which would not be expected to occur ordinarily. Al-Qarāfī illustrates this type of al-maṣāliḥ al-mursalah by the example of requiring a Muslim army to fire upon the enemy even though the enemy have shielded themselves with Muslim captives. The situation is such that, if the Muslim army does not fire on the enemy, it will probably be defeated, and defeat will expose

---

[1] Cf. al-Qarāfī, 1:142-143; ash-Shāṭibī, Al-Iᶜtiṣām, 2:314. For discussion of the absolute needs of society [aḍ-ḍarūrīyāt] and lesser needs, see idem, Al-Muwāfaqāt, 4:27-32.

[2] Ash-Shāṭibī, Al-Iᶜtiṣām, 2:292-293.

the Muslim population it is protecting to death or captivity.[1]

In this case, there is a true contradiction, I believe, between the policy that is followed and the precept that is suspended, namely, the precept that it is prohibited for Muslims to kill innocent Muslims. Furthermore, it is a contradiction that should not occur under usual circumstances. The policy that is followed here is based on the principle that Muslim society must be defended. Ordinarily, however, Muslim society can be defended without Muslims being forced to take the lives of other Muslims. Because of the unusual circumstances, however, that principle and the precept that it is prohibited for Muslims to kill innocent Muslims have come into conflict such that only one of them can be had and only at the expense of the other. Hence, it becomes necessary to establish priorities and to suspend that precept or principle which has the lesser priority. In this case, the principle has the higher priority, for, as ash-Shāṭibī has stated above, "the general interests of society always take priority over the limited interests of individuals." Nevertheless, the decision to fire upon the enemy and his Muslim captives does not become desirable; on the contrary, it is simply necessary.

Such true contradiction does not occur in the appli-

---

[1]Al-Qarāfī, 1:142-143.

cation of istiḥsān and sadd adh-dharā'i^c nor, for that matter, in all examples of al-maṣāliḥ al-mursalah. For the faqīh by resorting to istiḥsān or sadd adh-dharā'i^c does not contradict the general precepts to which he makes special exceptions or the general permissions which he prohibits in special cases. He indicates, rather, that it was not the intent of that general precept or general permission to be extended to such circumstances. Thus, it becomes not only necessary but also desirable that he make the specific exception or prohibition. To give a more up-to-date example, there is no true contradiction between the general precept that motor vehicles must stop for red lights and the special provision [istiḥsān] that emergency vehicles are exempted. For it was not the purpose of the general precept to be applied in such circumstances. Similarly, there is no contradiction between Mālik's general precept that a father may take back gifts he gives his children and the special prohibition that he may not do it if the child has entered into a social or economic matter of consequence by virtue of possessing the gift. For it was not the purpose of the general precept that it be used to defraud creditors and so forth. Furthermore, matters such as these to which istiḥsān and sadd adh-dharā'i^c apply, as can be seen from the examples, do not have the same characteristic of emergency and unusualness. They may not be common; nevertheless, they can be expected to occur in normal societies under usual conditions.