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Muslim Jurisprudence

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Abstract and Keywords

This article provides an introduction to Muslim jurisprudence. In searching for an Islamic legal philosophy, the most likely source is the genre of literature known as *uṣūl al-fiqh* ("the principles of jurisprudence"). Works of *uṣūl al-fiqh* have a reasonably predictable structure. Most begin with discussions of language and logic, giving way to discussions of the primary "sources" of the law, how the sources are to be established as authoritative and how they are to be interpreted, followed by a description of who it is who can interpret them. The influence of philosophical thought on Muslim jurisprudence was, in a sense, surreptitious. Outwardly the *uṣūl al-fiqh* condemned philosophical investigation. However, within the details of their legal theory, one finds ample evidence of the influence of philosophical categories. These may have entered the discourse of *uṣūl al-fiqh*through theological discussions or directly from philosophical works.

Keywords: Islamic philosophy, legal philosophy, Islamic law, uṣūl al-fiqh

MEDIEVAL Muslim legal literature is primarily characterized by casuistic modes of reasoning. That is, legal positions are principally developed through a question-and-answer process, whereby an author proposes a particular doctrine and objections to it are examined, one by one. These objections, often attributed to specific individuals, or (more generally) to one's opponents, are rebutted in turn. Often one's own position emerges as victorious not through a process of demonstrative reasoning resulting in a coherent position, but instead, one's views gain their authority from being the most defensible within the cut and thrust of academic debate. The dominance of this mode of reasoning restricted the development of a "theory" or an exposition technique that is "philosophical." That there is intellectual sophistication within legal literature is not in doubt. In general, though, Muslim legal theory is not presented as a "philosophical" system worked out from first principles or intellectual contemplation by an individual

thinker, but rather as a series of questions (*masā'il*), the answers to which cascade, and exhibit a sort of intellectual chain reaction. The sum total of this process could be considered a legal philosophy, but this is not always explicit in the literature.[1]

Muslim jurists generally avoid developing comprehensive theories linking law and philosophy. One example of this is the manner in which metaphysical ideas are discussed in respect to a particular legal problem. The notion of purity and its transmission form a major chapter in works of Islamic jurisprudence (*fiqh*). However, Muslim jurists very rarely discuss the operations of "purity" (*ṭahāra*) in the abstract. An abstract, generalized theory of how purity status is breached, how purity and (p. 448) impurity are transmitted, and whether purity status has any physical (as opposed to metaphysical) character is rarely encountered. Such a "theory" does not emerge as a preoccupation of either medieval or modern Muslim jurists. Instead, any "theory" (or "philosophy") of purity has to be deduced from a series of *masā'il* (questions). Consider the following question and answer:

> The skin of a dog is not made pure by being tanned. This is what al-Shāfi'ī says. Abū Ḥanīfa says that it is purified thereby, and Dāwūd says this also. We say [it is not pure] and our proof is that the "whole group" has agreed this. Furthermore, there is the report [from the Prophet Muḥammad] that any [animal] whose meat is forbidden cannot be made pure through being slaughtered. There is also another report from the Prophet, in which he forbids all [animals] which have an incisor—and this is a general [ruling] for every instance.[2]

On the face of it, there is not much in this ritual issue to interest a philosopher. The author of this text, Muḥammad ibn al-Ḥasan al-Ṭūsī (d. 460/1067), was a Shi'ite theologian and jurist, and in this book, *al-Khilāf*, he lists the opinions of the different schools, ending with his own school's opinion (signaled by the section that begins, "We say … "). He provides a sketch of the reasons behind his school's opinion. *First*, all the Shi'ites (his code for this is "the whole group") have agreed that tanning does not purify dog skin. This is a proof known as *ijmā'* in Islamic jurisprudence (though al-Ṭūsī is using it in a specifically Shī'ī sense). That everyone believes something is not, philosophically speaking, a particularly convincing argument. *Second*, the dog is an animal whose meat is forbidden; the Prophet said that all parts (skin included) of impure animals were impure; therefore, dog skin is impure (a simple use of a syllogism). There was no mention of an exception for tanned dog skin. *Finally*, dogs have an incisor; the Prophet forbade anything that has an incisor; therefore, the dog is forbidden (another syllogism). In this last citation it is not clear what exactly is being forbidden here—it could be any number of activities. The report merely says that such animals were "forbidden" by the Prophet (forbidden to eat? forbidden to keep as pets? forbidden to hunt with?). There is a presumption that the Prophet is saying to eat the meat of an animal with an incisor is forbidden. Al-Ṭūsī argues that the prohibition is general (*'āmm*), applying to "every instance"; that is, there no indication that an exception is made for the tanned skin of a

dog. This conclusion is shared by the great jurist al-Shafiʾī (more on whom is below) and his followers.

The dissenting opinion is that of Abū Ḥanīfa.[3] Like most of Abū Ḥanīfa's opinions, his opinion is recorded in later works by his followers rather than in any work (p. 449) he himself wrote. Al-Ṭūsī does not transmit it from him but knows it through the quotations of his followers. According to him, even though dogs are impure, their skin is not once it has been tanned. The argument is nested within a general exposition of the process of tanning and its ability to remove impurity. For the Ḥanafīs (the followers of Abū Ḥanīsfa), tanning a hide prevents it from decaying any further, effectively sealing it from the usual effects of the elements on animal skin. This sealing, for the Ḥanafīs, means that the hide can no longer transmit the impurity usually associated with the body parts of a cadaver (human or otherwise). Hence, all animal skins are made pure by the tanning process and available for ritual activity (such as being a ground surface for prayer). There are, however, two important exceptions: human skin and swine skin. For the Ḥanafīs, the reason for each exception is different. With respect to the human skin that has been tanned, this should not be produced, sold, bought, or used. The reason is not due to purity (human skin, once tanned, is pure just like any other skin), but out of respect for the human being who has died. While the dead bodies of animals can be used as a means, the dead body of a human cannot be (this principle raises interesting ethical questions regarding organ transplantation, which has been the subject of much debate in the modern period).[4] Swine skin is different from all other types of skin for a different reason. For the Ḥanafīs, pigs are the only animals that are essentially impure (*najas al-'ayn*). They are essentially impure for no physiological reason, but purely on a revelatory basis (God and the Prophet had indisputably said that pigs are impure). Dogs, they argue, cannot be essentially impure because essentially impure things cannot be bought and sold in a valid trade contract, and dogs can be bought and sold (pigs, on the other hand, cannot legitimately be bought and sold). Dogs, however, are impure (or, at least, are to be treated as if they are impure) not due to any essential impurity, but due to an accidental impurity that comes about because of their association with an impure object (such as carrion—a process called *tanjīs*).

In the Ḥanafī defense of their belief that a tanned dog skin is not impure, one sees the employment of philosophical categories. In particular, the essence/attribute distinction is utilized here in order to defend their particular categorization schema against that of opponents—the Shāfi'īs (the followers of Muḥammad ibn Idrīs al-Shāfi'ī), the Mālikīs (the followers of Mālik ibn Anas), and the Shī'a. The Shāfi'īs respond to this by asserting that dogs are essentially impure. Part of their argument is textual (they prioritize certain possible readings of texts over others, and accept some texts as authentic while rejecting others), but part of it refers to the manner in which essential impurity might be recognized and identified. For the Shāfi'īs, essential impurity refers to those things that cannot be considered pure in any circumstances. In all the revelatory evidence, and in all the laws regarding impurity developed by the jurists, dogs, when alive, are never considered pure. They transmit impurity on contact; when they lap from a bowl, the bowl must be washed (some (p. 450) reports refer to the need to wash the bowl seven times); if

they drink from water, that water becomes impure and useless for ritual purposes. Now, with all this evidence, one must conclude that dogs, not withstanding their position as “animals,” are in the same purity category as other “essentially impure” items, such as semen or feces. The Shāfi'īs here are using an empirical test for the identification of an essential attribute. If, in all respects, an object's behavior within the purity system is identical to those items that are categorized as “essentially impure,” then the object in question (in this case a dog) is an essentially impure thing. That is, this is a piece of inductive reasoning (“if it walks like a duck, looks like a duck and quacks like duck—it's a duck”). The Ḥanafīs, on the other hand, argue that essentially and accidentally impure objects may behave in an identical fashion within the purity system, but that the attribution of the purity/impurity attribute has a quite different mode of application in each case. It is just coincidence that accidental impurity appears identical to essential impurity in all known areas of the purity system: in fact, the essential status of each remains distinct (though not recognizable).

In the above discussion, the influence of categories and argument types developed within philosophical discourse (both within and outside of the Muslim tradition) is clear. However, the schema (even in its much debated form presented above) is never presented as developed from first principles. Instead, it is reactive, and the principal prompt for this reaction is revelatory material (the Qur'ān and the sayings and actions of the Prophet Muhammad, or in the case of the Shi'ites, the Prophet Muḥammad and the Shi'ite Imams). Revelation presents the individual jurist with a set of rules that require not justification but coherence (indeed, it could be argued that the fact that the rules are coherent is, in itself, the justification for their validity, since it proves divine construction of the whole scheme). That the rules form a consistent and comprehensive law authored by a single divine being is one of the rules of the game for Muslim jurists. They do not, in their works of jurisprudence, set about proving this proposition, but rather, they are concerned with constructing their own version of that coherent system, and in doing this they needed a set of rules whereby the texts could be interpreted and developed, and these rules were laid out in works of legal theory (*uṣūl al-fiqh*).

Islamic Legal Philosophy (*uṣūl al-fiqh*)

In a search for an Islamic legal philosophy, the most likely source is the genre of literature known as *uṣūl al-fiqh* (“the principles of jurisprudence”). Works of *uṣūl al-fiqh* have a reasonably predictable structure. Most begin with discussions of language and logic, giving way to discussions of the primary “sources” of the law, how the sources are to be established as authoritative (*ḥujjiyya*) and how they are to be interpreted, followed by a description of who it is who can interpret them (the so-called qualifications of independent reasoning, *sharā'iṭ al-ijtihād*). Whether or (p. 451) not the ideas contained within texts of *uṣūl al-fiqh* add up to a philosophy of law is not at all obvious. Taken as a whole, a work of *uṣūl al-fiqh* appears as a highly rarefied attempt to provide the law with

a coherent theory that demonstrates its basic "rationality." I mean by this not that the writers of *uṣūl al-fiqh* (the *uṣūliyūn*, as they are often referred to, or *uṣūlīs*) attempt to demonstrate that legal rulings can be found through rational (philosophical?) contemplation without the need for (irrational) revelation (there was much debate on this matter, but it was not the primary concern of the *uṣūlī*s), But rather, that their primary concern is to demonstrate that the apparent disconnectedness of the various legal rulings provided by revelation actually mask an underlying consistency. Once one has discovered this underlying consistency, one can at least attempt to work out what the law might be in cases unmentioned in the revelatory texts. *Uṣūl al-fiqh* works may not have succeeded in doing this consistently and in an entirely convincing manner, but it was the *raison d'être* of the genre.[5]

The beginnings of Islamic jurisprudence are the subject of controversy and debate, both within and outside of the Muslim tradition. It seems clear, though, that the law of the newly instituted Muslim administration was not subject to extensive theoretical foundations, but evolved in an *ad hoc* manner. The requirement of the law of the Empire to conform to a detailed set of religious regulations came into force some time after the death of the Prophet Muhammad in 632. Pressure on military and administrative officials to enforce a law underpinned by the religious values of Islam grew primarily through the emergence of a scholarly class (*'ulamā'*) during the Umayyad period (650–750). The increasing influence of this class of society ran hand in hand with a desire to introduce a legal system that was Islamic, based not on the expediencies of government, but on the principles of law supposedly laid down by God in his revelation (*waḥy*—a term that was used by later jurists to refer both to the Qur'ān and to the example, or *Sunna*, of the Prophet Muhammad). The Qur'ān does include some legal rules relating to ritual law (prayer, fasting, pilgrimage), taxation (the *zakāt* tax, and alms more generally), inheritance, marriage, and divorce. However, the legal regime set out there is hardly comprehensive, and its effect on the administration of the law in early Islam is much disputed. Day-to-day legal decisions on individual cases, as much as can be deduced from the available sources, were made on the basis of the personal opinion of judges and jurists (*ra'y*), local expediency (including the continuation of the extant law in the conquered territories), and political ideology. Dissatisfaction with the fractured and incoherent nature of the law as practiced, and its general lack of reference to the law that was supposedly revealed to the Prophet, led to the emergence of a class of jurists (*fuqahā'*) who trained legal practitioners and at times advised rulers on the correct (p. 452) administration of the law. The *fuqahā'* eventually coalesced into schools (*madhāhib*), of which four emerged in the tenth century as preeminent among the Sunni scholars (Shī'ī scholars had their own schools of law). These "schools" back-projected their origins to the legal thought of particularly eminent jurists of the eighth and ninth centuries. These early jurists were given the role of school eponym and hence the Mālikī (named after Mālik ibn Anas, d. 179/795), Ḥanafī (after Abū Ḥanīfa, d. 150/767), Shāfi'ī (after Muḥammad ibn Idrīs al-Shāfi'ī, d. 204/820), and Ḥanbalī (after Aḥmad ibn Ḥanbal, d. 240/855) recognized each other as encompassing different (but generally mutually acceptable) interpretations of the law of God as revealed in the sources. In the debate

that emerged between these schools, the theoretical underpinning of the law became a subject worthy of study, since if one wishes to prove an opponent wrong, one needs a valid reason for doing so, and the most persuasive reason was on the basis of the revelatory sources. Hence, theoretical reflection emerged around texts and their interpretation, the means of resolving conflicts within the texts, and the rules to be applied when the texts contained no clear law in a particular case. In short, Muslim reflection on the theoretical foundations of the law (as found in works of *uṣūl al-fiqh*) was inspired by the standard requirements of what we might, in a modern context, call hermeneutics.[6]

Al-Shāfiʿī's *al-Risala* (“Treatise”) is regularly described in traditional accounts as the first work of *uṣūl al-fiqh*, though within it, there are only hints of the full-blown genre that became a staple element of legal training some 150 years later.[7] More extensive and comprehensive rules of the validation and interpretation of texts have survived from the late tenth century, and between al-Shāfiʿī and these later texts there appears to have been numerous works of *uṣūl al-fiqh* (or at least works that dealt with issues related to the later discipline of *uṣūl al-fiqh*), though mainly our knowledge of these works is restricted to references in later bibliographical works.[8] What defined the genre of *uṣūl al-fiqh* was a desire to demonstrate that the law was consistent and coherent, and to rebuff any criticism that claimed it was a random, unrelated collection of rules. Nearly all debates within works of *uṣūl al-fiqh* can be divided into one of three categories—provenance (how do we know that the texts we use as sources of the law are reliable?), interpretation (how are we to understand the texts?), and authority (who can interpret these texts?). The findings in all these areas were, naturally, debated.

The contested nature of the consistency of the law can be seen in the debates among *uṣūlī*s over the hermeneutic procedures known as *qiyās* and *istiḥsān*. *Qiyās* is (p. 453) normally understood as analogical reasoning (whereby the reason—'*illa*—for a rule in a known case is transferred to another, unknown case). In the classic example, God forbade the consumption of wine; he did so because it was intoxicating; all intoxicating liquors are therefore forbidden because they share the characteristic of wine that caused God to make it forbidden. There is a valid analogy (*qiyās*) between wine and other intoxicating liquids because the rulings share the same *ʿilla*. *Istiḥsān* is often seen as an alternative to *qiyās*. A rule is apparently indicated by analogical reasoning (i.e., it appears that the known case and the unknown case share the same *ʿilla*) but to follow analogical reasoning mechanistically appears to result in a violation of a more fundamental legal principle. The *qiyās* is, then, set aside since it conflicts with other, often general and overarching principles of law, and another rule is proposed because it is “preferred” (*istiḥsān*). Take, for example, the following example of the two procedures indicating different rulings. First of all, a solution is offered by *qiyās*:

> When a man from the [Muslim] army frees a slave girl who has been captured as war booty, then according to *qiyās*, this manumission is effective. This is because their [cf. the men in the army's] right [to do this] has been confirmed by the capture [of the slave girl]. Do you not see that the division of the war booty [by the Muslim leader after the conflict] is to determine what each one owns? The division [of booty] is to specify ownership, not to establish ownership. By this [specification] it becomes clear that ownership was already theirs previously. He has merely freed a slave who was jointly owned by himself and others. This, according to the principle of al-Shāfiʾī is the most evident position. Because he argues that the accomplishment [of capturing the booty] establishes them as having ownership [of the booty].[9]

Qiyās, then, is analogical reasoning: by capturing booty (slaves included) in war, the soldiers have ownership rights over it. Ownership of property gives rights of its disposal. Manumission is a type of disposal; therefore, the manumission is valid.[10] Sarakhsī, a Ḥanafī, however, rejects this argument:

> According to us, under *istiḥsān*, his act of manumission is not legally valid. This is because the effectiveness of an act of manumission requires ownership which is confirmed as being in place [for the specific object]. This is not present with respect to them [cf. the soldiers] before the division [of booty]. Do you not see that the *imām* [i.e., the leader of the Muslims] has the right to sell items of booty, and divide the price [among the soldiers]? [Do you not see] that he does not calculate [when doing this sale] the share of each [soldier] in the manner which takes place during the division of booty? This is a condition of valid manumission, and it is missing here. Hence the manumission is not valid.[11]

(p. 454) What does *istiḥsān* mean here? It appears to mean that the analogy (*qiyās*) used by al-Shāfiʿī is invalid because one of its assumptions is incorrect. Both the Shāfiʿīs and the Ḥanafīs accept that ownership of the booty is established by capture. Where they differ is over whether the right of disposal of property (in this case manumission) comes with that right of ownership before the booty has been distributed (i.e., before it is specified the amount due to each soldier). The Shāfiʿīs, arguing from *qiyās*, say this right of disposal is created by capturing war booty, while the Ḥanafīs, arguing from *istiḥsān*, say it is not. *Istiḥsān* is the decision to reject a ruling derived from an analogy, because the validity of the analogy (and hence the ruling also) depends on an incorrect formulation of a basic principle of the law. In this case (Sarakhsī argues), the Shāfiʿīs have not understood that shared ownership of property (here being booty) does not give the right of disposal of part of the property (i.e., manumission). For manumission to be valid, the ownership must be “confirmed” for a specified amount or proportion of the property. *Istiḥsān*, here at least, represents a rejection of an apparently persuasive analogy because it is based on an incorrect assumption about the stipulations of a particular legal act (namely, manumission).

While *istiḥsān* and *qiyās* in this example give different rulings, they share the common aim of bringing coherence to the law. A rule in one area of the law has an effect elsewhere. The law, since it is the product of a single law giver (namely, God), must be coherent. Both procedures (*qiyās* and *istiḥsān*) are designed to establish this consistency, even though they differ when applied to specific legal problems. The opponents of *istiḥsān* argued that it was merely arbitrary individual preference. The opponents of *qiyās* argued that it was slavish dedication to a principle of argumentation to the exclusion of the "bigger picture" of the law. The philosophical themes that underlie the legal issue of the slave girl are easy to identify. The difference between *potentia* and *actus* when applied to the right of ownership pervades Sarakhsī's analysis here—even if he does not use the terms explicitly. For the Shāfi'īs, the soldier's potentially specific ownership of the slave girl when the booty is distributed gives him an actual present right to manumit her prior to distribution. For the Ḥanafīs, potential specific ownership remains potential, with none of the rights of actual ownership. It is only the act of the Imam that makes the specific ownership actual. The division between actual and potential ownership around which this legal dispute resolves is, of course, Aristotelian, and their strict and fundamental distinction was developed in medieval scholastic philosophy ("*potentia et actus cum sint de primus differentiis entis*," as Thomas Aquinas expresses it).[12] As with the purity example above, the concerns here are broadly philosophical, but the method of their examination is through exempla (or *masā'il*). Once again, there is no detailed discussion in the books of legal theory of (for example) the *potentia/actus* division (or indeed the accident/essence distinction), though there is extensive employment of these categories in solving legal problems.

(p. 455) Ethics and the Law

The relationship between ethics and law is, perhaps, less problematic within the Muslim tradition than it was in Western thought. For Muslim jurists, the Sharī'a—God's law for his creation—was, for humans, an ethical code outlining the (morally) correct and incorrect ways of behaving. Every element of human existence is of concern to God, and hence every action has one of five assessments (*aḥkām*) made by God. These assessment categories were obligatory, recommended, neutral, discouraged, and forbidden. The performance of actions in each of these categories resulted in rewards or punishments. Performing obligatory actions, for example, gained one reward in the next life, and failure to perform them brought punishment. Legal theory was concerned with detailing the means whereby these assessments might be known. It was, then, an ethical as well as strictly legal system.[13]

One of the areas of *uṣūl al-fiqh* where there was a detailed philosophical discussion is the question of the ontological status of the moral qualities of actions. The question, which is also dealt with in works of *kalām* (theology), concerns whether or not the moral assessment of an action (such as lying) is wrong because God has declared it so, or

because it has an external, objective moral quality of evil. In theological terms, the proponents of external moral qualities were the Mu'tazilīs (and the later Shiites), while their opponents were associated with the traditions of Abū al-Ḥasan al-Ash'arī (d. 324/935) and Abū Manṣūr al-Māturīdī (d. 333/944). The issue has obvious legal interest, hence its inclusion in works of *uṣūl al-fiqh*. In particular, performance of an act forbidden in the law leads to condemnation (*dhamm*) and punishment (*ʻaqāba*)—can the same be said of acts assessed as evil by reason? The Ash'arīs denied the relevance of the question. They argued that things were wrong because God had decreed them to be wrong—their position has been described as "divine subjectivism" (God's view on what is right or wrong is the only one that matters, and indeed the only one of which we can be sure).[14] The Mu'tazilīs and Shi'ites, on the other hand, were divided. Some argued that reason can recognize an action being evil, but it cannot recognize that it being evil necessarily leads to punishment. Others argued that reason could recognize both that an action was evil and that its performance led to punishment. Some went further than this and argued that the five legal categories (from obligatory to forbidden) can be linked to the assessment of reason in a direct manner, and hence revelatory sources (at least for some legal issues) can be entirely bypassed by the employment of reason. The question was, to an extent, ontological: did the moral quality of an act exist within that act to be recognized by reason (and if so, what were the legal implications of this)? Or, was the act devoid of moral qualities in itself, and the moral judgment of God had simply been "placed" on the act? The standard majority Sunni rejection of (p. 456) the former position (the idea that moral qualities were external, argued for by the Mu'tazilīs and Shi'ites) is succinctly expressed by al-Ghazālī:

> As for the first, claiming ['badness'] as being an essential characteristic [of an action], this is dogmatic assertion of the unintelligible. For, according to them [the Mu'tazilīs], killing is bad *per se*, provided that it is not preceded by a crime nor followed by compensation, such that it is permissible to inflict pain on animals and to slaughter them; and this is not regarded as bad on the part of God, for He will requite them in the afterlife. But killing *per se* has one essence that does not differ whether it is preceded by a crime or followed by pleasure. [It only differs] in terms of its relationship with the benefits and purposes [of the law]. Furthermore, [regarding] lying: how can it be bad *per se* even while it [may] be to protect a prophet's life through concealing his whereabouts from a transgressor aiming to kill him? In that case [lying] is good—rather, obligatory—and its abandonment would be sinful. Now, as for an essential characteristic, how can it be changed by relating it to circumstances? …

Al-Ghazālī's argument here is that for the Mu'tazilīs, killing or lying will always be essentially wrong because they believe in the essential "badness" of killing or lying. However, there are occasions when these actions are justified. Killing is justified when someone has committed a capital offense. Lying to the prophet's enemies concerning his whereabouts is good, as it protects a prophet's life. Killing and lying, therefore, cannot be

essentially “bad” (“bad” *per se*), but are only bad in particular circumstances. Al-Ghazālī continues:

> They argue: We know with certainty that if truth and falsehood are set before a person, he will choose truth and be inclined to it— if he is rational. And this cannot be so except because of its [essential characteristic of] goodness. Even a great king, sovereign over many territories, when seeing someone weak and near death would be inclined to save him, even if the king does not believe in the principles of religion, nor if he expects requital or gratitude [from the weak man] or his objectives favoured, as well. In fact, he may be troubled by it. Indeed, rational people have argued for the goodness of patience, even when confronted by the sword to utter a declaration of unbelief or reveal a secret or break a promise, while this is contrary to the objective of the [one being] compelled. In general, regarding moral qualities as good, “giving generously” is something that no rational being would deny [as being essentially good] except through deliberate obstinacy.
>
> Our reply is that we do not deny the popularity of these propositions among the people and regard them as commonly praiseworthy. But their basis is either religion, following the *Sharī'a*, or personal objectives.[15]

For al-Ghazālī, then, although it may feel as if good acts have a quality of goodness inherent within them, this does not reflect their true nature. Because people agree that a particular action is good does not indicate, as the Mu'tazila claim, that that action is good because of an ontological category. Rather, for al-Ghazālī, the fact that (p. 457) the people agree over the goodness of an act is an indication of the success of religion in inculcating these values into the human mind. However, he argues, the reason why some things are good and some things bad is not linked to their physical makeup. Rather, he argues, a thing can only be good when it has been declared so by God. Before God, who has ultimate power over all qualities in creation, has declared a thing good or bad, it is impossible for it to be assessed by anyone. In a sense, the argument is over whether moral qualities are known through nature or nurture. The Mu'tazilīs argue that, by their nature, human beings are rational and able to recognize moral qualities external to themselves. For al-Ghazālī, human beings have to be taught what is right or wrong—that is the point of prophets and divine revelation. The reemergence of the essential/necessary versus contingent/accidental division on which this argument depends demonstrates, once again, the inescapable influence of philosophical terminology on the manner in which the law is discussed.

There were, of course, a number of theological issues linked to this area of discussion. If moral qualities are objective and external, God is compelled to follow them (otherwise God might be capable of performing evil acts). The Ash'arīs, of course, were deeply uncomfortable with the idea that God might be forced to do anything, let alone something as central to his being as his law, hence arguing that moral qualities were divinely imposed rather than externally existent, and saved God from being forced to do the good;

instead, he defines what is good and then does it. Furthermore, if moral qualities exist independent of God's moral decree, then an act like punishing an individual for an action he or she could not help but commit would be unjust. Therefore, human beings must have free will in order that God can remain just.[16] These issues, however, were not the subject of much discussion in works of *uṣūl al-fiqh*. For a coherent theological vision, they were of course essential, but jurists (or at least scholars when writing works of jurisprudence) were not concerned with elaborating a coherent theological vision. Only those elements of theological discussions that had direct legal relevance were of interest. It was for this reason that the ability of reason to recognize moral qualities became a standard (usually introductory) chapter in works of *uṣūl al-fiqh*.

Conclusions

The influence of philosophical thought on Muslim jurisprudence was, in a sense, surreptitious. Outwardly the *uṣūlī*s condemned philosophical investigation (like most of their counterparts writing both *fiqh* and *kalām*).[17] However, within the details of their (p. 458) legal theory, one finds ample evidence of the influence of philosophical categories. These may have entered the discourse of *uṣūl al-fiqh* through theological discussions or directly from philosophical works (the exact trajectory is difficult to identify). However, dichotomies such as *potentia/actus*, essential/accidental, and necessary/contingent pervade the exploration of legal questions in works of *fiqh* (jurisprudence) and *uṣūl* (legal theory). Further evidence of this influence is that the technical terms used are, broadly speaking, those introduced into intellectual discourse in Arabic by thoroughbred Muslim philosophers or the translators of Greek works. While the study of philosophy (with its potential for slipping into heresy and antinomianism) was to be condemned by the *fuqahā'*, the achievements of Muslim philosophers and the translators gave the writers of *uṣūl al-fiqh* a vocabulary with which to analyze the details of the law. In this sense, though there were only ever hints of a full-blown philosophy of law as found in the Western academic tradition, there was considerable influence of philosophical thinking on the theoretical reflections of Muslim jurists.

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Notes:

(1.) The genre of literature known as the *masā''il* was a set of questions that had been posed to a jurist, followed by his answer. For an introduction to the importance of *masā''il*, see Susan A. Specktorsky, *Chapters on Marriage and Divorce Responses of Ibn Hanbal and Ibn Rāhwayh* (Austin, TX: University of Texas Press, 1993).

(2.) Muḥammad ibn al-Hasan al-Ṭūsī, *al-Khilāf* (Qum: Mu'assasat al-Nashr al-Islāmī, 1407AH), vol. 1, p. 66. All translations in this article are by the author.

(3.) Dāwūd al-Ẓāhirī (d. 270/883) is also said to have held the opinion that tanned dog skin is impure, though he was not as important a figure as Abū Ḥanīfa. On Dāwūd's school, see Ignaz Goldziher, *The Ẓāhirīs: Their Doctrine and their History* (Leiden: Brill, 2007). Al-Ṭūsī's convention here (as one finds in many works of *fiqh*) is to refer to the whole school by the name of the founder. So when he refers to Abū Ḥanīfa, he means his followers also (i.e., the Ḥanafīs). The same is true when he mentions al-Shāfi'ī and al-Ẓāhirī.

(4.) See Birgit Krawietz, "*Ḍarūra* in Modern Islamic Law: The Case of Organ Transplantation," in *Islamic Law: Theory and Practice*, ed. Robert Gleave and Eugenia Kermeli (London: I. B. Tauris, 1996), pp. 185–193.

(5.) More detailed introductions to the genre of *uṣūl al-fiqh* and its purpose can be found in Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1999), and Bernard G. Weiss, *The Spirit of Islamic Law* (Athens, GA: University of Georgia Press, 1998).

(6.) Differing theories on the emergence of Islamic law, both as a law that is practiced but also a theoretical body of rules, can be found in Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Oxford University Press, 1993); Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (Leiden: Brill, 2001); and Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries CE* (Leiden: Brill, 1997).

(7.) On the *Risāla* of al-Shāfi'ī see Joseph E. Lowry, *Early Islamic Legal Theory: The Risala of Muhammad Ibn Idris al-Shafi'i* (Leiden: Brill, 2007).

(8.) On this question generally, see D. Stewart, "Muhammad b.Da'ud al-Zahiri's Manual of Jurisprudence," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), pp. 99–158.

(9.) Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifa, 1406/1986), vol. 10, p. 50.

(10.) Of course, the manumitter's share of the booty will be reduced by the value of the slave girl he has just freed. If, after the division of the booty, the manumitter's share is less than the value of the freed slave girl, he will owe the booty purse money. This does not, however, have any relevance for the legal validity of the manumission.

(11.) Sarakhsī, *Mabsūṭ*, vol. 10, p. 50.

(12.) Thomas Aquinas, *Commentary on Aristotle's Physics* (London: Dumb Ox Books, 1999), III Phys., lectio 2, n. 285.

(13.) On the ethical nature of Islamic legal theory, see A. Kevin Reinhart, "Islamic Law as Islamic Ethics," *Journal of Religious Ethics* 11(1983): 186–203.

(14.) See the studies of George Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge University Press, 2007).

(15.) Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā min ʻIlm al-Usūl* (Beirut: Dār al-Kutub al-ʹYIlmiyya, 1417/1996), vol. 1, p. 53.

(16.) For detailed examination of the interconnectedness of these issues, see Harry Wolfson, *The Philosophy of Kalam* (Cambridge, MA: Harvard University Press, 1976).

(17.) See Frank Griffel, *Apostasie und Toleranz im Islam. Die Entwicklung zu al-Gazalis Urteil gegen die Philosophie und die Reaktionen der Philosophen* (Leiden: Brill, 2000).

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