

APPROXIMATING CERTAINTY IN RATIOCINATION:
HOW TO ASCERTAIN THE 'ILLAH (EFFECTIVE CAUSE)
IN THE ISLAMIC LEGAL SYSTEM
AND HOW TO DETERMINE THE *RATIO DECIDENDI*
IN THE ANGLO-AMERICAN COMMON LAW

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The terms rationality, or 'legal reasoning', in the context of law, construct an image of a coherent and well-defined set of principles or of a formalized methodology which is employed within a legal system to construct, determine, and apply law.¹ The reasons for which rationality in a legal system might be considered desirable depend upon the legal system, its sources, and its purposes.

This article explores two spheres of two entirely distinct legal systems in which legal reasoning is heavily relied upon: the ascertainment of the '*illah* (effective cause)² in *usul al-fiqh*, the Principles of Islamic Jurisprudence,³ and the determination of the *ratio decidendi* in the Anglo-American Common Law.⁴ Each concept is of the utmost importance to its legal system

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¹ See John Makdisi, *Formal Rationality in Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 97 (1985) [hereinafter FORMAL RATIONALITY].

² For some of the various possible translations of the term '*illah*', see *infra* notes 78-87 and accompanying text. For the key Arabic terms used in this article, readers may refer to the glossary. However, the definitions given in the glossary are simple and often do not convey a proper understanding of the term. For this reason, explanations in the body of the article are superior.

³ See Mohammad Hashim Kamali, PRINCIPLES OF ISLAMIC JURISPRUDENCE (1991) [hereinafter PRINCIPLES] (employing the translation Principles of Islamic Jurisprudence); Sherman Jackson, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI 121 (1996) [hereinafter ISLAMIC LAW] (translating *usul al-fiqh* as "Islamic theoretical jurisprudence").

⁴ I would ask readers to please bear in mind that this article is but an introduction to the topic of ratiocination in *Usul al-fiqh*. I have endeavored to present a summary of the discourse surrounding the main issues of how to ascertain the '*illah*'; my discussion is by no means exhaustive. Moreover, my presentation is in many ways an oversimplification, for there are a number of controversies, subtleties, complexities, and related theological issues, which I have not discussed due to the limitations of my knowledge, ability, and lack of formal training in Islamic law. For a thorough discussion of the topic of ratiocination in Islamic Law, see Muhammad Mustafa Shalabi, TA'LIL AL-AHKAM (1981).

because it informs as to what the law is, why the law is so, whether the law applies, to which situations it applies, whether change in the law is possible if not desirable or even necessary, and in which circumstances change is possible.⁵

A challenge often faced by legal systems is the necessity to be compatible with the social, economic, and political realities of the society to which they belong. The law must be adaptable. But at the same time it must maintain constancy and certainty.⁶ Both the *'illah* and the *ratio decidendi* are essential to allowing for flexibility and adaptability as well as for maintaining constancy and stability in their legal systems.⁷

The Islamic legal system is rooted in divinity; its sources are divine and thus cannot be altered.⁸ Muslims seek to conform to the dictates of their legal system in an effort to fulfill their religious duties.⁹ These religious duties include obligations and rights with respect to humanity and with respect to God, who is the Lawgiver.¹⁰ Contrary to the stereotype commonly held by both Muslims and non-Muslims, legal verdicts in Islam are subject to adaptability.¹¹ Moreover,

⁵ For an exploration of the possible influence of Islamic law upon the Common Law, see John Makdisi, *An Enquiry Into Islamic Influences During the Formative Period of the Common Law*, in ISLAMIC LAW AND JURISPRUDENCE: STUDIES IN HONOR OF FARHAT ZIADEH 135 (Nicholas Heer ed., 1990).

⁶ See e.g., Benjamin Cardozo, GROWTH OF THE LAW (1924); Paul Loving, *The Justice of Certainty*, 73 OR. L. REV. 743 (1994);

⁷ See *infra* notes 199-201 and 395-97 and accompanying notes.

⁸ See Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525 (1996).

⁹ Actions are categorized into legal injunctions (*ahkam*) and assessed values by the Islamic legal system. There are five such assessments: (1) *Wajib* (obligatory), (2) *Haram* (prohibited), (3) *Mandub* (recommended), (4) *Makruh* (disapproved), and (5) *Mubah* (permissible). See generally Ahmed Hasan, PRINCIPLES OF ISLAMIC JURISPRUDENCE (1993) (expounding upon these categories in greater detail).

¹⁰ See Mohammad Hashim Kamali, *Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law*, 10 AMER. J. ISLAMIC SOC. SCIENCES 342 (1994).

¹¹ See e.g., A. Kevin Reinhart, *When Women Went to Mosques: al-Aydini on the Duration of Assessments*, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 116 (Khalid Mas'ud et. al eds., 1996). Many U.S. judges have often used the term *qadi* (or spelled as kadi or as cadi) justice to indicate a system of arbitrary lawmaking; *qadi* is the Arabic term for a judge. See e.g., Clark v. Harleysville Mut. Casualty Co., 123 F.2d 499, 502, 503 (1941) (stating "We sit, after all, as an appellate court, administering justice under the law, not as an ancient oriental cadi, dispensing a rough and ready equity according to the dictates of his own unfettered discretion"); Terminiello v. Chicago, 337 U.S. 1, 11 (1949); Colonial Trust v. Goggin, 230 F.2d 634, 636 (9th Cir. 1955) (commenting "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency"); U.S. of A. v. Murray, 621 F.2d 1163, 1169 (1st Cir. 1980) (remarking that decisions of *qadis* are irrational and unprincipled). This stereotype has been absolutely refuted; see e.g., John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AMER. J. COMP. L. 63, 63-66 (1985) [hereinafter LEGAL LOGIC]. Hopefully,

the Islamic legal system is mutable and dynamic. However, change merely for the sake of change or for expediency is simply unacceptable.¹²

Muslim jurists determined that although the sources of Islamic law are divine, their assessment of the divine was in large part a construct of the human intellect; this aspect of their epistemology is reflected in the methodology of legal reasoning they constructed.¹³ The *'illah* is an element of *qiyas* (analogical extrapolation). The *'illah* may be explained as the reason for which a particular law is believed to have been established by the Lawgiver.¹⁴ It is thus essential to know the *'illah* in order to understand the law itself and to determine the scope and applicability of the law. The *'illah* is important to Muslim jurists and to Muslim society because Muslims want to conform to their religion and religious law as circumstances and realities in society change.¹⁵ In order to conform, Muslims must know what the law is regarding each newly arisen situation or challenge. The *'illah* and the process by which it is ascertained are also especially pertinent given the increased interest throughout the Muslim world in the establishment of an Islamic state and in enforcing Islamic law comprehensively.¹⁶

Unlike the Islamic legal system, the Anglo-American Common Law is not concerned with the divine and is secular.¹⁷ It exists primarily as a means to ordering society and its members.¹⁸ Yet like Islamic law, the common law has had to and continues to face the challenge

this article will also add to the body of literature proving the lack of arbitrary and unprincipled lawmaking in the Islamic system.

¹² See Kamali, PRINCIPLES, *supra* note 3, at 198.

¹³ See Reinhart, *supra* note 11, at 117.

¹⁴ See Jackson, ISLAMIC LAW, *supra* note 3, at 120.

¹⁵ See generally Seyyid Hossein Nasr, *The Question of Changes in Muslim Personal Law*, in ISLAMIC STUDIES: ESSAYS ON LAW AND SOCIETY, THE SCIENCES, AND PHILOSOPHY AND SUFISM 26 (1967) (discussing the necessity of the human to conform to the divine).

¹⁶ See e.g., William Ballantyne, *A Reassertion of the Shari'ah: The Jurisprudence of the Gulf States*, in ISLAMIC LAW AND JURISPRUDENCE: STUDIES IN HONOR OF FARHAT ZIADEH 149 (Nicholas Heer ed., 1990). Jackson, ISLAMIC LAW, *supra* note, at x-xix; C. Mallat, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF, AND SHI'I INTERNATIONAL (1993).

¹⁷ See e.g., Berman Greiner, THE NATURE AND FUNCTIONS OF LAW 6-7 (1972).

¹⁸ See e.g., Buck v. Bell, 274 U.S. 200 (1927); Huntington Cairns, LAW AND THE SOCIAL SCIENCES (1935); Walter Wheeler Cook, *Scientific Method and the Law*, 13 American Bar Association Journal 305 (1927), reprinted in American Legal Realism 242 (William Fisher et. al eds. 1993); William Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Greiner, *supra* note 18, at 8-16.

of changed social, economic and political realities. The Anglo-American Common Law requires constant modification as conditions and circumstances change in order to maintain order and to exercise social control.¹⁹

Determining the *ratio decidendi* of a precedent, as previously mentioned, provides an understanding as to what the law is and why it is so. On the basis of the *ratio decidendi* of prior case law and factual similarities and dissimilarities, as determined by the judge, the legal ruling may be extended to a new case.²⁰ At other times, a new case might necessitate that a particular *ratio decidendi* of the precedent be determined in order to fulfill a particular policy goal. In such cases, the similarity between the two cases becomes the common policy goal.²¹ A change in desired policy goals may also allow for a change in determined similarities and in the *ratio decidendi* itself.²²

The processes for determining the *illah* and the *ratio decidendi* are entirely different and, as can be expected, highly indicative of the differences in sources and purposes of the two legal systems. Jurists of the Islamic system deal with various theological issues, uncertainties and challenges in understanding complexities of the Arabic language and of the texts from which they worked, and determining the intent, rationale, and objectives of God, the Lawgiver, as indicated by the textual authorities. Jurists of the Anglo-American Common Law deal with issues of ambiguity and uncertainty in the English language in general, and in the language of the texts of case opinions used by judges to express their reasoning and conclusion. Common Law jurists do not base the law on the text of case opinions, and therefore do not deal with textual ambiguities and uncertainties.²³ The hermeneutical principles applied by jurists of the two legal systems differ tremendously. For the most part, this difference is due to the differing nature of

¹⁹ Cf. Greiner, *supra* note 17, at 6-16 (explaining the importance of flexibility in law and that the purpose of law is to control social order).

²⁰ See *infra* notes 364-61 and accompanying text.

²¹ See Richard B. Cappalli, THE AMERICAN COMMON LAW METHOD 34-35 (1997) [hereinafter AMERICAN COMMON LAW].

²² See *id.*

²³ See *id.*

the systems' respective texts. The methodologies developed by jurists of each system are an attempt to lessen and reduce the uncertainties and approximations involved in determining the *'illah* and the *ratio decidendi*.

The legal reasoning constructed by Muslim jurists to ascertain the *'illah* is far more systematic and detailed than the reasoning developed by the Anglo-American Common Law.²⁴ The Islamic system approaches precision and accuracy far more closely than the Anglo-American Common Law; in fact, the manner in which the *'illah* is determined is seemingly quantifiable.²⁵ Moreover, the Muslim system avoids rigidity by closely linking the *'illah* with the objectives of the law.²⁶ The concern and effort of the Anglo-American Common Law to avoid rigidity and mechanization in order to create and maintain flexibility is justified. However, this desired flexibility could be retained, and the uncertainties and ambiguities of the process of determining the *ratio decidendi* could also be significantly reduced by employing a coherent system of rationalized rules the aim of which would be greater precision in this process of determination and in the statement of the *ratio decidendi*. Such a system of rules, however, must be constructed in a manner so as to form a close relationship between the *ratio decidendi* and the ultimate purposes and objectives of the law, and to assure that the latter are not subverted. The relationship between the *ratio decidendi* and the purposes ought to be described, and the purposes of the laws, in specific and in general, must be fully articulated.

I. The Islamic Legal System: An Introduction

A. The *Shari'ah* (Islamic Law)

Islam embodies a comprehensive view of life for both this world and the Hereafter.²⁷

Originally, the word *Shari'ah* meant "the road to the watering place or path leading to the water, i.e., the way to the source of life."²⁸ In the present context, one may understand the term

²⁴ This should become clearer to the reader as the article progresses.

²⁵ See *infra* notes 172-263 and accompanying text.

²⁶ See *infra* notes 67-68 and accompanying text.

²⁷ See e.g., Imran Khan Nyazee, THEORIES OF ISLAMIC LAW 194 (1994). For a general introduction to Islam, see Roger DuPasquier, UNVEILING ISLAM (T.J. Winter trans., 1992); Suzanne Haneef, WHAT EVERYONE SHOULD KNOW ABOUT ISLAM AND MUSLIMS (1979).

Shari'ah as God's chosen path for humankind.²⁹ The term *Shari'ah* is now known as Islamic law.³⁰

Throughout Muslim history, various religious discourses have emphasized the obligation of Muslims to live by the dictates of the *Shari'ah*.³¹ In this regard, Joseph Schacht writes, "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."³² The eminent Muslim jurist Ibn Qayyim (d. 1350 C.E.) provides a sense of the importance of Islamic law to Muslims:

The *Shari'ah* is God's justice among His servants, and His mercy among His creatures. It is God's shadow on this earth. It is His wisdom which leads to Him in the most exact way and the most exact affirmation of the truthfulness of His Prophet. It is His light which enlightens the seekers and His guidance for the rightly guided. It is the absolute cure for all ills and the straight path which if followed will lead to righteousness. . . It is life and nutrition, the medicine, the light, the cure and the safeguard. Every good in this life is derived from it and achieved through it, and every deficiency in existence results from its dissipation. If it had not been for the fact that some of its rules remain [in this world] this world would become corrupted and the universe would be dissipated. . . If God would wish to destroy the world and dissolve existence, He would void whatever remains of its injunctions. For the *Shari'ah* which was sent to His Prophet. . . is the pillar of existence and the key to success in this world and the Hereafter.³³

The sources of the *Shari'ah* are the Qur'an, the *Sunnah*, and the principles contained therein.³⁴ The Qur'an is believed by Muslims to be "the book containing the speech of God revealed to the Prophet Muhammad, peace be upon him, in Arabic."³⁵ The Qur'an contains

²⁸ Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 1 J. ISLAMIC L. 1, 2 (1996).

²⁹ See Ahmad Hasan, *THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE* 7 (4th ed. 1988) [hereinafter EARLY DEVELOPMENT].

³⁰ See *id.*

³¹ See Abou El Fadl, *supra* note 8, at 1526

³² Joseph Schacht, *AN INTRODUCTION TO ISLAMIC LAW* 1 (1964) (using the term Islamic law to mean *Shari'ah*).

³³ Abou El Fadl, *supra* note 8, at 1526 (quoting Muhammad Ibn Qayyim, 3 I'LAM AL-MUWAQQI'IN 3, and describing the quoted language as "more colorful than most").

³⁴ See e.g., Zafar Ishaq Ansari, *The Contribution of the Qur'an and the Prophet to the Development of Islamic Fiqh*, 3 J. ISLAMIC STUDIES 2 (1992).

³⁵ Kamali, *PRINCIPLES*, *supra* note 3, at 14. The phrase 'peace be upon him' is customarily said and written after mention is made of the Prophet Muhammad as well as all the other prophets, peace be upon them all.

approximately 500 specific legal injunctions only; for the most part, the Qur'an sets general guiding principles.³⁶ The *Sunnah* are the acts and sayings of the Prophet Muhammad, peace be upon him, plus whatever he has tacitly approved and the reports which describe his physical attributes and character.³⁷ Whereas the Qur'an is revelation the meaning and exact text of which are from God, the *Sunnah* is revelation the meaning of which is divine, but the exact text of which is from the person of the Prophet, peace be upon him. The written record of the *Sunnah* is called the *hadith*. The validity of each *hadith* is determined by a strict and rigorous process of authentication, which involves analysis of its content and transmission.³⁸

B. An Introduction to *Usul al-fiqh* (Principles of Islamic Jurisprudence) and *Fiqh* (Practical Jurisprudence Proper)

Usul al-fiqh, which is the science with which this article deals, consists of the methods of reasoning and the rules of interpretation which are applied to the Qur'an and *Sunnah* to deduce the rules of *fiqh*, or practical jurisprudence proper.³⁹ *Fiqh* can be defined as the practical rules of *Shari'ah* derived from the detailed evidence in the textual sources.⁴⁰ *Fiqh* is thus the end product of *usul al-fiqh*. The two are entirely distinct disciplines. The former deals with detailed rules of law while the latter deals with the method by which such rules are expounded from the sources.⁴¹

As stated in the section above the sources of the *Shari'ah* are the Qur'an, the *Sunnah*, and the principles contained therein.⁴² Two other fundamentally important indicators or guides of the

³⁶ See Abdal-Haqq, *supra* note 28, at 21. Hasan, EARLY DEVELOPMENT, *supra* note 29, at 44-5. For an introduction in English to the sciences of the Qur'an, see Ahmad Von Denffer, 'ULUM AL QUR'AN: AN INTRODUCTION TO THE SCIENCES OF THE QUR'AN (1989). For a brief introduction in English to the discipline of Qur'anic exegesis, see Ibn Taymiyya, AN INTRODUCTION TO THE PRINCIPLES OF TAFSEER (Muhammad 'Abdul Haq Ansari trans., 1993).

³⁷ See Nyazee, *supra* note 27, at 132 n.3.

³⁸ See generally Muhammad Zubayr Siddiqi, HADITH LITERATURE: ITS ORIGIN, DEVELOPMENT AND SPECIAL FEATURES (Abdal Hakim Murad ed., 1993) (introducing the discourse surrounding the *hadith* texts); Muhammad Mustafa Azami, STUDIES IN HADITH METHODOLOGY AND LITERATURE (1977) (introducing the sciences of *hadith*).

³⁹ See Jackson, ISLAMIC LAW, *supra* note 3, at 121 (translating *fiqh* as "practical jurisprudence proper").

⁴⁰ See Kamali, PRINCIPLES, *supra* note 3, at 2-3.

⁴¹ See *id.*

⁴² See *supra* notes 34-38 and accompanying text.

law are *qiyas* (analogical extrapolation)⁴³ and *ijma*“(consensus); both are used “to derive the law from the two primary sources.”⁴⁴ *Ijma*‘ may be defined as the unanimous agreement of those persons of the Muslims community qualified to exercise *ijtihad*.⁴⁵ *Ijtihad* may be defined as “the exhaustion of one's (mental) capacity in the attempt to gain probable knowledge about anything concerning the divine law to the extent that the individual feels that he is incapable of exerting any further effort.”⁴⁶ A person qualified to perform *ijtihad* is a *mujtahid*.⁴⁷

Methodological issues such as distinguishing a probabilistic text from the definitive, the general from the specific, and the literal from the metaphorical are studied in *usul al-fiqh*.⁴⁸ Among the approved methods of reasoning in *usul al-fiqh* is *qiyas*, which is introduced below.⁴⁹ The manner in which *qiyas* may be performed, the limits of its validity, and its degree of authority are of concern in *usul al-fiqh*.⁵⁰

Knowledge of *usul al-fiqh* is essential to deriving legal injunctions from the Qur'an and *Sunnah*.⁵¹ Proper understanding of the texts and of *usul al-fiqh* also serves to ensure that *ijtihad*

⁴³ See ‘Abd al-Karim Zaydan, AL-WAJIZ FI USUL AL-FIQH 163 (1967) (defining *qiyas* as an attachment, or extension between the ruling of that which does not appear in the texts with the ruling of that which does appear because the two things share in the ‘illah of that ruling).

⁴⁴ Nyazee, *supra* note 27, at 133.

⁴⁵ See Kamali, PRINCIPLES, *supra* note 3, at 169; Abu Zahrah, USUL AL-FIQH 197-211 (1950).

⁴⁶ Sherman Jackson, *Taqlid, Legal Scaffolding and the Scope of Legal Injunctions in Post Formative Theory: Mutlaq and ‘Amm in the Jurisprudence of Shihab al-Din al-Qarafi*, 3 ISLAMIC L. SOCIETY 165, 167 n.5 (1996) (quoting Sayf al-din al-Amidi, AL-IHKAM FI USUL AL-AHKAM, 3 vols. (Cairo, 1968)). Dr. Jackson offers his own definition: “the interpretation of scripture directly with no intermediate authorities standing between the sources and the individual jurist”). *Id.* at 167 n.5.

⁴⁷ See Kamali, PRINCIPLES, *supra* note 3, at 169. *See id.* at 366-93 (discussing the rigorous conditions required to be a *mujtahid*).

⁴⁸ See Abu Zahrah, *supra* note 45, at 118-127 (introducing these topics).

⁴⁹ See *infra* notes 87-97 and accompanying text.

⁵⁰ See Sobhi Mahmassani, FALSAFAH AL-TASHRI FI AL-ISLAM: THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM 79-82 (Farhat Ziadeh trans., 1961). Another important methodological issue is that of *istihsan* (juristic preference), which is a proof in which a jurist gives preference to one of many possible solutions to a problem in order to comply with the objectives of the *Shari‘ah*. Which of these solutions and exactly why it should be selected as well as the degree of authority of *istihsan*, are among the considerations of *usul al-fiqh*. *Id.* at 85-87. For a comparative analysis between *istihsan* and the doctrine of equity, see Makdisi, LEGAL LOGIC, *supra* note 11, at 66 (concluding that unlike the doctrine of equity in Western law, the doctrine of *istihsan* is an integral aspect of Islamic law, and the doctrine of *istihsan* does not seek or recognize a law above and superior from it.).

⁵¹ See Abdal Hakim Murad, UNDERSTANDING THE FOUR MADHHABS (1995) (explaining, *inter alia*, the importance of formal Islamic legal training for persons interested in raising questions about the Islamic legal disciplines).

is employed properly in a system of law that is considered divine. “The principal objective of *usul al-fiqh* is to regulate *ijtihad*.”⁵²

C. *Maqasid al-Shari‘ah* (The Objectives of Islamic Law) and *Maslahah* (Welfare)

The Islamic legal system’s underlying objectives are termed *maqasid al-Shari‘ah*.⁵³ Securing benefit and preventing harm in this life and in the Hereafter is the intent of the law. This consideration, called *maslahah* (welfare), is an extremely important factor for jurists.⁵⁴ In order to prevent the use of arbitrary and imprecise procedures, jurists developed an elaborate set of conditions that must be fulfilled in order to permit reliance upon the *maslahah* concept when arriving at a particular ruling.⁵⁵

Most jurists classify *maslahah* into three categories each of which must be protected: (1) the *daruriyyat* (essentials), (2) the *hajiyyat* (complements), and (3) *tahsiniyyat* (embellishment).⁵⁶ Each divine ruling aims at one of these three.⁵⁷ The *daruriyyat* are those interests upon which life depends and the disregard of which results in “disruption and chaos.”⁵⁸ The *daruriyyat* consist of five essential interests: the preservation of *din* (religion), *nafs* (life), *‘aql* (intellect), *nasl* (progeny), and *mal* (property).⁵⁹ In order for any rule of law to be valid and applicable it must not violate any of these five essentials and the ultimate intent of the law.⁶⁰ The *hajiyyat* are

⁵² Kamali, PRINCIPLES, *supra* note 3, at 3.

⁵³ See Nyazee, *supra* note 27, at 237 (stating that, according to al-Shatibi (d. 1388 C.E.), the purposes of the law have been determined inductively from the texts).

⁵⁴ See *id.* at 41-43 (commenting that there is a lengthy and rich discourse surrounding the ultimate intent of the law and the Lawgiver). The concepts and terminology of utilitarianism, such as those of Jeremy Bentham, are purposely avoided here. See *id.* at 212-13.

⁵⁵ See Kamali, PRINCIPLES, *supra* note 3, at 273-275 (listing several important conditions for the use of *maslahah*).

⁵⁶ See *id.* at 271.

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ See *id.* (stating that “[t]hese must not only be promoted but also protected against any real or unexpected threat which undermines their safety.”) See Nyazee, *supra* note 28, at 244-49 (discussing the hierarchy among the purposes of the law as well as the distinction between public and private interests).

⁶⁰ See Nyazee, *supra* note 27, at 222-3, 242.

those interests the disregard of which result in hardship but not in the destruction or ruin of the community.⁶¹ The *hajiyyat* are complementary to the *daruriyyat*.⁶² Lastly, the *tahsiniyyat* are those interests “whose realisation [sic] leads to improvement and the attainment of that which is desirable.”⁶³ An example of such is cleanliness in personal appearance. Without these *tahsiniyyat*, or embellishments, life would be “less beautiful and less refined.”⁶⁴

The majority of *'ilal* (plural of *'illah*) found in the Qur'an and *Sunnah* “seek to establish, preserve, or protect a determined purpose of the law.”⁶⁵ The process of ascertaining the *'illah* involves, as will be shown, consideration of the *maslahah* and the *maqasid al-Shari'ah*; the three, as will be shown, are interconnected.⁶⁶

D. Ratiocination in the Islamic Legal System

In addition to these two concepts of *maslahah* and *maqasid al-Shari'ah*, the concept of ratiocination (*ta'lil*) in the Islamic legal system, must be employed when considering legal injunctions. The methods of legal reasoning developed by the jurists closely links the three in order to approximate certainty and assure the validity of their determination of the *'illah*. In this regard, Kamali comments:

The majority of ulema have. . .held that the *ahkam* [injunctions] of the *Shari'ah* contemplate certain objectives, and when such can be identified, it is not only permissible to pursue them but it is our duty to make an effort to identify and to implement them. Since the realisation [sic] of the objectives [*maqasid*] of the *Shari'ah* necessitates identification of the cause/rationale of the *ahkam* [injunctions], it becomes our duty to discover these in order to be able to pursue the general objectives of the Lawgiver. . .The majority view on *ta'lil*

⁶¹ See *id.* at 243.

⁶² Kamali, PRINCIPLES, *supra* note 3, at 272.

⁶³ *Id.*

⁶⁴ Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law* 61 ALB. L. REV. 511, 522 (1997).

⁶⁵ Nyazee, *supra* note 27, at 208.

⁶⁶ See *infra* notes 298-306 and accompanying text for an example.

[ratiocination] takes into account the analysis that the rules of *Shari'ah* have been introduced in order to realise [sic] certain objectives and that the Lawgiver has enacted the detailed rules of *Shari'ah*, not as an end in themselves, but as a means to realising [sic] those objectives. . . [A]ny attempt to implement the law should take into account not only the externalities of the law but also the rationale and the intent behind it.⁶⁷

Thus, both concepts of ratiocination and *maqasid al-shar'iah* are interconnected, and there exists an “interplay” between the concepts of ratiocination and *maqasid al-Shari'ah*.⁶⁸

It is important at this stage to discuss briefly the distinction between the *'ibadat* (matters of religious devotion) and the *mu'amalat* (civil and criminal matters), with respect to ratiocination. The *'illah* of acts of *'ibadat* are generally imperceptible to the human intellect; however, the human intellect may be able to perceive the general purpose and value of such actions, but not their *'illah* in specific cases.⁶⁹ For this reason, the *'ibadat* may be termed the “non-rationalizeable.”⁷⁰ The arrival of the month of *Ramadan* of the Islamic lunar calendar, for example, necessitates fasting, which falls under the category of *'ibadat*.⁷¹ The cause of this rule of law, i.e., why *Ramadan* in particular has been selected for obligatory fasting, is not discernible

⁶⁷ See Kamali, PRINCIPLES, *supra* note 3, at 36.

⁶⁸ See Nyazee, *supra* note 27, at 219. See *id.* at 208 (echoing the same idea, “The derived *'illah*....must contain, preserve, or protect an acknowledged purpose of the law.”)

⁶⁹ See Kamali, PRINCIPLES, *supra* note 3, at 202-03.

⁷⁰ Dr. Mokhtar Maghraoui, A SEMINAR ON USULI METHODOLOGY FOR TEXTUAL ANALYSIS AT THE UNIVERSITY OF PENNSYLVANIA (Feb. 7-8, 1998) [hereinafter SEMINAR ON Usul al-fiqh].

⁷¹ See Qur'an 2:185. Fasting during the month of Ramadan is one of the pillars of Islam; it is obligatory upon all adult Muslims with certain exceptions. The fast entails abstinence from all food, drink, and sexual activity from sunrise until sunset for each day of the month. The month of Ramadan is the month in which Revelation of the Qur'an to the Prophet, peace be upon him, began. 4 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 8-10 (John Esposito et. al eds. 1995)[hereinafter OXFORD ENCYCLOPEDIA]. Ahmad ibn Naqib al-Misri, RELIANCE OF THE TRAVELLER 278, 281-82 (Nuh Ha Mim Keller trans., 1994) [hereinafter RELIANCE]. In locating verses of the Qur'an, I have been assisted by Muhammad 'Abd al-Baqi, AL-MU'JAM AL-MUFAHRAS LI ALFAZ AL-QUR'AN AL-KAREEM (4th ed. 1994).

by the human intellect.⁷² One must not conclude though that there is no rationalization whatsoever in *'ibadat*.⁷³ Rather, the legal rules of the *'ibadat* cannot be understood or rationalized in the same manner as those of the *mu'amalat*.

The *'ilal* of the *mu'amalat*, on the other hand, are discernible to the human intellect.⁷⁴ Thus, the *mu'amalat* may be understood as the “rationalizeable.”⁷⁵ For example, in the rules of pre-emption (*shuf'ah*) the joint owner of real property has priority in buying the property whenever his partner wishes to sell it. The *'illah* in pre-emption is joint ownership itself.⁷⁶

1. Defining the *'Illah*

Literally, the term *'illah* means “an accident that befalls an object and causes its state, or condition, to become altered.”⁷⁷ Technically, the term *'illah* has been given a number of varying definitions. In fact, the term *'illah* itself was not universally used by classical jurists when referring to the effective cause of a legal ruling.⁷⁸ The medieval jurist Al-Shirazi (d. 1083 C.E.), for example, defines it as “the idea. . .which demands or determines the rule of law.”⁷⁹ Other definitions state that the *'illah* is that which defines or makes known the rule of law⁸⁰, or is that which indicates the existence of an injunction,⁸¹ or is “that which causes the existence of the rule

⁷² It should be noted that in the context of the *'ibadat* the term *sabab* is often used instead of *'illah* to refer to the effective cause, or perhaps more precisely the effective condition of a rule of law. See Nyazee, *supra* note 27, at 67 n.13; Kamali, PRINCIPLES, *supra* note 3, at 211.

⁷³ See e.g., al-Misri, RELIANCE, *supra* note 71, at 52-56 (discussing purities and impurities of water in the context of abolution).

⁷⁴ See Maghraoui, SEMINAR ON USUL AL-FIQH, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ See *infra* note 112 and accompanying text.

⁷⁷ E.W. Lane, 2 ARABIC-ENGLISH LEXICON 2124 (Stanley Lane Poole ed., Islamic Texts Society 1984) (1877).

⁷⁸ See 'Abd al-Wahhab Khallaf, 'ILM USUL AL-FIQH 64 (1972) (listing other terms, such as *manat*, *manat al-hukm*, *sabab*, *amaara al-hukm*). *Id.*

⁷⁹ Ahmad Hasan, ANALOGICAL REASONING IN ISLAMIC JURISPRUDENCE: A STUDY OF THE JURIDICAL PRINCIPLE OF QIYAS 169 (1986) [hereinafter QIYAS].

⁸⁰ See *id.*

⁸¹ See *id.* at 171.

of law”,⁸² or that which obligates the legal injunction not by its inherent value but by authority of the Lawgiver.⁸³ According to the majority of jurists, the term ‘*illah*’ is defined as “an attribute. . . which is constant and evident and bears a proper (*munasib*) relationship to the law (*hukm*) of the text.”⁸⁴

The term ‘*illah*’ may be translated in English as the effective or operative cause. Other translations, such as *ratio legis*, *ratio decidendi*, and *ratio essendi*, are sometimes seen in writings about Islamic law.⁸⁵ However, Weiss states that definitions employing the word *ratio* are inappropriate because “*ratio* may be too easily confused with ‘rationale,’ [*hikmah*].”⁸⁶ The terms effective cause and operative cause are most accurate because they both refer to causality, and a relationship of causality exists between a legal injunction and its ‘*illah*’.

2. The ‘*Illah*’: An element of *Qiyas*

The ‘*illah*’ is the most important element of *qiyas*.⁸⁷ *Qiyas*, literally, is the determination or measurement of the weight or quality of something.⁸⁸ Within the context of *usul al-fiqh*, there are several definitions of *qiyas*. *Qiyas* might be defined as “a likeness of one thing to another.”⁸⁹ Abu Hashim (d. 933 C.E.) has defined *qiyas* as “a linking of a thing to something else and an application of the rule governing that thing to the other thing.”⁹⁰ *Qiyas* has also been explained as “the application of a rule governing a principal case to a novel case because of a likeness that the *mujtahid* perceives between the two cases in respect to the occasioning factor (‘*illah*’) behind

⁸² *Id.* at 169.

⁸³ Hasan, QIYAS, at 169.

⁸⁴ Kamali, PRINCIPLES, *supra* note 3, at 206.

⁸⁵ See Bernard Weiss, THE SEARCH FOR GOD’S LAW: ISLAMIC JURISPRUDENCE IN THE WRITING OF SAYF AL-DIN AL-AMIDI 555 (1992). Jackson, ISLAMIC LAW, *supra* note 3, at 119 (employing *ratio essendi*).

⁸⁶ Weiss, *supra* note 85, at 556 (preferring to use the terms “occasioning factor” and “rule-occasioning factor”)

⁸⁷ See Khallaf, *supra* note 78, at 61 (commenting, “The essence of *qiyas* is the ascertainment of the ‘*illah*’”). Zaydan, *supra* note 43, at 169.

⁸⁸ See 2 Lane, *supra* note 77, at 2578.

the rule in question.”⁹¹ Qiyas is perhaps best defined as “an equivalency between a novel case and a principal case in respect to a rule-occasioning factor [*‘illah*] gleaned from a rule governing the principal case.”⁹²

There are four essential elements of *qiyas* called its *arkan*, or pillars: (1) The *asl*, original or principal case;⁹³ (2) the *far’*, a novel case;⁹⁴ (3) the *‘illah*, which is a feature (*wasf*), which must be found to be shared by both the *asl* and *far’*; and lastly, (4) *hukm al-asl* [hereinafter *hukm*], the ruling of the principal case that is extended from the *asl* to the *far’* if the *‘illah* is common to both.⁹⁵ Jurists of all legal schools, except the Hanafis,⁹⁶ agree upon these four elements. The Hanafis consider the *‘illah* to be the essential pillar of *qiyas* and the remaining three elements to be conditions of *qiyas*, not its constituents.⁹⁷

The following three examples should elucidate these four terms:

⁸⁹ Weiss, *supra* note 85, at 553.

⁹⁰ *Id.*

⁹¹ Weiss, *supra* note 85, at 554 (quoting a definition of Abu al-Hasan al-Basri (d. 728 C.E.)).

⁹² *Id.* at 555 (quoting al-Amidi). For a more detailed discussion of the definition of *qiyas*, see Hasan, QIYAS, *supra* note 79, at 94-121.

⁹³ Zaydan provides an alternative definition of *asl* as “that which appears in the text with its ruling.” Zaydan, *supra* note 43, at 164.

⁹⁴ Zaydan defines the *far’* as “that which did not appear in the text with its ruling and that which is sought to be given the ruling of the *asl* by way of *qiyas*.” Zaydan, *supra* note 43, at 164.

⁹⁵ See Nicolas Aghnides, MUHAMMADAN THEORIES OF FINANCE: WITH AN INTRODUCTION TO MOHAMMEDAN LAW AND A BIBLIOGRAPHY 49 (1971); Khallaf, *supra* note 78, at 60. Zaydan writes that the *hukm al-asl* is “The *Shari’ah* ruling, along with its corresponding *asl*, that appears in the text which ruling is sought to be extended to the *far’*.” Zaydan, *supra* note 43, at 164. With regard to the *asl* and the *far’*, al-Amidi comments that jurists were not in agreement about the use of these terms. Some used the term *asl* to describe the ruling of the principal case and some used it to refer to the text upon which that rule was based. As for the *far’*, some scholars used it for referring to the rule governing the novel case; al-Amidi argues that this is more correct for the case precedes its rule. In other words, the case is principal “relative to the rule, which is subsequent to it.” Moreover, the rule governing the new case is not an element or pillar (*rukn*) of *qiyas*, for the rule is the product of the *qiyas*, and the product cannot be a “constituent part of that which produces it.” Weiss, *supra* note 85, at 556-7.

⁹⁶ There are four schools of law extant in Sunni Islam of which the Hanafi is one. The other three are the Maliki, Shafi’i and Hanbali. For more information concerning the schools of law, see George Makdisi, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST (1981) and C. Melchert, THE FORMATION OF THE SUNNI SCHOOLS OF LAW: NINTH-TENTH CENTURIES C.E. (1992).

⁹⁷ Hasan, QIYAS, *supra* note 79, at 167.

1. If a jurist were trying to determine whether a particular narcotic drug were prohibited or permissible, he would begin by ascertaining the *'illah* of those cases similar to it. Narcotic drugs, however, are not explicitly mentioned by the texts. Alcoholic beverages are, however, expressly prohibited by the texts.⁹⁸ The jurist might begin by determining the *'illah* of other cases, which he determines to be similar to narcotic drugs. Such cases might include alcohol, which is prohibited. The *'illah* of the prohibition of alcohol is its intoxicating quality, or that it intoxicates. If the jurist found the *'illah* of alcohol (the *asl*) to exist in the case of a narcotic drug (the *far'*) the *hukm* of alcohol: prohibition, would therefore extend to that narcotic drug.⁹⁹
2. Another example of *qiyas* involves a *hadith*, which states: “The killer shall not inherit [from his victim].”¹⁰⁰ The *'illah* of this ruling is premeditated and hostile murder as a means to hastening death in order to inherit from the victim.¹⁰¹ By *qiyas*, this prohibition has been extended so that an individual who kills for the same reason may not receive bequests from the will of his victim.¹⁰²
3. Sale of goods, or conducting business, during the time of the Friday congregational prayer is prohibited by the following verse of the Qur'an: “O you who believe! When the call is proclaimed to prayer on Friday, hasten earnestly to the remembrance of God, and leave off sales

⁹⁸ See Qur'an 5:90 (prohibiting *khamr* (grape wine)). The word *khamr* is explained by the *hadith* which states: “Every intoxicant is *khamr*, and every *khamr* is forbidden.” Abu Dawud, 3 Sunan, Hadith no. 3679. Interestingly, the prohibition of alcohol presents an excellent example of the graduality of Qur'anic legislation; commands and prohibitions were quite often revealed gradually so as to prevent hardship upon believers. In the early years of revelation, alcohol was permitted. Shortly thereafter, a verse providing advice regarding alcohol was revealed; this verse reads: “They ask you about alcohol and gambling, say: in these there is great harm and also benefit for the people, but their harm far outweighs their benefit.” Qur'an 2:219. Then a verse prohibiting prayer while intoxicated revealed. Qur'an 4:43. Lastly, an absolute prohibition was imposed by the Lawgiver upon alcohol as well as gambling. Qur'an 5:93.

⁹⁹ Examples involving *khamr* are rather common in books of *usul al-fiqh*. See e.g., Kamali, PRINCIPLES, *supra* note 3, at 200; Zaydan, *supra* note 43, at 164-5.

¹⁰⁰ Abu Dawud, 3 Sunan, Hadith no. 3955. The following sources have been of assistance in locating *hadith*: Al-Hadith Al-Sharif by Sakhr Software (1991) and CONCORDANCE OF INDICES DE LA TRADITION MUSULMANE 9 vols. (A.J. Wensinck et. al eds. 1969).

¹⁰¹ See Zaydan, *supra* note 43, at 165

transactions.”¹⁰³ The *‘illah* of this prohibition is that which, from the transaction of sale, detains one from proceeding to the Friday prayer and the potentiality of alienating one from the Friday prayer. This *‘illah* has been deemed to be present in the transactions of lease, of mortgage, and of marriage. Therefore, the *hukm* upon these transactions during the Friday prayer is the same as that of sale.¹⁰⁴

The emphasis in *qiyas* is upon the determination of the *‘illah*, which is by no means always a divinely inspired or totally definitive determination inasmuch as Scripture is at times silent about the specific causes underlying certain injunctions.¹⁰⁵ The *‘illah* if found in the *far‘*, completes the analogy and allows an extension of a legal ruling. In addition, the *‘illah* plays a vital role in determining whether the applicability of a *hukm* should continue or whether it should be altered.

This determination depends upon whether a *hukm* may only be constructed upon its *‘illah*. The majority of legal scholars contend that the rules of *Shari‘ah* are founded upon their *‘ilal* and not upon their *hikmah* (rationale); this group consists in large part of the Hanafis and Shafi‘is.¹⁰⁶ The Malikis and Hanbalis, however, do contend that the legal rules may be based upon their *hikam* (*sing., hikmah*).¹⁰⁷ The *hikmah* of a legal rule is the attainment of certain benefits and/ or avoidance of certain harms; this is, in effect, the ultimate objective of the law.¹⁰⁸ For instance, in the concession granted by the Lawgiver to the sick not to fast during *Ramadan*,

¹⁰² See Zaydan, *supra* note 43, at 165; Khallaf, *supra* note 77, at 53.

¹⁰³ Qur’an 62:9. I have slightly modified this translation from that of The Presidency of Islamic Research, Ifta, Call and Guidance, THE HOLY QUR’AN: ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY.

¹⁰⁴ See Zaydan, *supra* note 43, at 165.

¹⁰⁵ See Jackson, Islamic Law, *supra* note 3, at 121.

¹⁰⁶ See Kamali, PRINCIPLES, *supra* note 3, at 207-08.

¹⁰⁷ See *id.* at 207.

¹⁰⁸ See *id.* at 208.

the *hikmah* is the prevention of hardship.¹⁰⁹ Similarly, the *hikmah* of the penalties of premeditated and deliberate homicide and of theft are the protection of the life and property, respectively.¹¹⁰ It would be proper in the view of the Malikis and Hanbalis to base their *qiyas* upon these objectives: the realization of benefit (*maslahah*) in these cases as well as the prevention of harm (*mafsadah*).¹¹¹ It is thus proper, according to this view, to perform *qiyas* upon the *hikmah*, the ultimate objective of the law whereas the majority does not permit this. This difference between the schools exists because the latter distinguish the ‘*illah* from the *hikmah* of the law and preclude the *hikmah* entirely from the scope of the ‘*illah*. Kamali gives the following illustration:

According to the rules of pre-emption (*shuf’ah*) the joint, or the neighboring, owner of a real property has priority in buying the property whenever his partner or his owner wishes to sell it. The ‘*illah* in pre-emption is joint ownership itself, whereas the *hikmah* of this rule is to protect the partner/ neighbor against a possible harm that may arise from sale to a third party. Now the harm which the Lawgiver intends to prevent may materialise [sic], or it may not. As such, the *hikmah* is not constant and may therefore not constitute the ‘*illah* of pre-emption. Hence the ‘*illah* in pre-emption is joint ownership itself, which unlike the *hikmah* is permanent and unchangeable, as it does not fluctuate with the changes in circumstances.¹¹²

Thus, according to the majority position, a ruling of the *Shari’ah* is always present so long as its ‘*illah* is present and even if its *hikmah* is absent. Moreover, a ruling of the *Shari’ah* is absent if its ‘*illah* is absent even if its *hikmah* is present. The minority position, however, concludes that a rule of *Shari’ah* is in fact present if its ‘*illah* is absent but its *hikmah* is present.¹¹³

¹⁰⁹ See Zaydan, *supra* note 43, at 170-71.

¹¹⁰ See Abu Zahrah, *supra* note 45, at 188.

¹¹¹ See *id.*

¹¹² Kamali, PRINCIPLES, *supra* note 3, at 207.

¹¹³ See *id.*

Generally, *qiyas* is only used when the solution to a problem is not found in either of the textual authorities or by *ijma'*.¹¹⁴ Many jurists have said that *qiyas* is an extension of already existing law and thus is not deemed by scholars to be the creation or the establishment of new law.¹¹⁵ Others have said that *qiyas* does in fact result in new law.¹¹⁶

Qiyas offers the jurist room for creativity and the development of existing law but within limits imposed by the Lawgiver. The manner in which *qiyas* has been defined and employed by jurists is as a rationalist tool by which the jurist may fulfill his religious responsibilities. In such a manner, it is hoped that individuals and society as a whole may continue to understand their religion as it applies to changed realities and to fulfill their religious duties with respect to these changes. *Qiyas* is also structured to try to ensure that jurists' reasons and rationalizations are guided by and held subservient to revelation. In identifying the '*illah*', the jurist must employ the textual authorities in light of the *maqasid al-Shari'ah*.¹¹⁷ Such guidance prevents law from arbitrarily being altered for reasons such as mere personal preference or expediency.¹¹⁸ However, there still remain a number of important cases in which the determination of the '*illah*' is an independent exercise of the human intellect but in which the intellect is subservient to the *maqasid al-Shari'ah*.¹¹⁹ This is not frowned upon by Islam's textual authorities.¹²⁰

The rational inquisition and identification of the objectives and intentions of the Lawgiver has caused disagreement over the validity of *qiyas*.¹²¹ Some of the *Mu'tazilah*,¹²² the *Zahiri*,¹²³

¹¹⁴ Although a particular *ijma'* may be the result of a *qiyas*. See Maghraoui, SEMINAR ON USUL AL-FIQH, *supra* note 70.

¹¹⁵ See Kamali, PRINCIPLES, *supra* note 3, at 198.

¹¹⁶ See Weiss, *supra* note 85, at 556.

¹¹⁷ See *infra* notes 211-12 and accompanying text.

¹¹⁸ See Kamali, PRINCIPLES, *supra* note 3, at 198.

¹¹⁹ See *infra* p. 44.

¹²⁰ See Kamali, PRINCIPLES, *supra* note 3, at 216-21.

¹²¹ See Kamali, PRINCIPLES, *supra* note 3, at 219-21; Weiss, *supra* note 84, at 633-54 (presenting a defense of *qiyas*); Hasan, QIYAS, *supra* note 78, at 424-62 (presenting a summary of the critique of *qiyas*).

¹²² The *Mu'tazilah* were a theological school. For more information, see 6 THE ENCYCLOPEDIA OF ISLAM 787-793 (M. Th. Houtma et. al eds. 1932).

¹²³ A sect of Muslims who derive much their religious and spiritual code from the descendants of the Prophet Muhammad, peace be upon him. For more information see Syed Hussain M. Jafri, ORIGINS AND EARLY DEVELOPMENT OF SHI'A ISLAM (1979).

some of the *Shi'a*,¹²⁴ and some Hanbali scholars have attacked *qiyas*.¹²⁵ An overwhelming majority of Muslim jurists, however, accept *qiyas*. The disagreement is in essence theological a discussion of which is far beyond the scope of this article.¹²⁶ For this reason, all jurists concluded that *qiyas* is a form of probabilistic (*al-zann al-rajih*) evidence.¹²⁷ Other than the form of *qiyas* in which the '*illah*' is clearly identified in the texts, *qiyas* is never deemed to be as high an authority as text or *ijma'* which are deemed as definitive or decisive evidences (*qat'i*). Rather, *qiyas* is recognized as a probability the degree of which is measured by the "proximity and harmony" with the textual authorities.¹²⁸

The concepts of certainty and probability within the Islamic legal system are of great import. An introduction to this subject is highly relevant to *qiyas* and the determination of the '*illah*', but a complete presentation is outside the scope of this article.

The validity of the transmission (*thubut*) of and the meanings conveyed (*dilalah*) by the Qur'an and the *hadith* are analyzed, *inter alia*, in terms of probability and certainty.¹²⁹ All of the verses of the Qur'an are, for example, of definitive (*qat'i*) transmission.¹³⁰ Certain *hadith*, on the other hand, are of probabilistic transmission.¹³¹ Similarly, the meanings conveyed by certain words, whether used in the Qur'an or in the *hadith*, may be categorized as either definitive or as probabilistic.¹³² The use of the term probabilistic here is subdivided into *al-zann al-rajih* or *al-*

¹²⁴ A now extinct school of law based upon the apparent and literal meanings of the Qur'an and *Sunnah*. The school flourished in Spain until the fourteenth century C.E. See 2 OXFORD ENCYCLOPEDIA, *supra* note 71, at 461-62.

¹²⁵ See Kamali, PRINCIPLES, *supra* note 3, at 198.

¹²⁶ See *id.* at 215-16.

¹²⁷ See *id.* at 198. See *infra* notes 129-139 and accompanying text.

¹²⁸ Kamali, PRINCIPLES, *supra* note 3, at 199.

¹²⁹ See Maghraoui, SEMINAR ON USUL AL-FIQH, *supra* note 70. Only those *hadith* deemed acceptable after a rigorous process of analysis and criticism are analyzed in *usul al-fiqh*. See *Id.*

¹³⁰ Those *hadith* which are *mutawatir* are also of definitive (*qat'i*) transmission. A *mutawatir hadith* is "transmitted throughout the first three generations of Muslims by such a large number of narrators that the possibility of fabrication is precluded" or that corroboration in fabrication is impossible. Siddiqui, *supra* note 38, at 110. Scholars have differed as to the numbers of narrators within each generation required for a *hadith* to be rightly classified as *mutawatir*; some have demanded seven and others seventy. See *id.* For an introduction to the process of analysis of narrators, see *id.* at 91-106.

¹³¹ Those *hadith* which are not *mutawatir* are termed solitary (*ahad*). See Maghraoui, SEMINAR ON USUL AL-FIQH, *supra* note 70.

¹³² See *id.*

zann al-marjuh.¹³³ *Al-zann al-rajih* may be defined as the preponderant, or “that the possibility of its being true is in excess of 0.5, when certainty is 1.0.”¹³⁴ *Al-zann al-marjuh* may be defined as the non-preponderant.¹³⁵ The preponderant is binding in law.¹³⁶ There are also intermediate degrees of probability. Jurists distinguished two other important categories, such as *shakk* (doubt), which represents a degree of knowledge “where the probability in favor of the truth. . .is precisely equal to the possibility of its being false.”¹³⁷ *Qiyas*, as stated above, is classified by most jurists as *al-zann al-rajih*.¹³⁸ The *maqasid al-Shari‘ah*, it must be mentioned, are *qat‘i*.¹³⁹

3. Conditions of the Elements of *Qiyas*

The validity of each of the four elements of *qiyas* is conditioned.¹⁴⁰ This article will deal with the conditions of the *asl*, *far‘*, and *hukm* briefly, for these are necessary for proper *qiyas*. More detail shall be given regarding the conditions of the *‘illah* as they are essential to the methods of determining it.

a. Conditions of the *Asl*.

The word *asl* in Arabic has two meanings. First, it can refer to the source, such as the Qur'an and *Sunnah*.¹⁴¹ Second, it can refer to "the subject matter of [a] ruling."¹⁴² Muslim jurists

¹³³ See Weiss, *supra* note 85, at 730.

¹³⁴ Wael Hallaq, A HISTORY OF ISLAMIC LEGAL THEORIES 218 (1997) [hereinafter ISLAMIC LEGAL THEORIES]. 1 Lane, *supra* note 77, at 1035 (translating *al-rajih* as “preponderant”).

¹³⁵ See Weiss, *supra* note 85, at xviii.

¹³⁶ See *id.* at 618.

¹³⁷ Hallaq, ISLAMIC LEGAL THEORIES, *supra* note 134, at 39. See also Reinhart, *supra* note 11 (writing “The entire apparatus of Islamic law is designed to produce assessments of acts. The assessment, in turn, has its origin in indicants—individual stipulations or evidences in the Qur’an and Sunna, as well as the consensus (explicit or inferred)—of previous generations of scholars. The constellation of relevant indicants is called the “address” (*khitab*) of God to the faithful. It might be thought that, once God had “addressed” a problem, the resulting assessment would be definitive. Muslim scholars realized, however, that this address was partially a human construct, for it was the [jurist] who chose the relevant indicants from the Qur’an and the ocean of the Sunna and previous legal thought, and it was the [jurist] who assembled these indicants into the address and “opined” what the assessment must be. Consequently, all Sunni scholars recognized that the currency of law was probability, not certainty. This admirably self-conscious epistemology made scholars both anxious and humble.”).

¹³⁸ See *supra* note 127 and accompanying text.

¹³⁹ See Nyazee, *supra* note 27, at 237.

¹⁴⁰ See Zaydan, *supra* note 43, at 166.

¹⁴¹ See Weiss, *supra* note 85, at 557.

¹⁴² Kamali, PRINCIPLES, *supra* note 3, at 200.

are in unanimous agreement that the sources of *qiyas* are the Qur'an and *Sunnah*.¹⁴³ In addition, according to the majority of scholars, *ijma'* is also a source of *qiyas*. For instance, *ijma'* allows guardianship over the property of minors; this allowance has been extended by *qiyas* to apply to the guardianship of minors in marriage.¹⁴⁴ The dispute of whether such a *qiyas* is appropriate centers about whether *ijma'* explains its justification in the absence of which it is difficult to construct *qiyas*--such a view, however, is based upon the assumption that the '*illah*' is always identifiable in the textual sources, which is certainly not the case.¹⁴⁵

b. Conditions of the *Hukm*

The *hukm* requires a number of conditions.¹⁴⁶ First, the *hukm* must be "a bona fide rule of divine law"¹⁴⁷ or a practical ruling of the *Shari'ah*.¹⁴⁸ Closely related to this is the condition that the *hukm* be based upon an actual indicator of the divine law.¹⁴⁹ That is to say, the proof of the *hukm* must be located in the Qur'an and/ or *Sunnah*. Some scholars opine that the *hukm*'s '*illah*' may be indicated by *ijma'* while others do not.¹⁵⁰ Those who refuse this use of *ijma'* argue that *ijma'* does not contain within it the cause of the ruling which it supports, and for this reason (the absence of cause), the '*illah*' cannot be ascertained and *qiyas* is impossible.¹⁵¹ Those who accept *ijma'* as a valid source of the *hukm* state that the '*illah*' can be ascertained by means other than sole reliance upon the letter of the text; this opinion seems to be the more proper.¹⁵²

The '*illah*' of the ruling itself must be comprehensible by the human intellect meaning that the *hukm* be constructed upon an '*illah*' that the intellect is capable of realizing. This is because

¹⁴³ See *id.*

¹⁴⁴ See Abu Zahrah, *supra* note 45, at 181.

¹⁴⁵ See Zaydan, *supra* note 43, at 166.

¹⁴⁶ For a brief discussion of these, see Khallaf, *supra* note 77, at 61-3.

¹⁴⁷ Weiss, *supra* note 85, at 559.

¹⁴⁸ See Kamali, PRINCIPLES, *supra* note 3, at 202.

¹⁴⁹ See Weiss, *supra* note 85, at 559.

¹⁵⁰ See Zaydan, *supra* note 43, at 166.

¹⁵¹ See *id.*

¹⁵² See *id.*

the essence of *qiyas* is the realization or ascertainment of the '*illah*'.¹⁵³ As discussed earlier, the '*ilal* of the '*ibadat* (the "non-rationalizeable") are not discernible to the human intellect unlike the '*ilal* of the '*mu'amalat* (the "rationalizeable").¹⁵⁴ For instance, the '*illah* of the prohibition of alcohol and of the prohibition of gambling, both of which fall under the category of '*mu'amalat*, can be understood by the human intellect. The '*ilal* of the '*ibadat*, such as, the number of prostrations in a particular prayer, the number of cycles (*rak'ah*) in a particular prayer, and the number of circumambulations of the *Ka'ba* made during *Hajj* are deemed to be unascertainable by humans.¹⁵⁵ For this reason, applying *qiyas* to '*ibadat* is more limited than it is in the '*mu'amalat*.¹⁵⁶

This particular issue of comprehension by the human intellect raises an important question answers to which are disputed. Some scholars claim that humans are not permitted to inquire into the causes of divine laws.¹⁵⁷ The majority of scholars in response contend that the texts of the *Shari'ah* are rational and can be understood, except for the distinction made earlier between ratiocination in the '*ibadat* and the '*mu'amalat*.¹⁵⁸

Another important condition of the original ruling is that it "must not be confined to an exceptional situation or to a particular state of affairs," for *qiyas* is designed to extend the normal, not the exceptional, rules of law.¹⁵⁹

Lastly, the original rule must not depart from the general rules of *qiyas*. For example, a traveler during the month of *Ramadan* is not required to fast: the '*illah* of this concession is

¹⁵³ See *id.*

¹⁵⁴ See *supra* notes 69-76 and accompanying text.

¹⁵⁵ See Kamali, PRINCIPLES, *supra* note 3, at 202-3. Zaydan, *supra* note 43, at 166-167. The *Hajj* is the annual pilgrimage made by Muslims to Mecca, Sa'udi Arabia. It is obligatory for all adult Muslims, who are capable, to perform the *Hajj* once in their lifetime. There are a number of rituals performed during the *Hajj* one of which is *Tawaf*, which is a seven fold circumambulation of the *Ka'ba*. The *Ka'ba* is the House of God first built by Abraham and his son Ishmael; it is the center or point towards which all Muslims face during their five daily prayers. See 2 OXFORD ENCYCLOPEDIA, *supra* note 71, at 88-92.

¹⁵⁶ See Kamali, PRINCIPLES, *supra* note 3, at 203.

¹⁵⁷ See *id.* at 203-04.

¹⁵⁸ See *id.* at 203.

¹⁵⁹ *Id.* at 204.

traveling.¹⁶⁰ It is an exception, according to many scholars, that cannot be extended to other forms of hardship.¹⁶¹ Shafi'i scholars, however, have validated *qiyas* in such instances. For example, the transaction of fresh dates on a tree in exchange for dry dates is exceptionally permitted by a *hadith* despite the somewhat usurious nature of the transaction; usury (*riba*), it must be noted, is prohibited by Islamic law.¹⁶² The 'illah of this concession is to fulfill the need of the owner of unripe dates for the dried type. By means of analogy, Shafi'i jurists have permitted the exchange of grapes for raisins on the basis of a similar need. The Hanafis disagree claiming the concession to be exceptional.¹⁶³

c. Conditions of the *Far'*

The *far'* must fulfill three conditions. First, the ruling of the *far'* may not already have been provided for in the texts or by *ijma'*.¹⁶⁴ Some Maliki and Hanafi jurists have, however, employed *qiyas* in the presence of textual discussion, but have only done so where they deemed the text non-preponderant, such as a solitary (*ahad*) *hadith*.¹⁶⁵

Second, the 'illah of the *asl* must be applicable or pertinent to the *far'* in the same manner as in the *asl*. If there is not uniformity or substantial equality in this respect, the *qiyas* is termed *qiyas ma' al-fariq*, or *qiyas* with a discrepancy, and is invalid.¹⁶⁶ In such an instance, the *hukm* of the *asl* cannot be extended to the *far'*.¹⁶⁷ If, for instance, a certain drink were to result in a lapse of memory and not in intoxication, then its ruling could not be based upon the 'illah of *khamr*, as discussed previously.

Lastly, the application of the original ruling to the *far'* must not alter the law as given in the text. For example, the Qur'an permanently prohibits the acceptance of the testimony of one

¹⁶⁰ See *id.* at 205.

¹⁶¹ See Kamali, PRINCIPLES, *supra* note 3, at 205..

¹⁶² See Muslim, SAHIH MUSLIM, Hadith no. 920. The issue of *riba* and its definition is apparently quite complex. See e.g., Nabil Saleh, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW (1992).

¹⁶³ See Khallaf, *supra* note 78, at 61-63.

¹⁶⁴ See Zaydan, *supra* note 43, at 168.

¹⁶⁵ See Abu Zahrah, *supra* note 45, at 204. See *supra* notes 130-140 and accompanying text.

¹⁶⁶ See Zaydan, *supra* note 43, at 168.

¹⁶⁷ See *id.*

who is guilty of false accusation.¹⁶⁸ The scholar al-Shafi'i (d. 820 C.E.) has drawn an analogy between false accusation and other major sins¹⁶⁹; he concludes that the testimony of a person penalized for grave sins, including false accusation, after he has repented may be accepted.¹⁷⁰ In response, the Hanafis contend such an analogy alters the explicit law of the text and is thus invalid.¹⁷¹

d. Conditions of the *'Illah*

There is general agreement that rulings of the *Shari'ah* were not legislated frivolously and without purpose or reason.¹⁷² Rather, there are reasons for the rulings of *Shari'ah* and purposes for these rulings. These purposes, as discussed earlier, are the *maslahah*, which consist of achieving benefit for the people and lifting harm and injury from them.¹⁷³ The *maslahah* is in fact the true reason for legislating various rulings, whether they be commands, prohibitions, or permissions and either in the realm of *'ibadat* or *mu'amalat*.¹⁷⁴

There are a number of conditions which have been attached to the *'illah* many of which are in dispute among the scholars of *usul al-fiqh*. For example, the scholar Shawkani (d. 1760 C.E.) lists twenty-four conditions, Ibn Hajib (d. 1248 C.E.) records eleven, and al-Amidi (d. 1233 C.E.) gives thirty-one conditions for the *'illah*.¹⁷⁵ The following is a list of some of these conditions; the weight and the extent of agreement among the jurists is stated individually. The discourse surrounding each of these has been very briefly summarized.

Condition 1. The *'illah* must be *zahir* (evident) and not *khafi* (obscure). Before proceeding with a discussion of this condition, it is necessary to expound briefly upon this pair of terms. The

¹⁶⁸ See Qur'an 24:4.

¹⁶⁹ See al-Misri, RELIANCE, *supra* note 71, at 649-712.

¹⁷⁰ See Kamali, PRINCIPLES, *supra* note 3, at 206.

¹⁷¹ See Aghnides, *supra* note 94, at 62.

¹⁷² See Zaydan, *supra* note 43, at 169.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Kamali, PRINCIPLES, *supra* note 3, at 227 n.3.

term *zahir* is found throughout the science of *usul al-fiqh* with varying usages and meanings.¹⁷⁶ *Zahir* may, for instance, refer to words “considered as bearers of probable meanings,” and it may refer to the meanings themselves.¹⁷⁷ In its broadest sense, *zahir* includes all that which is evident or manifest through indicators of the law--an indicator is the means by which the law becomes evident.¹⁷⁸ Often, indicators are not *zahir* and thus must be pondered upon by the jurist. Such obscurity is referred to by the term *khafi* which might arise from ambiguity or vagueness.¹⁷⁹ Vagueness or ambiguity, which Weiss refers to as “hiddenness,” may be absolute or partial.¹⁸⁰ An example of an obscure locution is the word *sariq* (commonly, but perhaps incorrectly, defined as thief) that has a basically understood meaning, but it is neither certain nor agreed upon whether the term *sariq* includes graverobbers.¹⁸¹ Obscurity, whether absolute or partial, also often arises in the *hikmah* of rulings.¹⁸² Founding law upon obscurity is highly problematic to say the least.

As mentioned earlier, the ‘*illah* must exist in both the *asl* as well as the *far*’ in order for its *hukm* to be extended to a *far*’.¹⁸³ If the ‘*illah* were *khafi*’, the senses would be unable to perceive it, and *qiyas* would be highly difficult if not impossible. Therefore, the ‘*illah* must be *zahir*’.¹⁸⁴ For instance, the intoxicating quality of *khamr* is *zahir*; perceiving this quality in *khamr* is possible through the senses just as it is perceptible in other alcoholic beverages.¹⁸⁵

¹⁷⁶ See *id.* at 91-4.

¹⁷⁷ Weiss, *supra* note 85, at 470-3.

¹⁷⁸ See *id.* at 573.

¹⁷⁹ See Kamali, PRINCIPLES, *supra* note 3, at 99-100.

¹⁸⁰ Weiss, *supra* note 85, at 573.

¹⁸¹ See Kamali, PRINCIPLES, *supra* note 3, at 97-8. Perhaps the closest one word translation of *sariqa* with reference to U.S. law, is theft, but this is inaccurate because of the differences between theft as it is understood in the U.S. legal system and the Islamic system. A requirement of *sariqa* is custody (*hirz*) that is commensurate with the value of property. Some scholars contend that the grave itself suffices for the requirement of custody of its contents, so that a graverobber is included in the definition of *sariq*. Other scholars, however, argue that the grave does not qualify as the type of custody required for the crime of *sariqa*. Telephone Interview with Dr. Mokhtar Maghraoui. (Feb. 26, 1998).

¹⁸² See Weiss, *supra* note 85, at 573.

¹⁸³ See *supra* notes 89-95 and accompanying text.

¹⁸⁴ See Zaydan, *supra* note 43, at 172.

¹⁸⁵ See *id.*

When the *'illah* is obscure, the Lawgiver establishes in its place a clear thing upon which it is presumed the *hukm* is established. For instance, mutual consent in the transfer of ownership is deemed obscure as are other hidden phenomena such as intention, good will, satisfaction, and happiness, and there is no way of perceiving these definitively. Such an obscure feature cannot be the *'illah*. The Lawgiver has established in place of the obscure phenomenon of mutual consent, the phrasing or wording of the contract--akin to the concepts of offer and acceptance in Anglo-American law.¹⁸⁶ Another example is the paternity of a child. The *'illah* of paternity is conjugal relations between spouses.¹⁸⁷ Conjugal relations, however, are considered an obscurity because they are not subject to inspection or cognizance and assurity.¹⁸⁸ Thus, in place of this obscurity the Lawgiver has established the marriage contract, marital cohabitation, and acknowledgments of paternity all of which are “external phenomena and are susceptible to evidence and proof.”¹⁸⁹

Condition 2. According to the majority of scholars, the *'illah* must be *mundabit* (inherently determinate) in that the *'illah* is applicable in all cases regardless of changes in time, person, place or circumstances. The opposite, inherent indeterminacy, is termed *mudtarib*.¹⁹⁰ In other words, the *'illah* must be fixed, determinate, and precise.¹⁹¹ “From the point of view of the science of theoretical jurisprudence [*usul al-fiqh*], when a thing is *mundabit* there is no conceivable factor that would make it *mudtarib*.”¹⁹²

For example, the *'illah* of the legal rule regarding a murderer does not depend on the identity of the murderer or the murdered. In the case of *khamr*, the *'illah* of its prohibition, which is its intoxicating quality, is fixed, determinate and precise. No regard is given to the

¹⁸⁶ See *id.*

¹⁸⁷ See Kamali, PRINCIPLES, *supra* note 3, at 209.

¹⁸⁸ See *id.*

¹⁸⁹ *Id.* See Khallaf, *supra* note 78, at 69; Zaydan, *supra* note 43, at 173.

¹⁹⁰ See Kamali, PRINCIPLES, *supra* note 3, at 207.

¹⁹¹ See Zaydan, *supra* note 43, at 173.

¹⁹² Weiss, *supra* note 85, at 574.

possibly different manner in which *khamr* (or alcohol entirely) might affect a particular individual or the extent of the substance's ability to intoxicate; the fact that it intoxicates or has such a quality suffices.¹⁹³

The reason for this condition of determinacy is that the essence of *qiyas* is the extension of the *hukm* of the *asl* to the *far'* because of equivalency of the existence of the '*illah*' between the two.¹⁹⁴ If the '*illah*' were not conditioned to be determinate, precise, and specified (contrasted with indeterminate and ambiguous), extending the *hukm* to the *far'* would itself be an imprecise and inaccurate process.¹⁹⁵

The Malikis and Hanbalis argue that the '*illah*' does not have to be *mundabit*.¹⁹⁶ Rather, the '*illah*' need only bear a proper and reasonable relationship to the *hukm*.¹⁹⁷ As discussed earlier, the Malikis and Hanbalis permit *qiyas* on the basis of the *hikmah*, the rationale of a law, whereas the majority does not. The *hikmah* of the law is to attain the *maqasid al-Shari'ah*, the objectives of the law. As such, the *hikmah* is in effect the very purpose and objective of the law.¹⁹⁸ The majority view, which is that of the Hanafis and Shafi'is, contends that the rules of the *Shari'ah* are founded upon their '*ilal*' and not upon their objectives.¹⁹⁹ Thus, as stated earlier, the majority contends that a ruling of the *Shari'ah* is always present so long as its '*illah*' is present even if its *hikmah* is absent. Furthermore, a ruling of the *Shari'ah* is absent if its '*illah*' is absent even though its *hikmah* is present.²⁰⁰ The minority position, however, is that a ruling of *Shari'ah* is present if the *hikmah* is present and the '*illah*' is absent.²⁰¹

The Hanafi and Shafi'i schools of law maintain that the '*illah*' must be both evident and constant.²⁰² In their view, the '*illah*' secures the *hikmah* in most cases, for the '*illah*' is the

¹⁹³ See Zaydan, *supra* note 43, at 173.

¹⁹⁴ See *supra* notes 89-95 and accompanying text.

¹⁹⁵ See Zaydan, *supra* note 43, at 173.

¹⁹⁶ See Abu Zahrah, *supra* note 45, at 188.

¹⁹⁷ See Kamali, PRINCIPLES, *supra* note 3, at 207.

¹⁹⁸ See *id.* at 208.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 207.

²⁰¹ See *supra* notes 112-13.

²⁰² See Kamali, PRINCIPLES, *supra* note 3, at 208.

probable indicator of the fulfillment of the *hikmah*. Their objection to the Maliki and Hanbali reasoning is that the *hikmah* of a particular ruling is often latent, obscure, and thus extremely difficult to ascertain with precision and clarity.²⁰³ However, the possibility that a *hikmah* could be *zahir* and *mundabit*, in which case it could be properly regarded as the '*illah*, is not ruled out.²⁰⁴ For the most part, though, the *hikmah*, according to the majority, tends to be obscure and inherently indeterminate. Therefore, *qiyas* on the basis of such an '*illah* greatly weakens the *qiyas* and the ruling proceeding therefrom.²⁰⁵ For instance, the concession granted to travelers and the sick to break their fast while traveling is intended to relieve the traveler of hardship; that is to say, relief from hardship is its *hikmah*. However, hardship is an ambiguity and an uncertainty in that it varies from person to person and circumstance to circumstance. Nevertheless, the '*illah*, according to some jurists, is simply hardship; for other jurists, the '*illah* is the type of hardship associated with travel or sickness per se, and the *hikmah* is the avoidance of hardship.²⁰⁶ Another example involves *khamr*. The *hikmah* behind the prohibition of *khamr* and all alcoholic beverages is the protection of the intellect. If this *hikmah* were made to be the '*illah* of this prohibition and a *qiyas* were constructed upon it, the door to unlimited analogizing would take place raising the questions: Are all acts which harm the intellect no matter how slightly to be forbidden? Where do we draw the line?²⁰⁷

Formulating a *qiyas* upon a *hikmah* as the '*illah* would without doubt be problematic because it would not be possible to ascertain these '*illah* with precision and accuracy except with great difficulty which itself would be violative of the Qur'an.²⁰⁸ Moreover, stating the '*illah* of a ruling to be the *hikmah* is, as has been shown, ambiguous and highly variable; it could lead, for instance, to the random removal of various legal duties and confusion in the law.²⁰⁹ This is

²⁰³ See Zaydan, *supra* note 43, at 173; Kamali, PRINCIPLES, *supra* note 3, at 208.

²⁰⁴ See Weiss, *supra* note 85, at 572-3.

²⁰⁵ See Kamali, PRINCIPLES, *supra* note 3, at 208.

²⁰⁶ See Zaydan, *supra* note 43, at 173.

²⁰⁷ See Weiss, *supra* note 85, at 581.

²⁰⁸ See *id.* at 576 (quoting the Qur'an 22:78, which reads: "He has chosen you and has not laid down upon you in religion any hardship, which al-Amidi believes to be violated in such cases.).

²⁰⁹ See *id.* at 573-4.

because the *hikmah* is so often imprecise, unspecific, and indeterminate. A case having such an indeterminate *hikmah*, however, may be linked to a determinate '*illah* so as to give effect to that *hikmah*.²¹⁰

Condition 3. The '*illah* must be *munasib*, or bear an appropriate and reasonable relationship, to the ruling.²¹¹ This relationship is deemed appropriate, and this particular condition fulfilled so long as the *hikmah* of the rule is secured and the *maqasid al-Shari'ah* are fulfilled.²¹² The attribute of intoxication of alcohol, for instance, is *munasib* to its prohibition because constructing this prohibition upon it secures the realization of benefit for humanity and fulfills the *maqasid al-shari,ah* by protecting the intellect.²¹³ The '*illah* must be such that we may presume it to lead to the realization of the *hikmah* and the objectives sought by the Lawgiver.

Munasabah (suitability), moreover, is not subject to arbitrariness and undisciplined methods of analysis because of its precise specifications.²¹⁴ In addition, *munasabah* only has force if it has been considered by the Lawgiver.²¹⁵ Accordingly, the scholars of *usul al-fiqh* have divided *munasabah* into four types based upon the type of consideration of the Lawgiver.²¹⁶

The first of these types is termed *munasabah mu'aththirah* (effective suitability). Such suitability exists when the Lawgiver has indicated that He has considered a feature specifically ('*aynihi*) as the '*illah*. This is the most complete form of consideration and highest form of *munasabah*.²¹⁷ The jurists are agreed upon the validity of *qiyas* using such a feature as the '*illah*.²¹⁸

²¹⁰ See *id.* at 579.

²¹¹ See Abu Zahrah, *supra* note 45, at 189.

²¹² See Nyazee, *supra* note 27, at 208.

²¹³ See Zaydan, *supra* note 43, at 174.

²¹⁴ See *infra* notes 217-35 and accompanying text.

²¹⁵ See Zaydan, *supra* note 43, at 176

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.*

The second form of *munasabah* is termed *al-munasib al-mala'im* in which there is no textual indicator that the very attribute, which is under analysis, has been considered as the '*illah* of a ruling. Instead, there are indicators that the Lawgiver has considered (1) this very attribute as the '*illah* of the genus of the verdict, or (2) the genus of this very attribute as the '*illah* of the verdict itself, or (3) the genus of this very attribute as the '*illah* of the genus of the verdict.²¹⁹

An example of the first form of consideration occurs in the guardianship of a father in the marriage of his minor, virgin daughter. The '*illah* of this ruling, according to the Hanafis, is the woman's minority and not her virginity, for the Lawgiver has given consideration to the former and not the latter in making it the '*illah* of guardianship of the property of minors.²²⁰ There are thus two rulings: the guardianship of the property of minors, and the guardianship of minors in marriage. Both rulings belong to the same genus of guardianship, and there is but one '*illah* of the two: minority.

An example of the second type of consideration is the concession granting permission to combine prayers on days of rain.²²¹ The *Sunnah* testifies to the permissibility of doing so but does not explicitly state the '*illah* of this permissive ruling.²²² We may begin with the assumption that rainfall is the '*illah* of this ruling. There is evidence, however, that the Lawgiver has considered an attribute which is of the same genus as rainfall and that is travel, for travelers are also permitted to combine their prayers. Both travel and rainfall belong to the same genus in that they are the probable causes of hardship for which facilitation and the easing of religious duties is ruled.²²³ The ruling in both instances is the same, yet the '*illah* is one, and it is hardship. Admittedly, the concept of hardship is vague and ambiguous. Muslim jurists have, in a detailed and sophisticated manner, debated upon this and related concepts; their discourse is far

²¹⁹ See Zaydan, *supra* note 43, at 177.

²²⁰ See *id.*

²²¹ See *infra* note 227.

²²² See Zaydan, *supra* note 43, at 177.

²²³ See *id.* at 177-8.

beyond the scope of this paper however.²²⁴ It is possible, contends Zaydan, that a *qiyas* may be constructed upon rainfall in order that during snowfall Muslims may combine prayers.²²⁵

An example of the third form of consideration is the ruling that a menstruating woman must not perform *salat* (pl. *salawat*).²²⁶ When her menstrual period has ended she is required to make up missed fasts but not the missed *salawat*.²²⁷ The '*illah*' of this ruling is that the requirement to make up missed *salawat* is a hardship upon the woman because she would be praying the five prayers which she is obligated to do anyway in addition to performing the prayers she has missed.²²⁸ The '*illah*' of this permission is of the same genus as the '*illah*' of the concession to combine prayers at times of hardship, and the rulings are of the same genus in each of these cases.

Al-Munasib al-Mursal, or an unarticulated broader suitability, is the third form of *munasabah*.²²⁹ In such cases, there is no specific evidence that the Lawgiver has considered the features under question or that the Lawgiver has not considered them; consideration is unarticulated by the Lawgiver.²³⁰ The *hukm* is built upon an unarticulated suitability as the '*illah*' because some *maslahah*, testified to by the rules of *Shari'ah* taken in general, is realized.²³¹ This is a form of suitability accepted by the Malikis and Hanbalis but not the Shafi'is and Hanafis.²³² Examples of it include the establishment of prisons and issuing currency.²³³

The last form of *munasabah* is *al-munasabah al-mulghah* (disregarded suitability). This term applies to a feature which appears initially to be *munasib*, or appropriate, for establishing a

²²⁴ See e.g., Nyazee, *supra* note 27, at 203-08.

²²⁵ See Zaydan, *supra* note 43, at 178.

²²⁶ *Salat* is the Arabic term used to refer to each of the five daily prayers. Every Muslim who has attained majority is bound to observe all five *salat* of dawn, of midday, of the afternoon, of sunset, and of the late evening. See E. Van Donzel, ISLAMIC DESK REFERENCE COMPILED FROM *THE ENCYCLOPEDIA OF ISLAM* 387 (1994). The obligation may be suspended in certain limited instances. See e.g., Al-Sayyid Al-Sabiq, 2 FIQH US-SUNNAH 103-04, 109-15 (1991).

²²⁷ This is not to say that a woman while menstruating does not pray or worship, but that she may not perform the *salat*, which should not be understood as only prayer. See Al-Sabiq, *supra* note 226, at 71.

²²⁸ See Zaydan, *supra* note 43, at 178.

²²⁹ See Weiss, *supra* note 85, at 616.

²³⁰ See Zaydan, *supra* note 43, at 179.

²³¹ See *id.* at 179.

²³² See *id.*

²³³ See Kamali, PRINCIPLES, *supra* note 3, at 267.

specific ruling upon it according to that which the jurist incorrectly assumes. The Lawgiver has invalidated consideration of this feature. For instance, a jurist might assume that the son and daughter of a deceased parent, because they share in common the fact that they are both children of the same parent, are entitled to equal shares of inheritance. Such reasoning, says Zaydan, is “utterly delusional” and is not *munasib*, for it conflicts with a specific provision of the Qur’an which states that the male child is to receive double of that which the female child receives.²³⁴ *Qiyas* upon features that have been ruled out by the Lawgiver is invalid according to unanimous agreement of the jurists.²³⁵

Condition 4. The *‘illah* must be a feature that the Lawgiver has considered.²³⁶ It might appear to a *mujtahid* at first glance that the feature is entirely suitable to the *hukm*, but in reality, it conflicts with the text and opposes legal evidence. Therefore, this feature cannot have been considered by the Lawgiver, and it is not *munasib* to the *hukm*.²³⁷ A particular person's abilities, for example, is an inappropriate, or unsuitable, (*ghayr munasib*) factor to employ in determining the *‘ilal* of certain rules, such as the prohibition of alcohol.²³⁸ Zaydan states that a certain Andalusian scholar, when asked by a *‘Abbasid* caliph of what the expiation is for having had sexual intercourse while fasting during *Ramadan*, replied it was to fast sixty days. The expiation according to the explicit directions of the text is to free a slave, but if unable then to fast sixty days, and if unable to do that, then to feed sixty poor persons.²³⁹ The Andalusian scholar, however, seems to have thought that since the caliph was wealthy, it would be easy for him to free a slave but difficult to fast sixty days given the caliph's luxurious lifestyle.²⁴⁰ Such

²³⁴ This is because the male child is required to spend his provisions upon those who are financially dependent upon him while the female is not obligated to do so and may spend her money as she pleases. For a further discussion of this legal rule and its *‘illah*, see *supra* notes 298-306 and accompanying text.

²³⁵ See Weiss, *supra* note 85, at 619.

²³⁶ See Zaydan, *supra* note 43, at 175.

²³⁷ See *supra* notes 211-12 and accompanying text.

²³⁸ See *supra* note 193 and accompanying text.

²³⁹ Abu Zahrah, *supra* note 45, at 187, 190, 194.

²⁴⁰ See Zaydan, *supra* note 43, at 175.

reasoning, as stated above, is incorrect because it is based on the peculiarities and particular circumstances of an individual.

Condition 5. The *'illah* must be *muta'addi* (transient) or “have an objective quality which is transferable to other cases,” for an analogy cannot be constructed upon an *'illah* which is limited to the *asl* alone.²⁴¹ The *'illah* of *khamr*, for example, is transferable to other alcoholic beverages as well as other substances.²⁴²

Shafi'i jurists state that transferability is not a must, for if the *'illah* of a particular case is confined to the original case (i.e., not transferable) this means that the Lawgiver had probably intended it as such. Furthermore, this probability should not be ignored merely for lack of transferability. The utility of the *'illah* is not, according to the Shafi'is, to be sought solely in its transferability or lack thereof.²⁴³

Condition 6. The *'illah* must not be an attribute which runs counter to the textual authorities or seeks to alter the law of the text.²⁴⁴

Condition 7. The *'illah* must be that which prompts the ruling. This may seem to be redundant, yet in Arabic it is not. In order for the *'illah* to prompt a rule it must entail a rationale that the Lawgiver has considered. Al-Amidi explains that this condition has a negative corollary, which is that the *'illah* may not be a *mere* sign alerting the jurist to the existence of the rule or to the applicability of a rule. For instance, assume that a jurist could not locate any indicators of the *'illah* of the prohibition of alcohol in the texts. The jurist was able though to find evidence that the Lawgiver forbade drunkenness or exposure to drunkenness. The jurist might conclude then that alcohol was prohibited because of its ability to intoxicate. The jurist would thus be

²⁴¹ See Kamali, PRINCIPLES, *supra* note 3, at 209; Zaydan, *supra* note 43, at 174.

²⁴² See Zaydan, *supra* note 43, at 175.

²⁴³ See Kamali, PRINCIPLES, *supra* note 3, at 210.

²⁴⁴ See *id.* at 210-211.

extrapolating the rule from the *'illah*. Those jurists who favor this condition conclude therefore that the feature being considered as the *'illah* cannot be the *'illah* because the *'illah* must not precede discovery of the rule.²⁴⁵

Condition 8. The occasioning factor must exist positively in instances when the original rule is affirmative.²⁴⁶ This condition bars a nonexistent factor as the *'illah* for an affirmative rule and permits a nonexistent factor to be the *'illah* of a negative ruling.²⁴⁷ Weiss provides the following highly useful elucidation: “One may say, for example, ‘The drinking of grape juice is *not* forbidden because the power to intoxicate is nonexistent in grape juice,’ but one cannot say such a thing as, ‘The drinking of *khamr* is forbidden because the power to enhance rationality is nonexistent in *khamr*.’”²⁴⁸ Thus, this particular condition requires that the *'illah* of an affirmative rule be something present and not absent. It seems that the majority accepted this condition.²⁴⁹

Condition 9. The *'illah* must consist of a single feature of the *asl* and not a complex of several features of the *asl*.²⁵⁰ The majority of jurists reject this condition insisting that the *'illah* may exist of several features of the *asl*, but that these several features must operate as a unit.²⁵¹ Those who do demand this condition state that in a case in which several of its features occasion the rule (i.e., constitute its *'illah*), each of these features, or one of the features, or all of them as a whole must contain the function or ability to occasion the rule which they argue is an attribute its own right.²⁵² If this ability exists in each feature, then each feature is an *'illah*, and if this ability

²⁴⁵ See Weiss, *supra* note 85, at 564, 570 (stating al-Amidi to be amongst those who accept this condition.).

²⁴⁶ The statement ‘Such and such is forbidden’ is affirmative as opposed to the statement, ‘Such and such is not forbidden’, which is a negative statement.

²⁴⁷ See Weiss, *supra* note 85, at 565.

²⁴⁸ *Id.*

²⁴⁹ See *id.* at 588.

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² See *id.*

exists in one only then only that feature is an '*illah*'. If this ability inheres in all of the features as a whole, then the whole unit is the '*illah*'.²⁵³ To this, those who reject this condition such as al-Amidi, argue that the ability of a feature to occasion a rule is not an inherent attribute of the feature. Rather, they are occasioning factors only because there are indicators that the Lawgiver has taken these into account.²⁵⁴ The minority accepting this condition also contend that if the Legislator has taken a feature into account it is because it is suitable in some manner to the *hikmah* of the rule.²⁵⁵ If each feature of a case is suitable, then each individually may function as the '*illah*' so that the features do not function as a unit occasioning the rule.²⁵⁶ If some are suitable but others are not, then they cannot together function as a unitary '*illah*'. If none are suitable, then none of them individually nor the complex as a whole can function as the '*illah*'. To this line of reasoning it is replied that the argument fails to take into account the possibility that the features when together have a suitability that none of the individual features possess.²⁵⁷

Condition 10. The *hikmah* which is closely connected to the '*illah*' of a rule must be "uniformly coincidental" with the rule.²⁵⁸ That is to say, when the rationale obtains, the rule must also, but if the rationale obtains and the rule does not, the '*illah*' ceases to be valid.²⁵⁹ For example, a traveler is exempted from certain duties of worship, such as *salat* in its full form.²⁶⁰ The *hikmah* for this concession is the hardship peculiar to travel.²⁶¹ A stationary individual may also be under hardship due to the nature of his profession, but he is not granted the same concessions as the traveler, according to the Shafi'is and Hanafis because the '*illah*' of such a ruling is absent even though its *hikmah* is present.²⁶² For those jurists, namely the Malikis and Hanbalis, who

²⁵³ See Weiss, *supra* note 85, at 585.

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See Weiss, *supra* note 85, at 586.

²⁵⁸ *Id.* at 566

²⁵⁹ See *id.*

²⁶⁰ See al-Misri, RELIANCE, *supra* note 71, at 189-97.

²⁶¹ See Zaydan, *supra* note 43, at 171.

²⁶² See *supra* notes 112-13 and accompanying text.

accept *qiyas* upon a *hikmah*, such a concession may very well exist because the *hikmah* is present even though the '*illah* is not.²⁶³

The above discussion presents several conditions required for a feature to be correctly considered as the '*illah* of a ruling. The conditions are designed, and quite successfully so, to eliminate arbitrariness, imprecision, indeterminacy, and subjectivity in the determination of what constitutes an '*illah*. The purpose is to assure to the greatest extent rationally possible a definitive determination and articulation of the '*illah*. In this manner, change in the law cannot be made loosely. Rather, change in the law must be the result of a change in the '*illah* of the *hukm* and also take into account the relationship and interaction between the '*ilal*, the rationales (*hikam*), and the *maqasid al-Shari'ah*.

4. Ascertaining the '*Illah*

As stated earlier, the ascertainment of the '*illah* is the most important and crucial step in constructing a *qiyas*. Jurists have used a number of methods for ascertaining the '*illah* when it is explicitly stated in the text, when it is given by *ijma'*, when it is implied by the texts, and the method of the elimination of alternatives.²⁶⁴ Once the '*illah* has been identified, it must be determined whether it exists in the *far'* so that the *qiyas* might be completed, and also so that it may be determined whether or not the applicability of a legal rule is to continue.²⁶⁵

a. *Al-'illah al-Mansusah*

In many instances, the '*illah* is provided for in the text.²⁶⁶ Such an '*illah* is referred to as *al-'illah al-mansusah*, or the textual '*illah*.²⁶⁷ At times, the text explicitly provides for the '*illah* and in other instances, the text implies or directs the jurist to the '*illah*.²⁶⁸

²⁶³ See *supra* notes 112-13 and accompanying text.

²⁶⁴ See Weiss, *supra* note 85, at 594-95.

²⁶⁵ See Zaydan, *supra* note 43, at 163, 172.

²⁶⁶ See *id.* at 180.

²⁶⁷ See Abu Zahrah, *supra* note 45, at 245-46.

²⁶⁸ See Zaydan, *supra* note 43, at 180.

The first case is in which the indication of an *'illah* is explicitly stated in a *qat'i* (definitive) text so that there can be no other possibilities of *'illah*.²⁶⁹ When the *'illah* is expressly identified by the text, there can be no disagreement as to what constitutes the *'illah* of a ruling.²⁷⁰ Often indications to the *'illah* are provided for through certain grammatical constructions; words such as *li*, *li-ajl*, *min ajl*, and *kay-la* immediately assist in the determination of the *'illah*; these are referred to as particles of ratiocination and may be translated as “on account of”, “because of”, and “so as not to.”²⁷¹ For instance, the Qur'an states, “I have created the *Jinn* and humankind only for the reason that [*li*] they might worship me.”²⁷² In the Qur'anic verse ruling upon the distribution of one-fifth of the war booty to the poor and needy, the verse provides for the *'illah* when it states, “so (*kay*) that wealth does not accumulate in the hands of the rich.”²⁷³

In other instances, the specific grammatical construction does not play such an absolute function. For example, in the Qur'an it is said, “O you who believe! Do not approach prayer while drunk.”²⁷⁴ This particular verse provides a clear reference to the concept of intoxication which is also done by a *hadith* in which the Prophet, peace be upon him, states, “Every intoxicant is *khamr* and every *khamr* is forbidden.”²⁷⁵ Using these references to intoxication together, the jurist is able to determine the *'illah* for the prohibition of wine drinking and extend that

²⁶⁹ See *id.*

²⁷⁰ See Kamali, PRINCIPLES, *supra* note 3, at 211.

²⁷¹ Muhammad Shawkani, IRSHAD AL-FUHUL ILA TAHQIQ AL-HAQQ MIN 'ILM AL-'USUL 212-13 (n.d.) (providing a lengthy list of the particles of *ta'lil*).

²⁷² Qur'an 51:56. The *Jinn* are a species of living beings made from fire (whereas humans have been made from earth and angels from light). THE HOLY QUR'AN: ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY 372 n.929 (Yusuf Ali trans., modified 1992). See also Ahmad Zaki Hammad, LASTING PRAYERS OF THE QUR'AN AND THE PROPHET MUHAMMAD 297 n.3 (1996) (writing, “*Jinn*, like human beings, have choice and free will. They are therefore subject to obligation by God and answerable to Him for their deeds, and God shall assemble them on the Day of Resurrection and recompense them with reward or punishment. *Jinn*, like angels, are invisible to human beings. . . While their creation predates that of humankind, several verses of the Qur'an and a substantial number of verified statements of the Prophet [peace be upon him] confirm that they live on earth—eating, drinking, procreating, and dying—and that, like humans, they agree and disagree, choose belief or disbelief, and are charged with adhering to the religion of Islam.”).

²⁷³ Qur'an 59:7.

²⁷⁴ Qur'an 4:43.

²⁷⁵ Abu Dawud, 3 Sunan, Hadith no. 3679.

prohibition as necessary and appropriate. Similar instances are found in the body of *hadith* as well; for example, the ‘*illah* of asking permission before entering a private home is given in the text itself when the Prophet, peace be upon him, says, “permission is required because of viewing.”²⁷⁶ The ‘*illah* therefore is to protect the privacy of the home.²⁷⁷ Take for example the *hadith* which states that the judge who while in a state of anger must not adjudicate.²⁷⁸ In this *hadith*, the text alludes to the state of anger being the ‘*illah* for the prohibition. *Qiyas* has been used to extend the prohibition of adjudication by judges who are in extreme hunger or depression.²⁷⁹

The second case is when the indicators of the ‘*illah* are explicitly stated in a text that is probabilistic in causality between the ‘*illah* and *hukm*.²⁸⁰ That is to say, the text indicates the ‘*illah*, but the text does not preclude other possible ‘*ilal*. The indication, thus, of the causality between the ‘*illah* and the *hukm* is not explicit.²⁸¹ An example of this is the Qur'anic verse, “A Book which We have revealed unto thee, in order that [*li*] thou might lead mankind out of the depths of darkness into light.”²⁸² The Arabic ‘*li*’ enclosed in brackets indicates the ‘*illah* of revelation and the consequence (‘*aqibah*) of revelation.²⁸³ There is thus more than one possibility of the meaning of this verse; it may indicate its ‘*illah*, it may indicate its consequence, or it may indicate both.²⁸⁴

Lastly, it should be noted that the ‘*illah* may have already been agreed upon by *ijma*’, in which case a jurist may not contradict the established consensus.²⁸⁵

b. When the ‘*illah* is implied by the text.

²⁷⁶ Abu Dawud, 1 Sunan, Hadith no. 90.

²⁷⁷ See Zaydan, *supra* note 43, at 181; Kamali, PRINCIPLES, *supra* note 3, at 211.

²⁷⁸ See Abu Dawud, 3 Sunan, Hadith no. 3582.

²⁷⁹ See Kamali, PRINCIPLES, *supra* note 3, at 212.

²⁸⁰ See Zaydan, *supra* note 43, at 181.

²⁸¹ See *id.*

²⁸² Qur’an 14:1.

²⁸³ See Zaydan, *supra* note 43, at 181.

²⁸⁴ See *id.* See *supra* note 45 and accompanying text.

²⁸⁵ See Kamali, PRINCIPLES, *supra* note 3, at 213.

If the text does not explicitly state the *'illah*, the jurist may turn to the texts to seek an implied meaning therein which would assist him in the ascertainment of the *'illah*. In such cases, the text is said to point and instruct the jurist towards the *'illah*.²⁸⁶

The grammatical construction of *fa al-ta'qib* or the “*fa-* of immediate succession” may show that the rule *follows* from the feature.²⁸⁷ From the structuring of the sentence, namely the feature followed by the rule, it is implied that the feature causes the rule; what is considered explicit from such constructions is immediate succession and not the causation of the rule.²⁸⁸

An example from the *Sunnah* is the following *hadith*: “Whoever revives dead land, [*fa-*] it is his.”²⁸⁹ The *'illah* of ownership is the revivification of the dead land.²⁹⁰ Another example is statements containing the particle *bi-anna* following a statement of the *hukm*. The succession of two events, whether question and answer, or occurrence and ruling, implies a causality between the two. This causality in turn implies the *'illah*. Mention may also be made in the texts of a rule together with its *'illah* in an answer to a question that has been posed without pertaining directly to the subject matter of that question.²⁹¹

c. Eliminating the Alternatives

The next method of ascertainment is called eliminating the alternatives; it is an extensive and detailed process of reasoning.²⁹² This process is employed when the *'illah* is neither stated nor indicated. The three steps in reasoning employed by the jurist is labeled *tanqih al-manat*, or

²⁸⁶ See Zaydan, *supra* note 43, at 181.

²⁸⁷ Weiss, *supra* note 85, at 599.

²⁸⁸ See *id.*

²⁸⁹ Muhammad Bukhari, 3 SAHIH AL-BUKHARI 306 (Muhammad Khan trans., 6th ed. 1983) [hereinafter BUKHARI]. The *hadith* text in BUKHARI states that the land must not belong to anyone else. The same idea is expressed by Malik ibn Anas, AL-MUWATTA' 295 (1863). Readers are cautioned not to presume the existence of a law on the basis of a single text alone. See *supra* note 51 and source contained therein.

²⁹⁰ See Weiss, *supra* note 85, at 600.

²⁹¹ See *id.* at 602.

²⁹² See Zaydan, *supra* note 43, at 183-86.

isolating the *'illah*, *takhrij al-manat*, or extracting the *'illah*, and *tahqiq al-manat*, or ascertaining the *'illah*.²⁹³

The jurist begins with the assumption that for every rule of law within the context of the *mu'amalat*, there is an *'illah*, and that the *'illah*, for the reasons stated above, is *zahir* (evident).²⁹⁴ Moreover, it is believed that the Lawgiver established the law in a rational and comprehensible manner, and thereby facilitating obedience to Him and adherence to the law.²⁹⁵

The first step is termed *takhrij al-manat*.²⁹⁶ After a careful examination of the case at hand, the jurist enumerates a list of possible features that may constitute the *'illah*.²⁹⁷ For instance, under Islamic inheritance law, children of a decedent inherit as follows:

When no son is present, a daughter or daughters are defined Sharers [Qur'anic heirs]²⁹⁸. A daughter who was an only child would receive one-half of her father's or mother's estate. If there are two or more daughters, they divide two-thirds of the estate equally. In the presence of a son, the daughter becomes a Residuary [an agnatic heir],²⁹⁹ taking one-half of the portion of the son.³⁰⁰

The question is why do females in this particular instance receive half of that which the male receives. Inheritance falls under the category of *mu'amalat*, the "rationalizeable," and the *'illah*

²⁹³ See *id.*

²⁹⁴ See *supra* notes 176-85 and accompanying text.

²⁹⁵ See Weiss, *supra* note 85, at 605.

²⁹⁶ See Kamali, PRINCIPLES, *supra* note 3, at 214.

²⁹⁷ See Zaydan, *supra* note 43, at 182.

²⁹⁸ See Chaudhry, *supra* note 64, at 530 (stating "Qur'anic Sharers are allotted a specific fractional share of the decedent's estate which cannot be changed. This class takes precedence over all others, and its members are the first to take their share from the estate. . . There are twelve Sharers defined as follows: (1) husband; (2) wife; (3) father; (4) true grandfather; (5) mother; (6) true grandmother; (7) daughter; (8) son's daughter; (9) full sister (10) consanguine sister; (11) uterine brother; and (12) uterine sister"). "A 'true grandfather' is a 'male ancestor between whom and the deceased no female intervenes,' such as a father's father." *Id.* at 530 n.144 (quoting Hamid Khan, ISLAMIC LAW OF INHERITANCE: A COMPARATIVE STUDY WITH EMPHASIS ON CONTEMPORARY PROBLEMS 44 (1980)). "A 'true grandmother' is a 'female ancestor between whom and the deceased no false grandfather intervenes,' such as a father's mother, or a mother's mother. A 'false grandfather' is a 'male ancestor between whom and the deceased a female intervenes,' such as a mother's father." *Id.* at 530 n.145 (quoting Khan, at 44-45). "Consanguine means a child of the same father as the deceased, but of a different mother." *Id.* at 530 n.146 (quoting Khan, *supra*, at 45). "Uterine means a child of the same mother as the deceased but of a different father." *Id.* at 530 n.147 (quoting Khan, at 45).

²⁹⁹ See Chaudhry, *supra* note 64, at 529 n.137 ("defining an agnatic relative as one whose relation to the deceased is traced only through males"). See *Id.* at 529-530 (explaining further the concept of agnate).

³⁰⁰ *Id.* at 531.

of this rule of law is therefore discernible to the human intellect.³⁰¹ In addition, there is neither explicit textual identification nor is there *ijma'* upon what constitutes the '*illah*.³⁰² Among the possibly valid '*ilal* a jurist might consider are gender and the functional roles of gender.³⁰³ But because there are, in fact, numerous instances in which the two to one *ratio* is nonexistent, and in which females inherit the same or more than males, gender cannot be the '*illah*.³⁰⁴ Gender has no causal relationship with the legal rule. Concluding gender to be the '*illah* would violate one of the *daruriyyat* of the *maslahah*, the protection of female rights of property, which would thus violate the *maqasid al-Shari'ah*.³⁰⁵ This example provides some of the means by which the jurist must eliminate certain possibilities which he believes may constitute the '*illah* until he arrives at a single '*illah*.³⁰⁶

This procedure of elimination of those features which cannot be the '*illah* is called *tanqih al-manat*.³⁰⁷ This elimination is done by assuring that the feature to be the '*illah* conforms to the conditions enumerated and fulfills the *maqasid al-Shari'ah*.³⁰⁸ For instance, the jurist might examine which of the features in question are *munasib*. The jurist must also examine the possibilities in light of the intent and objectives of the law. When the '*illah* is indicated in a manner that does not require a test of *munasabah* (suitability), such as if the '*illah* were explicitly stated in the text, the jurist would not need to concern himself with the Lawgiver's objective.³⁰⁹ In other cases, such as when the '*illah* must be deduced, the *maqasid al-Shari'ah* serve as a benchmark by which the jurist can determine which feature of the case is in fact the '*illah*.³¹⁰ As

³⁰¹ See *supra* notes 69-76 and accompanying text.

³⁰² See Chaudhry, *supra* note 64, at 540.

³⁰³ See *id.*

³⁰⁴ See *id.* at 536-9.

³⁰⁵ See *id.* at 538. See *id.* at 544 (concluding probabilistically that the '*illah* is that "males have the greater financial responsibilities towards the specialized female agnates with whom they inherit, and toward the family in general" whereas women are free from this obligation). For a further discussion of how this '*illah* fulfills the conditions of the '*illah* and the *maqasid al-Shari'ah*, see *id.* at 540-544.

³⁰⁶ See *id.*

³⁰⁷ See Kamali, PRINCIPLES, *supra* note 3, at 214

³⁰⁸ See *supra* notes 173-264 and accompanying text.

³⁰⁹ See *supra* notes 211-12 and accompanying text.

³¹⁰ See Weiss, *supra* note 85, at 609.

discussed previously, the objectives consist of the realization of benefit and the avoidance of harm. This may occur in this life and in the Hereafter.³¹¹ If the Lawgiver intends the objective to be manifest here in this life, then when the rule obtains it will result in a condition in which benefit is realized and/ or harm is avoided.³¹² For example, murder is forbidden under Islamic law and requires justice; the laws regarding murder are designed to protect life. The benefit of this rule is obtained both in this life as well as in the Hereafter. Another example in which benefit may be realized in both this life and the Hereafter is the permissibility of various forms of business transactions in which property is protected and developed. If, on the other hand, the objective is sought solely in the Hereafter, it will take the form of reward or punishment received in the next life.³¹³ The former and latter do not preclude each other.³¹⁴

It is possible that a feature could withstand the suitability test and yet, the Lawgiver could have deliberately ruled it out. If it appears to the jurist that the Lawgiver has ruled out such a feature, then the jurist must place his own judgment aside. Furthermore, the jurist must not assume that the Lawgiver has ruled out this feature without a rationale.³¹⁵ If there is evidence from the texts indicating that the Lawgiver has ruled out a feature, which fulfills the test of *munasabah*, the jurist is not permitted to assume that the feature has, therefore, been considered unless he has textual evidence to that effect.³¹⁶ The only manner in which it is known that a feature has been considered is if the related rule becomes operative in the presence of the feature, and this is attested to by the Qur'an, *Sunnah*, or *Ijma'*.³¹⁷ Even if a jurist determines a feature to be suitable but is unable to locate grounding in the Qur'an and *Sunnah*, explicitly or implicitly, and through both deductive and inductive reasoning, for the consideration of that feature, then he may not proceed on the assumption that the feature constitutes the '*illah*'.³¹⁸ The jurist must then

³¹¹ See Nyazee, *supra* note 27, at 240.

³¹² See Weiss, *supra* note 85, at 610.

³¹³ See *id.*

³¹⁴ See *id.* at 609-10.

³¹⁵ See Weiss, *supra* note 85, at 618.

³¹⁶ See *Id.*

³¹⁷ See *id.* at 619.

³¹⁸ See *id.*

renew the process examining another feature to determine whether it may be the *'illah*. This emphasis upon a textual grounding is designed to keep the entire process of ascertainment within the constraints of divine texts. By demanding a textual grounding, *qiyas* “remains within the category of a paratextual indicator of the law.”³¹⁹

Another method of ascertaining the *'illah* employs *shibh* (the concept of resemblance). Jurists have defined this concept differently; the majority define *shibh* as “that which leads one to suppose that a particular feature of a case is suitable” even though there is no direct evidence of such a supposition.³²⁰ This arises when a feature lacking *munasabah* resembles a feature which does fulfill the requirements of *munasabah*.³²¹ A question which then must be answered is whether *shibh*, which Weiss translates as “quasi-suitability,” allows a jurist to consider the feature as the *'illah*.³²² The answer to this question is that it does allow the jurist to do so, but the feature is to be regarded as the *'illah* by preponderance.³²³ The preponderant, readers are reminded, is binding in the realm of law.³²⁴ Weiss provides the following illustration: Suppose a ruling were operative in the presence of two features X and Y. Let us also suppose that the Lawgiver has never considered Y, and that X possesses “quasi-suitability.”³²⁵ The law as we have stated serves to achieve a known objective related to the benefit and well being of humanity. This objective must be tied to either feature X or Y, and most likely this objective is tied to feature X because Y lacks suitability and X is probabilistically suitable because of its quality of resemblance. Upon such an *'illah*, the jurist is permitted to construct *qiyas*.³²⁶

5. Historical Implementation of Ratiocination

³¹⁹ *Id.* at 619.

³²⁰ *Id.* at 629.

³²¹ *See id.* at 629-30.

³²² Weiss, *supra* note 85, at 629.

³²³ *See id.* at 630. Readers should not confuse my use of the term preponderance with that of the standard of preponderance of the evidence of U.S. law. *See supra* notes 129-139 and accompanying text.

³²⁴ *See supra* note 136 and accompanying text.

³²⁵ Weiss, *supra* note 85, at 629.

³²⁶ *See id.* at 630-1.

The following two examples, taken from Muslim history, should serve to further explain the foregoing theoretical framework.³²⁷ The first event discussed below falls within the realm of *'ibadat* (matters of religious devotion), and the second falls under the category of *mu'amalat* (civil and criminal matters).³²⁸

1. The Prophet Muhammad, peace be upon him, refrained from consistently performing *salat*³²⁹ during the nights of Ramadan,³³⁰ stating that he feared such devotional exercises would thereby become obligatory upon his followers; this fear was the *'illah* of the actions of the Prophet, peace be upon him.³³¹ Revelation ceased with the death of the Prophet, peace be upon him, and therefore the probability that these devotional exercises would become obligatory was significantly reduced, if not wholly eliminated.³³²

The caliph 'Umar b. al-Khattab (d. 644 C.E.) found people in mosques praying this *salat* individually and in small, scattered groups.³³³ 'Umar believed that the *'illah* for refraining from such *salat* had disappeared. Moreover, he feared laxity in the performance of this important, albeit non-obligatory, devotional exercise. Consequently, 'Umar brought the worshippers together in a single congregation.³³⁴ This decision was not in conflict with that of the Prophet, peace be upon him, for it preserved the intent of the law.³³⁵

2. The Prophet Muhammad, peace be upon him, prohibited the seizure of stray camels. The *'illah* for this prohibition, according to the Prophet, peace be upon him, is that such seizure was unnecessary because the stray camels were provided for and safeguarded.³³⁶ The caliphs, Abu Bakr al-Siddiq (d. 634 C.E.) and 'Umar, whose respective reigns immediately followed the death

³²⁷ See also Shalabi, *supra* note 4, at 37-51 (providing additional examples of the use of ratiocination in Muslim history).

³²⁸ See *supra* notes 70-77 and accompanying text.

³²⁹ See *supra* note 226.

³³⁰ See *supra* note 71.

³³¹ See Shalabi, *supra* note 4, at 40.

³³² See *id.*

³³³ 'Umar ruled from 634-644 C.E. See al-Misri, RELIANCE, *supra* note 71, at 1104-05. For an account of his life, see Muhammad Abdul Rauf, 'UMAR AL-FARUQ (1998).

³³⁴ See Shalabi, *supra* note 4, at 40.

³³⁵ See *id.*

³³⁶ See Shalabi, *supra* note 4, at 40.

of the Prophet, peace be upon him, did not alter this legal practice as the intent and the purpose of the law remained fulfilled.³³⁷

The caliph ‘Uthman b. ‘Affan (d. 656 C.E.) altered the application of this law, permitting stray camels to be seized. Information regarding the stray camels was then to be publicized so that the owner could reclaim his property. If the owner failed to come forward, the camel was sold. In the case that the owner later reclaimed his property, he was entitled to the price received for it.³³⁸ Apparently, conditions had changed so that the stray camels were no longer properly provided for and safeguarded as they had been during the Prophetic era and the rule of Abu Bakr and ‘Umar. One of the aforementioned purposes of the law: the preservation of property, would have otherwise been left unfulfilled or perhaps not realized in the most effective manner.³³⁹

Following the reign of ‘Uthman, the caliph ‘Ali b. Abi Talib (d. 661 C.E.) again modified the laws regarding stray camels. Due to prevailing circumstances, leaving the camels stray would not safeguard the intent of the Lawgiver.³⁴⁰ Therefore, as ‘Uthman had done, ‘Ali continued to permit the seizure of stray camels, but in addition, he built a safe house in which the stray camels were housed and maintained at the expense of the public treasury until their rightful owners reclaimed them.³⁴¹ ‘Ali did not, however, allow the strays to be sold because protection of the camels per se rather than their value alone was now of primary import.³⁴² Both ‘Uthman as well as ‘Ali sought to fulfill the intent and purposes of the law; their differences may have been due to either disparate realities during their respective reigns or disagreement concerning the means of achieving the same end.³⁴³

6. Conclusions

³³⁷ *See id.* at 40-41.

³³⁸ *See id.* at 41.

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See id.* at 42.

³⁴² *See id.*

³⁴³ *See Shalabi, supra* note 5, at 42.

The methods of determining the *'illah* and the previously presented conditional requirements, which are employed in these methods of determination, demonstrate the use of reason and the human intellect by Muslim jurists in approaching and authenticating their interpretations of the Qur'an and *Sunnah*. The goal of these methods and conditions is to decrease, to the greatest extent rationally possible, the approximations that result from human infallibility and to increase the probability of a conclusive and definitive determination of the *'illah*. In addition, these methods eliminate subjective determinations of the *'illah*. Furthermore, they demand a precise statement of what constitutes the *'illah*.

II. Determining the *Ratio Decidendi* in the Anglo-American Common Law

As stated in the introduction, the Anglo-American Common Law exists primarily as a means to ordering society and its members. The inflexibility and rigidity, which once characterized the Common Law have long passed in large part because of the American realists, who steered it away from its mechanized character.³⁴⁴ The Common Law's continued concern with maintaining flexibility, as reflected in the process of determining the *ratio decidendi*, are justified. In addition, the means of determining the *ratio decidendi* are designed to confront the uncertainties of language and of the texts of case opinions. The methods do not however substantially decrease these uncertainties so that the *ratio decidendi* could be determined with certainty and articulated with precision and accuracy.

A. Defining the *Ratio Decidendi*

The term *ratio decidendi* has been defined as the ground or reason of a decision or as "the point in a case which determines the judgment."³⁴⁵ Sir John Salmond states that the *ratio decidendi* is the underlying principle which forms the authoritative element of a decision.³⁴⁶

³⁴⁴ Makdisi, FORMAL RATIONALITY, *supra* note 1, at 109.

³⁴⁵ BLACK'S LAW DICTIONARY 522 (Bryan Garner et. al eds., 1996).

³⁴⁶ See John Salmond, JURISPRUDENCE 201 (12th ed. 1966).

Moreover, the decision of the court is binding upon the parties to that decision, but “it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.”³⁴⁷ The idea is expressed by Professor John Chipman Gray as follows:

It must be observed that at the Common Law not every opinion expressed by a judge forms a Judicial Precedent. In order that an opinion may have the weight of a precedent, two things must occur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter dictum.³⁴⁸

The distinction drawn here between the *ratio decidendi* and obiter dictum is important. Dictum may be defined as “a legal proposition stated in an opinion but involving facts not before the court.”³⁴⁹ Such language is nonbinding and holds only persuasive force.³⁵⁰ When attempting to determine the *ratio decidendi*, jurists must be careful not to confuse the court's holding with its dicta, if any.

B. Determining the *Ratio Decidendi*

In determining the ruling for a case before it, the jurist is first drawn during his research of prior case law to particular cases due to some similarity between them and the case *sub judice*. The jurist must first examine the degree of similarity among the precedent cases and the case at hand. Generally, the initial stages of such an examination is a comparison of the factual situations between and among the prior case law and the case at hand because the precedent ruling is constructed out of its material facts. Comparison must be made in order to determine what that rule of law is in order to correctly rule upon the case at hand. Before the rule of law for

³⁴⁷ *Id.*

³⁴⁸ Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case* 40 YALE LAW JOURNAL 161 (1930) (quoting Gray, THE NATURE AND SOURCES OF THE LAW 261 (2d. ed. 1921)).

³⁴⁹ Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 19, 39-40.

³⁵⁰ See Charles Collier, *Precedent and Legal Authority: A Critical History* 1988 WISC. L. REV. 771, 779-81. It may be possible to analogize the concept of dicta in the Anglo-American Common Law with the fatwa in the Islamic system as fatwas are nonbinding legal opinions. See Jackson, ISLAMIC LAW, *supra* note 3, at 213-17.

the new case can be determined and the new case decided upon, the *ratio decidendi* of each of the precedent cases must be determined.³⁵¹

One of the first to put forth a method of ascertaining the *ratio decidendi* in the Anglo-American Common Law was Arthur Goodhart.³⁵² This assertion, that the *ratio decidendi* is constructed from the facts of the case, conflicts with two important concepts. The first of these is that “[t]he reason of a resolution is more to be considered than the resolution itself,” and the second, “[t]he reason and spirit of cases make law; not the letter of particular precedents.”³⁵³ These statements, do not any longer accord with the contemporary notions of precedent.³⁵⁴ Goodhart contends that quite often the rule of law is not set forth by the court, or that the court states it in too wide or too narrow a manner.³⁵⁵ Later decisions may realize this impropriety and correct it. For instance, in the case of *Rex v. Fenton*,³⁵⁶ the principle of the case was stated too widely as follows:

If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter.³⁵⁷

Thereafter, this principle was narrowed in *Regina v. Franklin*,³⁵⁸ in which the defendant had thrown a box belonging to a third party into the sea thereby killing a swimmer.³⁵⁹ With regard to the *Rex* holding, the court wrote:

³⁵¹ This will become clearer to the reader as this article proceeds.

³⁵² See Wael Hallaq, *The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 79, 86 (1985), reprinted in Hallaq, LAW AND LEGAL THEORY IN CLASSICAL ISLAM (1995) [hereinafter LEGAL REASONING]. Hallaq concludes, and quite incorrectly in my opinion, that Islamic law is inflexible. Moreover, Hallaq also contends that current exigencies “have no particular importance” in the Islamic legal system, which is also incorrect because, for instance, social realities can produce an absence in the ‘illah which in turn can produce a change in the law. *Id.* at 96. It may have been more appropriate to have drawn clearer and more detailed conclusions regarding the type, nature, and need for change in each system and the manner in which the two differ.

³⁵³ Goodhart, *supra* note 348, at 164 (quoting *Cage v. Acton*, 12 Mod. 288, 294 (1796), and *Fisher v. Prince*, 3 Burr. 1363, 1364 (1762), respectively).

³⁵⁴ See Goodhart, *supra* note 348, at 165.

³⁵⁵ See *id.*

³⁵⁶ 1 Lew. C. C. 179 (1830).

³⁵⁷ Goodhart, *supra* note 348, at 166 (quoting 1 Lew. C. C. at 179).

³⁵⁸ 15 Cox C. C. 163 (1883).

³⁵⁹ See Goodhart, *supra* note 348, at 166.

We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and, therefore, the civil wrong. . . is immaterial to this charge of manslaughter.³⁶⁰

Another example is provided by *Riggs v. Palmer*³⁶¹ in which the court stated its *ratio decidendi* broadly by prohibiting a legatee who had murdered his testator from receiving anything by will because “no one shall be permitted ‘to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.’”³⁶² This holding, because it is so broad, is imprecise; for example, should a legatee who had accidentally or negligently killed his testator in an automobile accident be prohibited from inheriting from him?³⁶³ This holding was in fact later narrowed considerably.³⁶⁴ The *ratio decidendi* of a case is not necessarily located in the court’s reasoning or precisely stated in the proposition of law the court sets forth. Thus, a method to determine the *ratio decidendi*, other than a simple reading of the case opinion is required.

Some scholars disagree by arguing that the material facts along with the reasoning must be used together to determine the rule of a case.³⁶⁵ The reasoning is useful to determine which of the case’s facts are material as well as the appropriate level of a case’s rule’s generality; the purpose of a rule of law is also used for this same end.³⁶⁶ Other scholars contend that the court opinion may be entirely disregarded, and the *ratio decidendi* may be determined by studying what the judge has done rather than what he has written.³⁶⁷ This approach involves a focus upon the facts of the case and the conclusion reached therefrom by the court.³⁶⁸ Goodhart criticizes

³⁶⁰ *Id.* (quoting Cox C. C. at 165).

³⁶¹ 22 N.E. 188 (1889).

³⁶² Goodhart, *supra* note 348, at 166.

³⁶³ *See id.* at 167.

³⁶⁴ *See id.*

³⁶⁵ *See id.* at 168.

³⁶⁶ *See* Richard Cappalli, *At the Point of Decision: The Common Law’s Advantage Over the Civil Law*, 12 TEMP. INT’L & Comp. L. J. 87, 102 [hereinafter POINT OF DECISION]. I am grateful to Professor Cappalli for providing me with a copy of his work prior to publication.

³⁶⁷ *See* Goodhart, *supra* note 348, at 169.

³⁶⁸ *See id.* at 168; Oliphant, A RETURN TO STARE DECISIS (1927).

this methodology by stating that facts are not constant but relative.³⁶⁹ The determination of materiality is a subjective process; it is, in large part, the jurist's choice and a construct of his intellect. There are however facts the materiality of which will be agreed upon by many, if not most, jurists by virtue of the reasonability and obviousness of the determination.³⁷⁰ The choice of material facts by the judge is critically important. The exact wording of the case opinion cannot always be relied upon to determine the judge's choice because judges do not, as a norm, list the facts they deem important.³⁷¹ Here the court's reasoning may be of great use in determining which of the facts are material.³⁷²

The jurist should begin with a presumption that all facts are material, except for facts of "person, time, place, kind, and amount," which should be presumed to be immaterial.³⁷³ In addition, those facts stated by the court to be immaterial and those facts treated impliedly by the court as immaterial must also be considered as such.³⁷⁴ Evidence of such implication may be found for example when, after a broad recitation of the facts of the case, the court proceeds to select and state a smaller set of facts from which the rule of law follows.³⁷⁵ Those facts unmentioned after such selection may be presumed to be immaterial.³⁷⁶ Moreover, a court may not emphasize a particular fact even though it considers it material.³⁷⁷ Failing to recognize this would likely result in an improper ascertainment of the *ratio decidendi* and thus a misapplication of the precedents as well. It is hoped that higher courts upon appeal or later decisions will discover such an error.³⁷⁸ Next, the jurist must consider those facts as material which the court specifically states are such. This is not to say that the court will actually list a set of facts

³⁶⁹ See *id.* at 168.

³⁷⁰ See *id.* at 169.

³⁷¹ See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 53-54.

³⁷² See Goodhart, *supra* note 348, at 170-1.

³⁷³ *Id.* at 169.

³⁷⁴ See *id.* at 174-5.

³⁷⁵ See *id.* at 173.

³⁷⁶ See *id.* at 175.

³⁷⁷ See Goodhart, *supra* note 348, at 177.

³⁷⁸ See *supra* notes 354-363 and accompanying text.

labeling or referring to them in anyway as material.³⁷⁹ Rather, the court often states some number of facts and conditions, and then states the rule of law in a manner demonstrating causality from the former to the latter thereby indicating the *ratio decidendi*. For example, in *Heaven v. Pender*,³⁸⁰ the court wrote:

. . . whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.³⁸¹

In this portion of its case opinion, the court states a set of facts, after having been abstracted to generalities, and conditions and then concludes with its statement of the rule of law.

With regard to those instances in which courts have inconsistently interpreted a particular precedent because of a number of different opinions as to what constitute its material facts, Goodhart states that the “principle of the case is limited to the sum of all the facts held to be material by the various judges.”³⁸² For instance, consider a case involving facts X, Y, and Z. Fact X is deemed material by a judge in his reading of that case, and another judge deems Y material, and yet another judge finds fact Z material. In such a case, all three facts must be material to the holding of the case.³⁸³ However, if two judges considered facts X to be material and a third did not, then only fact X is to be considered material. The case would become a precedent on this basis.³⁸⁴ If a court were to determine facts Y and Z to be important and exclude X as unimportant, the following principles would follow: (1) In any future case involving facts X, Y, and Z, the same ruling of the original case must be applied, and (2) In any future case in which facts Y and Z exist, the same ruling must also be applied assuming the absence of any

³⁷⁹ See Goodhart, *supra* note 348, at 177-78.

³⁸⁰ 11 Q.B.D. 503 (1883).

³⁸¹ Goodhart, *supra* note 348, at 178 (quoting 11 Q.B.D. at 509).

³⁸² *Id.* at 179.

³⁸³ See *id.*

³⁸⁴ See *id.*

other important facts which might alter the factual situation in any significant manner.³⁸⁵ The absence of fact X in the second principle is acceptable, for the fact, according to the court, is immaterial.

Once the material facts are determined, the jurist must abstract them into generalities.³⁸⁶ For instance, a fact in a case such as the "failure to give an attorney an opportunity to be heard" could be abstracted as an "error."³⁸⁷ Another example is the abstraction of "disbarment of an attorney" as "judicial action."³⁸⁸ Once these such generalities are constructed, they are then blended into legal categorizations so that they have the relevant characteristics of law.³⁸⁹ Such legal categorizations include tort or contract suit.

A lengthy debate takes place in the *Modern Law Review* in which Stone criticizes Goodhart's methodology.³⁹⁰ The essence of Stone's argument is that Goodhart's methodology is prescriptive rather than descriptive.³⁹¹ Stone asserted that every case opinion implicitly contains a finite number of *ratio decidendi*.³⁹² From these, the judge must determine the "appropriate level of generality" with which the *ratio decidendi* can be stated in light of current exigencies, such as public policy, justice, expediency, or ethics.³⁹³ This holding would then be applied to the case before the court. The material facts do not, Stone continued, control the court's decision of the case before it.³⁹⁴ Rather, the court ought to be led to its decision by "the analogical relevance

³⁸⁵ See *id.*

³⁸⁶ See Cappalli, *AMERICAN COMMON LAW*, *supra* note 21, at 54. Stone, *The Ratio of the Ratio Decidendi*, 22 *MOD. L. REV.* 597 (1959). See J. Farrar, *INTRODUCTION TO LEGAL METHOD* 69-71 (1977).

³⁸⁷ Cappalli, *AMERICAN COMMON LAW*, *supra* note 21, at 54.

³⁸⁸ *Id.*

³⁸⁹ See *id.*

³⁹⁰ See *eg.*, Goodhart, *The Ratio Decidendi of a Case*, 22 *MOD. L. REV.* 117 (1959); Montrose, *The Ratio Decidendi of a Case*, 20 *MOD. L. REV.* 587 (1957); Montrose, *Ratio Decidendi and the house of Lords*, 20 *MOD. L. REV.* 124 (1957); Simpson, *The Ratio Decidendi of a Case*, 20 *MOD. L. REV.* 413 (1957); Simpson, *Ratio Decidendi of a Case*, 21 *MOD. L. REV.* 155 (1958).

³⁹¹ See Stone, *The Ratio of the Ratio Decidendi*, *supra* note 386, at 597.

³⁹² See *id.* at 618.

³⁹³ *Id.*

³⁹⁴ See *id.* at 604-05.

of the prior holding to the later case”]; such an analogy requires “the later court to choose between possibilities presented by the earlier case.”³⁹⁵ Stone writes:

In short a “rule” or “principle” as it emerges from a precedent case is subject in its further elaboration to a continual review, in the light of analogies and differences, not merely in the logical relations between fact situations, and the problems springing from these; but also in the light of the import of these analogies and differences for what is thought by the later court to yield a tolerably acceptable result in terms of “policy,” “ethics,” “justice,” “expediency” or whatever other norm of desirability the law may be thought to subserv. Not ineluctable logic, but a composite of the logical relations seen between logical propositions, of observation of facts and consequences, and of value-judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which “the rule of *stare decises*” confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.³⁹⁶

Stone thus argues, like Goodhart does, for a system not based upon fixed but of general rules and principles for the determination of the *ratio decidendi*.³⁹⁷ Such, it is believed, promotes flexibility in the law.³⁹⁸

Upon determining the holding(s) of the prior case law, the jurist's duty is to apply that law to the case before him. It should be mentioned that in many instances, a court will simply state, 'We hold' or use other similar language, in which case determining the holding involves far less thought and effort on the part of the jurist. In other, and arguably more significant instances, the jurist will have to interpret and extract the holding from the court opinion. This is a deductive process in which the facts are “subsume[d]” under the law.³⁹⁹ This process of subsuming is termed a legal syllogism.⁴⁰⁰ The jurist must, in short, determine whether specific case types fit

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 618.

³⁹⁷ See Hallaq, LEGAL REASONING, *supra* note 352, at 88 n.30.

³⁹⁸ See Cappalli, POINT OF DECISION, *supra* note 366, at 99.

³⁹⁹ Cardozo, NATURE OF THE JUDICIAL PROCESS 47 (1921).

⁴⁰⁰ Burton, LAW AND LEGAL REASONING, 68-77 (1985). Dennis Lloyd, *Reason and Logic in the Common Law*, 64 L.Q. REV. 468, 480 (1948).

into generalized rules of law.⁴⁰¹ Inherent in this process is at least some ambiguity, for “classification and categorization is a human linguistic operation.”⁴⁰² Dickinson explains this concept:

A word to be useful as a medium of communication will ordinarily cover so many somewhat different units of experience that inevitably it is at times more deeply shaded by some of these and at other times by others. A double element of uncertainty thus infects practically all verbal discourse; on the one hand the uncertainty due to differences between the thought-units themselves which are identified by having the same word applied to them, and on the other the uncertainty due to the different elements introduced by differences in the meaning of the same word when used at different times.⁴⁰³

In the choice of words, one must take account of, or at least recognize, the differences in connotations, implications, viewpoints, shades of meaning, and social context all of which contribute to the meaning of language.⁴⁰⁴ There are two lines of thought which seek to avoid, or at least reduce, the difficulties associated with the approximate character of thought units and the words used to express them.⁴⁰⁵ The first, labeled the method of mathematics, seeks to identify units by drawing attention to simple and shallow units which might replicate themselves indefinitely in human experience. Such units may be properly represented by letters or numbers and thus “escape the connotative ambiguity of words encrusted with the meanings of life.”⁴⁰⁶ The second method is that of logic or rhetoric, and it seeks to establish stability and clarity by introducing “identity into words themselves by a process of rigorous definition.”⁴⁰⁷ Dickinson seems to indicate that this cannot be done in an absolute manner, but the stability and clarity

⁴⁰¹ See John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052, 1058-9 (1931) [hereinafter APPLICATION AND ELABORATION].

⁴⁰²Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 55-56. Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1067-8.

⁴⁰³Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1067.

⁴⁰⁴See e.g., ELIZABETH MENSCH, THE HISTORY OF MAINSTREAM LEGAL THOUGHT IN THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13 (D. Kairys, ed., 1990).

⁴⁰⁵ See Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1068.

⁴⁰⁶*Id.* at 1069.

⁴⁰⁷*Id.*

sought can, however, be approximated.⁴⁰⁸ For instance, humans have through the identification of common element(s) of things (or units) grouped them together on the basis of that commonality. Some groupings, such as those of natural science, are based upon highly specific and narrow differentiations while others are of varying degrees of vagueness.⁴⁰⁹

An excellent and perhaps somewhat colorful example of the problems of ambiguity in categorization is provided by Cappalli. The rule of law is that “no motor vehicles shall enter the park.”⁴¹⁰ The question is whether “a toy plane motored by a rubber-band” is prohibited. The point of the example is to show that certain things clearly belong to a category but certain other things, such as the rubber-band motored toy plane, do not fit so easily and neatly into a category. This is precisely the point of ambiguity of which Dickinson writes. The ambiguity exists, at least in part, because the rubber-band motored toy plane is technically a motored vehicle, but in light of the law’s purpose, it seems inconsistent, if not slightly absurd, to include the toy plane in this category.⁴¹¹

The words employed by the lawyer in constructing the holding are especially useful for adversarial purposes. Lawyers may word the holding broadly or narrowly in order to serve their particular client’s purposes and needs.⁴¹² The judge, it is hoped, will realize such a biased choice of wording, and as a supposed impartial party, construct the *ratio decidendi* of the precedents objectively and then draft his opinion properly.⁴¹³

The problem of interpreting and applying a rule of law then involves a determination of the focus and scope of the rule. The problem itself will vary depending upon the nature of the rule and the words by which the rule is expressed and the words by which the fact sought to be subsumed is labeled.⁴¹⁴ Many rules of law, due to their high degree of specificity, are

⁴⁰⁸ See *id.*

⁴⁰⁹ See *id.* at 1070-1.

⁴¹⁰ Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 56.

⁴¹¹ See *supra* note 393 and accompanying text.

⁴¹² See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 55.

⁴¹³ See *id.* at 55.

⁴¹⁴ See Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1078.

determinate or may be applied by the jurist to the facts with relative ease.⁴¹⁵ For example, a rule of law demanding a certain number of witnesses and a rule of law demanding that there be a written instrument as evidence of a contract are both sufficiently certain.⁴¹⁶ Such highly specific rules are advantageous given the certainty and clarity with which they are articulated and applied. These specific rules, moreover, are said to have developed over time from principles of generality in what some consider a process of advancement.⁴¹⁷

The process of specification itself depends in large part upon identifying and isolating the common element or feature, which underlies the generalization.⁴¹⁸ In determining to which of a number of factual scenarios a general principle applies to, the jurist must determine an element common to all these scenarios.⁴¹⁹ This is quite impractical given the number of hypothetical situations which might occur to the mind when pondering a generalization.⁴²⁰ In addition, the hypothetical factual situations will often, though not always, vary from mind to mind.

Another problem that arises in the use of general principles comes about when the principles of law are themselves composed of general terms.⁴²¹ For instance, consideration is necessary for a valid contract. To determine consideration, it is often said that detriment must be suffered, but answers to the question of what constitutes detriment point to the ambiguity of the concept of detriment. Dickinson asks, "Is it 'detriment,' for example, for a promisee to give up nothing more than a power to make the promisor sue him on a pre-existing obligation? Certainly he gives up something, but is it something which is a 'detriment' for him to give up?"⁴²² In order to solve this ambiguity, some have suggested that the purpose of the law is secured with the application of the law.⁴²³ The purpose of common law rulings though are not constant, and are

⁴¹⁵ *See id.*

⁴¹⁶ *See id.* at 1079.

⁴¹⁷ *See id.*

⁴¹⁸ *See* Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 15.

⁴¹⁹ *See* Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1085-86.

⁴²⁰ *See id.*

⁴²¹ *See id.* at 1086.

⁴²² *Id.*

⁴²³ *See* Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 56.

broadly and generally articulated.⁴²⁴ Ultimately, however, this ambiguity shall be decided upon by a judge whose decision shall depend heavily upon his discretion and judgments of fact and of value.⁴²⁵

Discretion and judgment are of the utmost importance in the interpretation of Anglo-American Common Law. The exact words used by the court are important but are not law; they are only important insofar as they express the court's opinion and ideas.⁴²⁶ Later courts and jurists are not bound by the words per se but rather by the concept to which they point, for the words represent an “approximation of the rule.”⁴²⁷

Statutory law, in contrast, demands adherence to its precise language.⁴²⁸ Grammar and punctuation in addition to each word are considered as law. The reason given for such strict adherence is that statutes are enacted.⁴²⁹ Case law, on the other hand, is not enacted; rather, as stated above, it is an approximation of the rule within the precedent.⁴³⁰ Furthermore, the Legislature has contemplated each and every word, letter, and symbol it uses so as to capture the situations and cases it seeks to cover.⁴³¹

Most often, more than a single case exists standing as the law governing the case at hand. In this case, the jurist must examine all prior case law in order to understand the relevant law and determine the *ratio decidendi* of each case. If there is case law on point, the jurist's task is eased. If, however, there is no case law on point, the jurist must extend the law by applying analogical

⁴²⁴ See Cappalli, POINT OF DECISION, *supra* note 366, at 100-02.

⁴²⁵ See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 56-7. Dickinson, APPLICATION AND ELABORATION, *supra* note 401, at 1092-3. See Jerome Frank, *Law and the Modern Mind*, in AMERICAN LEGAL REALISM 205 (William Fisher et. al eds. 1993).

⁴²⁶ See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 19-20, 57.

⁴²⁷ *Id.* at 22, 57 (quoting Schauer, PLAYING BY THE RULES 177 (1991)).

⁴²⁸ See *id.* at 48.

⁴²⁹ See *id.* at 57.

⁴³⁰ See *id.* at 48.

⁴³¹ Arguably, a comparison with statutory interpretation and perhaps constitutional law would be more appropriate than the common law because such interpretive methodologies deal with “fixed” text. Such a comparison, however, falls outside the scope of this article. For a further discussion on statutory interpretation, see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950); Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE WESTERN L. REV. 1378 (1986); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, WISCONSIN L. REV. 1179 (1990).

reasoning.⁴³² Generally, the synthesis of large numbers of cases is a complex and sophisticated art, though in certain instances, the vast numbers of precedents can be easily managed because they have been decided in an orderly and linear manner.⁴³³ More difficult are the times in which the various rulings seem to result, or even do in fact result, in disparate consequences.⁴³⁴

Ambiguity is dealt with by limiting the rule of a case to the factual setting of the case.⁴³⁵ The factual setting narrows and specifies the scope of applicability of the rule.⁴³⁶ The focus of a rule is maintained through the force of precedent and *stare decisis*. At the same time, the generality of a rule of law is maintained through the process of abstraction--the inherent problems of which have been previously introduced.⁴³⁷ Generalization and the resort to maintaining the purpose or policy consideration underlying a ruling allow for flexibility and the extension of the ruling to changed circumstances.⁴³⁸ It should be noted that change in the common law is infrequent “mostly because legal change is slow-paced and incremental”; thus, the Common Law is stable and predictable.⁴³⁹

Over time, the number of decisions expounding a rule will increase, and through this increase the rationalizations and purposes of rulings become clarified.⁴⁴⁰ Therefore, the ruling itself is further clarified. This increase, furthermore, will contribute to the “correctness” of the ruling as it is tested in a variety of factual settings and by a number of courts. The common law through the “multiplicity of well-reasoned precedents”, gradually approaches predictability and certainty, two characteristics highly sought after by its jurists.⁴⁴¹

These methods of legal reasoning are designed to assure an accurate determination of the *ratio decidendi*. Jurists of the Anglo-American Common Law system simply do not seem to

⁴³² Cappalli, POINT OF DECISION, *supra* note 366, at 100-02.

⁴³³ See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 59.

⁴³⁴ See *id.* at 59 n.149.

⁴³⁵ See *id.* at 24-25, 31-34.

⁴³⁶ See *id.*

⁴³⁷ See *supra* notes 386-99 and 403-09 and accompanying text.

⁴³⁸ See Cappalli, POINT OF DECISION, *supra* note 366, at 101-02.

⁴³⁹ *Id.* at 28.

⁴⁴⁰ See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 15.

⁴⁴¹ Stone, COMMON LAW IN THE U.S. 6-7 (1936).

have been so concerned with seeking as definitive a determination as is rationally possible. Rather, their concern seems to be directed towards promoting flexibility, which is without doubt promoted by the methods of determining the *ratio decidendi*. The methods though also allow for too much uncertainty, ambiguity, and improper subjectivity each of which could be reduced significantly by a more formalized and conditioned process of determining the *ratio decidendi*.

In response, it may be contended that such a process eliminates, or at least greatly lessens the ability of the Common law to be flexible and adaptable. However, the suggestions for a more conditioned and formalized a process, discussed in greater detail in Part IV, must be closely linked with the objectives and rationales of the law in general and in specific. Such a link, which must be fully described and articulated, would continue to allow for adaptability in the Common Law.

III. Codification: A Common Contemporary Challenge

Interestingly, both the Islamic and the Anglo-American Common Law systems face contemporary challenges of codification. It has been contended that the Anglo-American Common Law system ought to be codified in order to facilitate the management of what has grown into a massive body of law.⁴⁴² Anglo-American lawyers have thus far in general resisted successfully such desires.⁴⁴³ The resistance to such a codification is best expressed by Stone:

By the very process of codification we would destroy those elements in the common law system which have given it its vitality and its great practical utility; viz., the power of the judge to create law as it arises and the consequent capacity of the law itself to adapt itself to actual situations by the elaboration of minute and precise rules of action.⁴⁴⁴

As briefly stated before, there has been, recently, an increased focus by Muslims on the establishment of an Islamic state and the enforcement of the Islamic Law comprehensively.⁴⁴⁵

⁴⁴² See Cappalli, AMERICAN COMMON LAW, *supra* note 21, at 62.

⁴⁴³ See *id.*

⁴⁴⁴ *Id.* at 62 (quoting Harlan Fiske Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319 (1923), *reprinted in* ESSAYS IN JURISPRUDNCE AND THE COMMON LAW 139 (Arthur Goodhart, ed. 1931)).

The aim behind the trend towards codification in the Muslim world, which has been at least partially realized, is to overcome the “unwieldiness and ambiguity of classical Islamic law by reducing the multitude of authoritative legal interpretations to a single standardized code.”⁴⁴⁶ There are a variety of factors contributing towards codification which include colonialism and secularism.⁴⁴⁷

This solution of codifying Islamic law, states Professor Joseph Schacht, ignores the fact that “Islamic law being a doctrine and a method rather than a code. . .is by its nature incompatible with being codified, and every codification must subtly distort it.”⁴⁴⁸ Ann Mayer stated that there is considerable support amongst Muslims for codification; she suggests that this is because they are either ignorant of certain aspects of Islamic law or are willing to forego these particular characteristics.⁴⁴⁹ Another important consideration pointed out by Jackson is that in codifying Islamic law, the Muslim jurists' authority is, for the most, replaced by the state, and Islamic law, it must be mentioned, is a jurist's law.⁴⁵⁰ In addition, there is the tension and separation between religion and politics, which has existed for most of Muslim history despite the theoretical unification of the temporal and spiritual in Islam.⁴⁵¹

IV. A Comparative Analysis

Arguing for the adoption of certain aspects of a legal system by another involves tremendous complexities. These complexities are especially pronounced when the two legal systems are so distinct in nature and philosophy as the Anglo-American Common Law and the

⁴⁴⁵ See Jackson, *ISLAMIC LAW*, *supra* note 3, at xxxvi-xxxviii (outlining the dominant approaches to the study of constitutional thought in medieval Islam). *Id.*

⁴⁴⁶ *Id.* at xvii. The most famous attempt is the Ottoman Majallah of 1877, which codified law from the Hanafi school. Ann Meyer, *The Shari'ah: A Methodology or Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE: STUDIES IN HONOR OF FARHAT ZIADEH* 177, 181 (Nicholas Heer ed., 1990).

⁴⁴⁷ See Mayer, *supra* note 446, at 182-83.

⁴⁴⁸ Schacht, *Problems of Modern Islamic Legislation*, 12 *STUDIA ISLAMICA* 108 (1960).

⁴⁴⁹ See Mayer, *supra* note 446, at 178.

⁴⁵⁰ See Jackson, *ISLAMIC LAW*, *supra* note 3, at xvii.

Islamic legal system. Law is not only a body of rules; rather, it is an essential aspect of a whole civilization integrated into the various institutions of society, and it is a reflection, if not a direct outgrowth, of that civilization's beliefs and values. For this reason, borrowing from another legal system will invariably involve the adoption of sources of law, beliefs, and values that may be alien to the borrowing system.

In developing their methodologies of legal reasoning, jurists of the Anglo-American Common Law and Islamic legal system responded to a variety of factors. Many of the differing concerns to which they respond are due to the contradictory nature of the sources and the differing philosophies of the two legal systems. One may argue though that given the two systems under comparison this particular difference is to be expected and perhaps even assumed. More importantly, for the purposes of this discussion, is the jurists' recognition of and shared concern for the uncertainties and challenges involved in linguistic and textual interpretation in *ratione*.

The methods of legal reasoning developed by Muslim jurists to ascertain the *'illah* are far more developed, detailed, and systematic than the methods developed by the Anglo-American Common Law to determine the *ratio decidendi*. One might even state that the manner in which the *'illah* is determined is seemingly quantifiable. In order to increase the probability with which Muslim jurists could properly and correctly determine the *'illah*, they imposed a number of conditions upon the feature under examination for the *'illah*.⁴⁵² For these same reasons, jurists also imposed a variety of conditions upon the other three elements of *qiyas*.⁴⁵³ These conditions represent an excellent and highly successful attempt to approximate certainty, to the greatest

⁴⁵¹ See e.g., Seyyid Hoseein Nasr, *Spiritual and Temporal Authority in Islam*, in ISLAMIC STUDIES: ESSAYS ON LAW AND SOCIETY, THE SCIENCES, AND PHILOSOPHY AND SUFISM 6 (1967).

⁴⁵² See *supra* notes 172-263 and accompanying text.

extent rationally possible, in the ascertainment of the *'illah*. The conditions also serve to significantly reduce, if not entirely eliminate, arbitrariness, indeterminacy, and improperly subjective determinations of the *'illah*. These conditions, moreover, assist in approximating the correctness of the *'illah*. Furthermore, the conditions demand that the *'illah* be articulated with tremendous precision.

In determining the *'illah* and examining whether or not the applicability of a rule of law should continue, the rationales of the Lawgiver and the underlying objectives of the law, which are held constant, are closely examined and protected. In this manner, the ascertainment of the *'illah* is made an even more certain and precise process. The relationship and “interplay” among the *'illah*, the *hikam*, and the *maqasid al-Shari'ah* are fully articulated and described so as to promote certainty and accuracy in determining the *'illah*, the law, and its applicability.⁴⁵⁴ Securing the purposes and objectives of the legal system as a whole is also greatly promoted in this manner.

Jurists of the Anglo-American Common Law deal with issues of ambiguity and uncertainty in the English language in general, and in the language of case opinions used by judges to express their reasoning and conclusion. The methods of legal reasoning developed by the Anglo-American system seek to reduce the uncertainties and inaccuracies involved in determining the *ratio decidendi* in order to assure a proper and correct determination. However, the Common Law's legal reasoning does not succeed in approaching certainty as nearly as is rationally possible.

The first step in ascertaining the *ratio decidendi* of a precedent requires a determination of its material facts. This step, discussed above, is often a highly difficult and somewhat

⁴⁵³ See *supra* notes 142-171 and accompanying text.

ambiguous process. Both uncertainty and subjectivity are somewhat reduced by the use of the court's reasoning. But because judges, in their case opinions, do not, as a norm, explicitly state which facts they have deemed material, there remains much uncertainty, ambiguity and imprecision in the determination of which facts are material. Furthermore, the process of determining the *ratio decidendi* allow for the use of facts to promote a certain end; in this respect, the process contains, or at least has the potential for, much improper subjectivity. The material facts, once selected, are then abstracted into generalities in a process that very often involves, in part because of the challenges and uncertainties inherent in language, much imprecision and inaccuracy. These linguistic challenges are not fully and sufficiently dealt with by Common Law jurists. The process of abstraction, as it stands, also allows for much improper subjectivity. The imprecision involved in abstraction is somewhat reduced though by linking this process with the purposes of the rule of law in question.

Jurists of the Common Law contend that as the number of decisions expounding a rule of law increase, the *ratio decidendi* of a case increases in certainty.⁴⁵⁵ Moreover, the *ratio decidendi* are further pondered upon and examined in light of policy considerations and factual settings; this provides the opportunity for the *ratio decidendi* to be clarified and made more precise. Jurists are correct in stating that what constitutes the *ratio decidendi* becomes more certain, but why it is the *ratio decidendi* and the process by which it was and will be determined do not themselves become more certain or precise by the amassing of precedents. Whether this entails any form of injustice to the first parties, assuming that the *ratio decidendi* was imprecisely and therefore incorrectly stated in the first instance, is a possibility that Anglo-American jurists ought to consider. In addition, it is neither clear at what point in the amassing of precedents

⁴⁵⁴ See *supra* note 68.

certainty is approximated nor at what level of probability the *ratio decidendi* has been properly determined and precisely articulated.

Perhaps jurists of the Anglo-American Common Law ought to develop, or at least consider the development of, a coherent and rationalized set of guidelines by which the *ratio decidendi* is determined; these should not necessarily be those of the Muslim system but rather developed with specific reference to the Common Law system. These conditions should be directed at reducing the uncertainty, imprecision, and improper subjectivity with which the materiality of facts is determined and the process in which the material facts are then abstracted into generalities. This would also serve to increase the precision with which the *ratio decidendi* is stated.

In addition, this set of rules and conditions for determining the *ratio decidendi* should be closely connected to the purposes of the law in general and in specific. The use of the purposes and objectives of the law in this process of determination should thus be expanded. The relationship between the *ratio decidendi* and the law, in general and in specific, ought to be described and more fully articulated. In this manner, it is hoped that the uncertainties and imprecision of the methods of determining the *ratio decidendi* as they currently exist may be significantly reduced and that certainty can be more closely approximated.

⁴⁵⁵ See Cappalli, AMERICAN COMMON LAW, *supra* note 22, at 15.