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The Changing Limits of Contingency in the History of Muslim Law

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Abstract

This paper attempts to analyze the relation between law and theology in Islam. It focuses on the acts of worship that constitute a sphere of transcendence, clearly distinguished from legal and social transactions between humans. In this sphere of transcendence believers find a model for embodied normative behavior meant to bring them closer to God. But coming closer to God is not just the function of the cult; it also serves as a model for social and legal behavior. It thus links the cult to the world of inter-human relations. The cult and the links to God that it establishes are integrated into a legal, not a theological framework. The author tries to render this fact comprehensible through references to major Muslims theologians and jurists of the twelfth and early thirteenth centuries who systematically explain the relation between Islamic jurisprudence and theology as a division of labor between a rational reconstruction of God's creation and a revelation-based legal norm derivation. The theoretical framework of this paper is provided by the reflection on the tension between contingent and non-contingent actors and norms.

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I. The Contingency of the Human World

The Qurʾān links the ethical precepts and legal ordinances of Islam to the cosmic dimension of religion.[1] The Muslim *fiqh*, on the other hand, the discipline of Islamic jurisprudence, focuses on the social dimension of religious ethics and law. While certain parts of *fiqh*, such as acts of worship (*ʿibādāt*), are inseparable from reflection on central elements of the cosmic order, such as time and space, they focus on the human interaction with them. *Fiqh* underlines the contingent character of legal norms and human acts, of dissent and uncertainty as factors that enter into human rule making. I will illustrate this assertion through the discussion of the way in which Sunni Muslim jurists treat the integration of cosmic elements, such as time and space, into the legal norms that regulate the cult. I will then show that *fiqh* recognizes contingency on all levels as a basic dimension of human and social life, while upholding the concept of a non-contingent origin of the contingent legal norms.

II. The Human World's Dependence on the Non-contingent

The Qurʾān describes God as the ruler of Heaven and earth, as "the most holy king,"[2] and the "king of men"[3] who created the universe, rules the cosmos and reveals Himself through the signs of His creation as well as through His word. It constantly refers to the way in which God

determined the universe so as to help human beings to survive and to benefit from it. God's omnipotence decides on human survival. The Qurʾānic verses and the cosmos are "signs of God."[4] God's word helps human beings better to understand the signs of His creation. The Last Judgment that will end human history is embedded in the eschatological vision of the end of the old cosmic order.[5] The ethics of probation and recompense, which gives sense to human life and history, has, in this way, a direct relation to the cosmic order. Human beings are addressed (*mukhāṭabūn*) by God's rules and their response will decide whether they will reach salvation or end in perdition. The eschatological and apocalyptic vision depicted in the Qurʾān shows that the history of probation will end with the old cosmic order and all human beings will be judged for eternity according to their acts during their life.[6] The end of the old cosmic order is thus directly linked, in the Islamic tradition, to the doctrine of bodily resurrection and the end of the contingent world.

But the Day of Judgment is not just a decision on the eternal status of individuals. It also has a collective dimension: from each community (*umma*) God will bring forth a witness for or against them[7] and confront them with the register of their good and bad deeds. The Prophet Muḥammad will be called upon to witness for his own community.[8] Religion is thought of as a world history of different peoples and communities, a universal history of salvation, centered on prophets sent to warn them of the coming Judgment and to show them the way to salvation. Jews and Christians are prominent examples of prophetic guidance[9] and of the dangers that deviance from such guidance will entail. But prophets are not the only guides of communities. Rulers may play an important part in the history of their peoples. Those who follow wicked rulers, such as Pharaoh, go astray. Political and normative institutions that preserve and stabilize the prophets' heritage are, therefore, of the greatest importance for a community's salvation.[10]

III. **The Political Dimension of the *Sharīʿa***

Unlike Christianity, Islam inherited neither a state nor a law. State and Law, therefore, had to be developed by the burgeoning Muslim community. The relation between the political leadership, the law and the religion of Islam had to be worked out in the political process. The first successors of the Prophet Muḥammad as leaders of the Muslim community were chosen according to their religious and political merits and their genealogy. They had to come from the tribe in which the Prophet Muḥammad was born. Their genealogy as Arabs and members of Quraysh was an important part of their qualification for the office of the caliph, the political head of the religious community. Patricia Crone, Martin Hinds, Joseph van Ess and others have, over the last decades, demonstrated that the Muslim community, until the middle of the ninth century, saw the caliphs not only as political, but also as religious leaders. They were called "God's deputies on earth";[11] they claimed to execute God's decrees (Walīd II);[12] they were thought of as assuring the religious guidance of their subjects,[13] to guarantee the salvation of those who followed them,[14] to be legislators,[15] to constitute the "embodied law" (*nomos empsychos*),[16] to be the highest judges[17] and they did, in fact, control the jurisprudence of the judges whom they nominated and to whom they gave instructions concerning the decisions in specific cases.[18] It goes without saying that among scholars and pious people these claims were not always accepted.

The early Abbasid caliphs, from the second half of the eighth century on, attracted to their court some of the most brilliant representatives of the Muʿtazila, a form of rationalist speculative theology that originated in the eighth century, reached the peak of its influence in the ninth and remained a factor of regional influence until well into the fourteenth century. It is this form of theology that—following the traditions of Late Antiquity—rests its ontological assertions on an elaborate cosmology.[19] It attempts an intellectual reconstruction of God's creation in terms of substances and accidents, atoms and bodies that are understood as entities belonging to the contingent world. The analysis of these elements

allowed the theologians to define the way in which the contingent world differs from its creator and, as most of these theologians did not use a concept of natural causality, it helped them to prove that only God can put these elements together and that, on the Day of Resurrection, He can create living bodies from dead remnants and a new earth in order to replace the old one. The same analysis provides the theologians with an ontological grounding for the human being's capacity to act. This type of theology puts the philosophy of nature and the natural sciences of Late Antiquity to use in order to answer theological questions. The result is that the contingent world proves God's existence as the non-contingent being.[20] The cosmic dimension of human existence is at the very core of this theology.

But the Abbasids did not only sponsor theology. Under Hārûn al-Rashīd (786-809), they put into place a special administration of justice directed by the highest *qāḍī* of the empire. This administration controlled the nomination and destitution of the judges in the provinces. Some of the most important Iraqi jurists engaged in this administration from its very beginning.[21] Their integration into the administration of an empire-wide judiciary gave the jurists leverage for the diffusion of their normative systems among the Muslim townspeople in different regions. Through the institution of the empire's judiciary, the jurists were associated to the caliphate and able to use its power to find acceptance for their norms.[22]

In 833, in the aftermath of a long and bitter civil war, the Caliph Maʾmūn tried to renew his alliance with the speculative theologians. The long civil war that started in 809 had turned Baghdad into an unruly metropolis. No caliph had set foot in the city between 813 and 819 and the rise of popular movements and gangs had led the population to organize its own defense under the leadership of men who held the opinion that all Muslims are obliged to "command the good and forbid the evil" and that Muslims do not need Caliphs or other authorities to do so.[23] The caliph feared that religious scholars, such as jurists and traditionists, that is scholars who collect reports on the Prophet's normative practice, would contribute to the city dwellers' ambitious

claims of autonomy. Therefore, Maʾmūn tried to establish his ideological hegemony over the legal scholars, the judiciary and the traditionalists through imposing on them the dogma of the created character of the Qurʾān, a doctrine held by the Muʿtazila and other speculative theologians. This policy was continued from 833-849 by Maʾmūn's successors. It finally failed because it met with stiff resistance among scholars and large parts of the city's population. The failure of this attempt to regain ideological hegemony for the caliphs diminished the political status of speculative theology. The credibility of its claim, that ontology and cosmology are the key to true understanding of the relation between God and his creatures, lost its persuasiveness. Jurists and traditionists gained the high ground.[24] Van Ess, probably the world's best historian of Muslim theology, comments on the outcome of this struggle in the following words:

> Consequently, it was not theology that took the lead of the sciences, as had been the case in medieval Christianity […]. Jurisprudence became the principal discipline […] In Islam, the religious expertise remained in the hands of those who were later called the *ʿulamāʾ*, the members of a class of scholars from bourgeois origins who resolved the daily problems of other bourgeois through their legal counsel and explained the belief to them by means of Qurʾānic exegesis.[25]

IV. **The Jurists (*fuqahāʾ*)**

From that time on the jurists, the traditionalists and, increasingly, also the theologians, saw the caliph as a political leader who defends the religious and the political community against its external and internal enemies, preserves it through the application of the law and the protection of the cult, but they no longer acknowledged him as a religious guide of his subjects (*imām al-hudā*), a vessel of divine knowledge and a guarantee of salvation for the Muslims.[26] From the middle of the ninth century on, the caliphs lost much of their power of political decision making to the

military slaves of their guards; from the beginning of the tenth century on, they were unable to prevent the fragmentation of the empire and to preserve its civil administration. Their main function became a symbolic one: they represented the unity of the Muslim political community and the principle of legitimate authority, based on the genealogy that linked them to the Prophet. Since the ninth century, not only traditionalists and jurists, but increasingly also theologians, had agreed that only the first four successors of the Prophet were Caliphs who exerted the functions of religious guides and lawgivers and that the Umayyad and Abbasid rulers had no claim to be successors of the Prophet in his religious qualities.[27]

According to Patricia Crone, this development led, in the tenth century, to a "distinct secularization of the political order."[28] None of the rulers, be they caliphs, kings or sultans, was able any longer to govern the whole Muslim world. Its political unity was lost. Kings and sultans exerted effective political power but enjoyed legitimacy only insofar as they took an oath of allegiance to the caliphs who, in turn, confirmed their political power. Their rule had no effect on the religious status of their subjects. People no longer followed the religious or legal confession of the Muslim princes who ruled over the region in which they lived. The jurists of the period held that rulers, in principle, are not lawgivers but are obliged to obey the law of Islam, which thus acquired a constitutional quality. In eleventh-century Baghdad, jurists close to the caliph tried to construct the norms for a public law that regulated the relations of authority between the caliphs, the other rulers, the different magistrates and their subjects under Islamic law.[29]

From the ninth century on, traditions from the Prophet were increasingly considered a material source of Muslim law. Shāfiʿī's *Risāla*, written (in its last version) in the early ninth century, is instrumental in this development. It assigns to the Prophet's normative praxis the status of the most authoritative "explanation" of the text of the revelation and puts it on the same rank with the Qurʾān.[30] In the last third of the ninth century, the six canonical collections of traditions recognized as authentic *ḥadīth* by Bukhārī, Muslim, Tirmidhī, Ibn Māja, Nisāʾī, and

Abū Dāwūd bear witness to the growing importance assigned to the transmission of the Prophet's normative praxis for the understanding of Islam in law and exegesis.[31] Roy Mottahedeh has pointed out that, by the eleventh century, the legally relevant reports from the Prophet were already integrated into the voluminous manuals of law that contained the doctrines of the various schools of Sunnī law,[32] Insofar the *fiqh*, the discipline of Muslim jurisprudence, inherited the religious authority of the Prophet's normative practice, the *sunna*. That is, in fact, what eleventh-century jurists taught. The norms developed or acknowledged by the *fiqh* are presented as an interpretation of the revelation and draw their religious authority from the Qurʾān, from the Prophet's normative practice, from the consensus of the jurists, or from the methods of norm derivation from these sources that were developed by the jurists. A famous maxim says: the jurists are the heirs of the Prophet.[33] This means: not the genealogy of Quraysh but the understanding of the norms of religion constitutes the Prophet's religious heritage.

V. The *Fiqh*: An Islamic Jurisprudence

How did jurisprudence, *fiqh*, come to be seen as the representation of the prophetic heritage? What qualified legal norms to be a source of religious identity? Basically, I see four reasons for this development. Firstly, *the law's growing independence from political authorities.* From the tenth century at the latest, and onwards, the political authorities were no longer considered to be lawgivers. *Fiqh*, a word that originally meant the understanding of religious texts and knowledge, denotes, from that moment on, forms of legal knowledge and reasoning and acquires the meaning of "jurisprudence." It denotes the activity of deriving legal norms from revealed texts. When the jurists and the traditionists defended the autonomy of their field against the Caliphs' intervention, their authority as independent representatives of religious knowledge and understanding increased.

Secondly, *the impersonal character of the law*. This suggestion may seem surprising. Nurit Tsafrir has convincingly demonstrated that from the second half of the eighth century on, the Ḥanafī law school was defined as a personal law school, a school that ascribes its doctrine to Abū Ḥanīfa (d. 767).[34] Other schools followed this example. From the end of the ninth century on, the Sunnī law schools are known as Ḥanafī, Mālikī, Shāfiʿī, or Ḥanbalī schools in reference to the major scholars who are treated as if they were the authors of the school doctrines. But that does not mean that the doctrine of a school of law is understood as being restricted to one scholar's teaching. The discussions and conflicts among the scholars of each law school as well as between the scholars of different schools of law are well known and their dissent is accepted. The personal authority of the eponym of the school is invoked to stress the historical continuity of the school's doctrine from its beginnings to its present state. In other words, the authority of the law schools transcends that of the scholars who are referred to as school founders. Its authority is normative authority, based on the doctrine of the school, not on one scholar. In this sense, and in this sense only, does Wael Hallaq's attack on the notion of the personal school makes sense.[35]

Not persons, but norms fulfill the function of religious guidance according to the *fiqh*. The interpretation of these norms is incumbent upon the individuals who apply them. Only if conflicting interpretations of these norms require a decision by a qualified scholar or official, are the norms subject to a judge's verdict or a scholar's opinion. The appropriation and internalization of legal norms by the members of a community or a society allows them to base their behavior on the expectation that everybody will, under defined conditions, choose to act in the specific way that the norm prescribes for such a situation. The norm thus reduces the complexity and contingency of a situation through rendering the act of each participant in it calculable.[36] In other words, the law's impersonal rule enables the members of a society to orient their acts according to common normative standards. The rules of *fiqh* denote the common standard of expected normative behavior. The validity of such a standard can extend over the life of many generations and is,

therefore, superior as a common standard to the orders of a ruler that may lose their validity at his death. The *fiqh*, thus, guarantees the historical continuity of the normative standards and through it, the normative identity of the community. This position was already taken by Shāfiʿī when he underlined that the community is not a physical or social unit, but a normative entity that exists in the rules on which it agrees.[37]

Thirdly, *pace* Joseph Schacht, through its norms*, fiqh distinguishes between fields of social action or spheres of the law.* It creates and enforces distinctions between social sub-systems and draws the limits between them. The *summa divisio* of *fiqh* separates the cult (*ʿibādāt)* from the legal transactions between particulars (*muʿāmalāt*). Within this second field, *fiqh* clearly distinguishes between the social contexts of legal acts. The norms for the exchange of goods and services cannot be applied to the field of family and marriage. The husband cannot sell or lease his wife, in spite of the fact that he owns "the property of the marital bond" (*milk ʿiṣmat al-nikāḥ*). Parties to a trial are not allowed to make donations to the judge, in spite of the fact that in other social contexts to make gifts and donations is a recommended and licit part of social life. Casuistry determines the limits within which a norm applies. The *fiqh* thus construes fields of legal acts, distinguished from each other through specific sets of norms.[38] Together, these different legal spheres form a normative way of life. This way of life is religiously legitimized through the fact that the norms that regulate and reproduce it are derived from the revealed texts by way of interpretation. *Fiqh*—through the normative reproduction of this way of life—depicts the Muslim community as the permanent representative of Islam in history, the historical subject of Islam. This dimension of the religious community can be upheld only if its individual members to whom God's law is addressed (*al-mukhāṭabūn*) respond to its appeal.

Fourthly, *fiqh*, while assigning an important place to the cosmic dimension of religion in the field of the cult (*ʿibādāt*), does not place it in the center of the field of legal transactions between private actors (*muʿāmalāt*). It *focuses on* human acts and their legal and religious

consequences in both acts of worship and legal transactions. It concentrates on the physical and intellectual qualities of human beings that serve as "indications" (*ʿalāmāt*) for their capacity to act. If no proof to the contrary is available, physical puberty (*bulūgh*) is a sign that renders probable the assumption that a person has acquired the reasoning capacity to discern between different acts and calculate the probability of their respective outcomes. Such a person is able to choose (*ikhtiyār*) deliberately between different options. This capacity to discern and to choose between different options is a sufficient condition for the capacity to accept the obligation to perform legal acts in the realm of transactions between human beings. It is also a necessary condition for those acts of worship, such as prayer and fasting, that are considered bodily acts. Choices always presuppose an open horizon of alternatives and an undetermined decision by the actor. The action that results from deliberate choice is contingent in a double sense: (a) its author could have acted differently; and (b) no human being ever fully controls the consequences of her choices. Unforeseeable and often unwanted effects will unavoidably follow.[39] The law thus regulates the legal consequences of contingent acts of individuals who have reached the age of puberty and are considered capable of sound reasoning. Under these two conditions their acts are imputable to them and they are responsible for them. The complex theological discussions about the relation between God's power and knowledge and the human capacity to act play no determining role for the form of the legal norms. In the *fiqh* literature, legal acts that constitute personal obligations always presuppose a responsible person, a rational actor, whose acts are imputable to her or him. Whereas theology—since the tenth century—underlines God's omnipotence, the legal literature highlights the capacity of the rational individual to take full responsibility for his acts. Consequently, irrational actors, such as small children or the mentally ill, are not responsible actors who can be obliged to perform personal legal obligations on their own. They have to be represented by rational actors. This type of representation is unproblematic in transactions between humans, but in the cult it is restricted to two acts of worship, the pilgrimage *(ḥajj)*[40] and alms-tax (*zakāt*).[41] When they come back to their senses, the mentally ill

and the fainting person are obliged to perform the prayer that they missed during their incapacity. In this particular case, Ḥanafī jurists engage in a contradictory debate between adherents of different doctrines, on the determining role of the cosmic causes of prayer and fasting and on the importance of understanding the legal discourse as a condition for the capacity to incur obligations.[42]

VI. **Acts of Worship (*ʿibādāt*)**

VI.1: Deontology and the Muslim cult

The doctrinal conflicts within the Hanafī school on the role of cosmic causes for the cultic obligations of the fainting person is important for the understanding of the role that references to cosmic causes of legal norms play in the jurists' regulation of cultic obligations. Cultic acts are considered legal obligations in Muslim *fiqh*. In order to be obliged to perform valid cultic acts, a person has to have attained the age of puberty and the capacity of sound reasoning. In addition, she has to adhere to the religion of Islam. Through this criterion, the cult is characterized as a system of norms that is addressed to Muslims only, a law for the Muslim religious community. Acts of worship constitute an integral part of the law. The "pillars of Islam," that is the five obligatory acts that a Muslim has to fulfill in his service to God, comprise in the first place the testimony of belief (*shahāda)*. This testimony consists of two parts: "I testify that there is no God but God and Muḥammad is his Prophet." The other four cultic obligations are the obligatory prayers (*ṣalāt)*, the alms-tax (*zakāt*), fasting (*ṣawm*) and the pilgrimage (*ḥajj*). Every law book invariably opens with chapters on ritual purity (*ṭahāra*), seen by most Sunnī law schools—with the exception of the Ḥanafīs—[43] as an obligatory act of worship that requires a declaration of intent (*niyya*).

The history of the Muslim cult has not been a major focus of Occidental research. It does not diminish the important contributions of Wensinck[44] and Klaus Lech[45] to underline that a path-breaking change in outlook has been produced in the works of Zeev Maghen[46] and Marion Katz[47] in the

1990s. The difference between their analysis of ritual purity as a universal, non-exclusive quality shared by all human beings irrespective of religion, and the perspective outlined by, for example, Bousquet, in his article on the cultic obligations (*ʿibādāt*) of Muslims for the second edition of the *Encyclopedia of Islam* (1971), is important.

To better understand the difference between an approach that underlines the universal character of the Muslim cult in its ritual of purity and Bousquet's denial of the quality of the Muslim worship as a cult, it is necessary to quote and discuss Bousquet in some detail. Here is what Bousquet has to say:

> If we translate *ʿibādāt* as 'cult' we are committing something of a theoretical error […] for it has quite correctly been said, that, strictly speaking, Islam knows no more of a cult, properly speaking than […] it does of law; nor, we should add, of ethics. *Fiqh* is, in fact, a deontology (the statement of the whole corpus of duties, of acts whether obligatory, forbidden, or recommended, etc.), which is imposed upon man. Therefore, what we call 'cult' is a part of the duties prescribed by Allāh and formulated in minute detail by learned writers in the works of *fiqh*, whereas in other religions the object of the cult is to bring the believer closer to the divine and in contact with it; it is not concerned solely, or even principally, with carrying out the divine will.[48]

This is an excellent example of how not to work in the field of Islamic Studies. One theoretical category, *deontology*, suffices to deny the status of cult to the Islamic acts of worship, the status of law to the *fiqh,* and the quality of ethics to *akhlāq.* Bousquet does not elaborate on the question why deontology should be irreconcilable with law, cult, and ethics and why, for example, the divine command theory is not considered to have the same effect on canon law in the European context.[49] He may also have found his statement a bit too bold: he admits, in the same article, that his assertion, while being true in theory, is not borne out by the social practices and psychological states of the believers. In other words,

his theoretical approach is entirely based on his analysis of the forms of the norms that regulate the cult.

Bousquet names two criteria that, according to his approach, distinguish Islamic *ʿibādāt* from the cult of other religions: 1. Other religions are not concerned solely, or even principally, with carrying out the divine will;[50] 2. The cult of other religions serves the purpose of bringing the believer closer to God, whereas, it seems, Islamic *ʿibādāt* are not able to do that because they insist too much on the commands of God.

There is little doubt that *fiqh* construes acts of worship as one-sided obligations.[51] But—much as in other monotheistic religions—the performance of these obligations by the believers is meant "to bring the believers closer to the divine and in contact with it." While the Muslim believers aim at "carrying out the divine will" they strive through their acts of worship to come closer to God and to be rewarded by Him. The jurists explicitly and over centuries teach that human "acts of nearness with God" (*qurba*) and "acts of approaching" (*taqarrub*) God will bring the actors closer to God. This tenet has its origin in the Qurʾān, Sura 9 (*al-Tawba*), verse 99:

> Yet some Arabs of the desert believe in God and the Last Day, and regard what they give as a means of bringing them closer to God (*qurubātin ʿinda llāhi*) and the blessings of the Prophet. This is certainly a means of achieving nearness for them *(qurbatun lahum*) (to God), and God will admit them to His mercy, for God is forgiving and kind.

Legal methodologies (*uṣūl al-fiqh*) and the positive law (*furūʿ al-fiqh*) of all four Sunnī law schools of the eleventh century integrate the discussion of *qurba* and *taqarrub* into the divine command theory of the law. Three of the Sunnī law schools hold that acts which fulfill the criteria of *qurba* and *taqarrub* distinguish those acts of the Prophet that are considered obligatory commands for the believers from other acts of the Prophet.

Al-Bājī (1012-1081), a Mālikī scholar born and educated in al-Andalus, travelled and studied for many years in Iraq and the Hejaz, and then returned to al-Andalus in 1047. After his return he was widely recognized as the leading Mālikī scholar in the methodology of law (*uṣūl al-fiqh*).[52] In his work on the methodology of law he uses the term *qurba* as a category that classifies acts of the Prophet as obligatory commands that the believers have to obey. He divides the Prophet's acts in three classes: (1). The Prophet acting in order to explain polysemous terms and texts of the Qurʾān; (2) The Prophet's acts in his everyday behaviour, such as eating, drinking, sleeping, etc.; (3) The Prophet's acts that teach the believers how to come nearer to God through their own acts, and that have to be regarded as obligatory commands. The acts of classes 2 and 3 are, according to al-Bājī, distinguished from those of class 1, because the Prophet acts in them on his own initiative (*ibtidāʾan*). Bājī holds that class 2 should not be considered as obligatory commands given to the believers, but as permissible acts. He distinguishes them from the acts of class 3 of which he says that they

> cover nearness to God and [acts of] worship (*mā fīhi qurba wa-ʿibāda*). The opinion held by most of our scholars is that these acts are [to be interpreted] as [conveying the sense of] obligation (*fa-lladhī ʿalaihi aktharu aṣḥābinā annahu ʿala l-wujūb*).[53]

He follows this sentence with a long list of jurists who shared his opinion and others who see in these acts recommendations or suspend their judgment on their classification unless they can be interpreted through recourse to clear indicants. He then states his own position:

> I hold that [they are to be interpreted] as [conveying the sense of] obligation unless an indicant points to something else. The establishment of the obligatory character of these acts is due under the aspect of [knowledge] transmitted by scripture (*min jihat al-samʿ*). This is indicated by God's word: 'Follow him, so that you may be rightly guided' (Sura 7, verse 158). And to follow him [means to follow him] in his sayings and his acts.[54]

Al-Bājī thus separates the Prophet's acts as authoritative interpreter of the revelation's polysemous terms and texts from those acts in which the Prophet acts on his own initiative (*ibtidāʾan*). In this last class of acts al-Bājī separates permissible or recommendable acts of everyday life from those that bring closer to God. He understands this last kind of acts as obligatory commands of the Prophet to the believers. This group does not only cover acts of worship. Rather, he distinguishes acts of worship (*ʿibāda*) as one precisely defined group of obligatory acts within a loosely-defined group of acts that bring closer to God (*qurbā*).

Abū Isḥāq Shīrāzī (1003-1083), born in Firuzabad in Iran, where he received his early education, migrated to Iraq in the 1020s, and, from the 1030s on, became the politically most influential leading scholar of the Shāfiʿī school of law of his time.[55] His classification is even more comprehensive than that of al-Bājī. He sums it up as follows:

> Briefly stated, acts have one of two qualities: either they are acts that bring closer to God or they are not (*inna l-afʿāla lā takhlū immā an takūna qurbatan aw laysa bi-qurba)*. [Acts of the Prophet that do not bring closer to God] such as eating, drinking, standing, taking a seat indicate the permissibility of these acts (*fa-huwa yadullu ʿala l-ibāḥa*) because he [i.e. the Prophet] does not affirm the forbidden [act]. If they are acts that bring closer to God, they fall under [one of] three aspects (*lam yakhlu min thalāthat awjuh*).

The three aspects in which Shīrāzī then subdivides the acts that bring closer to God concern the Prophet's authoritative interpretation of the revelation, the Prophet's obedience to a divine command or "that he acts on his own initiative without a cause [that would oblige him to act]." On this group of acts Shāfiʿī jurists hold three dissenting opinions. According to the first opinion, these acts are obligatory unless a clear indicant indicates otherwise. A second opinion holds them to be recommended acts unless otherwise indicated by serious indicants. A third group holds that the decision about their legal effects has to be suspended until a clear indicant for their obligatory or recommended legal effects can be found.[56]

This dissent does not diminish the classificatory aspect of the term *qurba* as a quality that is common to acts that bring the actors closer to God.

Ibn ʿAqīl, the leading Ḥanbalī scholar in Baghdad at the end of the eleventh and the beginning of the twelfth century,[57] discusses the notion of *qurba* and *taqarrub* in the same vein. Much like Shīrāzī, he divides the Prophet's acts in those that have a *qurba*-function and those that do not. Similarly, he subdivides the acts that bring closer to God into three groups: acts in response to God's command, that receive their meaning from the obligatory or recommended character of the command; acts that explain polysemous texts of the revelation and that follow the legal effect of the explained text; and finally, acts in which the Prophet acts on his own (*mubtadiʾan*). He enumerates the same three dissenting opinions about the character of these acts as does Shīrāzī.[58] Ibn ʿAqīl sees the main reason for God's commands in the effort to come closer to God. He states:

> Truly, God [...] only obliges his obligor to perform an act with the purpose that he perform this act in a way that is intended to [serve] the coming closer to Him and the obedience to Him (*inna llāha* [...] *innamā kallafa man kallafahu fiʿlan an yaqaʾa dhālika l-fiʿlu minhu ʿalā wajhi l-taqarrub ilayhi wa l-ṭāʿa lahu*). He obliges him to avoid an act in order that this avoidance may be enacted by him with the purpose of coming closer to God.

In other words, God's commands oblige only people who are in full possession of their mental faculties. God addresses them to legally capacitated persons who understand that they should fulfil God's commands because they aspire to come closer to God through their acts.[59]

In the eleventh and the twelfth centuries, the notion that the aim of legal obligations is to bring believers closer to God was generally accepted by the leading Sunnī jurists. The idea that cultic acts bring the believer closer to God can be used like a formula that is known by all and is uncontested. The Transoxanian jurist Sarakhsī (d. 1090) uses the

introduction to his “Book on Fasting” to define the conditions and the purpose of fasting in the following words:

> According to the Law, it [fasting] is a term for a specific form of abstention, the refraining from the satisfaction of the two desires, the desire of the stomach and the desire of sex, by a specific person who has to be Muslim, pure from menstruation and bleedings, at a specific time, from the breaking of dawn until the sunset, in a specific way: it has to be [performed] with the purpose of coming closer to God (*ʿalā qaṣdi l-taqarrub*).[60]

He specifies the purpose of coming closer to God through fasting as follows:

> The coming closer to God (*al-taqarrub*) through fasting [resides in] the effort (*mujāhada*) of the soul and this effort [takes place] under two aspects: the first one is the preventing of the soul from eating at the time of desire and the second one [is] the staying awake when the soul loves to sleep. To this effort belongs the discipline of the tongue and the glorification of the things that God has glorified.[61]

"Coming closer to God" thus implies for Sarakhsī the mental effort to make the right choice and to respect the legal limits within which this choice has to be realized. He underlines this link between *qurba* and human choice:

> In the obligation to fast, the meaning of the performance that brings closer to God (*qurba*) is realized because the [human] servant [of God] retains choice in it (*wa-maʿna l-qurbati fī aṣli l-ṣawmi yataḥaqqaqu li-baqāʾi l-ikhtiyāri li l-ʿabd fīh*). Therefore, it [the *qurba*] is not realized in the way of fasting (*fi l-ṣifa*), because the human being has no choice concerning it (*idh lā ikhtiyāra lahu fīhā*). It is unimaginable that he [the believer who performs the fasting] replace this way of fasting in another way in this time [the month of Ramaḍān].[62]

In other words, human beings have the choice of obeying or not obeying God's command, the choice between obedience and sin, but once they decide to obey, they have to follow the law. But on other occasions, Sarakhsī seems to open the concept of the act that brings closer to God also for non-Muslims.[63] This position is also held by one of the greatest and most respected jurists of the Shāfiʿī school, whose work has been commented on by the jurists of his school over the centuries, Muḥyī al-Dīn ibn Sharaf al-Nawawī (1233-1277). Like Ibn ʿAqīl, Shīrāzī and Bājī before him, he holds that the performance of the act of worship, the cultic act, acquires its meaning and its spiritual rank through the actor's intent to come closer to God. Nawawī quotes approvingly the Khorasanian mystic, theologian and Shāfiʿī jurist, ʿAbd al-Karim Ibn Hawāzin Qushayrī (986-1072),[64] who in his famous *Risāla*, a mystical treatise, defines sincerity of devotion (*ikhlāṣ*) in the following words:

> Sincerity of devotion is to single out purposely the obligee to the [act of] obedience, in such a way that through his [act of] obedience he wants to come closer to God, may He be exalted, to the exclusion of anything else [...] but the coming closer to God, may He be exalted. It is valid to say: sincere devotion (*ikhlāṣ)* purifies the mind *(ʿaql*) from the observation of the creatures, and truthfulness *(ṣidq*) banishes [from it] self-observation.[65]

Nawawī sees the religious and legal importance of the cultic act based on the actor's quest to come closer to God.[66] Like the above-quoted jurists, he distinguishes between acts of obedience (*ṭāʿa*), acts that bring closer to God (*qurba*, *taqarrub*), and acts of worship (*ʿibāda*).[67] An act of worship (*ʿibāda*) is always an act of obedience (*ṭāʿa*) that brings closer to God (*qurba*). An act that brings closer to God (*qurba*) does not necessarily have to be an act of worship. An act of obedience (*ṭāʿa*) indicates that the actor respects the law, but its validity does not depend on the actor's knowing that the purpose of his act is to approach God. Nawawī uses this terminology to explain why non-Muslims cannot perform valid acts of Islamic worship, but are quite capable of performing acts that may please God. He states:

> A prayer by an original non-Muslim (*kāfir aṣlī*) or an apostate is invalid, and even if he had prayed in the period of his unbelief and had then converted to Islam we do not declare this to be a valid prayer performance. Rather, it [the prayer performance before conversion] would be null and void, without any objection. But if the non-Muslim performs an act that brings closer to God (*wa-idhā faʿala l-kāfiru l-aṣliyyu qurbatan*), the declaration of intent is not a condition for its validity (*lā yashtariṭu l-niyya li-ṣiḥḥatihā)*, such as charitable gifts, hospitality, one-sided obligations for kinsfolk (*ṣilatu l-raḥm*), the emancipation of slaves, loans of fungible things (*qarḍ*) or of specific things for use (*ʿāriyya*), acts of kindness (*minḥa*) and similar acts. If he dies as a non-Muslim (*kāfir*) he will not have any rewards for it in the hereafter, but in this world he will take pleasure in them and he will have a richer and more generous way of living. If he converts to Islam, the correct opinion is that he will be rewarded in the hereafter [for the acts that bring closer to God which he performed before his conversion]. [This opinion is based on] the authentic *ḥadīth* according to which God's Prophet [...] said: 'If the human servant [of God] converts to Islam and lives a good Islam (*fa-ḥasuna islāmuhu*), God will account for him every good act (*ḥasana*) that he advanced'. This means [that all good acts] that he sent ahead (*qaddamahā*) [before his conversion to Islam count with God]. The meaning of 'good Islam' is that he converted to a real Islam without any hypocrisy.[68]

Nawawī distinguishes and separates the sphere of the cult as an exclusively Muslim realm from the sphere of those acts that are pleasant to God, but not cultic acts, and that can also be performed by non-Muslims. The cult distinguishes and separates Muslims and non-Muslims, whereas the acts that are purely pleasant to God but have no cultic status as Muslim acts of worship are accessible to Muslims and non-Muslims. Their ethical and moral status is restricted to the social world, to the relations between human actors. Nawawī seems to refer to a

common ground for social morality when he assigns to all members of society the capacity to perform acts that strengthen its cohesion.

The discussion of the ritual, ethical and legal classification of acts did, of course, not end with the authors of the pre-Mamluk and early Mamluk period. The widely-read seventeenth-century dictionary of legal and theological terms, *al-Kulliyyāt*, authored by Kaffawī (1619-1684), a Ḥanafī jurist who served as *qāḍī* of Istanbul and Jerusalem under the Ottomans, discusses the relationship between acts of worship, acts of obedience, and acts that bring closer to God. Kaffawī states: "The act that constitutes nearness to God (*qurba*) is more specific than the act of obedience (*ṭāʿa*) if one takes into consideration the cognition of the one whose nearness one searches (*maʿrifat al-mutaqarrab ilaihi fīhā)*. The act of worship (*ʿibāda*) is more specific than both [i.e. than the act of coming closer to God and the act of obedience] because in it the intent (*niyya)* [to perform a specific act of worship in order to come closer to God] is taken into account."

The hierarchy established in this sentence is based on the knowledge of God and the intent of coming closer to Him. The most specific notion is that of the act of cult because the intent to perform it is based on a specification of the act to be performed and of the divine authority in whose name it is performed. The second rank is assigned to acts with a *qurba*-function: though the act is not specified, the actor knows that he performs it in order to come closer to God. The act of obedience ranks third. It indicates the willingness to follow the law and the actor loses her/his capacity to perform it through the act of apostasy.[69]

The discussion of the relation between the act of worship, the effort to come closer to God through acts with *qurba*-functions, and the act of obedience is continued in the nineteenth century. Ibn ʿĀbidīn (d. 1836 or 1842), a widely-read and -discussed Damascene jurist of the Ḥanafī school of law, defines *qurba* in the following terms:

> That which brings closer to God (*qurba*) is the performance of an act that is rewarded [by God] after he [the actor] knows to whom

> he draws closer through it (*wa l-qurba fiʿlu mā yuthābu ʿalaihi baʿda maʿrifati man yataqarrabu ilayhi bih)* even if it does not depend on [the declaration of] an intent (*niyya*).[70]

Through this formula Ibn ʿĀbidīn distinguishes pious acts from those ritual acts that require a declaration of intent as a condition for their validity. These are: "the five obligatory prayers, the fasting, the alms-tax, the pilgrimage and everything that depends [for its validity] on [the declaration of] an intent." All these, he says, combine the character of *qurba*, obedience (*ṭāʿa)* and acts of worship (*ʿibādāt*). In addition to this group of acts of worship, Ibn ʿĀbidīn adds as pious acts (*qurba*) "the recitation of the Qurʾān, the [establishment of an] endowment, the emancipation of a slave, alms and similar things for which no declaration of an intent is required. These are acts that bring closer to God and acts of obedience, but not acts of worship." He also distinguishes acts of worship and acts that bring closer to God from "the intellectual investigation (*naẓar)* that leads to the knowledge (*maʿrifa*) of God. This one is an act of obedience *(ṭāʿa*), but neither a *qurba* nor a cultic act." He explains this distinction in the following words: "Intellectual investigation is not a *qurba* for the sole fact that [the person who uses rational examination] does not know whose nearness he is searching, as the knowledge [of this] is acquired [only] after the contemplation and it is no cultic act because it does not require a declaration of intent."[71]

The range of acts to which the notion of *qurba* applies, evidently grows larger over the centuries, in the Shāfiʿī (see above for Nawawī) and Hanafī debates. It is in no way restricted to ritual, nor even to obligations and duties. It is any act that brings the person who performs it closer to God. As far as I can see, Ibn ʿĀbidīn does not draw the conclusion that, centuries before, Nawawī had drawn: that acts which qualify as *qurba* may serve as a form of social morality common to Muslims and non-Muslims. It seems obvious, though, that the list of examples through which Nawawī and Ibn ʿĀbidīn illustrate acts of *qurba* cannot be explained in terms of sheer deontology: they are not duties or obligations,

most of them are acts of charity or acts considered to be useful for members of society (e.g.: loans without interest).

Rather than using a theoretical concept, in this case deontology, in order to establish a negative check-list denying the existence of an Islamic law, Islamic cult, and Islamic ethics, we should focus on the complex character of the notions through which Muslim scholars structure their debates, the way in which the content of these categories develops over the centuries and how the concept of social morality is distinguished from the cult and at the same time related to the aspiration to come closer to God. Nawawī's and Sarakhsī's texts on the acts of *qurba* that are accessible to Muslims and non-Muslims may be keys to a better understanding of the difference between cult and social morality. Ibn ʿĀbidīn's statement that intellectual investigation on how to reach the cognition of God should neither be considered a cultic act nor an act of *qurba*, indicates that this jurist conceives of a space of intellectual activity different from cultic acts and social morality. Deontology, while often being a helpful theoretical tool for the analysis of one-sided obligations is misleading when it is used as an overarching category that denies the existence of law, cult, and ethics in Islam. If used in this way, it renders unthinkable many of the complex structures of Muslim law, ritual, and ethics.[72]

VI.2: Theology and law: a division of labor

In the secondary literature one comes occasionally across the assumption that Islamic law is a theological discipline.[73] In the source texts of Islamic law one can often see how legal scholars take their distance from a theological approach to the law. This distancing does not necessarily imply a rejection of theology. The most systematic analyses of this relation base the division of labor between the two disciplines on the differences in methods and competencies and on the criterion of specialization and expertise.

Some such systematic investigations into the relations between theology and law have been developed by theologians, such as the revered mystic and ethicist Abū Ḥāmid Ghazālī (1058-1111),[74] who was also a respected Shāfiʿī jurist. Others have been developed by jurists specializing in the methodology of law, such as the Ḥanbalī jurist Ibn ʿAqīl (1039-1119).[75] Both kinds of reasoning are integrated into the arguments of Ḥanafī, Shāfiʿī, and Ḥanbalī jurists of the eleventh and early twelfth century, who plead for an exclusion of the theologians from the consensus of the jurists, an infallible source of law according to the Sunnī schools of law.

Ghazālī takes as his point of departure the division of labor between the disciplines in his time. According to him, in the professional language (*ʿurf)* of the scholars the term jurist (*faqīh*):

> is an expression for the knowledge of the legal norms which are established in particular for the acts of the legally capacitated person who is responsible under the law (*mukallaf)*, so that – according to custom – the name of the jurist (*faqīh)* will not be applied to the theologian, nor to the philosopher, grammarian, transmitter of *ḥadīth* and exegete. Rather, it will be used in particular for those scholars who are knowledgeable in the legal norms established for [the regulation] of human acts, such as the obligatory (*wujūb*), the prohibition (*ḥaẓr*), the indifferent (*ibāḥa*), the recommended (*nadb*) and the reprehensible (*karāha*), and the contract's being valid (*ṣaḥīḥ*), or deficient (*fāsid*) or null and void (*bāṭil*) and that the act of worship (*ʿibāda*) [if its execution has been defaulted upon] has to be replaced by an act of substitution (*qaḍāʾ*), or [if the performance has been executed correctly at the prescribed time] that it is an act of valid performance (*adāʾ*) and the like.[76]

He points out the difference between theology, a discipline that analyzes human acts in a cosmic context, and law that regulates human acts in a given social or religious context:

> It is not hidden to anyone that the acts follow rational judgments (anna li l-afʿāli aḥkāman ʿaqliyya)—i.e., perceived by the mind (*mudraka bi l-ʿaql*)—such as [the acts] being accidents, existing on a site [i.e., a body], different from substance [i.e., not being themselves bodies], and that they form events [in space] (*akwān*)[77] while in rest and while in movement, and the like of these. The [scholar] who knows these judgments is called a theologian (*mutakallim*), not a jurist. But the explanation of the legal qualifications of these acts as obligatory, forbidden, reprehensible, and recommended is only entrusted to the jurist.[78]

Ghazālī leaves no doubt that theology, in his judgment, is the most rational and the most universal discipline. He lists a number of disciplines that he identifies with either universal or particular knowledge. Among these disciplines he mentions theology, applied law, the methodology of the law, the discipline that collects, authenticates and classifies the transmissions from the Prophet, and, finally, exegesis (*tafsīr*). He then states:

> The universal discipline (*al-ʿilm al-kullī*)—among the religious disciplines—is theology. The other disciplines such as *fiqh* and its [methodological] foundations, and the transmission from the Prophet, and the exegesis (of revealed texts) are particular, partial [forms of] knowledge: the exegete only looks into the meaning of the Book [i.e. the Qurʾān], in particular; the transmitter of *ḥadīth* only looks into the methods of establishing [the authenticity and the meaning of] the *ḥadīth* in particular; the jurist does not look into anything but the legal qualifications of the acts of the legally capacitated person (*mukallaf*), in particular, and the scholar [in the field of *uṣūl al-fiqh*] (*al-uṣūlī*) only looks into the indicants of the legal norms in particular. It is the theologian (*mutakallim*) who looks into the most general of all things and that is the existent world *(al-mawjūd*). He subdivides the existent first into the eternal *(qadīm*) and that what came into existence in time (*ḥādith*). Then he divides what was created into substance

(*jawhar*) and accident (*ʿaraḍ*). Then he subdivides the accidents into those for which life is a condition, such as knowledge, will, the capacity to act, speech, hearing and vision (*baṣar)* and into those which are independent of life […]. He subdivides the substance into animals, plants, and minerals and explains that their differences arise from [the differences between] the species or the accidents. Then he looks into the eternal and explains that it is not multiple and is not subdivided in the way entities that sprung into existence in time are subdivided, but that it rather is one, and that it is distinguished from entities that sprung into existence in time through qualities which necessarily belong to it and through things that are inconceivable with regard to it and through qualifications (*aḥkām*) that are applicable to it but are neither necessary nor inconceivable. He [the theologian] separates between what is admissible, obligatory, and inconceivable concerning the eternal. Then he explains that the foundational quality of acting (*aṣlu l-fiʿl*) is admissible with regard to [the divine] and that the world is its admissible act and that it [i.e. the divine or the world], because that is admissible, was in need of created entities (*muḥdath*) and that sending the Prophets is among His [God's] admissible acts, that He is capable of it and of establishing their truthfulness through miracles and this [category of] the admissible has in fact become reality. Here, the [rational and authoritative] speech of the theologian breaks off and the [free] use of reason ends. Rather, reason indicates the truthfulness of the Prophet, then it sets itself aside and acknowledges that it received and accepted from the Prophet what he says on God and the last day, [things] that reason cannot by itself comprehend but which it also cannot declare to be inconceivable. The sacred law (*sharʿ*) here brings what reason by itself is unable to comprehend, as reason independently cannot comprehend that obedience [to God] is the cause for happiness in the world to come, and that disobedience is the cause of misery [in the hereafter].[79]

The rational reconstruction of the contingent world's creation by an eternal and not contingent divinity is the task of theology. But once it has performed this task and has proven the existence of the divine, the creation of the world by the divinity, the truthfulness of God's prophets and—consequently—the truthfulness of revelation, its competency and authority ends. God's word and God's will are only partly accessible to human rationality. With regard to them, rational investigation cannot reach conclusive results. When the Prophet and the texts of the revelation request that human beings obey the divine law in the contingent world so as to ensure their happiness in the non-contingent world of the hereafter, the theologians do not find the instruments by which to prove or to disprove this claim in their tool kit. They, therefore, have to submit to the authority of the revealed text, whose authenticity they can prove but for whose interpretation and analysis their methods of the rational reconstruction of the existing world are not appropriate. "The sacred law here brings what reason by itself cannot comprehend." The theologians—like all other believers—have to submit to this authority.

The authority to interpret the Qurʾān, to authenticate the *ḥadīth*, to recognize and develop the norms of the applied law (*furūʿ al-fiqh*) or the rules of the methodology of law (*uṣūl al-fiqh*) falls not to theology, the discipline of the universal, but to the disciplines of the particulars. Exegesis, *ḥadīth,* applied law (*furūʿ al-fiqh*), and legal methodology (*uṣūl al-fiqh*) are each more competent in their own fields than theology. These disciplines depend for the proof of the relation between the contingent world and its non-contingent creator on the results of the theologian's work. But their scholars are not obliged to be theologians, because their disciplines constitute particular fields of knowledge that cannot be governed by the universal discipline of theology.[8o]

In a similar approach the Ḥanbalī jurist Ibn ʿAqīl, the leading scholar of his school at the end of the eleventh and the beginning of the twelfth century, distinguishes the theologian from the jurist in the following words:

> The [term] *fiqh*, when used without further specifications, does not apply to knowledge in general as indicated by the sciences of grammar, medicine, language, geometry and arithmetic. The name 'jurists' (*fuqahāʾ*) does not denote the excellent scholars in these [disciplines] and their disciplines are not called *fiqh*. The same holds true for the scholars in the fundamentals of religion (*al-ʿulamāʾ bi-uṣūl al-dīn*) who are the experts in substances and accidents (*jawāhir wa-aʿrāḍ*), genera and species (*ajnās wa-anwāʿ*), the specific and the differences (*al-khāṣṣa wa l-faṣl*), in the inference from that which is present to that which is absent (*al-istidlāl bi l-shāhid ʿala l-ghaib*). The name of jurists does not apply to them because they have no knowledge in the norms of the sacred law (*li-ʿadmi ʿilmihim bi-aḥkām al-sharʿ*). Their [forms of knowledge] are not called *uṣūl al-fiqh* even if the indicants that we mentioned as fundamental elements are built upon [forms of] knowledge on which also the confirmation of the fundamentals of religion (*uṣūl al-dīn*) is established, such as the world's coming into existence in time (*ḥadath al-ʿālam*), the proof of the creator (*ṣāniʿ*) and that He is one and what one is due to Him and what is admissible [as predicated] on Him and what is not admissible, and the sending of the prophets and their truthfulness and other similar things. But as these [fundamentals] are more specific for the fundamentals of the religion (*uṣūl al-dīn*) one does not, without specification, apply to them what has been constructed from fundamentals that are below them. In the same way one does not say about the [study of] language that it is [a form of] fundamentals of religion (*uṣūl al-dīn*), even though the legal norms are based on linguistic terms.[81]

Based on this kind of reasoning, jurists of all schools defend the autonomy of the disciplines of the law, and other religious disciplines, for the rules and norms of their own field, while recognizing that in the division of labor between theology and the fundamentals of religion on the one hand, and exegesis, *ḥadīth* studies, applied law, and the methodology of law on the other, the second group relies for the relation

between the contingent world and its non-contingent, eternal creator on the results established by the theologians.

The indicants of the law, such as the interpretation of the Qurʾān, the Prophet's normative practice, and the normative application of analogy are, therefore, the domain of the jurists. The jurists' consensus is, according to most legal scholars, the highest source of the law, because it is supposedly infallible and, once established, cannot be abrogated. The question who should participate in the consensus is, therefore, of the utmost importance for the autonomy of the discipline and the forms of reasoning to be applied in it. From the eleventh century on, many legal texts exclude the theologians from the jurists' consensus.

The eleventh-century Transoxanian Ḥanafī jurist Sarakhsī (d. 1090) writes in his work on legal methodology:

> He who is a theologian and does not know *uṣūl al-fiqh* and the legal proofs for [the validity] of the norms, his statement is not taken into account for the consensus. This [statement] is transmitted as the position of Karkhī [d. 340H/951 C.E., a famous Ḥanafī authority in Baghdad, one of the leading Hanafi jurists of the tenth century]. In the same way, the statement of those who are transmitters of *ḥadīth* and who have no insight in the aspects of reasoned opinion (*raʾy*) and the methods of developing legal standards are not taken into account for the consensus (*ijmāʿ*). Because these scholars, as far as the construction of legal norms is concerned, are like ordinary people and one does not take into account the statement of the ordinary man in the consensus of the scholars of the period, because he has no guidance concerning the norm that needs to be recognized. He is, in fact, like a mentally ill person, so that one does not take into account his dissent.[82]

Ibn ʿAqīl develops the same reasoning on a more general basis. He writes:

> As to the consensus: it is the agreement (*ittifāq*) of the jurists of the epoch on the legal qualification of an event. Some say: 'scholars' [instead of jurists]. That is a definition through that what is common [to many types of scholars]. Truly, the agreement of the grammarians, the philologists, and the exegetes is not an authoritative legal argument, even though they are scholars. Their assertions do not count when [the legal qualification of an event] is concerned. What is unanimously agreed upon as consensus is [a statement on a legal qualification] on which their formal legal opinion [i.e., the formal legal opinion of the jurists] concords in clear language. [In case] the scholars disagreed on the formal legal opinion of one of them or on his act, and the others remained silent without disapproving it in spite of the fact that [the information about it] was spread among them, then it is said: this is [still] an authoritative legal argument, but it is not a consensus. It is also said: it is a consensus.[83]

He returns to the same problem in his *Book on Dissent* (*Kitāb al-khilāf*). Here he defends the right of the specialists to decide the cases that fall in their competency:

> One does not take into account the dissent of the scholars of the fundamentals [of religion] and they are the theologians, and not [the dissent] of the transmitters of *ḥadīth*, and the grammarians, the philologists, those who study arithmetic and geometry, as long as they do not belong to those who are knowledgeable in the foundations and the branches of Islamic jurisprudence (*bi-uṣūl al-fiqh wa-furūʿihi*). Aḥmad [Ibn Ḥanbal, d. 855 in Baghdad, eponym of the Ḥanbalī school of law] said: 'The choice [between options] are admissible only for a man who knows the Book and [the Prophet's] normative practice (*sunna*), [if he is] among those who, if a problem is raised before them, look into the matter and compare it to the Book and the [Prophet's] normative practice (*sunna*).' A group of theologians held that no consensus is complete except with their concord (*muwāfaqa*).

Ibn ʿAqīl answers this claim of the theologians by invoking the indicants that the widespread economic and scholarly practice of specialization and division of labor offers to the authority of the specialist in all fields:

> To these [indicants] belongs [the fact] that these [theologians] are ordinary people as far as Islamic jurisprudence (*fiqh*) is concerned, because they do not know the method of independent judgment (*ijtihād*), and [therefore] their dissent is not taken into account, much as that of the ordinary person (*ʿāmmī*).

He explains that this holds true for the relation between specialists and laymen in all scholarly disciplines:

> To these [indicants] belongs [the fact] that we have a consensus that, in each of these sciences, one does not, if a doubt or a dissent occurs within them, turn to anyone except the specialists of that discipline (*ilā ghayri ahlihā*). One does not take into account the statement of a jurist (*faqīh*) who has no knowledge of language, arithmetic, and grammar in anything of this [i.e. concerning these disciplines] (*fī shayʾin min dhālika*). The same holds true for [the specialists] in estimating the value of commodities (*taqwīm al-silaʿ*); concerning the fixing of a fine [for the value of the destruction or unlawful appropriation of a merchandise], one turns to the experts of textiles, and to the merchants in foodstuff for its appraisal and the experts of its value and similar things. There is no reasonable aspect for introducing the scholars of [other] disciplines into the discipline of *fiqh*. One also does not have recourse to jurists in the disciplines of other [scholars] as we have explained.[84]

The general principle of an increasing division of labor in society and scholarship is here mustered to prove the exclusive authority and control of the jurists and their methods over the field of law.[85] Abū Isḥāq Shīrāzī, certainly the most influential Shāfiʿī jurist of the eleventh century, has an

even more radical principle of exclusion, one that is based on a scholarly form of division of labor only. He writes:

> As to those who are not qualified for independent legal reasoning on matters of legal norms, such as the ordinary men, the theologians and the scholars of *uṣūl al-fiqh*, their voice does not count in the consensus. Some of the theologians said: the voice of the ordinary men has to be heard in the consensus. Some of them said: the voice of the theologians and the scholars of the methodology of law has to be heard. This [claim] is incorrect, because the ordinary men do not know the methods of independent legal reasoning, so they are like children. As far as the theologians and the scholars of legal methodology are concerned who do not know all methods [to develop] legal norms, their voice will not be taken into consideration, much as that of the scholars of applied law, if they do not know the methodology of the law (*idhā lam yaʿrifū uṣūla l-fiqh*).[86]

In the eleventh century, jurists of the Ḥanafī and Shafiʿī schools of law, and at least Ibn ʿAqīl among the Ḥanbalīs, do so explicitly when they exclude the theologians—and the traditionists—from those whose opinion counts in the consensus of the jurists, arguing that theologians do not know how to handle the methods of legal norm derivation.

Even those who do not exclude the theologians from the consensus of the community of legal scholars implicitly separate the law from theology in their presentation of the cult. As mentioned before, every law book begins with a presentation of the five pillars of Islam: the testimony of the existence of God, ritual purity, the five obligatory prayers, fasting, the alms-tax, and the pilgrimage. It is striking to see that there is no chapter on the first pillar of Islam, the *shahāda*. To testify that there is no God but God and that Muḥammad is God's prophet is the first and the most fundamental "pillar of Islam" that, according to theological reasoning, not only precedes all other cultic obligations but—as an expression of belief in God and His Prophet—also is, according to all jurists and theologians, the condition for their valid performance. The fact that the

law books do not have the same detailed information on the *shahāda* that they provide on ritual purity, prayer, fasting, alms-tax and pilgrimage seems to be due to the fact that a chapter-long discussion of this testimony would, by necessity, oblige the jurists to discuss the proofs for God's existence and of the role of prophets for belief in Islam. In short, it would involve them in the discussion of theological topics with no direct bearing on the legal consequences of human acts. It seems to me that they wanted to avoid this discussion by excluding the theologians from their consensus. Many jurists consider the belief in God and his Prophet to be the fundamental cultic act because, without it, no performance of the other parts of the cult would be valid. Again, belief—with one single exception—is not the object of a particular chapter in the Sunni law books and it is, as far as I can see, not subject to the kind of legal or ritual norms that regulate all other forms of the ritual. The law concentrates its attention on the human acts and utterances that can be observed and regulated. It discusses the religious meaning, the correct execution and the religious reward of cultic acts, but rarely their theological premises. In fact, it seems that Ghazālī, in his analysis of the relation between theology and law that he puts forward at the very beginning of his *Mustaṣfā*, gives a systematic explanation of the way this question is organized in the books of *fiqh.*

VI.3: The causality of the ritual act: divine commands and cosmic causes

Even the discussion of the practical aspects of ritual shows that the jurists face problems when they try to integrate the cosmic aspects of religion—as developed in theology—into forms of legal reasoning that are based on the free choice of the responsible actor (*ikhtiyār*). That the cult is closely linked to cosmic causes is evident to the jurists: the obligatory prayers have to be performed at certain times of the day, the obligatory fasting has to be performed during the days of the month of Ramaḍān, and pilgrimage can only be performed in the sacred month and in the sacred precinct of Mecca. Many jurists, therefore, latest from the eleventh

century on, hold the opinion that these times and the holy space of Mecca are the apparent causes (*asbāb)* of the believers' legal obligation to perform cultic acts. The obligation to perform cultic acts has thus a double origin: God commands that the cultic act be performed in the prescribed time. All cultic obligations, therefore, are "claims of God" on His human servants. The apparent cosmic causes, the *asbāb*, only serve to signal the time and the space in which these obligations become effective. The believer who understands God's word and the signal set by the cosmic causes can have no doubt concerning that his obligation to fast in Ramaḍān or to pray at the prescribed hours is based on God's commands. If s/he does not execute (*adāʾ*) the obligation in the appropriate time frame, s/he will have to perform a substitute-act (*qaḍāʾ*) at a later date but not obligatorily at the same hour of the day that is prescribed for the correct performance of the original obligation. The believers' ritual obligation is based on their capacity of sound reasoning that enables them to understand God's discourse (*al-khiṭāb*). Insofar it does not pose any problem for *fiqh*'s doctrine of legal capacity that is entirely based on the notion of the rational actor as the subject of legal acts and personal obligations.[87]

Fiqh is a system of legal and ethical rules that regulates not only the relation between God and men but also the relations between men in society. Its notion of legal capacity is based on the concept of the rational actor. Personal obligations to act can only be imposed on a person who understands them and is able to calculate their probable effects. But in the cult a different concept of personal obligation is upheld by at least some of the law schools. It is applied to the mentally ill, the irrational actor par excellence.

During the eighth century, two of the eponyms of the four most important Sunnī schools of law agreed on a doctrine concerning the cultic obligations of the mentally ill. Mālik ibn Anas, the eponym of the Maliki school of law, and Abū Ḥanīfa, to whom the Ḥanafī school of law attributes the origin of its doctrine, hold that the person who is capable of sound reasoning at the beginning of the month of Ramaḍān, and then

falls mentally ill after having declared his intent to fast, is obliged, once he recuperates his mental capacity during the same Ramaḍān, to perform the fasting of all the days during which he remained benighted (but he does not have to perform all the prayers that he missed during his illness). The Ḥanafīs hold that if s/he remains mentally ill during the whole of Ramaḍān, s/he is not obliged to make up for the fasting on which s/he defaulted. If s/he remains mentally ill for many years and then regains control over his/her mental faculties in a month of Ramaḍān, the two doctrines diverge. For the Ḥanafīs, the convalescent has to perform (*adāʾ*) the fasting of the Ramaḍān in which s/he regained her mental health and s/he has to make up (*qaḍāʾ*) for that part of the fasting on which s/he defaulted during the first Ramaḍān in which s/he fell mentally ill. According to Mālik's doctrine, the convalescents have to make up for all the fasting on which they defaulted during their mental illness.[88]

In the ninth century, two other law schools, the Shāfiʿī and the Ḥanbalī, hold that such an obligation to fulfill the missed cultic obligations cannot apply to the mentally ill. They argue that a legal obligation is valid and meaningful only if addressed to an actor who understands it and is able to fulfill it. As the mentally ill person does not fulfill both conditions, he cannot, once he comes back to his senses, be obliged to perform the cultic acts that he missed during his mental illness. It seems that the *fiqh*'s development of its notion of legal capacity during the ninth century led the Shāfiʿīs and the Ḥanbalīs to apply it also to cultic acts.[89] The development of a clearly defined concept of capacity leaves its traces on *fiqh*'s notion of the cultic obligations of the irrational actor.

The debate on the limits of the concept of capacity as a condition for the obligation to perform legally prescribed acts is most complex within the Ḥanafī school of law. One position, Iraqi in background, holds that God, through the cosmic causes of time and space, determines cultic obligations in a way that leaves no choice to human beings. No contradiction between the determining force of the cosmic causes and the doctrine of legal capacity arises in the case of rational legal actors. They have to fulfill the obligations that are caused by time and space and they

understand this obligation and act accordingly. The cultic obligations of the mentally ill are also determined by the cosmic causes, except that the mentally ill will not have to execute their obligations until after they recover their mental capacity. The second position, held by the Transoxanians, and more specifically the Samarqandīs school, holds that a legal obligation makes sense only if its performance can be required and that, therefore, it should not be imposed on someone who does not have the capacity to perform it. According to strict legal methodology, the mentally ill cannot, therefore, be obliged to fulfill duties that were imposed on them while they were unable to understand and to fulfill them. But equity allows imposing such an obligation upon them, because, through the performance of the cultic act, the mentally ill can aspire to God's recompense for their fasting. To assure them this reward is an equitable solution. The retroactive performance of the cultic duty is thus a favor done to the mentally ill. A third opinion, that of the eleventh-century Transoxanian jurist Sarakhsī, affirms that cosmic causes produce cultic obligations because God "glorifies (specific) times and spaces" through them. But these causes have no meaning for human beings unless the persons concerned are able to relate the effect of the causes in an appropriate way to their own choices. The believers must be able to understand, to refuse or to honor their obligations. Once this condition is fulfilled, the mentally ill, once they recover their mental capacity, may be requested to perform the cultic obligation retroactively for all the days that they missed during a month of Ramaḍān.[90]

All Sunnī schools of law were thus acutely aware of the tension that may exist, for the irrational actor, between the notion of the determining force of the cosmic causes and the concept of a legal obligation as developed for the relations between human beings in society. Two of them decided to assimilate the cultic obligation to other civil obligations: they did not admit the notion that cosmic causes can produce personal obligations of the mentally ill. Instead, they gave priority to the criterion of mental capacity over the concept of cosmic causes. The Ḥanafīs tried to strike an equilibrium between the notion of legal capacity and that of the cosmic causes. Only the Mālikīs clung uncompromisingly to the doctrine that the

irrational actor accumulated cultic obligations in the field of fasting during his mental illness. They held that a person, born mentally ill and remaining in this state until late in her life and then acquiring her reasoning capacity would have to perform the fasting (but not the prayers) that she missed during all the years in which she was mentally ill.[91]

VII. The Sacred and the Profane

VII.1: The cult: a sphere of transcendence

While, in the Ḥanafī and Mālikī schools of law, the cosmic causes may oblige the irrational actor beyond his capacity of understanding, rational actors do not face the same problem. They understand that they are under the obligation to perform their cultic acts and this comprehension justifies their obligation to perform, postpone or refuse to perform the cultic obligation. The first two options are admissible by law; the third one constitutes a violation of the legal norm. Their case is, therefore, in perfect accord with the *fiqh*'s general doctrine on the relation between legal capacity and legal obligation.

God chooses specific times and spaces for the performance of cultic acts and through God's choice these cultic obligations are tied to sacred time and sacred space. The pilgrim entering the sacred space, the *ḥaram* of Mecca, in the sacred month, changes his status (*iḥrām*), he cuts himself off from the profane spheres and adapts to the holy place. The purpose of the pilgrimage, as the jurists say, can only be attained in the holy time and the holy place.[92] The same holds true for the believer who performs an obligatory prayer: he cuts himself off from the profane sphere to enter into an intimate dialogue (*munājāt*) with God. I quote an eleventh-century Transoxanian jurist: "The [believer] who consecrates himself for the prayer is as if he disappeared from the people: he does not talk to them and they do not talk to him. When he desecrates, it is as if he returned again to them."[93]

In the field of the cult, the believer's normative behavior is directed by his attempt to adapt to the sacred and to cut himself off from the profane in order to come closer to God. This is evident in the obligatory prayers, the holy month of Ramaḍān, the month of pilgrimage and the sacred space of Mecca's *ḥaram*. The state of consecration that the believers acquire when they enter into prayer or take on the pilgrim's status and the profane state to which they return after the accomplishment of these duties translate the opposition between the sacred and the profane. The spatial and temporal sphere of the sacred thus gives its meaning to the cultic acts.

VII.2: The cult: a model of embedded normative behavior

The cult is a model for normative behavior. The performance of cultic acts requires an embodied capacity to orient one's behavior according to rules. The fact that its norms are characterized by an opposition between the sacred and the profane qualifies the cult as a sphere of transcendence that follows its own rules. As far as prayer, fasting, and pilgrimage are concerned, this sphere of transcendence is accessible for the believers only during specified times of the day or the year or in a specific space.

Cultic acts provide the law with a model of unilateral obligations. The believer owes God fasting, prayer, and pilgrimage. If he does not perform them in the time prescribed for them, he owes their performance at a later date. If he does not fulfill this obligation, he violates the legal norm. The notion of debt is thus introduced in the relation between the believer and God and expressed in a terminology (*dayn*) that is also used for debts in the commercial exchange.[94] The cultic act fulfills, as the jurists say, a purpose (*qaṣd*): it serves to bring the believer near to God (*taqarrub*). It is based on the religious ethics of probation and reward. It is construed as a legal act, the validity of which rests on the free choice (*ikhtiyār)*, the intent (*niyya*) and the purpose (*qaṣd*) of the actor. The actor's mental capacity to perform legal acts (*ahliyya*) and his legal personality (*dhimma*) that allows her to incur obligations are the basis of her debt to

God. The actor's contingent decisions based on free choice, intent and purpose form the object of the legal norms. The classifications of time and space into sacred and profane and the systems of classification that range cultic acts into hierarchies according to the degree of their obligatory character enable the jurists to construe the regulation of the cult as a legal system. Under all these aspects, the legal concept of the cultic act shows striking similarities with the concept of the legal act as used in other fields of the law. But there are even more striking dissimilarities: the most important of them being the fact that cultic acts constitute relations between the believers and God and that they are not subject to the judiciary's control. The political and judicial authorities only enter the field of the cult if individuals deny the existence or the validity of cultic obligations or refuse to practice them over long periods. The fact that non-Muslims cannot perform a valid cultic act is even more important. It shows that non-Muslims are not integrated into this field of the law. They are excluded from it. It is a field of law that is reserved for Muslim

VIII. **The World of Human Transactions**

The cult regulates the believer's obligations towards God. By contrast, the obligations between individual persons—or between individual persons and the political and judicial authorities—are regulated through the norms governing the field of "legal transactions" (*muʿāmalāt*). In this field, the legal subject does not have to be a Muslim, but a free person, in possession of her mental capacity. The rules that regulate this field apply to the political, not the religious, community of Islam. Contrary to the information provided by many manuals on Muslim law, these rules address non-Muslim subjects of Muslim rulers whether they belong to polytheistic or monotheistic religions. According to the Mālikī and the Ḥanafī schools of Sunnī law, "polytheists and fire worshippers" are admitted as subjects to the Muslim political authorities. The *fiqh* rules of legal transactions, therefore, apply to them. It is only from the ninth century on that the Shāfiʿīs and the Ḥanbalīs restrict the membership in

the Muslim political community to monotheists. The Ḥanafīs and the Mālikīs never follow this move. In fact, *fiqh's* claim to the universal validity of its norms renders necessary the inclusion of all members of the Muslim political community into the legal order of Islam.

Fiqh's norms on *legal transactions* confirm the legitimacy of the major institutions of Muslim society, organize their reproduction and discuss, on the basis of an immense wealth of information and systematic thought, social conflicts and social order in the Muslim political community. *Fiqh*, in this field, puts the social order of the community squarely into the center of law and religion. I will not go into any of the institutions of that law but content myself to draw the reader's attention to those of its structures which relate directly to its religious foundations. It is, the jurists say, the objective law, the *sharʿ*, that determines what is forbidden and allowed. But if individuals acquire legal claims based on the norms of the objective law they may turn to the judiciary in order to see them protected as their subjective rights. Eleventh-century jurists discuss the importance of the relation between objective law and subjective rights for family and contract law. In the sphere of legal transactions, "God's claims" on his servants are no longer the only or even the main category of rights. The "claims of men" take pride of place and often enjoy priority over the claims of God. Joseph Schacht has clearly stated this fact. He distinguishes two extreme cases of positive law. One is an "objective law which guarantees the subjective rights of individuals," the other one is a law "which reduces itself to administration, which is the sum total of particular commands". He states: "Islamic law belongs to the first type."[95]

Epistemological skepticism determines the debate on the status of legal norms in the field of legal transactions. Sunnī jurists do not place their trust in human reasoning as a source of legal norms. In principle, legal norms should be derived from the Qurʾān, the Prophet's normative practice, the consensus of the jurists, or the analogies based on these sources. Legal norms, in other words, should be derived from revealed texts. Only if the jurists cannot agree on such a norm, are they entitled to

use their legal reasoning (*ijtihād*) to establish legal norms. Such rules do not oblige those jurists who do not approve of the reasoning that led to their formulation. In other words, jurists can produce norms only in those fields on which they cannot reach consensus and the norms thus produced remain objects of dissent. *Fiqh* is, therefore, characterized by a high degree of dissent and normative pluralism between the schools of law and within each of them and by a continuously growing field of embattled norms that enlarge, in turn, the realm of *ijtihād*. The control that the jurists of different schools and opinions exert over each other's norm suggestions fulfills at least two functions: on the one hand, it puts into place a system of checks and balances, the purpose of which is to prevent individual scholars from claiming the authority of the divine law for their individual opinions and imposing them on other jurists; on the other, it keeps alive a constant debate about the religious meaning of the precepts and ordinances of the law. This debate is a constant resource of the renewal of religious meaning of institutions, customs and practices.

Epistemological skepticism also determines the status of the judiciary's judgment. The judge's decision can never claim to represent the truth of the facts because the judge can be deceived by the witnesses or the parties. His reasoning does not protect him from error. The authority of the judgment rests entirely on the judge's observation of the prescribed procedure, not on the material aspects of his decisions. The Muslim jurists, therefore, develop, in the eighth century of the common era, the distinction between the *exterior and the interior forum*. The judge cannot take God's place. He cannot impose his erroneous judgment as a religious truth on the condemned person. The truth is a matter that is decided between the believer and his Lord (*baynahu wa-bayna rabbihi*), the *qāḍī*'s judgment enjoys only a technical, procedural and judicial authority and does not bind the believer's conscience.[96]

IX. Conclusion

The *fiqh* thus legitimizes contingent decisions on all levels of the law. The concept of contingent religious norms is already present in the Qurʾānic reference to God's abrogation of Qurʾānic verses (2: 106). The jurists develop this reference into a theory according to which God revealed norms with temporary validity to his prophets. Therefore, the norms revealed to the prophets differed from each other. It is only at the death of the Prophet Muḥammad that God ended this practice of abrogation. Therefore, the norms contained in the Qurʾān at the death of the Prophet Muḥammad will remain forever unchanged.

Fiqh recognizes that changing customs and social conditions require new rules (*ikhtilāf al-ahkām bi-khtilāf al-azmān*). It thus refers explicitly to the temporary character of an important part of its norms. The contingent character of judicial decisions is discussed by all major jurists in great and sometimes luxurious detail. The contingent character of the decisions that form the object of the law, that is human acts, can be traced back to the central term through which the law defines the capacity to act: free choice (*ikhtiyār)*. A free choice always presupposes that the act is not determined and could have been different. A strong element of human self-assertion is, therefore, part of *fiqh*, the Muslim system of ethical and legal norms.[97]

Fiqh's insistence on the contingency of an important part of its norms and of human acts in general opens, on the one hand, a large field for the adaptation of legal norms to changing social conditions and could be a means to assure the flexibility of the legal system. On the other hand, the reference to contingency serves—in all pre-modern systems of thought—as a proof of the existence of an essential, substantial, eternal, true and living reality that guarantees the existence of contingent beings. In Islamic philosophy this reliance of contingent beings on non-contingent reality is best brought out in Fārābī's *Ideas of the Inhabitants of the Virtuous City*,[98] which opposes the necessary first being to the possible beings of the sublunar world. *Fiqh's* insistence on the contingency of norms and acts sets the same mechanism into action: the more the jurists

underline the contingency of their own doctrines and decisions, the more the elevated rank of the indisputable knowledge (*ʿilm yaqīn*) conveyed by the revealed texts becomes apparent. In the *Mustaṣfā*, Ghazālī discusses a field of non-contingent and unchanging truths that is constituted by the rational cognition of theology as well as the norms of those parts of legal methodology and the applied law that are directly based on God's words. He opposes this field to the changing, contingent and unpredictable character of the jurists' norms on transactional relations between men. To these, he denies the character of indicants able to prove the veracity of norms. I quote his evaluation of the relation between these two fields:

> What lies beyond [the first field] are the *fiqh* norms based on assumptions (*al-fiqhiyyat al-ẓanniyya*) for no categorical proof (*dalīl qatʿī*) is available [for them]. The *fiqh* norms constitute a [licit] object of *ijtihād*. In these norms, according to our judgment, there is no specific correct solution and no sin is committed by the *mujtahid*, as long as he perfects his effort of norm production through individual legal reasoning and as long as he is qualified [for *ijtihād*].[99]

In the twentieth century, norms of Muslim *fiqh* have been introduced into the codified law of an important number of Muslim countries. Since the 1970s, the principles of Islamic normativity have been given constitutional ranking in a number of Arab and Muslim countries. It is interesting to see that the Supreme Constitutional Court of Egypt in its continuous jurisprudence since the 1990s has recourse to the classical contingency model of Muslim *fiqh*. It distinguishes contingent—and therefore changeable—norms of the classical Muslim heritage from unchangeable principles and norms of the revelation. It thus opens the way to legal change and justifies it, at the same time, through anchoring this change in the eternal principles of the Muslim revelation.[100] *Fiqh*, in this jurisprudence, is no longer accepted as the indisputable representation of the Islamic religion. The question is whether the integration of *fiqh* and the eternal principles of the revelation into state law and constitutional jurisprudence will not, in the long run, thin out the

resources of its religious meaning implied in *fiqh*'s classical model of norm discussion and norm production and thus open the way to conceptions of contingency so radicalized that they view contingency as the general form of existence for all norms and acts.[101]

Therefore, many Islamist movements criticize the integration of Islamic law into the constitutional and positive law of the modern nation state. It seems to me that this critique produces its own contingency. These movements attempt to unite in their organizations the two functions that, from the tenth century on, were separated in the classical model of religion and politics in Islam: political authority and religious scholarship. They claim to be the only source of legitimate political authority in the religious community and, at the same time, the highest authority for the interpretation of Islam. They insist on the necessity to realize through direct political action the principles of the sacred law as they understand and interpret them. Their aim is to create a unity of the political and the religious that escapes the control of the nation state and represents the only religiously legitimate form of politics. They thus blur the frontiers between the learned interpretation of religion and direct political action. The religious argument increasingly becomes subject to political constraints and thus renders credible the notion that all arguments and all norms are contingent and receive their legitimacy, their validity and their force not from theological and intellectual insights but from the political requirements of the moment.

It seems, in fact, that many of these movements reinforce the fragmentation of politics within the nation-states in which they are active. Will this fragmentation, in the long run, be a positive factor for the democratization of their societies? Will their opposition to the executive open a larger field for the citizens' participation in the political process or will they play a negative role in suppressing the open debate and the public liberties that are necessary for the democratization of states and societies? The answer to this question cannot be searched for in religious dogmas and beliefs. It is a question of practical politics and remains as such entirely contingent.

Notes

[1] *Qurʾān*, Sura 42 (*al-Shūrā)*, 13; Sura 5 (*al-Māʾida*),97; Sura 45 (*al-Jāthiyya*), 1-7, 13-17.

[2] *Qurʾān*, Sura 59 (*al-Ḥashr*), 23; Sura 62 (*al-Jumʿa)*, 1.

[3] *Qurʾān*, Sura 114 (*al-Nās*), 2.

[4] *Qurʾān*, Sura 42 (*al-Shūrā*), 29-35; 2; Sura 2 *(al-Baqara*),164; Sura 3 (*Āl-ʿImrān*), 190-94.

[5] *Qurʾān*, Sura 99 (*al-Zalzala)*, 1-8; Sura 101 (*al-Qāriʿa*), 1-11.

[6] *Qurʾān*, Sura 6 (*al-Anʿām*), 94; Sura 25 (al-*Furqān*); 11-30; Sura 40 (*al-Muʾmin*); 7-18; 7 (*al-Aʿrāf*); 37-50: 107 (*al-Māʿūn*), 1; Sura 89 (*al-Fajr*); 1-30. See also Ghazali, *The Incoherence of the Philosophers*. Translated, introduced, and annotated by Michael E. Marmura (Provo, Utah: Brigham Young University Press, 1997): "Twentieth Discussion," pp. 212-29, in particular, p. 229, on the importance for the change of the cosmic order of the concept of bodily resurrection.

[7] *Qurʾān*, Sura 28 (*al-Qaṣāṣ*), 75. See also Sura 4 (*al-Nisāʾ*), 41.

[8] *Qurʾān*, Sura 16 (*Al-Naḥl*), 88-89.

[9] *Qurʾān*, Sura 2 (*al-Baqara*), 62.

[10] *Qurʾān*, Sura 3 (*Āl-ʿImrān*), 11; Sura 7 (*al-Aʿrāf*), 103-108.

[11] Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra. Eine Geschichte des religiösen Denkens im frühen Islam* (Berlin: Walter de Gruyter, 1991-1997), vol. I, pp. 24, 29; Patricia Crone and Martin Hinds, *God's Caliph. Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), pp. 5, 6, 12-15, 80.

[12] Crone and Hinds, *God's Caliph*, pp. 26-28.

[13] Crone and Hinds, *God's Caliph*, pp. 34-36, 80; Roy P. Mottahedeh, *Loyalty and Leadership in an Early Islamic Society* (Princeton: Princeton University Press, 1980), p. 18.

[14] Crone and Hinds, *God's Caliph*, p. 38; for Marwān I, see *ibid*., pp. 40-41, 82.

[15] *Ibid*., pp. 43, 49-56, 72; van Ess, *Theologie und Gesellschaft*, vol. IV, pp. 696, 701, 711.

[16] Patricia Crone*, God's Rule. Government and Islam: Six Centuries of Medieval Islamic Political Thought* (New York: Columbia University Press, 2004), pp. 22, 40.

[17] van Ess, *Theologie und Gesellschaft,* vol. IV, pp. 701-702; Crone and Hinds, *God's Caliph*, pp. 43-45.

[18] Crone and Hinds, *God's Caliph*, pp. 45-47; Baber Johansen, "Wahrheit und Geltungsanspruch: zur Begruendung und Begrenzung der Autorität des Qadi-Urteils im islamischen Recht," in *La Giustizia Nell'Alto Medioevo (Secoli IX-XI),* ed.

Centro Italiano di Studi sull'Alto Medioevo (Spoleto: Presso La Seda del Centro, 1997), vol. II, pp. 975-1065; see in particular pp. 980-81, note 12; p. 985, note 16.

[19] van Ess, *Theologie und Gesellschaft,* vol. IV, pp. 359, 459 ff; for Ḍirār b. ʿAmr (728-96), see *ibid*., vol. III, pp. 32-44; vol. IV, p. 460*;* Josef van Ess, *Les Prémices de la théologie musulmane* (Paris: Albin Michel, 2002), p. 75; for Hishām b. al-Ḥakam, see van Ess, *Theologie und Gesellschaft,* vol. I, pp. 350, 355-58, 364-69; for Abū Hudhayl, see *ibid.*, vol. III, pp. 209-44; vol. IV, pp. 460-62, 467; for his proof of God's existence, see van Ess, *Prémices*, p. 77. For the concept of nature in the thought of Muʾammar, see van Ess, *Theologie und Gesellschaft*, vol. III, pp. 64, 67; vol. IV, pp. 514-16; for the concept of nature in the writings of Naẓẓām, see *ibid.*, vol. III, pp. 307-53, 360-69; vol. IV, pp. 514-16. For Ashʿarī's preservation of Abū Hudhayl's cosmology, see Daniel Gimaret, *La Doctrine d'al-Aśʿarī* (Paris: Les Editions du Cerf, 1990), p. 43; for the analysis of this cosmology, *ibid*., pp. 43-208.

[20] van Ess, *Prémices*, pp. 76-79.

[21] The assertion—found in recent publications by some historians of theology—according to which no important jurists engaged in the judiciary is simply wrong. Names like Abū Yūsuf, Shaybānî, and Ibn Surayj are enough to show the shaky basis of such assertions.

[22] Nurit Tsafrir, *The History of an Islamic School of Law. The Early Spread of Hanafism* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2004), *passim*; see also Johansen, "Wahrheit und Geltungsanspruch," pp. 975-1016.

[23] Patricia Crone, "Ninth-Century Muslim Anarchists," *Past and Present*, 167, 2000, pp. 3-28.

[24] Crone, *God's Rule*, pp. 138-39; van Ess, *Theologie und Gesellschaft*, vol. III, pp. 446-502; idem, *Prémices*, pp. 14, 34-36; Tilman Nagel, *Rechtleitung und Kalifat: Versuch über eine Grundfrage der islamischen Geschichte* (Bonn: Orientalisches Seminar der Universität Bonn, 1975), pp. 430-46.

[25] van Ess, *Prémices*, p. 36.

[26] Crone, *God's Rule,* pp. 128, 138; van Ess, *Theologie und Gesellschaft*, vol. IV, pp. 712-17; vol. I, pp. 56-68 for Jaʿfar b. Mubashshir (d. 849); vol. IV, pp. 68-77 for Jaʿfar b. Ḥarb (d. 850); for Ashʿarī, see Gimaret, *La Doctrine d'al-Ashʿari*, pp. 550, 553-54; Shahrastānī, *op. cit*., vol. I, p. 470; for Juwaynī, see Crone, *God's Rule*, p. 234; for the Ḥanafīs, see Abū Bakr Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūṭ* (Beirut: Dār al-maʿrifa li l-ṭibāʿa wa l-nashr, 1398/1978), vol. X, pp. 9, 121; for Qāḍī ʿAbd al-Jabbār see Crone, *God's Rule*, p. 69.

[27] Muḥammad b. Idrīs al-Shāfiʿī, *Al-Risāla*, ed. Aḥmad Muḥammad Shākir (Beirut: Dār al-Kutub al-ʿilmiyya, n.d.) holds that the caliphs have to follow the Prophet's *sunna*: p. 424, nos 1165-1168; p. 426. no. 1172; pp. 426-27, no. 1174; p. 428, nos 1176, 1178; p. 430, nos 1180, 1183; p. 431, no. 1185; p. 435, no. 1200. All other human beings have to act in the same way: p. 429, no. 1180; pp. 450-53, no. 1234. As the community is dispersed in many parts of the world it has become impossible to assemble their bodies in one place. If it were possible, their opinion on good or bad would be meaningless because their community would mix Muslims and non-Muslims, pious believers and frivolous persons. The physical assembling of the community would have no normative meaning. What counts is only "the agreement of the community on delaring things allowed and forbidden and on the obedience to

both," p. 475, no 1319. In other words, the community exists as a normative unit and it is in this form that it is meaningful.

[28] Crone, *God's Rule,* p. 146.

[29] *Ibid*., pp. 281-82.

[30] Shāfiʿī, *Al-Risāla*, p. 22, no 57; p. 29, no 88; p. 31, no 92-95; p. 158-59, no 440; p. 166, no 461; pp 176-77, no 490, 491.

[31] On the authority of the collections of authentic *ḥadīth*, and in particular the collections of Bukhārī and Muslim, in the thirteenth century, see Ibn al-Ṣalāḥ al-Shahrazūrī, *An Introduction to the Science of the Ḥadīth (Kitāb Maʿrifat anwāʿ ʻilm al-ḥadīth*), trans. Eerik Dickinson, reviewed by Muneer Farid (Reading: Garnet Publishing Limited, 2006), pp. 5-16, esp. p. 15.

[32] Mottahedeh, *Loyalty,* p. 11.

[33] Sarakhsī, *Mabsūṭ*, vol. XVI, pp. 65, 108, 111; Abū Bakr b. Masʿūd al-Kāsānī, *Kitāb badāʾiʿ aṣ-ṣanāʾiʿ fī tartīb al-sharāʾiʿ* (Cairo: Dār al-kutub al-ʿilmiyya, 1910), vol. VII, p. 4.

[34] Tsafrir, *History of an Islamic School of Law,* pp. X, XII, XIII, 15, 22, 24, 27-28 and the lists of the *qāḍī*s of different cities in Iraq, Syria, West Iran, the Maghreb on pp. 29-30, 38-39, 50-53, 59-60, 62-64, 71-73, 74-75, 75-76, 86, 99-102, 114-115.

[35] Wael B. Hallaq, "From Regional Schools to Personal Schools of Law? A Reevaluation," *Islamic Law and Society*, 2001, vol. 8, no 1, pp. 1-26.

[36] Niklas Luhmann, *Rechtssoziologie* (Hamburg: Rowohlt, 1972), vol. I, pp. 30, 42-44.

[37] Shāfiʿī, *al-Risāla*, p. 475, no. 1319; see also note 27.

[38] Baber Johansen, "The Valorization of the Human Body in Muslim Sunni Law," *Princeton Papers. Interdisciplinary Journal of Middle Eastern Studies*, Spring 1996, vol. IV, pp. 71- 112, esp. pp. 71-81.

[39] Rüdiger Bubner, *Geschichtsprozesse und Handlungsnormen* (Frankfurt am Main: Suhrkamp, 1984, stw 463), pp. 27, 33ff. He succinctly summarizes the problem in the following words: "Handeln vermag sich nur dort zu vollziehen, wo die Dinge auch anders sein können, und es muss sich dort aufhalten, solange es Handeln ist," *ibid*., p. 38, see also pp. 41, 118.

[40] The legal guardian is entitled to represent the minor and the mentally ill in acquiring the status of *iḥrām* that is the necessary condition for the performance of the pilgrimage. For the Mālikī school of law see Muḥammad al-Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sayyidī Khalīl* (Beirut: Dār Ṣādir, n.d.), vol. II, p. 282; for the financial conditions of the obligation to perform the pilgrimage, see ibid., pp. 284-285. For the Shāfiʿī school on the same questions see Muḥammad al-Shirbīnī al-Khaṭīb, *Mughnī al-muḥtāj ilā maʿrifat alfāẓ al-minhāj* (Cairo: Sharikat maktabat wa-maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1377/1958), vol. I, pp. 461, 462. For the Ḥanbalī school see Muwaffaq al-Dīn Ibn Qudāma, *Al-Mughnī* (Beirut: Dār al-Kutub al-ʿilmiyya, n.d.), vol. III, pp. 161-162, 164, 180-186. For the Ḥanafīs see Sarakhsī, *Mabsūṭ*, vol. IV, p. 130 (indicating clear limits of the religious and ritual validity of the minor's pilgrimage as well as of his father's capacity to oblige his son to abide

by all rules of the pilgrimage including the legal consequences of their non-performance or of their violations), see also pp. 147, 149, 152, 173-74.

[41] The Mālikīs, Ḥanbalīs and Shāfiʿīs hold that the *zakāt* has to be paid out of the property of the minor. As the minor himself cannot perform a task that brings him financial disadvantages and as he does not understand the legal discourse that obliges him to do that, his legal guardian has to take care of the alms-tax payment . See Khurashī, *op.cit*., vol. II, pp. 222-223;

Shirbīnī, *op. cit*., vol. I, pp. 409, 414 ; Ibn Qudāma, *op. cit.,* vol. II, p.493-94 (this author also quotes a dissenting minority opinion). The Ḥanafīs (see Sarakhsī, *Mabsūṭ*, vol. II, pp. 162-163) hold that the *zakāt*, being an act of worship, presupposes the capacity of the tax-payer to form a valid intent (*niyya*). As the minors are not able to accept legal and ritual obligations, they cannot be obliged to pay the alms-tax.

[42] Kāsānī, *Badāʾiʿ* , vol. II, pp. 88-89; see also Baber Johansen, "L'ordre divin, le temps et la prière : une discussion sur la causalité concernant les actes de culte," *Melanges de l'Université Saint-Joseph*, LXI-2008 (Université Saint-Joseph – Dar El-Machrek, Beyrouth-Liban), pp. 545-557.

[43] Sarakhsī*, Mabsūṭ*, vol. I, pp. 72-73, 117; Kāsānī, *Badāʾiʿ,* vol. I, pp. 17-18; Ibn ʿĀbidīn*, Radd al-Muḥtār ʿala al-durr al-mukhtār* (Cairo : n.p., 1307h.), vol. I, pp. 78-79.

[44] A. J. Wensinck, *The Muslim Creed. Its genesis and Historical Development* (Cambridge: Cambridge University Press, 1931-32), pp. 17-35.

[45] Klaus Lech, *Geschichte des islamischen Kultus: rechtshistorische und hadit-kritische Untersuchungen zur Entwicklung und Systematik der 'ibādāt* (Wiesbaden: Harrassowitz, 1979).

[46] Zeev Maghen sums up his many path-breaking articles from the 1990s in his book *Virtues of the Flesh. Passion and Purity in Early Islamic Jurisprudence* (Leiden: Brill, 2005).

[47] Marion Holmes Katz, *Body of Text. The Emergence of the Sunni Law of Ritual Purity* (Albany: State University of New York Press, 2002).

[48] H.-G. Bousquet, *s.v.* "ʿibādāt," in *Encyclopedia of Islam New Edition* (Leiden and London: Brill and Luzac, 1971), vol. III, pp. 647-48.

[49] John Deigh, *s.v.* "Ethics," in Robert Audi (ed.), *The Cambridge Dictionary of Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 244-249; for divine command theory, see p. 246. Compare the summary of Christian natural law given by Brian Tierney, "Natural law and natural rights," in John Witte Jr. and Frank S. Alexander (eds.)*, Christianity and Law* (Cambridge: Cambridge University Press, 2008), p. 90: "Christians believed that the universe was created *ex nihilo* by an omnipotent God whose will was revealed to man in the teachings of sacred scripture." See *ibid*., p. 96 the reference to the voluntarist theologians of the fourteenth century who confronted God's will and power to reason; and p. 101 on Samuel Pufendorf's "Voluntarist theory of a natural law grounded on divine command."

[50] But see the text of the Pater Noster: *Pater noster, qui es in caelis, sanctificetur nomen tuum. Adveniat regnum tuum. Fiat voluntas tua, sicut in caelo et in terra.*

[51] Abū Bakr Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī* ed. Abu l-Wafāʾ al-Afghānī (Beirut: Dār al-Maʿrifa, n.d.), vol. I, pp. 32-33 on God's entitlement to the believer's performance of the acts of worship; *ibid*., pp. 44 on the legal effects of God's command; pp. 60-69 on God's command as the determining factor of the ethical quality of the required act; Kāsānī, *Badāʾiʿ,* vol. I, p.127, 129: all obligatory acts of worship (*ʿibādāt)* are the result of God's command and, therefore, require the declaration of intent (*niyya*) to fulfill them as acts entirely dedicated to God.

[52] D.M. Dunlop, *s.v.* "al-Bādjī," *The Encyclopaedia of Islam*. *New Edition* vol. I (Leiden and London: Brill and Luzac, 1960), pp. 864-865.

[53] Abū al-Walī al-Bājī, *Iḥkām al-fuṣūl fi aḥkām al-uṣūl* ed. ʿAbd al-Majīd al-Turkī (Cairo: Dār al-Gharb al-Islāmī, 1407/1986), p. 309.

[54] *Ibid.,* p. 310.

[55] E. Chaumont, *s.v.* "Al-Shīrāzī," in *The Encyclopaedia of Islam*. *New Edition*, Vol. IX (Leiden: Brill, 1997), pp. 481-483.

[56] Abū Isḥāq al-Shīrāzī, *Al-Lumaʿ fī uṣūl al-fiqh* ed. Muṣṭafā Abū Sulaymān al-Nadawī (Manṣūra: Dār al-Kalima li l-nashr wa l-tawzīʿ, 1997/1418), p. 73-74. See also the French translation by Eric Chaumont: *Le Livre des Rais illuminant les fondements de la comprehension de la Loi. Traité de théorie légale musulmane. Introduction, traduction annotée et index par Eric Chaumont* (Berkeley: University of California Press, The Robbins Religious and Civil Law Collection, 1999), p. 179-180.

[57] George Makdisi, *Ibn ʿAqīl. Religion and Culture in Classical Islam* (Edinburgh: Edinburgh University Press, 1997), pp. 17-53.

[58] Abū al-Wafāʾ ʿAlī b. ʿAqīl b, Muḥammad Ibn ʿAqīl, *Al-Wāḍiḥ fī uṣūl al-fiqh* (Beirut/Stuttgart: Franz Steiner 1996), part I, p. 19.

[59] *Ibid*., part I, p. 36.

[60] Sarakhsī, *Mabsūṭ*, vol. III, p.54.

[61] *Ibid*., vol. III, pp. 54-55.

[62] *Ibid*., vol. III, p.61.

[63] Sarakhsī, *Uṣūl*, vol. I, p. 62.

[64] Heinz Halm, *s.v.* "Al-Ḳushayrī," *The Encyclopaedia of Islam. New Edition* (Leiden: Brill, 1982), vol. V, pp. 526-527.

[65] Muḥyī al-Dīn Ibn Sharaf al-Nawawī, *al-Majmūʿ sharḥ al-Muhadhdhab* ed. Zakariyyāʾ ʿAlī Yūsuf (Cairo: Maṭbaʿat al-ʿĀṣima, n.d.), vol. I, p. 29.

[66] That this attitude is fairly general can also be seen in the work of Zayn al-ʿĀbidīn b.Ibrāhīm Ibn Nujaym (1520-1565, Egypt) who in his *al-Ashbāh wa l-Naẓāʾir ʿala madhhab Abī Ḥanīfa al-Nuʿmān* (Beirut: Dār al-kutub al-ʿilmiyya, 1980/1400), p. 21,

indicates that the legal validity of the act is not important for the heavenly reward, whereas the *niyya* is decisive for it. On p. 23 he lists the acts that are valid without *niyya* and can, therefore, also be performed by non-Muslims. But his texts also shows the tendency to extend the notion of the cultic acts far beyond prayer, fasting, alms-tax, and pilgrimage through the use of metaphoric language.

[67] Nawawī, *al-Majmūʿ*, vol. I, pp. 362.

[68] Ibid., vol. III, pp. 5-6.

[69] Abū al-Baqāʾ Ayyūb b. Mūsā al-Ḥusaynī al-Kaffawī, *al-Kulliyyāt. Muʿjam fī l-muṣṭalaḥāt wa l-furūq al-lughawiyya* eds. ʿAdnān Darwīsh and Muḥammad al-Maṣrī (Beirut: Muʾassasat al-risāla, ,1993/1413), p. 583.

[70] Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-durr al-mukhtār*, vol. I, p. 78, see also pp. 144-145.

[71] Ibid., vol. I, p. 78.

[72] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964; repr. 1971), p. 208, writes: "As regards the formal character of positive law, the sociology of law contrasts two extreme cases. One is that of an objective law which guarantees the subjective right of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals. The opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands. Islamic Law belongs to the first type, and that agrees with what the examination of the structure of Islamic 'public law' has shown." Schacht is definitely right in stressing the importance of subjective, individual rights in Islamic law. There are also one-sided obligations in Islamic law that one cannot simply disregard. The cult certainly knows many of them and thus justifies the use of deontology as an analytical tool, but that cannot go so far as to ignore the many ways in which Islamic law guarantees individual rights and in which the discussion of the cult opens perspectives for individual initiatives and a social morality built upon them.

[73] But see van Ess, *Prémices*, p. 36.

[74] Helmut Ritter, *s.v.* "Al-Ghazālī," in *The Encyclopaedia of Islam. New Edition*, Vol. II (Leiden and London: Brill and Luzac, 1965), pp. 1038-1042.

[75] George Makdisi, *s.v.* "Ibn ʿAqīl, Abu l-Wafāʾ," in *The Encyclopaedia of Islam. New Edition*, Vol. III, pp. 698-700.

[76] Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustaṣfā min ʿilm al-uṣūl* (Cairo: Maṭbaʿat Muḥammad, 1356/1937), p. 3.

[77] Ibid., p. 4. I choose this translation of *akwān* following van Ess, *Theologie und Geschichte*, vol. IV, pp. 128-129.

[78] Ghazālī, *Mustaṣfā*, p. 4.

[79] Ibid., p.4.

[80] Ibid., p.5.

[81] Ibn ʿAqīl, *al-Wāḍiḥ,* vol. I, p. 2.

[82] Sarakhsī, *Uṣūl,* vol. I, p. 312.

[83] Ibn ʿAqīl, *al-Wāḍiḥ*, vol. I, pp. 19-20.

[84] Ibid., vol. IV.2, pp. 294-295.

[85] For other reasons to bar the theologians from the law, see *al-Wāḍiḥ,* vol. IV.2, pp. 296-297. For a warning against the preoccupation with theology based on the one hand on the tradition of the Shāfiʿī school, starting with Shāfiʿī himself, and on the other hand on the difficulty of the subject matter, see Nawawī, *al-Majmūʿ*, vol. I, pp. 41-42.

[86] Shīrāzī, *al-Lumaʿ*, p. 97. In addition, see Ghazālī, *Mustaṣfā*, vol. I, pp. 115-116: who puts into doubt the capacity of "many theologians and grammarians" to participate in the *ijmāʿ* (p. 115) and makes a rather critical comment on the capacity of the jurists to understand the theologians and the theologians' capacity to understand the jurists. In fact, he compares both groups when they discuss the field of the other to "ordinary men." But he defends their consensus (p. 116).

[87] Baber Johansen, "Secular and religious elements in Hanafite Law. Function and Limits of the Absolute Character of Government Authority", in Baber Johansen, *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh* (Leiden Boston Köln: Brill, 1999), pp. 189-218 (esp. pp. 190-200). The importance of this concept for the performance of the ritual is discussed in idem, "Amwāl Ẓāhira and Amwāl Bāṭina: town and countryside as reflected in the tax system of the Hanafī school," in *Contingency,* pp. 129-152.

[88] *Mudawwana*, vol. I, p. 208. The Ḥanafī doctrine is very complex: in principle, the mentally ill is—during his illness—not obliged to fast and, therefore, not obliged to perform the fasting that he missed during his illness. But if he falls mentally ill during the month of Ramaḍān, after having declared his intent to fast during the daytime in that month, and then recovers his mental capacities in the same month, the effect of God's command still applies to him and he is, therefore, required to perform all the days of fasting that he missed during his illness. But if he was mentally ill during the whole month of Ramaḍān he was under no obligation to fast during that month and, therefore, not obliged to make up for the days of fasting that he missed. If he was mentally ill for many years, starting in a month of Ramaḍān, he has to make up the fasting of the first and the last Ramaḍān of his mental illness. See Shaybānī, *Kitāb al-asl*, vol. II, pp. 228-29, 233; Sarakhsī, *Mabsūṭ,* vol. III, pp. 87-89.

[89] ʿAbd al-Raḥmān b. Abī ʿUmar Muḥammad b. Aḥmad Ibn Qudāma al-Maqdisī, *Al-Sharḥ al-kabīr ʿalā matn al-Muqniʿ* [printed in the margin of Muwaffaq al-Dīn Ibn Qudāma, *Al-Mughnī* (Beirut: Dār al-kutub al-ʿilmiyya, n.d.)] vol. III, pp. 21-22; Ibn Qudāma, *Al-Mughnī*, vol. III, pp. 32-33; Saḥnūn b. Saʿīd al-Tanūkhī, *Al-Mudawwana al-kubrā* (Cairo: Maṭbaʿat al-Saʿāda, 1323) vol. I, pp. 93-94, 208; Muḥammad b. Idrīs al-Shāfiʿī, *Al-Umm* (Beirut: Dār al-Maʿrifa, n.d.), vol. I, pp. 69-70; al-Shirbīnī al-Khaṭīb, *Mughnī al-Muḥtāj*, vol. I, p. 432; Nawawī, *al-Majmūʿ*, vol. I, p. 437.

[90] Sarakhsī, *Uṣūl*, vol. I, pp. 100-107; vol. II, pp. 330-36; Kāsānī, *Badā'iʿ*, vol. II, p. 88.

[91] Sahnun ibn Saʿid al-Tanukhi, *al-Mudawwana al-kubra* (Cairo: Matbaʿat al-Saʿada, 1323 h.), vol. I, pp. 93-94; Muhammad ʿArafa al-Dasuqi, *Hashiyat al-Dasuqi ʿala l-sharh al-kabir* (Beirut: Dar al-Fikr, no date), vol. I, pp. 520-22.

[92] Sarakhsî, *Mabsūṭ*, vol. IV, pp. 106-107.

[93] *Ibid*., vol. I, p. 30.

[94] *Ibid*., pp. 100.

[95] Schacht, *Introduction to Islamic Law*, pp. 208-209.

[96] Johansen, "Wahrheit und Geltungsanspruch," pp. 1015-1065.

[97] Sarakhsī, *Uṣūl,* reference to later Transoxanian developments.

[98] See *Idée des Habitants de la Cité Vertueuse*, traduit de l'Arabe avec introduction et notes partrs. Youssef Karam, J. Chlala, A. Jaussen (Beyrouth-Le Caire-Beirut-Cairo: Librairie Orientale, 1980): for the contingent beings, see pp. 17, 39, 41, 42, 47, 51, 55, 56-58; for the necessary being: pp. 21, 27, 32, 37, 38, 39, 43-50.

[99] Ghazālī, *Mustaṣfā*, vol. II, p. 106.

[100] Baber Johansen, "The Constitution and the Principles of Islamic Normativity against the Rules of Fiqh: A judgment of the Supreme Constitutional Court of Egypt," in Muhammad Khalid Masud, Rudolph Peters and David S. Powers (eds.), *Dispensing Justice in Islam. Qadis and their Judgments* (Leiden-Boston: Brill, 2006), pp. 179, note 19.

[101] Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989).

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