STANFORD UNIVERSITY

Department of Religious Studies
Phone: (650) 723-3322

Building 70, Stanford, CA 94305-2165
Fax: (650) 725-1476

Ebrahim Moosa

ALLEGORY OF THE RULE (*Ḥukm*): LAW AS SIMULACRUM IN ISLAM?

"By an unforeseen twist of events and an irony which no longer belongs to history, it is through the death of the social that socialism will emerge—as it is through the death of God that religions emerge. A twisted coming, a perverse event, an unintelligible reversion to the logic of reason. (JEAN BAUDRILLARD)[1]

It seems that the law as such should never give rise to any story. To be invested with its categorical authority, the law must be without history, genesis or any possible derivation. That would be the law of the law. Pure morality has no history . . . no intrinsic history. And when one tells stories on this subject, they can concern only circumstances, events external to the law and, at best the modes of its revelation." (JACQUES DERRIDA)[2]

INTRODUCTION

Modern students of Islamic law have not sufficiently probed the relationship between law and theology.[3] When jurists claim that their extrapolation

I would like to thank several people for their role at various stages of the preparation of this article: to Frank Reynolds, for inviting me to participate in this special issue of *History of Religions;* Winifred Fallers Sullivan and Vincent Cornell, for their most valuable suggestions and comments; and Robert C. Gregg for assisting me with some sources. It goes without saying that the remaining errors are mine, in which they are free to share, if they so wish! Unless otherwise noted, all translations are my own.

[1] Jean Baudrillard, "Simulacra and Simulations," in *Jean Baudrillard: Selected Writings,* ed. Mark Poster (Stanford, Calif.: Stanford University Press, 1988), p. 181.

[2] Jacques Derrida, "Before the Law," in *Acts of Literature,* ed. Derek Attridge (New York: Routledge, 1992), p. 191.

[3] See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), pp. 134–43, 256–57. While

© 1998 by The University of Chicago. All rights reserved.
0018-2710/99/3801-C...1$02.00

of the rules from the sources constitute "Allah's law" (*ḥukm Allāh*), one immediately realizes that the law in Islam involves a transcendental dimension. One of the more intriguing questions encountered in the study of Islamic law concerns the legal ruling or rule (*ḥukm*).[4] How is it possible for the jurist (*faqīh*) to conclude at the end of a very empirical evaluation and research of facts and texts that his conclusions constitute a transcendental and divine authority?

This article attempts to explore the manner in which jurists come to know the revealed rule. Its primary contribution is to insist that there is a cosmology underlying Muslim juristic theology or legal theory (*uṣūl al-fiqh*). This cosmological narrative enables us to bridge the discursive divide between the empirical and transcendental realms. In order to get a better view of this overlapping discourse, I take a closer look at how the rule is perceived in the juristic theology of the Ashᶜarī school. Despite the centrality of the *ḥukm* in legal discourse, it has hardly been adequately theorized. I explore this topic by looking at texts of *uṣūl al-fiqh* in middle Islam.

LAW AND THE HISTORY OF RELIGION

Among historians of religion, Wilfred Cantwell Smith stands out among those who did see Islamic law as a field deserving of study.[5] In his study of texts on legal theory and dialectical theology, Smith shows that in the formative and classical periods of Islam the term *sharīᶜa,* the systematic formulation of legal ordinances, was hardly in use. Instead, Smith argued that the term *sharᶜ,* meaning the moral imperative, had greater currency.[6] In the early period, the two terms *sharīᶜa* and *sharᶜ* were not interchangeable, as the practice had become in later periods. Smith's inquiry led him to formulate the difference between the two. *Sharᶜ* was an activity that took place in heaven, as God's ordaining human beings to act in specific ways: something that God did. The *sharīᶜa,* on the other hand, was the explicit pattern and statement whereby human beings knew

Hallaq acknowledges that the legal theorists of Islamic law did have to countenance the presuppositions of theology, he argues that matters of theology in comparison to legal and juridical issues were few and marginal. While this point has to be accepted as moot, the overall impact of fundamental theological presumptions on juridical thinking still awaits a full examination. By contrast, scholars like Fazlur Rahman and Joseph Schacht seem to find a great interdependence between law and theology. See Fazlur Rahman, "The Functional Interdependence of Law and Theology," in *Theology and Law in Islam,* ed. G. E. von Grunebaum (Wiesbaden: Harrassowitz, 1971), pp. 89–97; and Joseph Schacht, "Theology and Law in Islam," in von Grunebaum, ed., pp. 3–23.

[4] In English the term *ḥukm* can be translated as the legal "rule," "determinant," "assessment," and "judgment."

[5] W. C. Smith, "Islamic Law: Sharīᶜah and Sharᶜ," in his *On Understanding Islam: Selected Studies* (The Hague: Mouton, 1981), pp. 87–109.

[6] Ibid., pp. 90–91.

they were obligated: something that humans heard.[7] He thought the claims by Muslim and Western scholars were somewhat misleading in believing that obedience or transgression of the law was coterminus with obedience to God. The "rise of a concept of law as religiously absolute," Smith argued, "may be correlated with a decline, if not of Islamic civilization, [then] anyway of the vigor of its intellectual and religious life."[8] A concept like *sharīᶜa* as law comes into play "where one's sense of God and His immediate intervention, and one's sense of *engagement*, of one's own immediate cosmic moral involvement, are weak or absent."[9] The notion of *sharᶜ* for Smith was primarily a moral coordinate, not a legal one. In other words, the central fact of Islam as a religion was moral responsibility rather than the idea of law. To paraphrase Baudrillard, it appears that for Smith it will only be with the death of *sharīᶜa* as "law," that *sharīᶜa* as "morality" will emerge. However, history weighs heavily against Smith, since the law and legal culture is highly developed in Muslim thought. One of the main difficulties with Smith's thesis is that he does not explicitly state what model of law as morality he had in mind when he reflected on the *sharīᶜa*. His assumptions surely betray traces of a very Kantian and transcendental understanding of law more than anything else. Furthermore, this rather essentialist ideal type is not a very useful explanation as to why *sharīᶜa* as "law" materialized. In other words, Smith must also have the courage to state where and why Muslims had deviated in their understanding and practice of the *sharīᶜa* over several centuries. This is the net implication of his assumptions about the law that will have to be addressed in detail elsewhere.

Fazlur Rahman partially concurred with Smith's thesis that the *sharᶜ* was the moral ordaining of the way. He also argued that the term *sharīᶜa* was not employed in early Islam as much as the term *dīn* (following and submission) was used.[10] For him *sharīᶜa* meant an ordained way, but the problem for him was the method to know the *sharīᶜa*.[11] However, Fazlur Rahman did not dismiss the formulation of the legal ordinances

[7] Ibid., p. 105.
[8] Ibid., pp. 99–100.
[9] Ibid., p. 100.
[10] Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), pp. 100, 102.
[11] Fazlur Rahman employed the two complementary "principles" of learning (*ᶜilm*) and understanding (*fiqh*) to know the *sharīᶜa*. Learning (*ᶜilm*) was the objective principle, an organized and disciplined body of data; understanding (*fiqh*) was the process or activity of understanding and deducing knowledge (*Islam*, p. 101). Fazlur Rahman's search was to find an understanding of the *sharīᶜa* that integrates law, moral principle and theological metaphysics. He partially found this synthesis in the work of the twelfth-century thinker Abū Ḥāmid al-Ghazālī (d. 450/111), who tried to formulate a creative integration of law and morality. However, the disciplinary boundaries between law, theology, and sufism did not encourage such a synthesis on a broader scale. See Rahman, "Functional Interdependence of Law and Theology," pp. 89–97.

as the *sharīᶜa* as an aberration. His primary concern was whether the *sharīᶜa* in its manifestation as a positive law was consistent with the stated ethical and moral imperatives of the Qurᵓān. While Muslim jurists had refined the formal methodology of deriving rules from the revealed sources, Fazlur Rahman lamented the fact that they did not develop an equally rigorous ethical dimension of the *sharīᶜa*. If apprehending the *sharīᶜa* as a moral imperative was unclear, then the notion of a *ḥukm* was equally unclear.

Ḥanafī, in his attempt to formulate a grand narrative of the epistemological function of legal theory, described it as a trilateral structure representing three dimensions of Muslim conscience ("les trois dimensions de la Conscience").[12] Each "conscience" has a particular function. The historical conscience—*al-shuᶜūr al-taᵓrīkhī*—constitutes the objective data of legal theory such as revelation, prophetic tradition, consensus and analogy.[13] This conscience verifies the reliability and historicity of the data. The reflective conscience—*al-shuᶜūr al-taᵓammulī*—is the process of understanding, analysis, and theorization that is the essence of legal theory. This includes the interconnectedness of debates on language, logic, and law. Finally, the practical conscience—*al-shuᶜūr al-ᶜamalī*—represents the search by jurists (*fuqahāᵓ*) and master jurisprudes (*mujtahidūn*) to discover the legal and moral value or rule in the canonical sources. Once discovered, the rule is applied to the practical affairs of life.

Reinhart recently argued that *uṣūl al-fiqh* was best characterized as Muslim moral philosophy.[14] He argued that the various topoi of this discipline over the centuries reflected the vagaries of historical conditions that Muslims experienced. He found that religious scholars conscientiously tried to figure out the significance of revelation for Muslims. Scholars in this discipline fell into two large groups: those who trusted innate human abilities and those who did not.[15] *Uṣūl al-fiqh* literature was thus a rich archive of patterns of Muslim moral thought and the complex issues with which scholars wrestled.

All the scholars briefly surveyed here dealt with legal theory in a general sense. They share a common repertoire of describing it as morality,

[12] Ḥasan Ḥanafī, *Les méthodes d'exégèse: essai sur la science des fondements de la comprehension-ᶜIlm Uṣūl al-Fiqh* Ḥassan Ḥanafī (Le Caire: Conseil Supérieur des Arts, des Lettres et des Sciences Sociales, 1385/1965), p. 5.
[13] Ḥasan Ḥanafī, *Dirāsāt Islāmiyya* (Cairo: Maktaba al-Angelo Miṣriyya, n.d.), pp. 69–103. Ḥanafī, in *Les méthodes d'exégèse*, calls it "la conscience historique," "la conscience eidetique," and "la conscience active."
[14] A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995).
[15] Ibid., p. 179.

law, conscience, and moral philosophy. None of these studies inquire how jurists know the moral imperative, in the form of the transcendent rule. In order to understand what the rule is and how it is known, part of this article will revisit the question of revelation and divine speech, since the eternal rule is inseparably linked to revelation.

LEGAL THEORY AND THE RULE (*Ḥukm*)

By probing the nature and function of the rule, our understanding of the place of the transcendent order in the mundane affairs of Muslims may be sharpened. For any student of Islamic law, it does not take long to realize that the "revealed law" (*sharīᶜa*) provides the interface between the eternal and the temporal. We know that once jurists had arrived at a decision, they would usually say that the *ḥukm*, the moral-legal value, for an act is *x*, either prohibition or permission. The crucial intersection of the divine will into history occurs by means of the *ḥukm*. It represents the most powerful rhetorical and practical criterion that differentiates a religious existence from a nonreligious existence. In Muslim discourse it serves as a marker of a religious value system. In practical affairs, a conscientious Muslim would want to know what is the *ḥukm sharᶜī* (rule of the revelation or moral rule) for an action (s)he is undertaking. It is the language of the *ḥukm* that distinguishes between a good and evil action, proper and improper conduct, or a pious and impious lifestyle.[16]

There is a long history of ordering Muslim life in terms of the law, via the discourse of *uṣūl al-fiqh*. The latter, in addition to being a moral philosophy, also informs the judicial order and provides the epistemology for a religious worldview. In the ninth century it was the achievement of Muḥammad b. Idrīs al-Shāfiᶜī (d. 820) to confirm the coherence and the transcendental authority of the revelation. He argued that both the hermeneutic, as well as the "model for" interpretation of the Qurᵓān were provided by revelation itself.[17] Jurists and theorists like al-Shāfiᶜī and others not only gave form and shape to the content of Muslim juridical and moral practices but were instrumental in the production of Islamic reason (*raison islamique*) by means of legal theory. This directly

[16] In the civil war of Islam, the zealous Khawārij (Secessionists) sect popularized the centrality of the *ḥukm* of God in their epithet, *lā ḥukm illa lillāh*—"there is no rule (*ḥukm*), but the rule of God"—as part of their political slogan. In the late twentieth century, various Islamist groups in different parts of the Muslim world are demanding that a political order be established in which the *ḥākimiyya*, rulership or sovereignty of God, will substitute secular governance. In other words, the "rule of God" must apply as a complete code of life, where "rule" is a synecdoche to the revealed law, the *sharīᶜa*.

[17] Muḥammad b. Idrīs al-Shāfiᶜī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Dār al-Turāth, 1399/1979); see also Clifford Geertz, "Religion as a Cultural System," in *Anthropological Approaches to the Study of Religion*, ed. Michael Banton (London: Tavistock, 1966), p. 7.

affected the epistemological foundations of Muslim moral thought.[18] Legal theory, however, did not only serve as a repository for epistemology. It was also the means by which a symbolic system was inscribed onto the Muslim intellectual tradition. In examining some of the medieval texts of legal theory, we will not only encounter the polemics of fierce contending ideological contests, read as theological and political polemics, but we will also begin to see the complex relationships of the symbolic and imaginary worldviews that legal-moral discourse inheres.

The task of dealing with the law was normally left to two kinds of scholars. Scholars of juristic theology or legal theorists (*uṣūliyūn*), whose task was to develop the theoretical framework or metanarrative for the interpretation of the sources of the law. Then there are the practical jurists, called the *fuqahāᵓ*, who apply the established legal axioms and theories in given contexts. Legal theory primarily deals with questions of epistemology as to what constitutes "probative evidence" or "indicators of rules" (*adilla-tᵓl-aḥkām*) in concise terms. It also engages with issues of the "manifest aspects of signification" (*wujūh al-dalāla*), a cascading confluence of hermeneutics and linguistics.[19] Classical theorists elaborated in detail the formalistic procedures and methodologies as to how the rule is derived from the source texts. The sources that legal theorists deal with include the Qurᵓān, the prophetic traditions (*sunna*), the consensus decisions reached by past jurists, and the role of reason in lawmaking, among other issues. It is the task of the legal theorist (*uṣūlī*) to construct a framework for the positive lawyers, in order that the latter may deal with practical legal questions. In this respect, it is mostly the judges (*quḍāt*), jurists who specialize in the substantive law (*fuqahāᵓ*) and jurisconsults (*muftiyūn*) who are in search of God's law in a given context, namely, to find the *ḥukm* through intellectual exertion (*ijtihād*). Of course, these are not exclusive professions. A positive lawyer may also be a legal theoretician and a judge may also be a legal theorist. Practitioners of the law assume that if the method of legal theory is properly applied, it would yield the correct or true *ḥukm*.

In Arabic the root word *ḥ-k-m* means to "restrain" (*manᶜ*) and "avert" (*ṣarf*). We have to bear in mind that the term *ḥukm* is used in different senses. If a judge hands down a ruling, the judgment is called a *ḥukm*.

[18] Mohammed Arkoun, *Pour une critique de la raison islamique* (Paris: Maisonneuve et Larose, 1984), pp. 65–80.

[19] Al-Ghazālī, *al-Mustaṣfā fī ᶜIlm al-Uṣūl*, 2d ed. (Beirut: Dār al-Kutub al-ᶜIlmiyya, 1403/1983), 1:5. See also Muḥammad Abū Zahra, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-ᶜArabī, n.d.), p. 8; ᶜAbd al-Wahhāb Khallāf, *ᶜIlm Uṣūl al-Fiqh*, 4th ed. (Beirut: Dār al-ᶜIlm, 1401/1981), p. 12. Legal theory covers the domain of moral philosophy underlying the rule of acts, the epistemological categories that make up our knowledge of rules, the linguistic arguments as to how knowledge is signified, and the authoritative transmission, as well as the veracity of the sources of knowledge that produce the rules.

When making a finding regarding the status of a hypothetical or a real-life question, the ruling or opinion provided by a jurisconsult is also called a *ḥukm*. When the legal theorist deliberates the epistemological and ontological categories of the "five moral rules" (*al-aḥkām al-khamsa*), then the term *ḥukm* also applies. In this scheme an act is assessed to be one of five values: proscribed/interdicted (*ḥarām*), obligatory (*wājib*), recommended (*mandūb*), disapproved (*makrūh*), and indifferent or permissible (*mubāḥ*).

The figure of speech used to indicate that the jurist had exerted himself to provide a rule for a particular situation is the term *ḥukm*, often stated as the "rule of God," *ḥukm Allāh*. However, one cannot avoid noticing that the term *ḥukm* is employed to describe two moves simultaneously: it involves an empirical judgment, as well as a transcendental judgment. In fact, the authority of the empirical dimension is dependent on its relationship with the transcendental and metaphysical *ḥukm*. If we do show some awareness of these two dimensions, we will begin to understand the complexity of the human-divine interaction in the process of discovering "God's rule" in Islamic law. The *ḥukm* proper is a transcendental norm, of which the empirical *ḥukm* is but a temporal manifestation. It is in such a scenario that God is the real *ḥākim* (transcendent nomothete or sovereign ruler) and the real *shāriᶜ* (Supreme Legislator). Given his proximity to the revealed texts, the empirical findings of the jurist are often seen as equivalent to the nomothetic authority that is inherent in the revealed text. This effect imbues the authority of the jurist with an aura of sacredness and often shields juristic opinion from being interrogated for its political and ideological motivations.

LAW AND COSMOLOGY

Surely myths, ontology, and metaphysics provide the modes of perception and organizing principles for creative activities in life. Law is such a creative activity. The way that law relates to myths and creative activity in Islamic law is not well explored, whereas in other religious traditions it is.[20] In some instances, law is related to both cosmogonic and cosmological myths. Part of Islamic law is related to a myth before the creation of the world. As the legal system unfolds, it also provides us with a collection of images of the universe and moral system, a cosmology. At its deepest level, Islamic law is shaped by a transcendent myth that generates creativity.[21] It is indeed the case that cosmogonic myths

[20] See Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (Ithaca, N.Y.: Cornell University Press, 1995).

[21] For the interface of theology and law, see Aziz al-Azmeh, "Islamic Legal Theory and the Appropriation of Reality," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (London: Routledge, 1988), p. 254.

depict the "imaginative religious space and time that exist prior to the universe as normal habitation for human beings."[22] Burkhalter has correctly observed that to recount the myths of beginnings to the exclusion of myths of completion and realization is to misrepresent the breadth of cosmogony in Islam.[23] However, myths of completion in Islam can be characterized by their continuity like those that shape the notion of moral authority (*sharᶜ*) and the practical ordinances of that authority in the *sharīᶜa*. Myths also provide us with notions of primordiality, especially primordial time. In Muslim thought, the primordial has a particular effect of ordering creation and the ethical life through a creator deity. Ordering a specie of creation which has volition, namely humans, takes place through the revealed law, the *sharᶜ*. And, the revelation in turn makes itself perceptible through the rule.[24]

While there is no one-to-one relationship between myth and the ethics of a community, the former does indirectly and profoundly inform ethical thinking. Thus, by understanding a single element of Islamic law, the rule, we may be able to shed light on the complex relationship of myth and symbol on the one hand, and the manner in which these influence cognitive behavior and conditions of religious people on the other.[25] At least we begin to get some idea not only as to what place the law occupies in the imagination of people who are devoted to a *sharīᶜa*-centered life but, more importantly, how the *ḥukm* interacts with the imaginary. Realist perspectives claiming that reality is fully transparent and completely within grasp, provided that one applies the correct rules of research, to a large extent occlude the imaginary discourse in law. This is further reinforced by the belief that law or any concept for that matter is knowable through approved methodologies and theories, despite growing evidence that the major concepts and ideas in religion and law are open to ambiguity and polysemy. However, we should not be surprised to discover that in medieval times, jurist-theologians seemed to have some sense of the role of the imaginary and the symbolic in the religiolegal discourse.

[22] Charles Long, "Cosmogony," in *Encyclopedia of Religion*, ed. Mircea Eliade (New York: Macmillan, 1987), 4:94.

[23] Sheryl L. Burkhalter, "Completion in Continuity: Cosmogony and Ethics in Islam," in *Cosmogony and Ethical Order: New Studies in Comparative Ethics*, ed. Robin W. Lovin and Frank E. Reynolds (Chicago: University of Chicago Press, 1985), p. 226.

[24] A "divine command morally incumbent and immediately personal," in the words of Smith (n. 5 above), p. 99.

[25] Long, 4:98. Also see Talal Asad, "Anthropological Conceptions of Religion: Reflections on Geertz," *Man*, n.s., 18 (1983): 240, for a discussion on symbols as complexes and concepts.

WEB OF THE *Ḥukm*

In order to explore the question of the imaginary and the symbolic in legal discourse, we turn to one of the most celebrated medieval Muslim jurist theologians of Persia, Abū Ḥāmid al-Ghazālī (A.H. 450–504/A.D. 1058–1111). He stated, in *al-Mustaṣfā* (Quintessence), his work on *uṣūl-al-fiqh*, juristic theology, that the rule is intimately related to the "nomothetic discourse" or "dictum of revelation" (*khiṭāb al-shar*ᶜ). Framed in this "grammar," the *ḥukm* as the composite site of "dictum" and "revelation" is inserted into a sacerdotal realm of the unseen (*ghayb*) of Ashᶜarī-Muslim cosmology. In a sense, al-Ghazālī gestures toward a kind of dialogics, in the Greek etymological sense of "dia-logue" and cross-play between the empirical realm of the rule and the transcendental realm of the dictum of revelation.[26] Al-Ghazālī, who, according to some scholars had an ambivalent relationship with the medieval Ashᶜarī theological school, said:[27] "a rule (*ḥukm*), according to us [the Ashᶜarīs], denotes the dictum of revelation when it is linked to the acts of those made responsible" [inna 'l-ḥukm ᶜindanā ᶜibāra ᶜan khiṭāb al-sharᶜ idhā taᶜallaqa bi afᶜāl al-mukallafīn].[28] There can be no doubt that on this point, his definition fell squarely within the Ashᶜarī tradition, since the Māturīdī jurist-theologians of Transoxiana described the rule as an "eternal attribute."[29]

Reinforcing his description of a *ḥukm* as denoting the dictum of revelation, al-Ghazālī adds: "Know that once we have realized by speculative reasoning (*al-naẓar*) that the source (*aṣl*) of rules (*aḥkām s. ḥukm*) is only one, namely, the statement (*qawl*) of Allāh the Sublime, then the

[26] See also Michael M. J. Fischer and Mehdi Abedi, "Texts, Con-Texts, and Pre-Texts," in their *Debating Muslims* (Madison: University of Wisconsin Press, 1990), p. 97.

[27] George Makdisi, "Al-Ghazālī, disciple de Shāfiᶜī en droit et en théologie," in his *Religion, Law and Learning in Classical Islam* (Hampshire: Variorum, 1991), pp. 45–55, is of the opinion that al-Ghazālī was less of an Ashᶜarī and was more inclined to Shāfiᶜism in both his law and theology.

[28] Al-Ghazālī, *al-Mustaṣfā*, 1:55; Muḥammad b. al-Ḥasan al-Badakhshī, *Manāhij al-ᶜUqūl* (Beirut: Dār al-Kutub al-ᶜIlmiyya, 1405/1984), printed with Jamāl al-Dīn ᶜAbd al-Raḥīm al-Isnawī, *Nihāya-t al-Sūl*, 1:40. Al-Badakhshī says that the *sharᶜī* meaning of *ḥukm* according to al-Ashᶜarī is *khiṭāb Allāh*. One should bear in mind that this definition resembles in part the standard definition of *fiqh* (positive law) as: "That body of knowledge that deals with the five rules (*aḥkām*) when they relate to the actions of those made responsible." See Aḥmad b. Muḥammad al-Ḥanafī al-Ḥamawī, *Ghumz ᶜUyūn al-Abṣār Sharḥ Kitāb al-Ashbāh wa 'l-Naẓā'ir* (Beirut: Dār al-Kutub al-ᶜIlmiyya, 1405/1985), 1:18. Al-Ghazālī says *fiqh* is that body of knowledge that deals with those established revealed rules that relate to the actions of those made responsible" (1:4).

[29] See ᶜAlā al-Dīn al-Samarqandī, *Mīzān al-ᶜUṣūl fī Natā'ij al-ᶜUqūl*, ed. ᶜAbd al-Malik ᶜAbd al-Raḥman al-Saᶜdī (Baghdad: Maṭbaᶜa al-Khulūd, 1407/1987), which confirms the difference between the Ashᶜarī and Māturīdī definitions of the *ḥukm*. According to the Māturīdī school, *ḥukm Allāh* is "the eternal attribute of Allah and His action" [ḥukm allāh taᶜālā ṣifa azliyya lahu wa fiᶜluhu] (p. 112).

statement of the Messenger of Allāh is not a rule (*ḥukm*) [on its own], nor [is such a statement] binding in any sense. [More accurately] he [the prophet] is an informant from Allāh the Sublime, that He determined this or that. The rule [of things] belongs to Allāh alone."[30] He could not have been more explicit in linking *ḥukm* to the "statement of Allāh," meaning the Qurᵓān. Therefore, he can confidently proclaim that Allāh alone is the Supreme Assessor (*ḥākim*). According to al-Ghazālī then, the rule is entirely transcendent. In this passage, al-Ghazālī also seemed to suggest that the dictum of revelation encompasses both linguistic and nonlinguistic conceptual elements. The linguistic elements are obviously the five rules. "If there is no such dictum of revelation," says al-Ghazālī, "from the Lawgiver (*shāriᶜ*) then there is no rule (*ḥukm*)."[31] The nonlinguistic elements are less clear. This is because some of the key concepts, such as *sharīᶜa*, "dictum" (*khiṭāb*), and "rule" (*ḥukm*), lack precise definition.[32] They may not have aroused any significant controversy in the milieu of medieval Islam but they do so today. Al-Ghazālī himself was extremely cryptic and offered no further explanation for either *ḥukm* or *khiṭāb*. In *al-Mustaṣfā*, he discusses the rule in the context of how acts are assessed to be morally good or detestable.[33] In our attempt to tease out the significance of the rule, we discover that the concept is located within a web of meanings. One of the most significant concepts on which it depends is the notion of the "revealed dictum" that unfolds into two categories: (1) "verbal or phonic speech" (*al-kalām al-lafẓī*) and (2) "inner or psychic speech" (*al-kalām al-nafsī*).

ASSESSING THE INNER SPEECH

Since we are interested in the nonlinguistic and transcendental dimension of the rule, we pursue al-Ghazālī when he mentions the concept of "revealed dictum" in the context of moral liability (*taklīf*). In this instance, he describes moral liability as "a special type of inner speech" [nawᶜ khāṣṣ min kalām al-nafs].[34] And, he goes on to say, "since there is a certain amount of obscurity in understanding the origin of *inner speech*, understanding any of its details would be even more abstruse."[35]

[30] Al-Ghazālī, *al-Mustaṣfā* (n. 19 above), 1:100.

[31] Ibid., 1:55.

[32] Smith, in "Islamic law: Sharīᶜah and Sharᶜ," says: "The evidence I have collected strongly suggests that *sharīᶜah* is not a major concept for classical Islamic thinkers . . . the *sharīᶜah* is a concept with which Islamic thinkers in the formative and classical periods were not concerned" (pp. 90–91).

[33] See Reinhart (n. 14 above), for a detailed discussion of these topics.

[34] Al-Ghazālī, 1:88.

[35] Ibid.; italics added.

The notion of inner speech as raised by al-Ghazālī and others stems from a larger debate that ranged in the ninth century dubbed as the controversy around "the creation of the Qurʾān" (*khalq al-Qurʾān*).[36] One cannot help but agree with Gibb, who observed that this controversy at first sight took on a "strange theological form."[37] Because the rule is intimately linked to revelation, it is imperative to revisit aspects of the controversy over the creation of the Qurʾān. This will help to clarify several aspects related to "inner" and "outer" speech and its impact on the *ḥukm*. At bottom the issues were metaphysical and theological, as well as a clash of different kinds of reasoning. At the risk of gross oversimplification, one can possibly say with the intended caution, that it was a confrontation between Hellenic and Semitic forms of interpretation, ethical worldviews, or different forms of rationality.[38] More important, a point that will be raised in the course of this discussion, is the way that the Hellenistic doctrine of the Logos gets absorbed into the Muslim understanding of revelation. The umbilical cord tying law to revelation in Islam also ensures that this logos-centrism is continued in the law itself.

The Muʿtazila were a ninth-century rationalist-pietist group that began to formulate the Islamic faith in a language that was acceptable to the educated non-Arabs. That they were influenced by Hellenistic thought, there is no doubt. Their major intervention was on the issue of free will and predestination, a debate that was spawned by the political and dynastic conflicts of early Islam. For the Muʿtazila, it was God's infinite justice that was at the center of their hermeneutic, whereas for their Ashʿarī opponents it was God's infinite power that was a determining factor in interpreting religion. As a debate about the nature of God the argument centered on the kinds of divine attributes. Both the Ashʿarīs and Muʿtazila distinguished between two kinds of divine attributes: attributes of essence (*ṣifāt al-dhāt*) and attributes of act (*ṣifāt al-fiʿl*). Immutable attributes of essence like knowledge, power, and life can never be absent in God. The changeable ones like creation, speech, pleasure, and displeasure are attributes of act. They do not affect the immutable essence, and in the terminology of the *mutakallimūn* (dialectical theologians) they were

[36] See Richard C. Martin and Mark R. Woodward, with Dwi S. Atmaja, *Defenders of Reason in Islam: Muʿtazilism from Medieval School to Modern Symbol* (London: Oneworld, 1997).

[37] H. A. R. Gibb, *Mohammedanism: An Historical Survey*, 2d ed. (London: Oxford University Press, 1953), p. 111.

[38] Smith, "Islamic Law: Sharīʿah and Sharʿ," pp. 101–2, calls it the divergence between the Greek and Semitic; and Gibb, p. 111, sees it as the difference in Greek and oriental philosophies.

"other than" (*ghayr*) God and logically outside God. For the Ashʿarīs, the Qurʾān stemmed from the attribute of essence, namely, God's knowledge (*ʿilm*), and therefore it was immutable and eternal (*qadīm*).[39] For the Muʿtazila the Qurʾān was a product of an attribute of act, namely, speech, and was thus mutable, created (*makhlūq*) and temporal (*ḥādith*).[40] The Muʿtazila argued that only God's essence was uncreated. For them accepting the Qurʾān as being from the attributes of essence meant it was coeternal with God. Such a belief would compromise pristine monotheism and the unity of God. This more general philosophical debate became hooked to the Qurʾān insofar as the revelation was the "speech of God" (*kalām Allāh*) and the question arose whether this speech was created or uncreated.[41] The Ashʿarīs described the relationship between God and his speech in apophatic language: "God's eternal speech is not God, nor something other than God; God is not His speech, nor something other than his speech."[42] In these polemical exchanges, the Ashʿarīs had to countenance the reality of a written Qurʾān in human language, by means of ink on paper and letters that produced sounds, alongside their claim that revelation was eternal and immutable. In response to these very cogent ideas, the Ashʿarīs developed the argument distinguishing between "inner speech" (psychic speech) (*kalām al-nafs*) in opposition to "phonic speech" (*kalām al-lafẓ*).[43] They had to finally concede that

[39] Abū al-Ḥasan al-Ashʿarī, *al-Ibāna ʿan Uṣūl al-Diyāna*, ed. Fawqiyya Ḥasan Maḥmūd, 2d ed., 2 vols. (Cairo: Dār al-Kitāb, 1987), 2:88. Johannes Reinier Theodorus Maria Peters correctly observes: "The belief that the Qurʾān is eternal implies, for instance, that God preordained any event described in it and leads to a belief in God's absolute predestination; who wants to deny this predestination must believe the Qurʾān to be created. And to mention yet another example, he who advocates the doctrine of God's absolute unity and unicity (a central Islamic belief) and wishes to take this in the strictest sense, denies the existence of an uncreated Qurʾān [coexisting] together with God in all eternity" (*God's Created Speech* [Leiden: Brill, 1976], p. 3).

[40] See A. J. Arberry, *Revelation and Reason in Islam* (London: Allen & Unwin, 1957), pp. 23–24.

[41] The controversy became even more inflamed when it took on political overtones resulting in the Inquisition (*Miḥna*) in ninth-century Baghdad. This was when the Caliph al-Maʾmūn, a student of theology, decided to apply the Muʿtazila doctrines to matters of state and required all judges (*qāḍīs*) to subscribe to the view that God's speech, the Qurʾān, was created. The backlash is now legend, propelling to fame the pious and traditionalist Aḥmad b. Ḥanbal (d. 855), whose cause on this issue was later championed by a former student of Muʿtazilism, Abuʾl Ḥasan al-Ashʿarī (d. 935), the founder of the Ashʿari theological tendency.

[42] Peters, p. 332.

[43] The Ḥanbalī's, who agreed with the Ashʿarīs about the eternity of God's speech, however, refuted the doctrine of "inner speech." See Jeanette Wakin, "Interpretation of the Divine Command in the Jurisprudence of Muwaffaq al-Dīn Ibn Qudāmah," in *Islamic Law and Jurisprudence*, ed. Nicholas Heer (Seattle and London: University of Washington Press, 1990), p. 38.

only a very special kind of revealed speech, a mythical one, was uncreated and eternal.[44]

It was Gibb who first drew our attention to the ironical fact that it was the Ashᶜarīs, opponents of the pro-Hellenist Muᶜtazila, who wittingly or unwittingly internalized the Hellenistic doctrine of the Logos.[45] Gibb did not explain how the logos theory got entangled with the "creation of the Qurʾān" doctrine. However, if one reflects on the significance and function of the differentiation of "phonic speech" and "inner speech" in Ashᶜarī theology, then one begins to get a sense of logos theory in Muslim theological discourse. The obvious question that comes to mind is, Why was it necessary to distinguish between various levels of revealed speech? The need was to say that the Qurʾān as God's speech, despite its material manifestation, remained eternal and uncreated. It was a case of resolving the paradox of something having an apparent created form but also at the same time being uncreated.[46] If, however, we momentarily and briefly reflect on what happened in early Christian theology, the parallel of logos theory in Islam may become apparent.

The question raised in early Christianity was, How could God who is unoriginate or ingenerate, indefinable and eternal, be related to the world of matter, through Jesus, without himself being changed by being related to the sphere of change?[47] Hellenized Christianity had to overcome the problem of identifying Jesus with the divine. In the patristic period the Stoic description of logos was employed. The Greek logos was a problematic concept. In pre-Socratic thought, logos was applied to "speech, anything said or written, as well as to the exercise of reason."[48] These two meanings, reason and speech, became the difference between *logos*

[44] Claud Salamé, "Muqaddima," in Saᶜd al-Dīn Masᶜūd b. ᶜUmar al-Taftāzānī, *Sharḥ al-ᶜAqāʾid al-Nasafiyya fi Uṣūl al-Dīn wa ᶜIlm al-Kalām*, ed. Claud Salamé (Damascus: Manshūrāt Wazāra li'l Thaqāfa wa'l Irshād al-Qawmī, 1973), p. 20. This immateriality of the revealed word, or perhaps the "mythic" nature of revelation, characterizes the difference between the "created" revelation of the Muᶜtazilīs and the "uncreated" revelation of the Ashᶜarīs. Muᶜtazila thought would not deny the transcendent nature and origin of revelation but found it easier to perceive revelation in an empirical and rational mode. The Ashᶜarī argument was more complex, allowing for the role of the imaginary and myth in conceptualizing aspects of revelation.

[45] Gibb, p. 112.

[46] In fact, al-Ashᶜarī does not even permit anyone to say that he or she had "verbalized (*yulfaẓ*) the Qurʾā n . . . the Qurʾān is in reality recited (*yuqraʾ*) and read aloud (*yutlā*) . . . for it is not permissible to say that a single part (*shay*) of the Qurʾān is created (*makhlūq*) because the Qurʾān is in its entirety uncreated (*ghayr makhlūq*)" (2:101).

[47] Hubert Cunliffe-Jones, *A History of Christian Doctrine* (Edinburgh: T & T Clark, 1978), p. 32. I am grateful to Robert C. Gregg for his invaluable assistance in providing me with this and other references on the topic of logos in early Christianity.

[48] David Chidester, "Word against Light: Perception and the Conflict of Symbols," *Journal of Religion* 65, no. 1 (1985): 54.

endiathetos (*ratio*), which connotes "immanent reason" in the human breast, as distinct from *logos prophorikos* (*oratio*) "uttered speech."[49] The debate within Christianity was brought into relief by what is now known as the Arian heresy. For the early Arians in the fourth century, even the cosmological Christ was a creature, no matter how exalted were the results of this creaturehood.[50] For the Arians, the Creator Logos, as immanent reason, was sovereign and free and whose modus operandi was his will and the creatures that existed were the results of his pleasure.[51] Therefore, Christ as the word was "begotten" or "became," the Arians claimed, and was a creature. For Athanasius who represented the orthodox position, Christ was the very incarnation of the word (Logos). Before anything came into existence, God generated his Logos, making him external, as the firstborn of all creation.[52] "In the beginning was the Logos, and the Logos was with God," says John 1:1. Then we are told: "And the Logos was God; everything was made through him, and apart from him nothing was made" (John 1:1–3). Jesus was thus, according to the orthodox position, the uttered speech of the immanent reason or the Word turned flesh.

There is an uncanny resemblance between the debate in early Christianity over the status of Jesus and the controversy over the creation of the Qurʾān. The question was, How does God speak to a material world without His divine speech (the Qurʾān) being changed by the medium in which it was expressed and its relationship to a realm of change? Realizing the challenge that the Hellenic logos theory would pose to Islam's sensibility of monotheism, the Muᶜtazila, like the Arians, viewed any suggestion of independent eternal attributes of God, as separate from God's essence to be anathema. For this reason, the Muᶜtazila could not accept the Qurʾān as the speech of God and also being the equivalent of the eternal essence of God. While the early Ashᶜarīs adopted the belief of the Qurʾān as the uncreated word of God, the later Ashᶜarīs had to concede that the sounds, writing, and material on which the Qurʾān was written were created. The proper doctrinal formula was to say: "the Qurʾān is the uncreated *speech of God* the Sublime" [al-Qurʾān kalām Allāh taᶜālā ghayr makhlūq].[53] The reason for not simply saying "the Qurʾān is the word of God" was to prevent any erroneous exaggeration that the mate-

[49] G. W. Lampe, *A Patristic Greek Lexicon* (Oxford: Oxford University Press, 1961). Of course, one had to contend with the fact that the term "logos" was polysemic and encompassed a variety of meanings, including divine plan, reason, mind, utterance, Son, articulation in creation and voice in history, rationality, word, and a notion of speech.

[50] Robert C. Gregg and Dennis E. Groh, *Early Arianism: A View of Salvation* (Philadelphia: Fortress, 1981), p. 2.

[51] Ibid., p. 9.

[52] Robert M. Grant, *Theophilus of Antioch ad Autolycum* (Oxford: Clarendon, 1970), p. 63.

[53] Al-Taftāzānī, p. 56; italics added.

rials on which it was written was also uncreated.[54] For the Ashᶜarīs, the uncreated and eternal Qurʾān was the "inner speech" (*al-kalām al-nafsī*). The Qurʾān as inner speech was the equivalent of the "immanent logos," while the Qurʾān as "verbal speech" was the equivalent of the "expressed logos." If in Christian thought Jesus is the "word" turned flesh, then in Muslim thought, the Qurʾān is the speech (*kalām*) turned book (*kitāb*).

Our detour has now taken us to the point that we can appreciate al-Ghazālī's version of the Ashᶜarī counter-polemic that the notion of "speech of God" (*kalām Allāh*) was equivocal.[55] The expression "God's speech" could mean two kinds of speech: "verbal/phonic speech" (*kalām al-lafẓ*) and "inner speech" (*kalām al-nafs*).[56] This dualistic nature of speech, a mimesis of the duality of essence and nonessence, corresponded to a duality present in all languages: the duality of meaning (*maᶜānī*) and the emitted sound (*lafẓ*), signified and signifier. "The attribute of the Word, subsisting in the divine Essence, is first and foremost this internal Word of God, which is eternal and uncreated, without future or past, without multiplication or division."[57] God then made this inner speech manifest, *ad extra*, by means of sounds and letters, that are both created substances.

This kind of theological dualism or logocentrism made it easy for al-Ghazālī to assert that the "phonic speech" of God, is only figuratively called *kalām Allāh* (speech of God). For instance, saying that one "heard" the speech of God, he argued, was like saying one "heard" the poetry of the Arabic poet, Abū 'l-Ṭayyib al-Mutanabbī (d. 354/955). The fact is that we did not ourselves hear the voice of the poet, but we heard it through the voice of someone else who recited his poetry. In other words, the "essence of speech" is attributed to al-Mutanabbī, while the emitted sounds were those of the person who recited the poetry. Likewise the "real" word of God is the "inner speech," which constitutes the essence of the phonic speech and is uncreated.[58] Inner speech is, of course, "located with the

[54] Ibid. A proper study needs to be done in order to track the changes in Ashᶜarī theology vis-à-vis the Qurʾān. Have there been shifts similar to what occurred in Christian Eucharistic theology of doctrines of transubstantiation and consubstantiation in Muslim theology? The early Ashᶜarī doctrine that the Qurʾān was identical to the uncreated word of God, as articulated by Abu'l Ḥasan al-Ashᶜarī himself, is reminiscent of some kind of transubstantiation. However, the later Ashᶜarī doctrine that the Qurʾān is uncreated, while its words, language, and writing are at the same time created, shows signs of a doctrine of consubstantiation.

[55] Al-Ghazālī, *al-Mustaṣfā* (n. 19 above), 1:100.

[56] Bernard Weiss, "Exoterism and Objectivity," in Heer, ed. (n. 43 above), p. 54.

[57] See *Encyclopaedia of Islam*, 2d ed., s.v. "Kalām."

[58] Al-Ghazālī, *al-Mustaṣfā*, 1:339. In the case of the Qurʾān, the inference of al-Ghazālī's statement is that the Qurʾān as eternal and "inner speech" is entirely the speech of God, while as "outer speech" it was uttered by the Prophet Muḥammad. Fazlur Rahman's statement that the "Qurʾān is entirely the Word of God and, in an ordinary sense, also entirely the word of Muḥammad" makes perfect sense if viewed from this insight offered by al-Ghazālī (*Islam* [n. 10 above], p. 31).

essence of Allāh (*bi dhāt Allāh*), the Sublime."[59] God's speech, al-Ghazālī continues, "is an eternal attribute from among His attributes. And, *al-kalām* (Speech) is an equivocal noun (*mushtarak:* homonym). It could mean those words that signify what is in the mind/soul (*nafs*). . . . Or, it could mean the signified (*madlūl*) of expressions (*ᶜibārāt*), which are significations (*maᶜānī*) in the mind/soul (*nafs*). As it was said by the poet [al-Akhṭal][60] 'Speech lies in the heart (*fuʾād*)/ And surely the tongue has been made a sign of what is in the heart.'"[61]

In this passage, al-Ghazālī only hints at the possible relationship between inner speech and legal theory. To be fair, the cosmology of the transcendent rule can only be discerned implicitly in this statement of al-Ghazālī. But the relationship between inner speech and the transcendental rule becomes more evident in the texts of other legal theorists. The notion of inner speech in the context of legal theory that was not elucidated by al-Ghazālī was amplified by several scholars of dialectical theology (*ᶜilm al-kalām*) and scholars of legal theory.

Among the many legal theorists who explore the issue of inner speech I have selected two. They are the Shāfiᶜī legal theorists, Muḥammad b. al-Ḥasan al-Badakhshī (d. 716/1316) and Jamāl al-Dīn ᶜAbd al-Raḥīm al-Isnawī (d. 773/1370). They expand on this notion in their respective glosses on the work of their A.H. seventh-century (A.D. thirteenth-century) predecessor, al-Qāḍī Nāṣir al-Dīn al-Bayḍāwī (d. 685/1286). Al-Bayḍāwī also defined a rule as: "the dictum of God the Sublime [which is] related to the acts of those who have [accepted moral] liability/responsibility, in terms of demand or choice" [khiṭāb Allāh taᶜālā al-mutaᶜallaq bi afᶜāl al-mukallafīn bi'l iqtiḍā aw al-takhyīr].[62] While neither al-Ghazālī nor al-Bayḍāwī make a distinction between an empirical and transcendent rule, both define the appearance of a rule as a relational concept. A rule, they say, is when a "revealed dictum" becomes "attached" or is "related" (*taᶜallaqa*) to the "actions of those who have accepted moral liability." Clearly, the references to revelation and God imply a transcendent sensibility, while the allusion of the rule being attached to human actions signifies the realm of the empirical. I would argue that unless one accepts a radical form of immanence, there is hardly a chance of ignoring the dualism of the empirical and transcendental in Muslim legal cosmology. For the classical and medieval jurists, the term *ḥukm* was the locus for an amalgam of the eternal and temporal dimensions.

In order to understand the place of the *ḥukm* in the web of signifiers we need to cross a linguistic bridge and determine whether the terms

[59] Al-Ghazālī, *al-Mustaṣfā*, 1:100.

[60] The sobriquet of the Christian Arab poet, Ghiyāth b. Ghawth b. al-Ṣalṭ (d. 92/710), to whom this line is attributed (*Encyclopaedia of Islam*, 2d ed., s.v. "al-Akhṭal").

[61] Al-Ghazālī, *al-Mustaṣfā*, 1:100.

[62] Al-Badakhshī (n. 28 above), 1:41.

"revealed dictum" (*khiṭāb*) and "speech" (*kalām*) are identical and interchangeable.[63] When al-Bayḍāwī and other Ashᶜarī scholars construe the notion of "revealed dictum" as tantamount to being the "rule," then *khiṭāb* in this context means "inner speech" (*al-kalām al-nafsī*). If this is the case, then the rule is nothing but the inner speech of revelation and a discourse of a transcendent order. The controversy over the creation of the Qurʾān also influences the language of the law. The Ashᶜaris view the *ḥukm* as eternal (*qadīm*), whereas the Muᶜtazila view it as temporal (*ḥādith*). Just as the "speech of God," the Qurʾān, is "created" and thus temporal, so it is the case with the *ḥukm* too, according to the Muᶜtazila. Ashᶜarī scholars in turn point out that it is incorrect to say that a rule is temporal, since an eternal discourse like the speech of God (including the *ḥukm*) can generate only an eternal rule. The Muᶜtazila had erred, they say, by confusing and conflating two different things. They failed to distinguish between an eternal rule, on the one hand, and the temporal "attachment/linking" (*taᶜalluq*) of such acts to an eternal rule, on the other hand. It is the human effort and labor, in short the empirical activity of "linking" acts to rules, which is a temporal and created activity, and not the rule itself.[64] In the Ashᶜarī view the rule only becomes manifest (*ibrāz/ẓuhūr*) when the revealed dictum is attached to human actions. It is a kind of transcendental burst into history at the moment of action.

LAW IN WRITING AND SPEECH

Indirectly, the Ashᶜarī preference for the eternal and divine inner speech meant that the "phonic speech" (*al-kalām al-lafẓī*) was devalued. Ashᶜarī metaphysics thus constituted itself on this disavowal of the written word, while privileging the inner speech of the soul. It is only through the inner speech, in which "speech hears itself" via the "inner" psychic substance, that the divine presents itself as the nonexterior, nonmundane, nonempirical, and thus noncontingent signifier.

It was important to know not only how an eternal rule got attached to a temporal act but also how the legal discourse comprehended both the transcendental and the empirical dimensions. At the empirical level, jurists would search for the imperatives in the textual sources of the law so that they could know what is right from wrong. The legal subject responds directly to the commands of the *sharᶜ*, revelation. When morality is

[63] For al-Bayḍāwī they were interchangeable, but not in the view of his two commentators. They say that it is a prerequisite for *khiṭāb* to have an addressee. Like some authorities, they also believe there is a significant difference between "dictum/discourse" and "speech." Linguistically, discourse (*khiṭāb*) requires an addresser (*mukhāṭib*) and addressee (*mukhāṭab*). And, *khiṭāb* only occurs when the addressee is capable of understanding it (see al-Badakhshī, 1:42). By contrast, speech (*kalām*) is an expression that can exist on its own without the need for a speaker and an audience (see al-Isnawī [n. 28 above], printed with al-Badakhshī, 1:42).

[64] Al-Isnawī, 1:48.

derived from such imperatives, we call it a "deontological ethic." While some Muslim legal theorists did formulate the law in this fashion, that was not the end of the enterprise. Legal theorists were primarily interested in formulating a legal-moral epistemology. This was accomplished by marshaling proofs for the various forms of rational discourse. In this form of argumentation, morality stems from ontological or metaphysical imperatives. It is through reason that one discovers what is good or bad, axiology. In fact, in treatises of legal theory one finds that both axiology and deontology coexist side by side. But epistemology does not explain how the transcendent rule becomes manifest.

How the eternal rule got "linked" to a human action was left to the explanatory power of the cosmological narrative. We return to the texts of al-Isnawī and al-Badakshsī to assist us. Most interesting, the example proffered by both deals with coitus. It is a known rule that permissible coitus between a male and female can take place only within a lawful marriage. When the law says that marriage makes coitus permissible, the ruling of permissibility is a rule attached to the act of marrying.[65] Al-Isnawī and al-Badakhshī say that for marriage to become permissible a special kind of speech took place in a beginningless and continuing past (*al-azal*) when God said: "I permitted Zayd to copulate with Hind when he marries her."[66] In other words, the physical act of marriage and the legal rule are all prefigured in this mythical narrative in precreation. Al-Isnawī adds that it was God's eternal decree of permissibility that became activated once the parties fulfilled the practical acts of "offer" (*ījāb*) and "acceptance" (*qabūl*), the formalities required for a valid contract. To say that a certain act was permissible (*ḥalāl*) was to assume that a rule of God preceded the act, which said: "I (God) lifted the impediment (*ḥaraj*) [of illicit sex] from the subject [of this act]."[67] The example of marriage is the only one used by both theorists simply because it is an illustration of a prohibited act, sex, being made permissible by means of the law. This is a general aphorism in apothegmatic and rhyming forms that states: "The principle (*aṣl*) in all things is permission and the principle in coitus is prohibition" [al-aṣl fīʾl-ashyāʾ al-ibāḥa waʾl-aṣl fīʾl-ibḍāᶜ al-taḥrīm].[68] Thus, coitus only becomes permissible if there is a divine ruling on it. This divine decree or mythical narrative can be assumed to occur for every human transaction involving a moral act.

[65] There are detailed discussions in Muslim juristic theology that deal with the question as to whether the rule (*ḥukm*) is an attribute that the legal subject deserves or whether it is a description of the essence of the legal subject. See al-Samarqandī (n. 29 above), 1:120.

[66] Al-Badakhshī, 1:48; al-Isnawī, 1:52.

[67] Al-Isnawī, 1:52.

[68] Zayn al-Dīn Ibrāhīm (Ibn Nujaym), *al-Ashbāh waʾl-Naẓāʾir*, ed. Muḥammad Muṭīᶜ al-Ḥāfiẓ (Damascus: Dār al-Fikr, 1403/1983), pp. 83–84; and Jalāl al-Dīn al-Suyūṭī, *al-Ashbāh wa ʾl-Naẓāʾir fī Qawāᶜid wa Furūᶜ Fiqh al-Shāfiᶜiyya* (Beirut: Dār al-Kutub al-ᶜIlmiyya, 1403/1983), p. 65.

Ashᶜarī legal theorists and jurist-theologians were consistent in their commitment to the dual nature of language: inner speech versus outer speech. This dualism surfaces in the *ḥukm*, where the myth mediates the transcendent via the empirical. In effect, one can say that the *ḥukm* is in one sense the rule of humans, the empirical activity of rule finding by the jurist and in another sense the eternal rule of God. The story of God's eternal decree in prefiguring the moral acts of human beings is an essential dimension to the discourse of Islamic law. This precreation myth makes it possible to speak of two realms existing simultaneously by simulating in the temporal realm what God had already decreed in a past without beginning, *al-azal*.

The consequence of this myth is that the transcendent *ḥukm* is always at an ontological remove, not immediately within grasp. It will be correct to say that a jurist does not "discover" the transcendent rule through independent thinking (*ijtihād*). Rather, he or she exerts him/herself to unveil the always already existing rule by "dis-covering" the empirical indicators (*adilla*) that signify the transcendent rule. The legal indicator serves as the iconic representation of the transcendent archetype. Thus, when a jurist states that he or she had found the rule of an act, it is a figurative utterance: synecdoche, stating the part, but signifying the whole. The jurist had found only the empirical part—the legal indicators contained in the outer speech that signified the rule, not the transcendent rule itself. The latter is beyond the jurist's empirical reach. But once the jurist had grasped the empirical part, it is the closest he or she can claim to have come to the eternal rule without "con-fusing" the legal signs with the transcendental rule. So, one can talk about the sign/signifier/indicant (*dalīl*) of a given *ḥukm*, but one cannot claim to have incontrovertibly "found" a transparent eternal *ḥukm simpliciter*. In a different way, one can say that as the jurist pursues the legal epistemology, simultaneously the inner speech silently and imperceptibly "slides" onto the temporal reality.

In the cosmological narrative, religious memory or myth is privileged to a providential prehistory in which God had decreed certain things. Al-Azmeh has correctly described such narratives as taking on the modality of performative statements, and these are contained in the Qurᵓān and other texts of canonical status.[69] Thus, he goes on to say, that the *ḥukm*, like the ᶜ*illa* (legal cause), is neither naturalistic nor rational, but purely legal.[70] By legal, he means, it follows the logic of a closed legal-moral system and is not based on rational foundations. The creator-God or

[69] Aziz al-Azmeh, "Chronophagous Discourse: A Study of Clerico-Legal Appropriation of the World in an Islamic Tradition," in *Religion and Practical Reason: New Essays in the Comparative Philosophy of Religions*, ed. Frank E. Reynolds and David Tracy (Albany: State University of New York Press, 1994), p. 175.

[70] Reynolds and Tracy, eds., p. 180.

nomothete has posited the legal rules or legal causes. If that is the case, then the answer to an ordinary legal question is then predetermined. What remains is for the rule to be disclosed in history. The implication is that the legal imaginary or aesthetics is self-referential. The rule, in its linguistic and nonlinguistic modalities, has no ground or reality as referent except its own. The rule *is* the "dictum of revelation" (*khiṭāb al-sharᶜ*) and only becomes "visible" at the moment it connotes human acts. In Ashᶜarī discourse, it means that there is no intrinsic link between a rule, that is, the value of an act, and the act itself. The link is a theological and mythical one.[71] The rule has no reality outside itself and has no grounds to be contrasted with the real.[72] In fact, the *ḥukm* absorbs the "real" into itself. So the person intending to undertake the contract of marriage in order to make coitus permissible, stands before the mystical authority of the unknown transcendental law, that is, the *ḥukm*, and at the same time stands before the legal indicators that signify it. This is analogous to the theological proposition that the existence of the world discloses or points toward the existence of the primordial Creator, but the world cannot be confused with the Creator.[73] Given the radical separation between the empirical and the transcendental realms, it is impossible to apportion error to the jurist, who may have failed to "hit" the correct transcendent rule. In terms of Muslim theology, jurists are protected from the moral consequences of bona fide error. A correct and an incorrect rule are both subject to reward, albeit that the correct one elicits more reward than the incorrect one. This is because the transcendent rule is "unknowable" and not subject to epistemological refinement. Derrida's reflections on the law are perhaps apt here.

> Here we "touch" without touching this extraordinary paradox: the inaccessible transcendence of the law before which and prior to which "man" stands fast only appears infinitely transcendent and thus theological to the extent that, so near him, it depends only on him, on the performative act by which he institutes it . . . an absolute performative whose presence always escapes him. The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past. Every "subject" is caught up in this aporetic structure in advance.[74]

[71] A. Kevin Reinhart, "Transcendence and Social Practice: Muftis and Qādis as Religious Interpreters," *Annales Islamologiques* 27 (1993): 16.

[72] Muslim jurists generally talk about the legal causes (ᶜ*illal*) that are derived from textual sources. The absence and presence of such causes are associated with certain legal rules. One must bear in mind that marriage, divorce, leasing, and commercial transactions are not in themselves legal causes but are human acts that activate and invite specific revealed rules (*al-aḥkām al-sharᶜiyya*). These acts are only "indicators" (*muᶜarrifāt*) and point toward the appropriate rule. See al-Isnawī, 1:52.

[73] Al-Isnawī, 1:48.

[74] Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (New York: Routledge, 1992), p. 36.

RULE AS SIMULACRUM

Within an Ashᶜarī framework one can safely say that the transcendent rule precedes the empirical one in time.[75] A form of simulation is also at work, a pretense to originate a rule that had always already been there. Using a different configuration, one could say that the "model for" the *ḥukm* preexists reality in its Platonic archetype. When the empirical rule is apprehended, and it will be remembered that this occurs when the rule attaches itself to an act, the transcendent rule (*ḥukm*) remains unaffected and unchanged by reality itself. The empirical *ḥukm* is thus a mere image of the transcendent *ḥukm*.

So, when the jurist or judge interacts with the revealed text—the Qurʾān, prophetic tradition—to find the *ḥukm*, they establish these texts-as-symbols, through the process of simulation. It is in the space of this text-as-symbol, as a displaced site of speech, where the legal subject, the *ḥukm* and/or act speaks as if a person.[76] The function of cosmology in medieval Muslim legal aesthetics, to use the words of Goodrich in another context, is that of "putting in play the simulation of an order and method of institutional life that is made to appear as if it were regulated and lived according to the written law."[77] This does not mean that the *ḥukm* plays out only as symbol in Muslim law. To the contrary, the *ḥukm* is also the site for practices and it provides empirical rationales for these practices. Rather, we need to acknowledge the dual role of the *ḥukm*, that of symbol, in its transcendent guise, and as practice, in its empirical guise.

The Qurʾān as the immanent logos (*al-kalām al-nafsī*) is represented by the "outer speech." Similarly, the *ḥukm*, as part of the immanent logos, is the simulacrum, the representation of the deity. Thus, one can say that in Ashᶜarī theology simulacrum is not in the form of a person, image, or icon, but a kind of transcendent moral imperative, *ḥukm*. From the Ashᶜarī cosmology it becomes apparent that the *ḥukm* is the locus of divine authority incarnated in the "grammar" of the law. The divine will is known through the *ḥukm*, the moral guidance that is seen as a sign of God's divine justice.

[75] Reflecting on this cosmogonic narrative of the law, as detailed by the medieval Muslim jurists, there is more than a striking resemblance with Jan Baudrillard's notions of simulations and simulacra. It was Baudrillard who boldly proclaimed that abstraction is no longer the double or mirror image of something, a referential being, or substance. Simulation in late modernity, he said, was being characterized as the "precession of the model" (Baudrillard [n. 1 above], p. 175). "It is the generation by models of a real without origin or reality: a hyperreal" (Baudrillard, p. 166). The illustration that Baudrillard provides is that of a map that represents the real space and then the territory itself. Simulation in this instance occurs when the map precedes the territory and is taken as "real" even before one gets to the material space itself. This is what he calls the precession of simulacra. In other words, the map is the allegory of the territory.

[76] I have borrowed this idea from Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990), p. 284.

[77] Ibid., p. 284.

On this point there may be, to some extent, a commonality between the theology underlying the Ashᶜarī notion of the *ḥukm* and Christian Eucharistic theology. The Eucharist as a sacrament in the Catholic tradition represents human communion with the divine. Of course there are differences among theologians as to whether this encounter is with the "real presence" of the body of Christ or a symbolic communion.[78] These differences aside, what is important though is the effect of this sacrament. One of the effects is union with Christ and the possibility that the one partaking in it may be restored to grace and live a moral and virtuous life.

Given the complexity of the nature of divine speech in Ashᶜarī theology, Muslim jurist-theologians have not dwelt in any significant manner upon the nature of the human encounter with the eternal *ḥukm*.[79] In Muslim theology, I have argued, the intimate engagement with divine speech is generally through the Qurʾān and, more specifically, the *ḥukm*. And clearly the practices inspired as well as generated by the *ḥukm* also carry the imprint and stamp of religious moral approval or disapproval. By living a life that is guided and regulated by the divine *ḥukm*, the individual is ensured of both earthly and afterworldly felicity. Now, whether it is through the Eucharist or a life lived in proximity to the revealed norm (*ḥukm*), believers in both faiths have different kinds of encounters or communion with representations (simulacra) of the deity or with ultimate reality.[80] In both instances the function is to ensure that the participants acquire a certain moral rectitude. At least they can begin to visualize the ideal model of such envisaged life of virtue, whether that be through nomocentric values of the *sharīᶜa* in the case of Islam, or the transforming effect of grace and love, in Christianity.

It is indeed in the *ḥukm* where moral authority transforms itself into legal authority and power. Given the proximity of the legal and moral discourse to the transcendent rule, it should come as no surprise why the

[78] See *New Catholic Encyclopedia* (New York: McGraw-Hill, 1967), s.v. "Eucharist"; Eliade, ed. (n. 22 above), s.v. "Eucharist"; Richard P. McBrien, *Catholicism*, new ed. (San Francisco: HarperCollins, 1994), pp. 823–33.

[79] It is interesting to note that both al-Ghazālī (d. 1111) and Thomas Aquinas (d. 1274) made statements about the obscure and mysterious nature of the "inner speech" and the Eucharist, respectively. Al-Ghazālī said that the notion of *kalām al-nafs* (inner speech) was "obscure," while Aquinas said that the Eucharist was a mystery that no theological explanation can hope to master (al-Ghazālī [n. 19 above], 1:88; and Richard P. McBrien, ed., *HarperCollins Encyclopedia of Catholicism* (San Francisco: Harper, 1989), s.v. "Eucharist," p. 485.

[80] See Wilfred Cantwell Smith, "The True Meaning of Scripture: An Empirical Historian's Nonreductionist Interpretation of the Qurʾan," *International Journal of Middle East Studies*, 11 (1980): 487–505. Smith observes that the Qurʾān is the entry of the transcendent into history. The way Muslims relate to the Qurʾān, he says, is to "enter into some sort of communion with ultimate reality—the former in a fashion that I have found it not irreverent to compare formally with the Christian eucharist."

profession of law (*fiqh*) enjoys a privileged position in Islam. The association of the jurists (*fuqahā'*) with transcendent knowledge (*'ilm*) make them part of the class of learned scholars (*'ulamā'*). And, of course, there are prophetic reports that state that "the *'ulamā'* (the learned) are the true heirs of the prophets."[81] This statement suggests that the prophets and the learned share knowledge of a transcendent origin. Therefore, the juristconsult (*muftī*) is virtually God's representative on earth. Past jurists explained that "the muftī makes clear the ruling of God, and he is the inheritor of prophethood."[82] Shihāb al-Dīn al-Qarāfī, a thirteenth-century Egyptian jurist, confirms this view: "When a judge rules, by God's permission, and his ruling on behalf of God is substantively correct, this ruling becomes as a text from God [kāna dhālika naṣṣan wāridan min Allāh] upon the tongue of His representative, who is His representative on earth and successor to His prophet, regarding this particular case."[83] It is the tongue of the jurist, that is, his or her speech, that embodies the eternal rule. No wonder al-Ghazālī and other Ash'arī jurists also insisted that even the "recitation" (*tilāwa*) of the Qur'ān/*ḥukm* was eternal (*qadīm*).[84]

CONCLUSION

It is important to recognize that a combination of mythical, theological, and metaphysical conceptions shape Islamic law. By looking at the texts of legal scholars who adhere to the Ash'arī theological school, one can begin to isolate the interface between law and theology. I have suggested that the rule, an essential element of legal discourse, has a dual character. It is simultaneously the carrier of both a transcendental and an empirical communication. It has been shown that the very nature of the *ḥukm* allows it to mediate the two realms by means of cosmogonic and cosmological myths. God, who prefigures all moral conduct in eternity, decrees the *ḥukm* is precreation. Muslim moral ontology generated by

[81] Abū Muḥammad 'Abd Allāh b. 'Abd al-Raḥmān b. al-Faḍl b. Bahrām al-Dārimī, *Sunan al-Dārimī* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 1:98.

[82] Abū 'l-Ḥasan Taqī al-Dīn 'Alī b. 'Abd al-Kāfī al-Subkī, *Fatāwā al-Subkī*, 2 vols. (Cairo: Maktabat al-Qudsī, 1365/1937), 2:543. Also see Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), p. 161. The duty of the *muftī* to issue a *fatwā* compared with the work of the author-jurist, says Norman Calder, was "dangerous because it represented an arrogation of authority, making the *muftī* a direct mediator between God and man" (Norman Calder, "al-Nawawī's Typology of *Muftīs* and Its Significance for a General Theory of Islamic Law," *Islamic Law and Society*, 3 [June 1996]: 163). The truth of the matter is that the *muftī* does play a mediating role. Furthermore, the legal tradition has not been reluctant to admit the intimate role of the jurist in mediating the divine rule.

[83] Jackson, pp. 182–83.

[84] Abū Ḥāmid al-Ghazālī, "Iljām al-'Awām 'an 'Ilm al-Kalām," in *Majmū'a Rasā'il al-Imām al-Ghazālī* (Beirut: Dār al-Kutub al-'Ilmiyya, 1404/1986), p. 12.

Ash'arī theology is rooted in this cosmology, which is generally ignored in favor of a rational and epistemological discourse.

The perception of revelation, the Qur'ān, which is the locus of the *ḥukm*, also determines our cognition of the rule. The debates over the creation of the Qur'ān invariably have an impact on the understanding of a revelation-based legal system. Logos theory as internalized by the early Ash'arīs in defense of the eternity of the Qur'ān also plays out in the rule. The dualism and paradoxical nature of the rule, being transcendent and empirical, eternal and yet associated with a temporal world in the same instant, cannot be ignored. It appears that the mythical narrative is capable of bridging the chasm between these opposing discourses.

The *ḥukm* lies at the core of the inner speech and is equally eternal. It is the *ḥukm* that makes the divine presence felt in history. Value is conferred on all acts via the *ḥukm*. As the immanent speech of God, the rule as allegory represents the deity. In some way, the *ḥukm* and the Eucharist in the Christian tradition have resembling functions and effects. Both are concerned with the encounter between the human and the divine, albeit radically different modes in each. The *ḥukm* is best understood to be a hybrid event. It participates in the transcendent by means of mythology and intervenes in the empirical realm by means of epistemology. It is the meeting place of an overlapping human and divine judgment that is made possible by a religious cosmology enumerated above.

The mythical discourse if pressed to its logical conclusion can subvert the rational legal epistemology and reduce it to a simulation of already-decreed divine archetypes. Yet this does not happen. It appears that the mythical, meaning the transcendent, authority of the law, has an appeal to induce compliance and obedience: the need to follow God's law. But it does not have a more prominent role in legal discourse. Muslim legal discourse seems to have found a "fit" in which the transcendent and empirical are interdependent and at the same time they are also viewed as autonomous realms.

University of Cape Town