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PRECEDENTS AND THE ROLE OF ANALOGY IN COMMON LAW AND ISLAMIC LAW

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This paper looks at the common grounds for legal reasoning based on analogy in common law and Islamic law. Despite the difference between the systems, based on the structure and sources, the use of judicial precedent and Qiyas (analogical reasoning) prima facie seem strikingly similar but unexplored. The authors look at the development stages of the two doctrines, the role of analogy, and the making of conclusions. The method of this doctrinal study is comparatively less synthetical and more analytical. The study finds that analogy does play a role in legal reasoning based on the doctrine of judicial precedent and Qiyas. However, there is a difference between the two doctrines where the analogy is the instrument of the discovery of facts in common law and of the discovery of rules and vice of them in Islamic law, which enable jurist to extend it to a new case that shares the vice of a previous case. Therefore, the certainty of rules and their uniformity seem stronger in Islamic law compared to common law.

INTRODUCTION

The second source of Common law is the judicial precedents or the decisions of a higher court decided early that have binding force on subsequent similar cases brought before lower courts. In contrast, in Islamic law the judicially non-binding decision of a judge or a mufti (jurists) resembles precedents in Common law in finding a rule for a new issue brought before them. Just as in common law a judge has to find solution to a dispute under any of the recognised canons of interpretation or analogical reasoning, social utilitarianism, custom and policy, in Islamic law, the muftis

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and judges do the same through the use of *Qiyas*, *Istihsan*, *Masalah Mursalah*, *Istishab*, and custom. This paper attempts to highlight the similarity between *Qiyas* of Islamic law and the role of analogy in judicial precedents of common law from the perspectives of being a source of law and a tool for extending existing rules to new cases. *Qiyas* and analogical precedent in reality are the sources of law despite the weaknesses of the latter and the surrounding doubt pertaining its binding force.[1] Whether or not the similarity between the two is the natural growth of common law at the footsteps of Islamic legal system or it was a mere coexidental fact that one has to think and study about is not the concern of this paper.

The idea of similarity of the two concepts was triggered at one of my tutorials with first year law students of International Islamic University Malaysia at a discussion on the nature of precedents and how they work. At first it was just a matter of curiosity that I had to follow it a bit seriously. But as the reader will find, there is more to it when we think of certainty of law, its rationale, and the methods of judicial reasoning from the point of view of the systematisation of the judicial reasoning and the reliability of its methods, so that the rights of citizens are not decided arbitrarily. The paper may be useful for the students of comparative law, and legal systems. It may also benefit policy makers in charge of designing new legal systems or concerned with localising their legal system or even reforming the existing ones. The paper begins with a brief glance at the historical background of both judicial precedents and *Qiyas* in the two systems of laws. It will be followed by the differences in the two concepts, their similarities and the conclusion.

A HISTORICAL OVERVIEW OF PRECEDENTS AND THE ROLE OF ANALOGY IN ITS HIERARCHICAL SETUP

In the following discussion we would look at the characteristics of legal precedents in common law. The purpose is to find at what point of time analogical reasoning was used and whether or not such reasoning persist today.

Precedent as Source of Law

The history of the precedent is tied up to the report of a decided case.[2] Therefore the nature of the precedent and its accuracy is dependent on the accuracy of report of a given case. The early pleadings and reports were oral and some time they included points that were considered relevant by the reporter rather than exact reporting of the facts, pleadings, and the decision of the court.[3] Up to 14th Century the rules were general and every possible imagination was used to apply a rule to an imaginary defendant.[4] Yearbooks and later reports by some renowned reporters are the main sources of reported cases. We will explain both.

According to Coke 'during the Year Book period, counsel did not cite specific cases,' but simply appealed in general terms to principles known to be established ...'[5]. The reports of Plowden and Dyer are considered to be between the year 1535 to 1565 and later.[6] These reporters did not intend to publish their reports and most work was for their own instruction. Not much is reported about Dyer except that he had used the style of Year Books, and has reported cases that had cited previous cases.[7] Nevertheless, Plowden does mention reference to the decision on points pleaded which were to be observed. In *Soby v. Molins* (1574) 2 Plowd. 470 he has asked for the reasons from another as the judges at the time of decision making had failed to give.[8] the reporters focused on the point of law. This change is said to be the recognition of authoritativeness of previous cases, which in turn have resulted in their citation in courts.[9] According to Lewis (1932) nowhere did 'Plowden definitely say that judicial decisions are binding, but this may be inferred from some of his observations.'[10] During this time reference is made to maxims and reason as the basis of decisions and for the same reason some cases were termed to be authoritative. In *Pollard v. Jekyll*, the counsel had cited sixteen cases 'to prove that the law is so in the case', which after decent research Hale J. ordered the deputy sheriff to follow the law as stated in the cases. In *Woodland v. Mantel and Redsole* (1553) 1 Plowd. 96., Bromley and Portman, JJ. are mentioned to have taken a 'case as 'good proof' of the law'. In *Buckley v. Rice* (1554) 1

Plowd. 122., Staunford J. is quoted to have said: 'We ought to follow the Steps of our Predecessors Judges of the Law…'. Supporting evidence is found in other cases and it states that such cases are to be followed throughout the realm.[11] Lewis claims that by this time the difference between ratio and dicta was clear as according to Plowden some diversities were removed in his reports.[12] It is clear that in this stage the main task was to authenticate the decision of the courts, as confirmed by Coke.[13] All one has to show is that there was a case decided by an early court on a given point. The justices then would accept it and follow or advise the parties to follow it. This definitely does not show the rigor of reasoning.

Precedent as a Source of Law in Analogous Cases

A systematic work on the role of previous cases is of the Edward Coke of the 17th Century.[14] His work is considered to be a contribution to the continuity of common law. He uncovered old authorities reported in Year Books, and examined the *dictas* in such cases, deducted common principles therefrom, and reconciled wherever possible the inconsistency between conflicting cases. His innovative work is viewed to be the revival of old principles with object to connect past with present and future. Coke for the first time is quoted to have given the purpose of legal precedent 'to give direction in like cases that might happen'. for this he urged that the reason for a judgment to contain, 'all authorities, precedents, reasons, arguments and inferences whatsoever,' and to be reported as such.[15] We may treat this to be the beginning of identifying analogous cases for the purpose of analogical reasoning.

Lewes reports: 'Coke's definition of a report shows how the modern idea was fast developing: "A public relation, or bringing again to memory cases judicially argued, debated, resolved or adjudged in any of the King's Courts, . . . together with such causes and reasons as were delivered by the judges of the same".[16] This is a general statement though it indicates that the judge of present has to follow the views of the predecessor on the same issue. Nevertheless, it is Coke's opinion and not a judicial sanction.

He called them precedents, and law that is binding on the court of current time. Coke opined that in the absence of law and precedents, the judges are to decide cases 'by natural reason, that is, legal reasoning based on study, experience and observation.' He defined law in terms of its sources, based on *the Marshalsea Case* 10 Co. Rep. f. 75a, which included " (a) Year Books, (b) Books written on the laws of England, (c) Judgments in Parliament...; (d) Judicial records and precedents-..."[17] Coke cited the Lane's Case, where it was laid down that every Court is bound to take judicial notice of the customs of other superior Courts, but secus of inferior Courts. He quoted Yearbook authorities, for 'the rule that the custom and course of a Court make law' but considered precedents without debate or argument 'not so authentic' as judicial precedents.[18] To Coke perhaps the authority of case law came from the development of a rule through a course of time when an idea was refined and improved upon, approved and proven by experience. Therefore changing such a law would be hazardous. A new precedent in his opinion had a bad beginning and a matter that is not found in case law should be left to the king.

We therefore can conclude that Edward Coke viewed precedents as source of law and binding on subsequent judges in analogous cases. This view therefore does not cover the evolutionary element of common law. The American jurist has recently criticised the practice of judges by turning the *stare decisis* into *stare dictis*. He may have urged to return to the traditional way, as proposed by Coke. The said jurist advised against vague judicial pronouncements and generalised principles that can cover dissimilar matters too.[19]

Precedent as Mean of Developing Law

Polack,[20] as Collier understood him, says 'we must assume that the same facts give rise to the same decision'.[21] On its face, it means courts of present should apply the verdict of the past in the present case if facts are similar. Pollock may have implied broader opinion as his proposed method is: "[I]n making predictions of

legal decisions, the jurist first sifts through the facts of the case to separate out the most material ones, next makes a provisional determination as to what area of law is involved, and then seeks out the general rule of law that governs those facts".

Polack relies on material facts and then the application of an existing general rule. We take material facts to mean similar as described by Collier above. Polock does not give the properties of material or similar facts here. Do material facts include a boat, a flying boat, floating motorcycle, and a floating car or just a boat and a boat? The above text, as it is, supports the cases involving boats and others, as he assumes that there should be a general rule that can cover all. If this is true and one intends to include all the above facts, as material facts, then something is missing in the method prescribed by Pollock.

Polack claims that law is an inductive type of science, and therefore the above statement may be taken to be in line with his belief. But, it falls short of inductive reasoning as he does not suggest the making of a new rule based on similar facts. Even, how much facts are similar, the method for arriving at a conclusion on inductive reasoning is not what Polack described it. He only suggested the identification of the right kind of cases with present case, and finding the right kind of points for similarity[22] which in the context of social sciences need to be clearly stated. Social scientists recognise the interplay between inductive and deductive reasoning. This in our discussion may be plausible if similarity is found inductively and a general rule is inferred therefrom. Then, such a known rule is deductively applied to new cases.[23] Deductive reasoning extends the known rule or concept to the unknown facts while inductive reasoning is used to discover from known facts/cases an unknown rule or concept.

If the above statement could clearly support inductive reasoning i.e. the judge in the present case should infer a general rule from the precedents. The problem is that in this scenario the concept of precedent may crumble. Additionally, judiciary should not create rules, it is claimed. Based on such admission of judges Polack can imply the application of a particular old known rule to

a particular new similar case. A uniformity and predictivity of decisions may be achieved. Be that as it may, this is not helpful in making the law dynamic. If we take the phrase '*seeks out the general rule of law that governs those facts*' to mean existing rule then deductive reasoning, a top down from general to specific, should be used. In this way the general known rule can cover many new cases if combined with the objective of the rule. In this way Polock may have laid down a principle for the evolution of common law.[24]

Precedent as the Conclusion of Previous Case

Goodhart,[25] in the early 20th century, disagreed with Pollock, to an extent. He asserted that judges are guided by principles, i.e. ratio decidendi of a case. Ratio decidendi means the reason for a judicial decision or a rationale thereof.[26] Nevertheless he emphasised on finding facts, understanding and interpretation of them. The judge, Goodhart asserted, has (a) to ascertain the facts that a previous judge had taken into consideration, (2) to determine those facts which were material to his decision, and (3) to ascertain his conclusion. The ratio decidendi of the case would be the conclusion of the early judge. Goodhart seems to have divided precedents into direly binding, and binding by analogy. In analogous cases, judge may rely on the reasoning of the court in the early case. He also acknowledges a sleep-wlker rule; we mean a new rule that has been unconsciously developed by a judge, as Goodhart put it and can be discovered by courts in recent cases.[27] Goodhart refused to admit that the facts and reasoning of a judge in a precedent are important for subsequent judges. The majority of writers[28] after Goodhart held that the reasoning of courts in a precedent is material and Common law has been developed in this way.

Precedent as Ratio Decidendi

Subsequent thought on precedent may be divided into traditional and otherwise. To the traditionalists the ratio of a case is the rule of law which is binding as the letter of the constitution. To Salmond, a 'precedent ... is a judicial decision which contains in

itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi* … which alone has the force of law as regards the world at large.'[29] it is a general rule that forms the foundation of a decision. A ratio proceeds on the following 'assumptions: 1) every case has one, and only one, ratio decidendi that explains the holding on the (material) facts; 2) the ratio decidendi can be determined through an analysis of the particular case itself; 3) this unique and unchanging rule or principle, and it alone, is what is binding on later courts.'[30] In a non-traditionalist sense Realist authors do not determine the limits of binding ratio. They thought 'that the ratio is wholly at the discretion or even whim of later judges.'[31]

To sum up, on what is precedent, Anglo American authorship has written long but too little to be precise and clear. One will understand that the 16th century writers looked at the whole record of the previous decisions as a source of law if authenticated. Similarity of facts of cases were identified later to be important and the reason for such cases to be followed was because of the deliberation and reasoning of the previous justices. It is claimed that before the time of Coke, 17th century, there was a difference recognised between *ratio* and *dicta*. As exactly what was it one can see reference to the decisions and another time to rules. By decision we mean the conclusion of the court to pronounce on the liability of a party to a dispute. Nevertheless, the records of Edward Coke and his commentaries seem to be instrumental in the formation or at least the refinement of the theory of precedents. To him precedent were binding in similar cases, as a rule and the causes and reasons thereof, deliberated by early judges, were improved and approved in the course of time was the strength of the precedents. Therefore we can infer for the court to identify and follow a precedent three main components of a source case be found: (1) the rule, (2) the cause or reason, and (3) the similarity of facts.[32]

Current Concept of Precedent

Precedent as a decision of the superior court is still considered the source of law, and is binding on courts below. It contains ratio

decidendi and obiter dictum, the latter not being relevant to the material facts of the case and hence not binding. Ratio is the rule that was established in the source case. As to what is the rule that is binding, it is said that it should be canonical in nature, separate from the reason given, and be formulated in the same decision. We trust Freeman's conclusion that, for modern precedent, there exist no specific rule, principles, and standard how a precedent is made[33]. Nevertheless, in addition to statutes, and precedents, courts decide based on the prevailing 'social objectives and policy choices'[34] which may be customs, traditions, historical development, sociological utilitarianism, and ethics.[35] Some described it as 'lawyers observe practices and receive ideas' that then are used for the formation of judicial reasoning.[36] Sometimes the decisions of judges may be intuitive and less articulate. To call a precedent as such may be true only if subsequent cases were not allowed to be decided differently. The problem is this is not how common law works, as all cases are not completely alike.[37]

At best, Freeman persuades us to have faith in the capability of judges to come up with rational opinion for dispute resolution brought to them even if such decision, some time, is intuitive and inarticulate.[38] The rationality of a judgement is based on the rules of natural justice which is considered difficult in complex cases where some issues are not addressed.[39] Such faith is broken when rationality is missing in dealing with the rights and obligations of parties therefore forming no uniformity, uncertainty, and the failure of justice to treat like cases alike. This persuasive argument is less so when the means to peace in society is mismanaged by bad and conflicting precedents or when a party has to lose his benefit due to a custom-made rule manufactured by a judge on the spot. Indeed an ad hoc process be left ad hock and not to be made a precedent particularly when he makes a policy choice that is discriminatory in the first place.

Freeman (2014) enumerates three models that may jointly justify the need for the existence of precedents: (a) the resilience model that naturally generates reasons for subsequent case how a decision to be made, (b) the rule model, and (c) the result model.

The first model seeks justice and equality in all cases, i.e. all persons to be treated equally in likely circumstances. But this is not the real picture of common law; in the web of reasonings it is likely that a precedent may not be followed, subjectively and even in likely circumstances. Under rule model the identification of a rule in a precedent is difficult[40] which therefore weakens its certainty hence, its reliability. Additionally, in view of judges' discretion recognised by some writers[41] or the personal moral convictions of a judge make the authoritativeness of a precedent either in the source case or current weaker, not for the sake of certainty of a rule alone but also for the fear of arbitrary judgement, open to manipulation and abuse of power. The result model is a guide for subsequent court to follow a precedent. The result model is described to be analogical, if the party in the recent case is analogous to the party in the precedent or better, or the recent court has 'to decide analogously to the decision of precedent case if in a world in which the precedent court's decision were correct'.[42] Mere comparison of a case with alike is not sufficient because the properties of similarity may differ[43]. The answer to the what, the how and the why aspects of this issue need to be satisfactory. Irrespective of weakness in the concept of precedent, precedent under any of the above models has contributed to the development of common law. How such development is approached by judges of common law in comparison to *Qiyas* in Islamic law is the concern of this paper. In this relation we look at two methods: analogy, and purposive interpretation.

THE METHOD OF ANALOGICAL REASONING AND PURPOSIVE INTERPRETATION

The development of a rule is approached in common law in two ways: Statutory Interpretation, and analogical reasoning. In respect to analogical reasoning we do not intend to include cases where there is the possibility of balancing. That is where there exists no precedent on a target case, but can be related to various previous cases and among them one is chosen. This is not relevant to our discussion.[44] This type of analogical reasoning and the balancing

of principles in it are similar to the concept *Istihsan* in Islamic law, which is not discussed here.

Analogical reasoning

Analogical reasoning is good in inductive arguments. The Main Purpose of analogy is to find similarity between different matters. Finding such a similarity in real life science is probability that is below certainty. Golding[45] explains analogy in the following way:

1. X has characteristics F, G, …
2. Y has characteristics F, G, …
3. X also has characteristics H, …
4. therefore y has characteristic H

It is probable that the conclusion here is true, as it is likely it may not be true, even though X and Y have two positive similarities. Even if you improve the above method as below certainty may not be achieved:

1. X has characteristics F, G, …
2. Y has characteristics F, G, …
3. X also has characteristics H, …
4. F, G, …, are H-relevant characteristic
5. Therefore, Y has characteristic H

The move to certainty in this way may be improved but it is still probable that F may be relevant to H in a casual manner and G in a casual way. The conclusion will still need confirmative study. In spite of this inductive probability of truth, analogy is used by judges.

In legal sense, we may speak of correctness of a conclusion. Golding cites as an example of legal analogical reasoning the case of *Adams v. New Jersey Steamboat Co.* (1896).[46] Golding states that: "[W]here money for travelling expenses, carried by a passenger on a steamboat, was stolen from his stateroom at night, without negligence on his part, the carrier was liable therefore, without proof of negligence". Judge O'Brien argued by analogy from the liability of innkeepers. In his opinion he called a steamboat a

'floating inn': [...] The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence. The summary of Golding's reformulation of the above analogy according to the second form above is as follows:

1. A hotel guest procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
2. A steamboat passenger procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
3. A hotel guest's proprietor has a stringent responsibility, such that the proprietor is liable without proof of negligence, if money is stolen from the guest's room.
4. Procuring a room for personal use and having one's money and personal effects highly subject to fraud and plunder from one's proprietor are reasons for the proprietor's having such a stringent responsibility.
5. Therefore, a steamboat passenger's proprietor is liable without proof of negligence, if money is stolen from the passenger's room.

It is clear that the logical form in scientific sense and legal sense are two different matters. The first is about truth and the second is about the combination of truth and value judgement. That is the similarities of facts be determined first, and based on such determination the value judgment, being made. The problem in the above analogy is that (i) and (ii) are facts, (iii) and (iv) are normative judgement, being made (rule or normative being) and the reason (objective) for the given rule, respectively, while (v) is the conclusion that strictly should be the factual description of (ii) which is unknown, as is found in (i) which is known. The unforgivable error to make is to ignore the role of judges who in their decisions create truth in their conclusions rather comply

with truth. This is different from the work of jurists in academia who could be concerned with a concept or predictability of decisions. The philosophy of law may be discovered by analogy but not the creation of law. Golding rightly observes that the conclusion of the judge seems 'as if it were the outcome of a formally valid deductive argument.'[47] In fact, the conclusion may be justified based on a deductive argument where inductive reasoning is casted in.[48] This is by introducing an independent premise that can serve as justification based on its known characteristic.[49]

To sum up the role of analogy, in common law court decisions, as explained in the *Steamboat* case above, it is used when the common law rule is intended to be extended to a different scenario where similarity of facts is found based on their constituting elements, or some other purposive or normative characteristics. Finding such common characteristics in scenario A and B, judges then extends the rule concerning the material facts in scenario A based on background premises to the material facts of scenario B. To be precise a precedent in its analogical sense is reached in mixed method of logical reasoning: inductive-deductive model. This is not strange to logic.

Purposive Interpretation

Interpretation is used in common law precedents when the courts of this system embark on statutory interpretation. Interpretation is not used in the extension of common precedents. We see a resemblance between analogical reasoning and extensive interpretive reasoning. In extensive interpretation the courts of law go beyond the letter of law in some cases where legislative expression is seen to be insufficiently implying the intent of the legislature, or some time such interpretation may limit the letter of the statute for it to have gone beyond the intent of the legislature. The result of extensive interpretation is seen to be the same in some cases. Canale & Tuzet (2018) explained interpretive reasoning: if C does not fall in N_1 according to I_1 of P, C may fall under N_2 if it is obtained through alternative I_2 of P.[50] The alternative interpretation he refers is purposive or according to the golden or

mischief rule. This he called extensive interpretation. A legal norm can be extended in this way. This may be obtained through analogical reasoning too. In *Adams v. New Jersey Steamboat Co.* (1896) steamboat was likened to floating inn. Where this is considered an extended meaning of hotel, an analogical result would be in the extensive interpretive reasoning way: *Canale & Tuzet* (2018) explained it as below:

1. C1 falls under N1.
2. C2 does not fall under any actual norm of the system (there is a gap in the law).
3. There is a relevant similarity between C1 and C2.
4. C2 falls under N2 obtained by analogical reasoning (filling in the gap).

Freeman explained the Swedish model in a similar sense: a statute can be used in obvious cases, but courts can determine the sphere of application by reference to the purpose of the statute and extend the statute to analogous cases. It was also attempted to be used by New Zealand by the enactment of the Interpretation Act, 1924.[51] To escape further scrutiny, one may assume the writers in common law justified rules of law as open textured, not logic but experience.[52] This truly makes decisions of courts subjective, not rational and fair.[53] Precedent as assumedly envisioned by Edward Coke and explained by modern scholarship, and the interpretive reasoning of court as explained above and practiced in Continental European legal system have some resemblance with *Qiyas* in Islamic law. For this reason, we will explain this concept of Islamic law.

LEGAL REASONING IN ISLAMIC LAW

The decisions of judges and muftis in Islamic law regarding a legal issue can be likened fully to the presidents of common law, that both contain textual or non-textual rules applied to the facts of case either based on lexical interpretations or rational argumentation. These two types of argumentation some time may be referred to as *naqli* and *aqli* or simply said *dalalah* and *dirayah*

or *mansus* and *ghair mansus* respectively. The non-textual argumentation in its wideness may be put under the concept of *ijtihad*.

Kamali (1998) in his discussion of *Ijtihad* or rational legal/ judicial reasoning points to its methods. He specified the method of judicial reasoning saying: the scholar or judge has to survey the Qur'anic verses, and the verbal *hadith* of the Prophet (pbuh) for finding a rule. Where he fails to find it, then he has to refer to the actions of the Prophet (pbuh) and his approvals. Failing to find the rule in any of them, then it is searched in the unanimous rulings (*Ijma'*) of *ulama* or analogical reasoning (*Qiyas*)[54]. After such a survey and failure to find the desired rule, he then has to do his own *ijtihad* or deduct [or induct] a rule by using the method of *Qiyas*, *Istihsan*, and *Maslahah Mursalah*.[55] Of course there are other methods if we follow Professor Kamali. Jurists refer to custom, use of prevention of the means to bad ends (*Sadd al Zara'i'*) and others. Accordingly, *Qiyas* is one of the rational methods of judicial and legal reasoning.

The above explanation of *ijtihad* or judicial reasoning is rational and in this sense it is similar to precedent the judicial reasoning in common law, as both systems include textual and non textual material for reference during the ascertainment or determination of a rule by courts. Qur'an and *Sunnah* may be equated roughly with statutory texts. In the case of interpretation of these texts both Islamic law and Common law have their rules of construction, though the rules of construction in Islamic law may be strict (in contrast to purposive interpretation) but clear, detailed and wider.

Where there is a gap in the law one may use *Qiyas* in Islamic law to fill it. This is similar to that obtained through analogical reasoning in Common law and its method of purposive or extended interpretation of statute as mentioned above. Other sources of Islamic law may be interrelated. Sociological utilitarianism and the use of *Maslahah Mursalah* (human interest not being included in the two sources of law) can be similar. *Istihsan* may be likened to legal balancing: that is to choose a principle based on equitable preference when there exist two source texts and one of them is

selected to fill a gap in the law, because the choice of the other may lead to rigid or absurd conclusion. Similarly custom and the practice of a community are used by both systems with varied rules of application. In this paper, detailed discussion is devoted to *Qiyas*. The degree of rationality in *Qiyas* is based on the use of deductive reasoning and therefore due to the process of discovery of original textual rule ultimate *qiyas* may be less rational compared to other source e.g. *Maslahah*, as the latter operates in the absence of any legal text of *Shari'ah* (Qur'an and Sunah be it express, or implied, or source case or target case decided based on the rules from the source case (*Ijma*' and *Qiyas*). The two major schools of law, Maliki and Hanafi, emerged at the same time, one in Madinah and second in Iraq, Kufah to be specific, in the second century of *Hijrah*. The first is classed among the traditionalist while the second is called rationalist. Abu Zahrah[56] considered the first least organised compared to the second, and the former real while the second perceptive.[57] We may consider *Qiyas* to be less rationalistic compared to decisions based on human interest (*Maslahah*).

Qiyas, its Conceptual Analysis and Historical Background

The Arabs use the word *Qiyas* for measurement of something with another (yardstick) and the comparison of one with another things. Al Baqlani defined *Qiyas*[58] as: adding a known to another unknown [case] in having the same rule (permissive or otherwise) due to a matter common to both. For Ibn Masud[59] *Qiyas* is the extension of a rule from source case to target case (*Far'*) due to a cause (common to both- *'illah Mutahidah*) that cannot be discovered through interpretation. Others defined it as: the adding of non-textual case to textual case in a rule applicable to the textual due to a cause that both cases share, or it is the adding of target case to the source case in ruling due to both having the same cause.[60]

The comparables are referred to as *Mithli* and has its derivative terms in the Qur'an. Ahmad Hasan thought it may have influenced the conception of *Qiyas* in the early time of its formation. Examples of extending a rule to similar events are many.[61]It is used for the making of unknown similar to the known fact and its rule or the

making of an existing rule about a known fact to cover the unknown similar facts. It is best explained in the Aristotelian Syllogism, but only in that it requires a major and a minor premises, the middle term, and the result or conclusion.[62] Therefore, one can refer to it as one of the species of the systematic judicial reasoning or methodical reasoning, where the accuracy of the result should be dependent on the accuracy of premises. The premises in *Qiyas* need to be certain both factually and normatively. Unlike in analogical reasoning *Qiyas* is the extension of the known to the unknown and not prediction of it.

In discussion of *Qiyas* with relation to its similarity with precedent we invoke the history of *Qiyas* in its unsystematic manner (where *Qiyas* equals to *al Ra'y* or the use of reason, or the reason for a rule not explicit in Qur'an and *Sunnah*) and the methodological reasoning where the rule about a source matter is textual and extended to a non-textual matter. The latter is the systematic reasoning. We will see if both can be relatable with precedent and judicial reasoning in Anglo-American legal sources.

An Historical Sketch of Qiyas

The time of analogical reasoning in Islamic law can be seen to be before the introduction of Greek logic in Iraq to Muslim world.[63] From the time of the Prophet (pbuh), Qur'an and *Sunnah* were respectively approved by the Prophet (pbuh) to be the two hierarchically highest sources in Islamic law. Reason in the form of individual opinion was also approved by the Prophet (pbuh) therefore making the sources of judicial reasoning to be three. This is the reason some scholars have traced it back to the Prophet (pbuh)[64] when there was no text of Qur'an.[65] The Prophet (pbuh) has approved the use of personal opinion when he asked Mu'adh bin Jabal how would he decide court cases. After the Prophet's demise the consensus of the companions was added which later on was considered the third highest source of judicial reasoning, followed by the use of personal opinion as the fourth source of Islamic law. *Qiyas* as part of personal opinion was used where the subject matter of a case could not be included under the three

main uncontroversial sources of Islamic law among the Muslim scholars: the Qur'an, *Sunnah*, and *Ijma*'.[66] It was used for measuring non-similar matters by each others[67], and the comparison of similar matters (*tanzir*-identifying similar). In this sense it existed from the time of the companions whereby a specific textual rule was generalised to cover new cases.

All in all the term *al-Ra'y* covered *Qiyas*, *Istihsan*, *Istislah*, and *Istishab*.[68] It was during this time that *Qiyas* attracted harsh controversy among some Muslim jurists and others that died later when juristic reasonings were revised or reanalysed objectively.[69] Later, Hanafi Jurists used *Qiyas* extensively.[70] Imam Muhammad al Shaybani is quoted to have said: whoever is conversant with the Book and *Sunnah*, and the opinions of the Companions, and what is approved by the early (early) Muslim jurists, is allowed to exercise his opinion on legal matters. He may take a decision by his opinion, and follow it in his prayer, fasting, pilgrimage, and all commands and prohibitions. If he exerts his best effort, deeply reflects and exercises analogy with parallels showing no slackness, he is permitted to act upon it (his personal opinion), although he misses the right judgement.[71] Imam al Shafi'i the student of Imam Muhammad later refined the concept.[72]

The Types of Qiyas

As mentioned earlier, *Qiyas* is used where analogical reasoning was not relevant. Other time, analogical reasoning was invoked once or even twice. But generally *Qiyas* is used in a single analogical reasoning case. The example of double analogy is the opinion of Imam Abu Yusuf where he justified the permissibility of undefined share in future income in crop sharing contract (*Muzara'ah*) on sleeping partnership (*Mudarabah*) basis. *Muzara'ah* at the same time is permissible based on the lease contract of fruit trees (*Musaqat*) based on the practice of the Prophet (pbuh).[73]

Conceptually, a *Qiyas* is divided into two types[74] according to Imam Shafi'i: (1) cause-based *Qiyas* and (2) resemblance-based *Qiyas*.[75] The first is generally approved and applies where two different issues are considered one due to having the same cause of

the legal rule. Initially one of the issues, the old issue- have a specific rule in the Qur'an or *Sunnah* or *Ijma'*, whereas, the new issue is not covered by the three sources of Islamic law, but it shares a cause (*'illah*) because of which the old issue was either permitted or prohibited. The jurists examine the first rule in order to discover its underlying cause (*'illah*).[76] After discovering the cause of the rule in the old issue the jurist proceed examining the new issue to find out whether it could be covered by the cause of the rule in the old case. If they find similarity between the attributes of both the old and the new cases, representing their underlying cause they will extend the rule to the new case due to the similarity of their cause. Example is given below.

The drinking of wine is prohibited by Qur'anic text explicitly. Suppose, the rule about other drinks that share the attributes of intoxication are not mentioned (in this example, in fact, the *hadith* of the Prophet (pbuh) gives the reason and generalises the rule to all intoxicants). The jurist, after determining the cause of prohibition of wine i.e. intoxication, will extend the prohibiting rule to other types of intoxicating drinks. This therefore ends up extending the existing rule to a new case. For example, the old rule was object based, say drinking wine is prohibited. After the discovery of the cause of such prohibition the jurist then will extend the rule about wine to another drink that contain intoxicating agent; therefore the new rule will be generalised: drinking intoxicants is prohibited. To explain it differently we look at the steps a jurist has to follow:

1. Case 1 (*Asl*): a textual case that has a characteristic about which a textual rule is known to exist,
2. Case 2 (*Far'*): a non-textual case, about which there exist no textual rule,
3. The rule (*Hukm*) applicable to case 1 is texually known.
4. The cause of the textual rule (*'illah*) about case 1 is known expressly or implied which indicate that the rule in case 1 is characteristic relevant and objective based.
5. Therefore, due to identical cause, jurists conclude that

the rule about Case 1 can be extended to Case 2: that is to say Case 2 is either permitted or prohibited.

The cardinal rule is that the source case, the applicable rule and the cause of the rule have to be known and certain in the textual sources of Islamic law. It is due to this reason that Sadr al Shari'ah made it part of his definition of *Qiyas*. This rule is applicable to all four types of *Qiyas*, i.e. *Qiyas* of priority, *Qiyas* of *Dalalah*, *Qiyas* of *Tard* and *Qiyas* of *al 'Aks*). It is also to be noted that in Islamic law similarity of cases is not material. The important element of *Qiyas* is the similarity of the source and target cases in the cause of the rule which also imply the similarity of characteristics of the source and target cases.

Based on the above explanation one may think that analogical reasoning is usable in the process of *Qiyas*. However, this is not true entirely. It is possible to ascertain the similarity of causes of rules in different cases analogically and after confirmation of the analogical conclusion. Once the cause is ascertained to be the characteristics of both source and target cases, then a deductive reasoning should be used. Such a deductive reasoning is explained above.

ANALYSIS ON THE DIFFERENCES AND SIMILARITIES BETWEEN PRECEDENT AND *QIYAS*

Differences between Precedent and Qiyas

It would sound odd to compare and contrast the common law theory of *stare decisis* or judicial precedent with that of *Qiyas* in Islamic law. Yet we think it would be refreshing for those who think some ideas are universal when one cannot prove that the latest system has taken it from the older. But before we explain the similarities, there are some differences between precedents and *Qiyas* that has to be detailed.

Precedent refers to the decision of courts based on a variety of reasons. It is similar to the general concept of *Ijtihad*. *Qiyas* however involves a peculiar deductive reasoning that has some resemblance of analogical reasoning. *Qiyas* is one of juristic methods in Islamic

law for the discovery of textual rule and cause and extending the former to non-textual matter, which is used by jurists and judges to narrowly extend an old rule to a new case.

The articulation of reasoning in precedent is different: the source case is identified by its properties and similarly with the target case. Both must have similar properties. The unknown property is inferred from the known property in the source case, which in logic may amount to a theory that needs to be confirmed by further study of the case. In *Qiyas* such inferred similarity is not required; it is rather shunned due to its value of probability[77]. Both source and target cases have to be different. Two other premises are rule and reason based, and similarity in both is required. However, in *Qiyas* only the similarity of cause is required as the rule for the target case does not exist yet. In precedent the conclusion indicates similarity, while in *Qiyas* the extension of the rule.

The analogical reasoning of a precedent involve uncertainties. What is analogous is dependent on the properties of the source and target cases, and these properties may be selected subjectively. Furthermore, where conflicting rules of precedents exist court may apply balancing which makes the certainty of rule and its equal application doubtful. This does not apply in *Qiyas*, as such an approach to legal reasoning is not acceptable to the jurists of Islamic law. Since the premises of logical articulation of *Qiyas* is based on known premises, the conclusion in *Qiyas* is the addition of the unknown case to the known by applying the same rule to both. This is performed in a deductive sense.

A precedent is generally the decision of court. *Qiyas* on the other hand is not. Unlike precedent in *Qiyas* the source case is textually established in Qur'an and Sunnah while in precedent both are judicial. Additionally, *Qiyas* does not necessarily refer to the decision of the court in early case only as it could be found in textbooks and fatwas of the scholars who know the Qur'an and Sunnah and face with a problem that needs clear rule of permissibility or otherwise based on the first two sources of Islamic law and al *Ijma'*.

A precedent consist of facts, rules, reasons for the rules therein and conclusion. Which part of it is binding on constrained courts is until today subject of controversies. The major uncertainty is found in making cases analogous, and identifying the rule or reason of a rule. The rule refers to the ratio decidendi of a case decided by a court of higher ranking in the hierarchy of courts under common law system. Whether the ratio is the reasoning or the rule precisely still is subject to the discretion of courts. In *Qiyas* it is the rule about source case that is binding due to its textual value.

Similarities between Precedent and Qiyas

In spite of the above differences, there are some *prima facie* similarities between precedent and *Qiyas*. A precedent is a binding source of law; this is similar to the source case rule which is binding and is a source of law. In subsequent complete similar cases the source case rule will be strictly binding on subsequent jurists and judges if such a *Qiyasi* rule is valid and reliable. The ascertainment of facts and rules together with their reasons in analogical sense can be made both in precedent and *Qiyas* though in *Qiyas* such results are sufficient for extending the rule due to the inherent probability factor segmented in analogical reasoning. The technique for developing analogical reasoning seems similar; as in both *Qiyas* and precedents five premises are required for the articulation of extending existing rules. i.e. source, target, the rule and the reason.

CONCLUSION

The process of legal reasoning in precedent is similar to *Ijtihad* which involves some form of inductive and deductive reasoning. Precedent in its analogical sense seems to have some uncertainties compared to *Qiyas*. The process of legal reasoning under *Qiyas* seems to have taken little time in the first two centuries to be refined and final in excluding fatal uncertainties. Despite the element of probability in analogical reasoning, the conclusion of both precedent and *Qiyas* is in deductive form and this helps courts to fill a wider range of gaps in the existing common law rules and narrowly in Islamic law.

Note

[1] See Freeman M. D. A. (2014). Lloyd's Introduction to Jurisprudence, UK, Sweet & Maxwell, 9th Edition, at 1561.

[2] Lewis, T. (1932). The history of judicial precedent. Law Quarterly Review, 48(2), 230-247.

[3] Ibid at p 231.

[4] Maitland, (1889). The History of the Register of Original Writs, 3 Harv L. Rev. 212, 225 quoted in Collier, C. W. (1988). Precedent and Legal Authority: A Critical History, Wis. L. Rev. 77. Available at the p:// scholarship.law.u .edu/facultypub/675.

[5] Lewis, at p 232.

[6] The reports of Sir John Burrow, 1765, is considered a new way of law reporting. His regular series were based on the work of authorised reporters attached to particular Courts for publication.

[7] Ibid 234.

[8] Ibid 232.

[9] Id p 232.

[10] Ibid.

[11] Id 233.

[12] Ibid.

[13] Id at 238. Coke is quoted as "Every case imports suspicion of its legitimation, unless it has another case which shall be as a cousin-german, to support and prove it".

[14] Relying on Lewes accounts and sources we assume that the foundation of modern precedents could be laid by Coke based on his own imagination and backed by the deep understanding of historical sources i.e., judicial decisions. Coke did not only report cases but also added his comments which show his ability to sway the future trend in judicial decision making.

[15] Lewes, 234-235.

[16] Id at 236.

[17] Ibid.[18] Id 237

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[19] Collier, at 785.

[20] Pollock, F. (1882). The Science of Case-Law, in Essays in Jurisprudence and Ethics 237, reprinted in Jurisprudence and Legal Essays 169 (A.L. Goodhart ed. 1961). Reference here is made to Collier at 787.

[21] Collier at 787.

[22] Ibid 788-89.

[23] See Golding, M. (2018). Argument by analogy in the law. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 123-136). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.11. He considered inductive reasoning through analogical argument to be unreliable, at 124. But inductive reasoning is used for predicting similarity of known matter in the unknown, which may or may not be true.

[24] Common law is more than what some jurists in common law would admit. Judges in common law go beyond the application of old rules to narrowly similar cases. The making of things similar is subjective and it happens when judges intend to make them similar. Additionally, new facts arise which may have little in common with previous facts or nothing at all. In the latter case new rules are created as existing one cannot cover them. Rules therefore are constantly developed, and for this reason common law is viewed to be evolving.

[25] Reference is made to Collier at pp 790-92 quoting Goodhart in his introduction to Polock's The Science of Case- Law. Also Goodhart, (1930). Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161, 163 , reprinted in A. Goodhart, Essays in Jurisprudence and Common Law 1 (1972).

[26] But to him this meaning of ratio is misleading, as ratio may not be found in the reasons given for a decision. It is about the judicial behaviour of the judge. To Goodhart incorrect decision or bad reasoning in it may become important precedent.

[27] Collier, at 791.

[28] Collier cited the following authors: Montrose, (1957). Ratio Decidendi and the House of Lords, 20 Mod. L. Rev. 124 ; Simpson, (1957). The Ratio Decidendi of a Case, 20 Mod. L. Rev. 413; Montrose, (1957). The Ratio Decidendi of a Case. 20 Mod. L. Rev. 587; Simpson, (1958). The Ratio Decidendi of a Case, 21 Mod. L. Rev. 155 ; Goodhart, (1959). The

Ratio Decidendi of a Case, 22 Mod. L. Rev. 117 ;Simpson, (1959). The Ratio Decidendi of a Case, 22 Mod. L. Rev. 453; Stone, (1959). The Ratio of the Ratio Decidendi, 22 Mod. L. Rev. 597. Simpson, (1961). The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in (A.G. Guest ed.) Oxford Essays in Jurisprudence 148 ; J. Stone, (1964). Legal System and Lawyer' Reasonings 267-80; Montrose, (1951-53). The Language of, and a Notation for, the Doctrine of Precedent (pts. I & 2), 2 U.W. AUSTL. ANN. L. REV. 301, 504; Stone, 1966 And All That! Loosing the Chains of Precedent, (1969) 69 COLUM. L. REV. 1162.

[29] Collier at 794.

[30] Ibid 794-5.

[31] Collier at 795.

[32] In spite of subsequent controversy, as mentioned earlier, it is true that the recorded cases after the time of Coke do have the above three components, and despite Coke's dislike of new precedents, and the denial of courts, the unwritten law of England evolved through precedents despite its binding nature is the product of the nineteenth century thinking (Freeman, (2014) at 1555). The question whether the judges should come up with a broad or specific generalisation or conceptualisation of their argument, as a rule, is a different issue, but yet depends on the three components inferred from Coke's commentaries.

[33] Freeman, Lloyd's Introduction to Jurisprudence. 9th Edition. We prefer his writing as a comment after compilation and analysis of various write ups on the topic. We ignore the original authors of the ideas presented by Freeman.

[34] Id at 1552.

[35] Id 1570.

[36] Id at 1551.

[37] Id at 1560-61.

[38] Id 1551.

[39] Id 1553.

[40] Freeman, Lloyd's Introduction to Jurisprudence. 9th Edition, at 1562.

[41] Id 1563.

[42] Freeman, Lloyd's Introduction to Jurisprudence. 9th Edition, at 1562-3.

[43] Id 1570. See further Duarte, D. (2018). Analogy and balancing: The partial reducibility thesis and its problems. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 87-100). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.8.

[44] On this topic see Bro¿ek, B. (2018). Analogy and balancing: A reply to David Duarte. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 101-108). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.9. Cf: Duarte, D. (2018). Analogy and balancing: The partial reducibility thesis and its problems. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 87-100). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.8.

[45] Golding, M. (2018). Argument by analogy in the law. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 123-136). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.11. See also Bro¿ek, B. (2018). Is analogy a form of legal reasoning? In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 49-64). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.6.

[46] 151 N.Y. 163, 45 N.E. 369.

[47] Golding, (2018). At 129.

[48] Recent developments in the use of analogical theories indicate that legal reasoning is included in Connectionist models, whereby normative characteristics are combined with others especially the constraint-satisfaction models dealing with pragmatic and semantic constraints. The former considers objectives and purpose in their process.

[49] See also Brewer, S. (2018). Indefeasible analogical argument. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 33-48). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/j.ctv62hfhb.5.

[50] Canale, D., & Tuzet, G. (2018). Analogical reasoning and extensive interpretation. In Kaptein H. & Van der Velden B. (Eds.), Analogy and Exemplary Reasoning in Legal Discourse (pp. 65-86). Amsterdam: Amsterdam University Press. Retrieved from http://www.jstor.org/stable/

j.ctv62hfhb.7.

51 Id 1580.

52 Id 1568.

53 Id at 1569.

54 After analysis of the theory of analogy and the concept of qiyas and its form of reasoning, we find the translation of qiyas by analogical reasoning may not be accurate.

55 Kamali, M. H. (1998). Principles of Islamic Jurisprudence, Kuala Lumpur: Ilmish Publishers, p 279.

56 Abu Zahrah, M. (1946) Malik, Hatatuh, Asruh, wa Ara'uh, Ciro: AngloEgyptian Press, at pp 7-10.

57 The reason for this is the use of human interest (masalahah) by Imam Malik as a basis of his reasoning, despite being vocal about the use of Qur'anic verses, sunnah, and the tradition of the people of Madinah. It is this reason why Imam Malik's opinions are least organised. The realistic ruling of the Imam were due to the fact that many real issues from different localities of Islamic territories were brought to him and asked about a ruling in accordance to Islam. Malik gave his opinions in a big number of it, based on human interest rather Qur'an and Sunnah due to lack of such texts. The number of such ruling is big and therefore Ibn Qutaibah, followed by Abu Zahrah, ranked Imam Malik among the rationalist scholars (ashab al ra'y) i.e. Ibn Abi Laila, Abu Hanifah, Abu Yusuf, and Muhammad. Abu Zahrah opined that the difference between Imam Malik and Iraqi scholars was the difference of rational method used rather than the quantum of rational views. He found that Imam Malik learned the interpretation of Shariah text and reasoning based on maslaha from Rabi'ah al Ra'y. During this time they did not use qiyas and analogical reasoning: Abu Zahrah, M. (1946) at page 26.

58 Amadi, A. M. al Ihkam fi Usul al Ahkam, 3: p 183. https://www.islamweb.net/ar/library/index.php?page=bookcontents&ID=336&bk_no=101&idfrom=313&idto=398.

59 Sadr al Shari'ah, al Talwih al Tawdih.

60 Al Shirazi, A I. Kitab al Luma' fi Usul al Fiqh. Damuscus: Dar Ibn Kathir 1995; Ibn Qudamah, Rawdah al Nazir w Junnah al Munazir, Risalah Publishers, 2009; al Jawini, al Burhan, Mukhtasar Ibn Hajib.

[61] Ahmad Hasan.

[62] On the history of qiyas see Ahmad Hasan, (1976). The Principle of Qiyas in Islamic Law_ an Historical Perspective, Islamic Studies, Vol. 15, No. 3, pp. 201-210. We refer to him but not necessarily all statements in this part reflects his views.

[63] Mehawesh, Mohammad Issa, History of Translation in the Arab World: An Overview. https://www.academia.edu/24904725/History_of_Translation_in_the_Arab_World_An_Overview Avilable on 24/9/2019. Greek philosophical works were translated in the time of Mamun, the third Abbasid ruler, at a time when Imam Abu Hanifah, the founder of Hanfi school and the main proponent of qiyas had passed away. Imam Malik is said to have known about qiyas, when he was asked whether or not he and others practiced qiyas during their discussions when he was learning jurisprudence from Rabi'ah al Ra'y, he denied it.

[64] The ulama invoke the hadith of the Prophet (pbuh) who was asked by a woman whether or not she can perform hajj on behalf of her father who had passed away. The Prophet (pbuh) told her "yes, if he were indebted you would have paid it for him". It said that this is an indication of qiyas where performance of a ritual obligation is seen similar to the performance of an obligation owed to humans. that is the rule validating the performance of obligations under loan by a third party is extended to such performance by third party in ritual matters. Note this just show how the Prophet (pbuh) identified the rationale for his ruling. Nevertheless, it is to be noted that rule under the said hadith cannot be considered a qiyasi rule rather it is original.

[65] The use of reason by the Prophet (pbuh) and Qur'anic verse asking the Prophet (pbuh) to consult Muslims is taken as evidence of use of individual opinion. The Hadith of Mu'adh bin Jabal is often quoted for this purpose too. But, the confusion may be related to the generalised labeling of jurists in Iraq. Soon after the Prophet's era or later the term of ra'y was used. This term was often ascribed to the Iraqi Jurists though the people of Madinah and Syria were equally using it. In fact the Maliki School can be viewed as much as s school of reason or ra'y as it was true about the Iraqis especially Hanafis. The use of the term al ray was later substituted by qiyas. This period includes both pre-Shafi'i (d. 240 AH, 819-20 AD) period and later. Even though Imam Shafi'i was opponent of ra'y he is however equally supportive of it as can be seen from his other writings and actions.[66] See Ahmad Hasan on the definition of reason to some classical scholars. He

restricts reason to good reasoning after careful thinking and contemplation where evidence conflict.

67 The example of measuring things with one another is true about the fixing of punishment for drinking wine. Umar (r.a.) had asked Ali (r.a.) about it who then replied: 'We see that you can whip him eighty because when he drinks he gets drunk and when he gets drunk he piffles and he when he piffles he commit false accusation or defaming innocents'. Here a probable case of a defaming drunkard is likened to the sober defaming person, and accordingly the textual punishment for qadhaf is extended to the drankard.

68 Abu Zahrah.

69 Ibid.

70 Ahmad Hasan (at 206) cites Imam Muhammad for non analogical reasoning i.e., the use of non analogical reasoning in the contractual rights under a sale and purchase contract. If the purchaser mortgages, donates, had intercourse with or have kissed a slave girl, these actions according to qiyas indicate the assent of the purchaser to the transaction and therefore he will not have the right to return the goods to the vendor on the ground of defect. Here Imam Muhammad used qiyas for pure rational thinking without reference to Qur'an or Sunnah and Ijma'.

71 Ibid.

72 Most of Imam Malik rational rulings were based on unrestricted benefits, custom and usage which are non textual and non analogical. Analogical reasoning entered into Maliki School after the demise of Imam Malik, the founder of the school: See Abu Zahrah Imam Malik, on how the two main schools of Islamic law affected each other at 405-406.

73 Ibid.

74 Al Amadi in his Ihkam divides the cause based Qiyas into Qiyas Tard and Qiyas Aks. In the former the cause expressly covers the rule, and therefore it is shared between the source and target case. In Qiyas Aks the cause is about something to be done or abstained and it is expressly provided by a text. Jurist then infer it contrary implication and deduct a rule that has to apply to the target cases.

75 Al Shirazi in his Luma 'divided Qiyas into three: Qiyas Illah, Qiyas Dalalah and Qiyas al Shubh. The first is divided in express and implied. The implied qiyas is weak and so is qiyas al Dalalah where an implied cause of

the rule due to its characteristics is used as the cause of the rule though the text has not expressly mentioned it. The third type is the Qiyas al naza'ir or tanzir which looks at the similarity of properties between several given source cases, and selects one as source case because it has more properties similar to the target case. All these types of Qiyas in the opinion of al Shirazi are weak.

[76] On a set of definitions and the components of qiyas see Moghul, U. F. (1999). Approximating certainty in ratiocination: How to ascertain the 'illah (effective cause) in the islamic legal system and how to determine the ratio decidendi in the Anglo-American common law. Journal of Islamic Law, 4(2), 125-200.

[77] See the rejected definition of qiyas by al 'Amadi, Ihkam al Ahkam. https://www.islamweb.net/ar/library/index.php?page=bookcontents&ID=336&bk_no=101&idfrom=313&idto=398.