

TRUTH AND VALIDITY OF THE QADI'S JUDGMENT

A LEGAL DEBATE AMONG MUSLIM SUNNITE JURISTS FROM THE 9TH TO THE 13TH CENTURIES *

Baber Johansen

(Ecole des Hautes Etudes en Sciences Sociales, Paris)

I

Throughout my lecture I argue implicitly against the widespread notion that the normative structure of Islamic law leaves no room for individual ethical decisions and moral resistance against judicial authority and political power.¹ Those who hold this opinion justify it respectively by one or both of the following reasonings. On the one hand, it is said, that the normative structure of Islam does not give room to the ethical decision of the individual. The legal norms being decreed by God, the individual's required ethical and legal obligation is that of obedience to God's orders. Consequently, there can be no opposition and no conflict between judicial authority and ethics. The norms of Muslim law being nothing but duties, Muslim law itself constitutes a religious deontology in which ethical and legal aspects are narrowly intertwined and subject to the divine command.² The tragic aspect of a conflict between law or the judiciary on the one hand, and ethics on the other, in which the individual has to take side and engage himself, seems, therefore, to be completely absent from the Islamic normative conceptions.

Max Weber, and his modern interpreters, tend to accept the same explanation. As Wolfgang Schluchter puts it: the fact that the relation between God and man is conceived of as a relation of ruler and subject and not as a relation of probation and confirmation³ means that the ethics of conviction and belief (*Gesinnungsethik*) do not play the same role in the conduct of life (*Gesamtlebensführung*) of a Calvinist and a Muslim. The Muslim, according to Max Weber in Schluchter's interpretation, replaces these ethics through his belief in God and the

* I gave a first version of this lecture at the 1996 meeting of the RIMO in Leiden and a second as a Dean's lecture in the 1997 series of the Law School at Yale University. I have changed the text in the light of the discussions which I had at both occasions and I want to express my gratitude to both audiences from whose learned comments and criticisms I profited greatly. The responsibility for my theses remains, of course, entirely mine.

prophet and his obedience to the divine law.⁴ That such an attitude may also imply important ethical decisions on the part of the individual Muslim in his or her daily conduct of life does not seem to occur to the representatives of this tradition.

Their reasoning defines Islamic law as a system of duties, a religious deontology, in which ethical, legal, and religious norms are indissolubly intertwined. Its main argument is based on the idea that in such a normative system a confrontation between legal rights and ethical duties is impossible, because ethics and law can never be sufficiently differentiated to impose the choice between them on the individual. In the Weberian tradition this assumption is confirmed by the concept of the 'sacred law'. According to Max Weber a sacred law is unable to develop the concept and the institutions of a formally rational justice because the weight of material religious ethics will always force the judge to define justice in the light of material considerations inherent in the case which he has to try. It will, therefore, produce 'Kadi-Justiz'.⁵ The mixture of ethics and law is considered to be an efficient impediment against the formal rationalization of law.⁶ The fact that the 'priests' serve a judges and at the same time as charismatic recipients of the 'revelation of the law' which they reveal to the public and then implement in the judiciary practice⁷ prevents the division of labour between those who determine the law and those who apply it and creates, thus, an additional obstacle to the law's formal rationalization. The highly formalistic procedure, often of magic origins, is not systematically separated from the material law.⁸ It contrasts with the irrational means of proof and decision which characterize a sacred law.⁹

Many of these observations are obviously correct. We will have occasion to highlight the formalistic character of the law of proof and procedure and we will see that the legal theory of important schools of Muslim Sunnite law, in fact, attributes to the qadis¹⁰ the role of pronouncing legal revelations concerning the cases which they have to decide. It is also true that Muslim law classifies all acts on a scale of ethico-legal evaluation and thus links the legal norm to an ethical dimension. But it should be kept in mind that these ethical qualifications are meant to guide the individual believer's ethical conduct and that the judge cannot base his verdicts on them.¹¹ Notwithstanding all these facts, the theoretical approach defined above turns out to be an obstacle, rather than a help, for the understanding of a major debate which has determined Muslim legal doctrine for roughly one thousand years and which helps to elucidate the structure of its institutions. This debate concerns conflicts between the legal norms as pronounced by the qadi and the ethical norms as enshrined in the memory of the individual believer. They concern the criteria by which to fix a line between the legal and the ethical validity of the qadi's judgment. At the center of these debates we find the question of truth: can the judgment of a qadi be ethically binding on the parties to the conflicts if it is based on errors in fact?

II

Muslim Sunnite jurists have invested enormous intellectual efforts in order to mark off the system of the judiciary's judgments from all other normative systems of Islam such as theology or ethics. In doing so they have met with stiff resistance in their own ranks. My lecture focuses on a debate in which one position spells out the jurists' ambition to conceive of law and justice as doctrinal and judiciary systems which autonomously determine the outcome of legal conflicts. Other jurists point out the ethical risks that such an ambition implies. The debate is clearly related to the development of the Muslim judiciary system which in the eighth and ninth centuries is differentiated against all other forms of public administration.¹²

III

What is commonly called Islamic Sunnite Law consists, until well into the eleventh century, of an important number of small and big schools of law of which seven survive until 1300.¹³ In fact, the number of schools in Muslim Sunnite law decreases continuously from the tenth century onwards and thus reduces the inherent normative pluralism of Muslim law. From the fourteenth century onwards, four Sunnite schools of law survive. The basis for their survival as the sole representatives of Muslim Sunnite law had been laid in the competition for the control of the judiciary, for the administration of the ritual and the formation of students and jurists which opposed these schools to each other since the eighth and the ninth centuries. These four schools have survived until today. Two of them originated in the eighth century. The Hanafite school, named after Abū Ḥanīfa (d. 767), developed in eighth century Iraq, the eponym of the Mālikites was Mālik ibn Anas (d. 795) and this school had its roots in Medina and developed its doctrines in Egypt, Muslim Spain and north-west Africa. The ninth century gave rise to the Shāfi'ite school which recognizes as its leading authority Muḥammad ibn Idrīs ash-Shāfi'ī who died in Egypt in 820. Finally, Bagdad, the capital of the Abbasid empire, was the scene on which the Hanbalite school of law came into being, which traces its origins back to Aḥmad ibn Ḥanbal (d. 855).

Iraq, the western part of the Arab peninsula, and Egypt were the cradle of the Muslim schools of law. But most of these schools extended their influence into regions far beyond the Arab world: the Hanafites and the Shāfi'ites spread into the eastern part of the Muslim world and up to this day the Hanafite tradition represents Muslim Sunnite law in Central Asia and the Indian subcontinent. In the Ottoman period it became the dominant Muslim law school in Anatolia, on the Balkans and among the political elites of the Arab world. The Shāfi'ites, who for a long time competed with the Hanafites for the dominant position in the towns of Central Asia, also followed the maritime trade in other directions and grew influential in Yemen, at the Indian coast-line and in Indonesia. The Mālikites

spread into Muslim Spain whence they were expelled by the reconquista, but remain influential up to this very day in north-west Africa, the subsaharan Africa and Kuwait. The Ḥanbalites lost their influence in Baghdad with the Mongol invasion but continued to be influential in Syria. Today they are the officially recognized school of law in Saudi-Arabia, and the ideological influence of Neo-Ḥanbalism on the contemporary Islamist movements can hardly be overestimated.

IV

The debate on which I will focus is, from the eighth to the tenth centuries, mainly a debate between the Ḥanafites and the Shāfi'ites. In later periods it is discussed by all schools of law and becomes a juridical paradigm for the relation between the legal norms pronounced by the judiciary and the ethical obligation of the individual believers. Its origins date back to the end of the eighth century and the development of the Abbasid judiciary is evidently its main *raison d'être*. In the period from the eighth to the tenth centuries, the Abbasid caliphate centralizes the organization of the judiciary: the caliph nominates a supreme judge who in turn appoints the judges in the provinces. The competition for the post of the supreme judge, for the intermediate 'mega-judges' who administer justice for one or more provinces and for the qadi-positions in the provinces is carried out between the schools of law. It is important to be well represented at the caliph's court but the schools also have to exert their influence on the local level if they want to yield their influence on the appointments to the judiciary. The school's interior cohesion, therefore, becomes important. Not even the supreme judge is able to nominate his candidates if they are not backed by local support structures which center around the representatives of the schools of law. The Ḥanafites occupy the judgeships in the eastern provinces and Iraq from the end of the eighth to the end of the ninth centuries. From the end of the ninth century onwards, the Mālikites are dominant in Muslim Spain, Egypt and parts of north-west Africa and at the same time they are starting to replace the Ḥanafite judges in Iraq. The tenth century sees the rise of the Shāfi'ite judges in Iraq, Egypt, Syria and Khorasan. The Ḥanbalites are late-comers. Their origins date back to ninth-century Baghdad but it is only from the eleventh century onwards that Ḥanbalite judges are to be met with in Baghdad and Damascus.¹⁴ In other words, the debate on the ethical and legal limits of the qadi's judgments is a debate between two schools of law of which one, the Ḥanafite, is, during the eighth and ninth centuries, closely linked to the Abbasid caliphate, controls the administration of justice and occupies the most important judgeships in Iraq and the east of the empire and of which the other, the Shāfi'ite school of law, did not appoint one single judge in the whole Muslim empire during the ninth century.

Three major developments exert their influence on the development of the Abbasid judiciary during this period: Firstly, the law acquires a literary form: legal texts and comments on texts determine from now on the jurists' work. The written

form of such material enables the jurists and the schools of law to lead their debates on an empire-wide scale and to professionalize the formation of jurists and judges.¹⁵ We can follow the history of the debate on the qadi's judgment through these texts. Secondly, the judiciary is clearly differentiated from the rest of the administration. Qadis appointments lie in the competence of the supreme judge.¹⁶ Since the end of the eighth century, qadis keep their own archives which are meant to give written evidence for every decision which they pronounce. The scrutiny of the qadi's archives by his successor is used to examine the removed judge's administration of office. The archives and their scrutiny by the qadi's successor and the administration constitute, therefore, an important rationalization of the control over the judiciary.¹⁷ Such a control requires, in turn, criteria for the definition of the legitimate and illegitimate use of the judge's power to pronounce judgment and enunciate norms. These criteria have to be developed in the legal doctrine which attributes a particularly important role to the institution of the 'just witness' (*shāhid 'adl*). The institution of a class of professional witnesses became a characteristic trait of the Muslim judiciary. The model of such a group of officially acknowledged witnesses was first developed in Egypt at the end of the eighth and fully bureaucratized and regulated at the beginning of the ninth century. It had a profound and lasting influence on the procedural law of the courts. Every judge had to have his acknowledged witnesses which he chose after having carefully and secretly screened the candidates and examined their reputation. This institution of a special class of acknowledged witnesses raised storms of protest when it was first begun because it seemed to diminish the status of the rest of the urban Muslims who were not admitted as witnesses. But it soon became a judiciary routine and the qadi was obliged, once reliable and acknowledged witnesses testified to an event or an act, to render judgment according to their testimony.¹⁸ Witnesses thus became members of the judiciary and their verbal testimony, together with the declarations and the oaths of the parties, became the standard proofs in civil procedure. The dominant proof of Muslim law, prior to the fourteenth century, consists of verbal declarations. The scrutiny of the facts as far as contract law is concerned, became largely the task of the witnesses on whose testimony the judge had to rely. This fact has a direct bearing on the topic of the debate between the Ḥanafites and the Shāfi'ites insofar as the judge has no procedural means at his disposal which allows him to check the truth of the facts mentioned in the verbal declarations of parties and witnesses. All jurists agree that he has to follow the outward appearances (*ẓāhir*) of the testimony and that he has no access to the forum internum, 'the interior' (*bāṭin*) as the jurists say, of the witnesses and the parties concerned.¹⁹

V

The debate on the legal and religious status of the qadi's judgment is led on two levels: the first one concerns the qadi's interpretation of legal norms, the second his verdict's assumptions about the facts of the case. Whereas the second one concerns specifically the qadi, the rules for the derivation and interpretation of legal norms concern all learned jurists. The mufti, for example, may be asked by individuals, by the parties to a conflict, by qadis and even by political authorities to give his legal opinion on the solution of legal problems. He serves as a legal expert and as a spiritual guide and he may, in fact, decide the same question in his role as a legal expert in a way that differs from the counsel he gives as a spiritual guide.²⁰ In so far, the legal doctrine seems to support Max Weber's idea of the prevalence of material ethics in a sacred law. The rules concerning the correct derivation and interpretation of legal norms are, therefore, not exclusively addressed to the qadi but to all learned jurists engaged in the development of legal doctrine, legal counselling and spiritual guidance. These rules are developed in a special genre of legal literature called the 'roots of the juridical science' (*uṣūl al-fiqh*) which treats the sources of the law and the methodology by which legal norms can be derived from them, i.e. the jurisprudence. This kind of literature stresses the particular character of the law which differentiates it from philology, Koran exegesis, theology and ethics. It is ash-Shāfi'i who, in the beginning of the ninth century, has authored a famous treatise which is generally considered to be the first book to represent this literary genre, his *risāla* (for the present debate on the dating of this text an its interpretation see the article by Christopher Melchert cited in note 15). From the tenth century onwards, the discussion of the jurists' role as an interpreter of the law is mainly led in this type of literature. And before the background of the jurisprudence concerning all learned interpreters of the law, the specific role of the qadi's decision of individual cases is thrown into relief.

All Sunnite schools of law agree that the Koran, the praxis of the prophet (*sunna*) and the consensus of the learned jurists (*ijmā'*) are sources of the law which, if they are univocal and if there is a general consensus on their interpretation are legally valid even without the intervention of the judiciary. These three kinds of sources all form part of the revelation. They generate their legal effects all by themselves. All jurists recognize them as binding and effective and the qadi's role, if he is at all called upon to decide upon them, is a declaratory one: he has to declare that the rule of the revelation applies to the case which he hears. In this case it is not the qadi's judgment which establishes the norms: the norms necessitate his declaration.²¹

If, on the other hand, the texts of the revelation are polysemous or if there is no holy text which refers directly to the event or the act in question, the judge has, like all other jurists, to exert his own independent reasoning (*ijtihād*) in order to derive the legal norms on which to base his verdict.²² The most prestigious form which this independent reasoning can take is that of conclusion by analogy (*qiyās*)

from revealed texts which is, by some jurists, considered to be the fourth source of the law, though, in fact, it is not a source but a method. Other forms of reasoning are discussed controversially among the schools of law: the juridical preference (*istiḥsān*) which justifies the breach of strict analogy,²³ the public interest (*maṣlaḥa*)²⁴ which allows to do the same, the pondering of a text (*ta'ammul*)²⁵ in order to arrive at a meaningful interpretation (*ta'wīl*) which serves the need for scriptuary legitimation of legal norms while at the same time not being authoritative for other scholars.²⁶ The absence of unequivocal scriptuary proof and the use of methods who do not produce ascertained and undoubted knowledge leads necessarily to dissent (*ikhtilāf*) among the jurists. And wherever the dissent of jurists is established, the judge, like all other qualified jurists, is entitled to follow his own independent reasoning in finding the legal norm to be applied.²⁷ The cases which may be ruled by the jurists' exerting of their independent legal reasoning are called the 'reasoning cases' (*masā'il ijtiḥādiyya*)²⁸ or the 'opinion cases' (*ẓanniyyāt*)²⁹ i.e. cases for whose decision the judge has to rely on the legal opinion to which his reasoning leads him. The field in which the exerting of individual reasoning is licit is called 'the field of the cases to be decided by licit reasoning (*mujtahadāt*).³⁰ All jurists accept that such a reasoning does not lead to the same certainty as the texts of the revelation and that all one could hope for in this field it is to form a predominant opinion (*ghalabat aẓ-ẓann, ghālib ar-ra'y*).³¹ The result of one scholar's independent legal reasoning is, therefore, not binding for the others. But it is a sufficient argument for the legal decision by a qadi.

From this premiss, the Ḥanafites and the Shāfi'ites have drawn radically different conclusions concerning the religious status of the qadi's judgment. In the ninth century, ash-Shāfi'i follows a legal maxim developed in eighth century Iraq according to which 'all scholars who exert their independent legal reasoning find the right solution' (*kull mujtahid muṣīb*).³² This maxim is turned into a theological doctrine in the tenth century by the famous al-Ash'arī (d. 935) whose theological tenets were soon accepted by the leading Shāfi'ite jurists.³³ He argues that jurists whose legal reasoning leads them to different and even contradictory conclusions are equally right. The inconclusive character of human reasoning does not allow them to reach certainty and as long as they follow sound methods of reasoning their diverging opinions should be accepted as equally sound. A famous eleventh-century Shāfi'ite jurist, al-Ghazālī (d. 1111), spells out the meaning of such a doctrine: cases in the field of dissenting doctrines (*ikhtilāf*) are characterized by the fact that God did not decree specific solutions for them. God orders the qualified scholars to follow the predominant opinion to which their reasoning leads them.³⁴ If they do so, they follow God's orders. God, therefore, makes his decision known through the verdicts which the qadis pass on the opinion cases which they hear. All the decisions pronounced by the many judges who give their different and diverging verdicts in cases which fall into the field of dissenting doctrines and have to be decided by the qadi's independent legal reasoning are God's commands. The judge cannot err in his legal interpretation when he decides on such 'opinion cases' (*ẓanniyyāt*).³⁵ And as he cannot err in his decision he cannot sin by it. He is the

instrument through whom God reveals his judgment on a particular case. No unified legal doctrine, therefore, binds the qadis' decisions in the field of dissenting doctrines. Later Mālikī authors are even more outspoken about the qadi as the heir to the function of the prophet. The famous thirteenth-century Mālikite author al-Qarāfi states:

As God gave the judges the right to decide cases by independent legal reasoning (*masā'il al-ijtihād*) according to one of two opposed doctrines, their judgment according to one of these doctrines is God's judgment in this particular case. If the judge informs (us) on his decision in this case (his information is) like a text revealed from God the almighty which arrived and which concerns this particular case especially (*ikhbār al-hākim bi-annahū hakama fihā: ka-naṣṣ min allāh 'azza wa-jalla, warida khāṣṣ bi-tilka 'l-wāqī'a*).³⁶

In other words, in a case which is not determined by a text of the revelation the judge's decision based on his personal reasoning is a judiciary revelation of God's will. Again, this doctrine supports Max Weber's thesis that in a sacred law the judiciary decision is a 'legal revelation' (*Rechtsoffenbarung*).³⁷ The notion of the qadi's verdict as a legal revelation of God's will clearly implies the concept of a sacred justice. But sacred it is only for those who are subject to the qadi's decision in this particular case. It does not represent a binding legal norm for other judges nor even for the judge who gave the verdict himself. If, on the same day, he reaches a better legal reasoning with new conclusions concerning the same type of cases he can give new judgments and he is in no way bound by his own precedent.³⁸ But he is also not entitled to retroactively change his verdict in the case which he already decided: for this particular case his older reasoning represents God's will and cannot be reversed.³⁹ For the same reason, the judgments on 'opinion cases' cannot be reversed by any other judge even if he holds the first judge's reasoning to be faulty.⁴⁰ In the field of dissenting doctrines all judges are equally entitled to follow their own legal reasoning and no judge is entitled to reverse the judgment of another judge because he does not share his reasoning. This doctrine, obviously, leaves the judges an enormous margin for discretionary decision.

The Ḥanafites are less concerned with the sacred aspects of the judges' decision. They state that even in the field of dissenting doctrines God did decree one correct solution only for each case. But as no one knows with certainty which one it is, all attempts to find it are equally valid. The scholar who has to rely on his legal reasoning is prone to err but not to sin. Every human judgment is fallible as far as the interpretation of the law is concerned. The judge can hope that he meets God's will, but he cannot be certain.⁴¹ The different and divergent verdicts of the qadis in the field of dissenting doctrines have to be implemented by all other qadis even if they think them to be wrong.⁴² This is not because the verdict is a judiciary revelation of God's will but because it was pronounced by a judge who

was validly installed by the political authorities, was qualified for the office, had the intellectual capacity to perform independent legal reasoning and found himself in a situation where he had to rely on this capacity. The judge derives his authority from his appointment by the caliph and from the fact that he applies sound legal reasoning to the interpretation of legal norms which are based on the revelation. He is not a legal prophet according to the Ḥanafite doctrine.

VI

The qadi's capacity and authority to choose the norms by which he decides his cases is not the only criterion by which the jurists measure the validity of his judgments. Contrary to other learned jurists, the qadi's task is to 'settle conflicts between parties' (*qaṭ' al-khuṣūma*).⁴³ He can do so either by persuading the parties to find a compromise or by deciding their case according to prescribed legal procedure. This procedure follows a prescribed sequence of declarations in which the avowal of one of the parties and the testimony of the witnesses are the most important forms of proof.⁴⁴ Through the proofs admitted and the procedure to be applied, the qadi has to decide whether the case which is brought before him did, in fact, take place in the form in which the plaintiff presents it to the court. He has, then, to admit the plaintiff's claim or to dismiss it. Whereas the other learned jurists discuss the validity of norms in the light of abstract principles and hypothetical cases, the qadi also has to examine the truth of the facts of the case brought before him. And the way in which his judgment refers to the truth of the facts of the case constitutes the second criterion by which the jurists measure its validity. What happens if a learned and honest judge pronounces a legally and procedurally impeccable judgment which is blatantly wrong in its appreciation of the facts? The jurists of all schools discuss this question in debating a certain number of paradigmatic cases, some of which are historically traceable to eighth century Iraq. The richest collection of such cases is to be found in ash-Shāfi'ī's work on the application of legal norms, his *al-Umm*, edited by his student Rabī' at about the middle of the ninth century in Egypt.⁴⁵ The most detailed Ḥanafite account is, unfortunately, rather late. It is contained in the thirty-volume work *al-Mabsūṭ* in which the eleventh-century Transoxanian scholar as-Sarakhsī comments a tenth-century commentary on the work of ash-Shaybānī, the important eighth-century Iraqi Ḥanafite qadi and doctrinal authority of the Ḥanafite school of law. But as as-Sarakhsī's discussion of the cases and of the forms of reasoning concords largely with the information to be drawn from ash-Shāfi'ī, we can be reasonably sure to deal with a debate which stems latest from the first half of the ninth century. All later commentaries of all schools of law contain references to this debate.

Before going into the details of the paradigmatic casuistry I want to draw the reader's attention to the importance which contract law and, in particular, the legal acts which change the personal status of free men and women as well as that of slaves of either sex play in the jurists' debate on the relation between the legal and

the ethical validity of the qadi's judgment. Once more, we find that Max Weber's sociology of law stresses an important structural element of Islamic law when, in its discussion of the development of subjective rights, it points out the difference between contracts concluded for commercial or other strategic purposes (*Zweckkontrakte*) and those legal acts and contracts which change the personal status of the parties involved (*Statuskontrakte*) such as marriage, divorce, emancipation etc.⁴⁶

The legal acts which, in Islamic law, change the status of persons through integrating them into or excluding them from family and household⁴⁷ are expressed in verbal declarations which take the form of performative speech acts (*inshā'ār*)⁴⁸ whose effect it is to establish new legal relations between the parties to the contract or the subject and the object of the legal act. In the field of status changing speech acts the performative enunciations, if formally correct, immediately produce their legal effects even if the speaker does not really want to produce them.⁴⁹ In the Ḥanafite law, the speaker's motivation is not at all taken into account.⁵⁰ It does not matter whether the person who utters the declaration understands its meaning, whether he or she acts under duress or on their own free will, whether the speaker utters the declaration jokingly, in a recital and, therefore, without the intention (*niyya*) to perform a legal act or to accept the legal effects of the declaration (*ridā*). Whatever the reason for the enunciation, by the sheer fact that it is uttered in a correct form it produces its legal effect.⁵¹ The legal acts which bring about the change of personal status create new social relations in the sphere of household and family. They are characterized, in Ḥanafite law, by a rigid and unmitigated formalism. But also the other Sunni schools of law ascribe a much more formalist character to them than to the contracts which are used for the exchange of goods and commodities.

It is in this field of rigid formalism, so different at once from the field of liturgical acts and from the exchange of goods and commodities with their stress on deliberate choice (*ikhtiyār*), intent (*niyya*), and purpose (*qaṣd*)⁵² that the jurists situate the line which marks off the qadi's judgment's legal validity from the sphere of the individual's ethical responsibility for the implementation of the verdict. In my discussion of this demarcation line between the qadi's legal authority and the individual's ethical responsibility I will focus on one of the paradigmatic cases contained in ash-Shāfi'ī's *Umm* and in as-Sarakhsī's *Mabsūṭ*.⁵³

A woman brings an action against her husband before the qadi. She bases her action on the false testimony of two acknowledged witnesses who testify to the fact that her husband repudiated her three times in their presence. The husband declares that he never did anything of that kind. The qadi, following the testimony of the witnesses, dissolves the marriage and a few weeks later one of the witnesses marries the woman. As far as the procedural law is concerned, the judgment is perfectly correct: two acknowledged witnesses of solid reputation have given testimony. The judge has no reason to doubt their honesty. He decides on the basis of their testimony. As far as substantial law is concerned, the verdict is impeccable: a threefold repudiation brings about an immediate dissolution of the

marriage. Any sexual relation between the former husband and his ex-wife would from now on constitute the crime of fornication. All schools of law agree on all these points. The qadi is obliged to separate the two. But all parties to the conflict know that the judgment contains blatant errors in fact.

What is the legal and what the ethical validity of this judgment for the parties concerned? All Ḥanafite jurists agree that the judge's decision is legally valid. But they develop dissenting doctrines as to the ethically binding character of the verdict. The eponym of the Ḥanafite school, Abū Ḥanīfa, develops a doctrine according to which the qadi's judgment in the field of contract law creates its own ethical legitimation. Therefore, the parties to the conflict have to abide by the judgment not only as far as their legal relations are concerned: they also have to accept it before their forum internum (*bāṭin*) as the decision which reshapes the legal relations between them. He reasons as follows: the qadi has been appointed by the caliph in order to apply God's law. He is, therefore, entitled to pronounce the law through performative speech acts. If the witnesses and the plaintiff lie to him, he cannot do anything about it. He does not have the capacity to inquire into the hidden knowledge and motivations of human beings and he has no access to the hidden thoughts of the witnesses and the woman. All he can do is to carefully screen the candidates for testimony. Once he did this to the best of his knowledge he performed his duty. As nobody can be obliged beyond his capacity (*at-taklīf bi-ḥasab al-wus'*) the qadi is not subject to any further obligation. He is, then, bound to accept the witnesses testimony and to judge accordingly. The examination of the testimony's truth does not belong to the conditions for his judgment's validity:

This is so because he has no way to find out the truth about the sincerity or the mendacity of the testimony. God does not enable us to recognize the true sincerity in the constative utterance⁵⁴ of a person whom God does not protect and immunise against lying. One cannot legally oblige the qadi to inform himself about things whose cognition remains inaccessible to him, because the obligation is (legally) binding only to the extent that the capacity (to fulfil it) exists. He is capable to inquire into the status of the witnesses. If he probes deeply and precisely into this inquiry he does what is in his capacity. He is (then) obliged by the law to pass judgment. There is no further obligation upon him as his capacity does not reach further. And the (legal) order is addressed to him only to the extent that he is able (to fulfil it).⁵⁵

The performative speech act of the qadi's changes the legal relations between the parties to the conflict, much as the parties' performative utterances would. When the qadi tells the husband that his marriage is dissolved by his threefold repudiation he does not give him a historical information about his own action, rather, his verdict is a performative speech act the effects of which become immediately operative: it establishes a new legal relation between the first husband and his former wife which is binding for the two of them. They have to accept the qadi's

judgment as the redefinition of their legal relations. As the qadi's authority to create legal relations by performative speech acts surpasses that of the private parties, there is no reason why they should object to the judgment on ethical grounds. As a result, the first husband loses his rights on his former wife, the false witness can marry her without any qualms because in the new constellation she is free to marry whom she wants and the woman can for the same reasons conclude her second marriage because the qadi's judgment has entitled her to do so.

Abū Ḥanīfa's doctrine seems to confirm the notion of the sacred character of the judiciary's verdict: the judge's decision is God's norm as revealed by his deputy and the believers have to abide by it. The Hanbalite jurists tell us that the founder of their school of law, Aḥmad ibn Ḥanbal, accepted Abū Ḥanīfa's doctrine, presumably because he interpreted it as a form of sacred justice. But Abū Ḥanīfa's doctrine should rather be read as a way of establishing the supremacy of a rigid juristic formalism over all legal and ethical considerations: legal acts which change the status of persons in household and family produce their effects through the sheer fact that the authorized person utters the correct formula. The enunciation of a performative utterance if brought about by a person whom the law entitles to perform this act, produces its legal effect independently from the motives and the insight of the speaker. Therefore, and this is the main thrust of Abū Ḥanīfa's argument, the qadi's authoritative performative speech act is sufficient to replace the performative utterances which the parties may have enunciated.⁵⁶ It is, therefore, also be binding for their *forum internum* (*bāṭin*), because they have to interiorize the legal norm enunciated by the qadi. It is their ethical duty to respect the law as pronounced by the qadi.

Abū Ḥanīfa's most prominent students criticized his doctrine as a piece of exaggerated juristic formalism. Abū Yūsuf (d.798 in Baghdad) and ash-Shaybānī (d. 804), both of them important qadis under the early Abbasids objected to the doctrine of their master on the ethically binding character of the judge's verdict which is based on error in fact. They admit that the judgment is legally valid because its legal and procedural ruling are impeccable and because the qadi cannot be obliged to establish the truth of the verbal declarations of the parties and the witnesses. On the level of the performative speech act, therefore, the qadi's verdict establishes new legal relations between the persons to the conflict. But the implementation of the qadi's decision is the parties responsibility. It is not automatically operative on them by the sheer fact that the qadi pronounces his decision: the parties take the ethical responsibility for accepting and applying it. The ethical autonomy of the individual who faces an erroneous judgment of this type is expressed by the jurists in a stereotyped technical terminology which is also used in other fields of the law. The *forum internum* (*bāṭin*) is opposed to the *forum externum* (*ẓāhir*), the religious evaluation of a fact or a person (*diyāna*) is confronted with 'the judge's verdict' (*qaḍā'*), the relation 'between the individual and God' (*baynahū wa-bayna rabbihi*) faces 'the judge's verdict' (*qaḍā'*),⁵⁷ finally a technical term for 'conscience' (*ḍamīr*)⁵⁸ serves to denote that innermost psychological element which remains inaccessible to the outward observer and

which is the seat of intentions, motives and memory.

Referring to the Koran (2; 188) and to traditions from the prophet, Abū Yūsuf and ash-Shaybānī state that a judge's decision based on error in fact cannot change the believer's ethical and religious duty to behave according to his knowledge of the truth of the facts. If he does not follow this duty he gains the legal title to his claim but he risks hell-fire in the world to come. The qadi's verdict is ethically invalid because it does not correspond to the truth of the facts which existed before his judgment and the qadi's performative statements cannot retroactively change these facts. Performative statements are operative on persons in the sphere of power and outward appearance, they are not effective before the *forum internum*, 'the interior' (*bāṭin*). In the relation 'between the individual and God' the 'forum internum' is governed by the knowledge which the parties have of the truth of the facts. Only in referring to his or her knowledge of the facts can the individual person define his or her responsibilities before God. If the judge's decision does not correspond to the truth of the facts it cannot, before the *forum internum*, determine the individual's ethical responsibility. Hence, if one of the parties to a conflict or the witnesses deceive the judge about the facts of the case, the party to whom the erroneous judgment adjudicates rights and titles is legally entitled to use these advantages. But he or she is not, before God, justified to implement the judgment. To do so constitutes a sin and jeopardizes the believer's salvation in the hereafter. To waive the legal titles thus acquired is the only strategy which can reconcile the judiciary's claim to legal authority and the individual's desire to lead an ethical life. This reconciliation has to be brought about by the individual who acquired the legal advantage: he has to abstain from using it.

So far Abū Yūsuf and ash-Shaybānī concur. They differ in the distribution of legal and ethical rights which they attribute to the different parties. Abū Yūsuf holds the opinion that the first husband is not entitled to have any sexual relations with his former wife: legally, because the judge has decided; ethically because he risks to be condemned for fornication and no believer is entitled to expose himself to risks which might cost his life or his honour. The second husband has no right to have sexual relations with his new wife because he knows that before God she is still the first husband's wife and that his crime of lying to the judge does not give him any religiously valid title to a legal marriage. For the same reasons the woman is not entitled either to have sexual relations with her first or her second husband. The separation between legal and ethical claims is complete for all three persons.

Ash-Shaybānī sees the results differently. According to him, the first husband is legally forbidden to have sexual intercourse with his former wife, but is ethically entitled to do so until the second husband, who is ethically forbidden to approach his wife, enjoys his legal rights. At that moment the first husband's claim ceases to be ethically justifiable because a woman cannot have two husbands, one on ethical and one on legal grounds and after the second husband has consummated the marriage the woman has to pass through a waiting period before she can legally have intercourse with another man. The line which separates ethical from legal

titles is for ash-Shaybānī the result of practice. He clearly assigns two functions to the forum internum. On the one hand it represents the capacity to preserve the memory of the truth of the facts and to act accordingly. Therefore, the first husband preserves his ethical rights to uphold marital relations with his wife even after the qadi dissolved the marriage. On the other hand, the facts change through the praxis of the parties and the forum internum has to take into consideration the change so effected. Even ethical titles cease to exist when the practical situation to which they refer, changes. There is a continuous change in the relation between legal and ethical claims which is determined by the praxis of the parties and which tends to diminish the autonomy of the forum internum.

The debate on the different doctrines of Abū Ḥanīfa's, Abū Yūsuf's and ash-Shaybānī's is continued in the Ḥanafite school of law until the nineteenth century. The tendency is to declare Abū Ḥanīfa's doctrine to be authoritative for the judges and the teaching of Abū Yūsuf's and ash-Shaybānī's to be followed by the muftis, that is, to stress the identity of legal and ethical effects of the judiciary's verdicts in the administration of justice and the conflict between them in the mufti's spiritual guidance for the believers.

The doctrine of Abū Yūsuf and ash-Shaybānī underlines the conflict between judicial decision and ethical duty which is caused by the judge's error in fact. The two famous Ḥanafite jurists try to resolve this conflict by imposing on the person to whom the judge adjudicates undue advantages the obligation to waive his title to these advantages. This strategy is not sufficient to avoid tragical consequences of the conflict between legal and ethical claims. But before touching on the tragical dimension of this debate I want to stress the one aspect of this argument which strikes me most. It is the role that the jurists assign to the memory as an ethical resource. The truth of the facts is accessible only to the individual or collective memory. The knowledge of it is, as the jurists say, a matter between the individual believer and his lord (*baynahū wa-bayna rabbihi*), i.e. it is a matter of religious conscience. Only if the individual memory is upheld can the acts and the facts be imputed to their authors. The individual responsibility before God is thus a function of the memory. And so is the formation of an individual identity. The memory's controlling function decides on the attribution of acts and facts, on the formation of individual responsibility and identity; it is the basis for the interiorization of legal and ethical norms. The judgment which passes over the memory's controlling function is ethically unacceptable even if it is legally valid. The waiver of the unjustly acquired legal title is the effort to reconcile judicial authority with the individual memory as an ethical resource.

But not all conflicts between the legal validity of the judgment and the ethical imperative to remember the truth can be solved through the waiver of legal titles. This is true of all cases in which the qadi imposes ethically unacceptable obligations on persons. One of the examples in which the jurists discuss such a situation is the inversion of the case which I described above: a woman sues her husband before the qadi. Her drunken husband repudiated her three times. After sobering down he refuses to acknowledge the irreversible repudiation. The woman

has no witnesses for the act. The husband denies her allegation. The qadi dismisses her action. She is now obliged to continue to live in a legal status which allows her husband to have marital relations with her whereas she knows that before God she no longer is his wife. From the point of view of religious ethical conduct this relations has to be qualified as fornication. According to Abū Ḥanīfa's doctrine no serious complications are to be envisaged. The qadi has pronounced his verdict as a performative speech act. He has redefined the legal relations between husband and wife. They are, thus, legally married. No ethical conflict can result from the normal consummation of a legally established marriage. The doctrine of Abū Yūsuf and ash-Shaybānī which, after the eleventh century is the doctrine of the Sunnite jurists of all schools of law, engenders a tragical conflict. The qadi's judgment obliges the woman to enter in a relation of fornication which is one of the most serious crimes which Islamic law knows. Before God she has no right to do so. According to Ḥanbalite authors of the thirteenth century she has no right to yield to the husband's sexual approaches and she is entitled to kill him if he insists. This is also the doctrine of the Shāfi'ites since the ninth century, and, in a much later period, the legal opinion of two of the highest Ḥanafī muftis of the Ottoman Empire in the sixteenth and seventeenth centuries who oblige the woman in such a situation to poison her husband. In its extreme forms then, the conflict between legal and ethical validity may cost the life of the one who wants to impose a legal title against ethically founded resistance. In this way ethical obligations become legal facts.

VII

According to ash-Shāfi'ī's doctrine, the erroneous judgment may even lose its legal validity in face of ethical opposition. The founder of the Shāfi'ite school of law does not envisage the dividing line between the legal and ethical validity as a frontier that separates two distinct dimensions. Rather, the one exerts its influence on the other. The friction between them is constant and the conflict between them is radical. Ash-Shāfi'ī shares with Abū Yūsuf, whom he quotes, the concept of the memory as an ethical resource that bars the way to the ethical acceptance of the judgment which is based on error in fact. He shares with him also the strategy of imposing the waiver of legal titles on the party to whom the qadi adjudicated unjustified advantages. But he goes a decisive step further when he also suggests that the party on whom the qadi inadvertently imposes obligations which do not correspond to the facts of the case, should refuse to honour them. The knowledge of the parties concerning the truth of the facts, their memory which imputes these facts to them or refuses this imputation, their personal insight into the conflict delimit the validity of the judiciary decision. The legal validity is dependent on the judgment of the forum internum.

The paradigmatic case discussed by the Ḥanafites, i.e. the case of the woman who brings false witnesses and succeeds in getting a dissolution of her

marriage from the qadi is also discussed by ash-Shāfi'ī. According to his doctrine, after the qadi dissolved the marriage, the woman is obliged, on ethical grounds, to act as if she continues to be married. She is not entitled to marry another husband. She cannot refuse her first husband's sexual advances, but she has to take care to conceal these ongoing sexual relations with him because she risks, otherwise, to be condemned to death for the crime of fornication. The husband preserves all his marital rights after the qadi dissolved his marriage. But he also has to take care not to be caught and condemned to death for fornication. He must, on the other hand, not marry more than three other women and take care not to marry his first wife's sister. The mutual claims for inheritance continue to be effective and the heirs have to respect them. If the man dies the wife has to observe the prescribed waiting period. In other words, the parties should act as if the qadi's verdict did not exist but make sure not to expose themselves to legal punishment by getting caught in an act which is legally forbidden.

In the reversed case, i.e. in the case in which a wife cannot prove that her husband pronounced a threefold repudiation against her so that the qadi dismisses her action, the husband is ethically obliged to behave as if he were no longer married to his wife. The woman must refuse his sexual advances and if she cannot repulse him otherwise, she is entitled to kill him. Ash-Shāfi'ī evidently holds the opinion that the lack of a judgment's ethical validity may also reverse its legal validity. It is, in fact, a question of risk calculation to which degree the parties openly act against the judgment. The individual has to calculate the risk and to act in its light. As Islamic ethics as well as the law forbid to unnecessarily expose oneself to deadly risks, it is the character of the risk which in the final instance decides on the course of action to choose. The competence of the impartial third, the judge, to impose binding decisions on the parties is put into jeopardy by the individuals' religious duty to remember the truth and to act accordingly. It is evident that such an approach opens the field widely for the ambition to act as one's own judge and ash-Shāfi'ī does, in fact, encourage such ambition.

All doctrines which accept the possibility of a conflict between the legal and the ethical validity of a qadi's judgment admit the fact that the qadi's judgment may differ from the truth of the facts, a plaintiff's or witness's declaration from his knowledge and memory. For all of them the fact that such a difference may exist in every verbal declaration constitutes the contingency which is the condition of each judiciary decision. But ash-Shāfi'ī is the only jurist who transforms this condition into the rank of a procedural instrument. He wants the judge to do justice to both dimensions, the legal and the ethical one. Whereas the qadi has to pronounce his judiciary verdict in the light of the verbal declarations of parties and witnesses he should, in addition, make the parties utter declarations which, while being in stark contrast with the declarations they made in the trial, solve the ethical problems related to the case. I give an example: a man who married a woman denies the marriage. The woman sues him in court but does not bring acceptable witnesses. The qadi orders the man to swear to the truth of his assertion that he did not marry the woman. He then dismisses the case of the woman. Immediately

following the pronouncement of the verdict, he should, according to Shāfi'ite doctrine, ask the man to declare that, should he ever have married the woman, he is now repudiating her. What happens is that the qadi leads two trials, a legal and an ethical one, at once. The oath of the man serves as a legal proof. The truth of the fact may differ from the content of the oath. To impose on the man the conditional declaration of repudiation implies the insinuation that he lied. The conditional declaration is supposed to solve the ethical conflicts that might arise from this hypothetical assumption. Ash-Shāfi'ī's procedural law thus recognizes officially the difference between the two dimensions in which each judgment has to struggle for its recognition: the legal and the ethical one. He clearly starts from the assumption that the two contradict each other and that it is the qadi's task to steer the parties in a position where they are able to solve their legal and their ethical conflicts which are at stake in the trial.⁵⁹

VIII

With the exception of Abū Ḥanīfa and, possibly, Aḥmad ibn Ḥanbal, Sunnite jurists acknowledge the difference between the legal and the ethical validity of a qadi's judgment. For the Mālikites the relation between a fact created by the political and judiciary authority on the one hand, its religious evaluation on the other hand, remains an open question until well into the thirteenth century⁶⁰ but even in their school of law the dominant doctrine has it that in cases in which the judgment is based on error-in-fact it is not valid for the religious evaluation (*futya*) of the fact.⁶¹

All Sunnite schools of law discuss the demarcation line between the legal validity and the ethical authority of a qadi's judgment by using paradigmatic cases from the contract law and, in particular, from the field of legal acts which change the personal status in family and household. The main reason seems to be that in sharp contrast to the liturgical acts (*'ibādāt*) the acts which change the personal status generate their legal effects even when the capacity of deliberate choice (*ikhtiyār*) is defective (*fāsida*), the intention (*niyya*) doubtful and the purposely action (*qaṣd*) absent.⁶² In contrast to the penal law or to the law of torts the status changing acts do not rely on any material fact, such as the slaying of a person, the housebreaking or the destruction of a corporeal good. The facts in the field of the status changing legal acts consist of declarations and the declarations are facts which generate their legal effects immediately. The validity of such declarations does not, at least according to the doctrine of the Ḥanafite school, depend on the speaker's psychological readiness to accept its legal effects or to pursue its purpose. The question which is at the core of the jurists' debate on the validity of the qadi's judgment in this matter concerns the authority to be attributed to a declaration. Whose word counts more? The performative statements of the parties to a conflict or the qadi's performative utterance of a judgment? Abū Ḥanīfa decides for the authority of the qadi. So do the jurists who are the co-founders of

the Hanafite school, but they restrict this validity to the sphere of power and judiciary authority. It is only valid before the *forum externum*, not before the *forum internum*.

What is at stake in this debate is the definition of the judgment. Is the qadi's enunciation of his verdict a legal norm which obliges the parties to the conflict to act accordingly? Abū Ḥanīfa decides in the affirmative. Therefore, the parties have to accept the judgment's validity also before their *forum internum*. The co-founders of the Hanafite school, and with them the vast majority of the Sunnite jurists, decide differently. The qadi's judgment constitutes a legal title, the confirmation of a legal claim, a right (*ḥaqq*) for the party to whom the qadi adjudicates this title. For the party to whom the title is adjudicated, to implement this decision and to enforce his right is an option, not an obligation. The qadi's verdict is an obligatory legal norm only for the party who is condemned to discharge an obligation.

The option of the entitled party is determined by ethical considerations. It is his or her religious duty to act according to the truth of the facts. The judiciary's verdict does not change these facts. The party has to remember them and act accordingly. The entitled party has to waive her title if the qadi's verdict was based on error in fact. Even the condemned party may find herself confronted with the religious duty not to follow the qadi's judgment which is based on error in fact and it may be her ethical duty to use illegal means in order to free herself from the constraint of performing illegal acts which the qadi's verdict erroneously imposes on her.

In other words, the legal validity of the judgment is a matter of its correct enunciation by the authorized person, i.e., the judge. Its implementation by the parties is an option which depends on ethical considerations. The execution of the title or the obligation is licit only if the judgment concurs with the truth of the facts. Even if the qadi ignores this truth the parties' memory preserves it. The truth of the facts as preserved by the parties' memory is recognized by the jurists as the decisive criterion of the *forum internum* for the legitimacy of the verdict's implementation by the parties. It is on the level of its implementation by the parties that the qadi's judgment remains related to and dependent upon the truth of the facts. Before the *forum internum* the qadi's decision is valid only if it is based on true assumptions as far as the facts of the case are concerned.

The *forum internum* depends largely on the memory which through recalling acts and facts and attributing them to their authors is a necessary, if not sufficient, condition for the constitution of individual and collective responsibility and identity. Interiorization of legal and ethical norms and the construction of a religious conscience depend on the ethical resources of a memory which controls the past. To allow the qadi's judgment, as does the doctrine of Abū Ḥanīfa, to replace this memory and to substitute the verifiable information of the memory with the effects of performative utterances imposed from above would put into jeopardy the memory as an ethical resource and with it the basis of monotheistic religious ethics. Therefore, the legal and the ethical dimension of religious normativity have to co-exist.

The type of relation which the Muslim jurists construe between *forum externum* and *forum internum* allows them to preserve the formalist character of the law of procedure and proof and to shield it off against the expectation of material justice whose realization is, in the last instance, incumbent on the *forum internum* of the individuals. One can, in fact, interpret this type of relation as an attempt to protect the formal procedure of the judiciary against the consequences of the disappointment which it necessarily brings about when confronted with the individual expectations of material justice. Whereas the legal validity of a verdict is conditioned by its being in accordance with the substantial law but even more with the law of procedure and proof and while in so far it follows its own rationality, the *forum internum*, on the other hand, is the dimension of religious ethics which preserves the expectation of material justice in each case. In accepting this line of differentiation between *forum externum* and *forum internum* the jurists differentiate between the legal and judicial authorities who apply formal procedures to the cases brought before them, and the individual persons who appear before court with the expectation to see the truth of the facts, which is known to them, respected and material justice brought about. The jurists concede their own notion of justice to each of them. In order to do so they have to discharge the qadi's verdict from the task of establishing the truth of the facts. The only certainty which the qadi can reach is that he exerted his legal reasoning to the degree which allows him to form a prevailing opinion on the legal aspects of the case and that he followed the prescribed procedure. This is the extent of certainty which the law obliges him to reach. The difference between, on the one hand, the authority of the judicial verdict which is based on correct procedure and independent legal reasoning, and, on the other, the truth of the facts which remains hidden to the qadi, is the basis on which Islamic law protects the judiciary against the temptation to use illegal means in order to pressure the parties into avowals and confessions. Until the fourteenth century, Islamic law, contrary to the European *ius commune*, forbids judicial torture as a legal means of inquiry.⁶³ The trial is not meant to establish the truth of the facts, the verbal declarations are sufficient proof for a legal judgment based on correct procedure which remains valid even if it does not correspond to the facts. There is strictly no need for torture as long as this doctrine prevails. The acknowledgment of the difference between the judicial verdict's authority and the truth of the facts is also the basis of the normative and judiciary pluralism which befits a jurists' law. In both functions, the protection of the accused against inquisitorial procedures and the preservation of a normative pluralism among qadis, the acknowledgment of the difference between the qadi's judgment's legal validity, on the one hand, and the truth of the facts, on the other, is tied to the acknowledgment of the ethical limits drawn to the validity of the qadi's verdict before the *forum internum* of the parties to the conflict.

IX

In spite of its many insights into essential structures of a sacred law, the Weberian theoretical tradition, which extensively discusses Muslim law as one of the representations of this category, has turned a blind eye to the differentiation between *forum internum* and *forum externum*, in spite of its fundamental and structural importance for the reasoning of the Muslim jurists. There are certainly many reasons for such an attitude. But it seems to me that the most important one is that this theory discusses Islamic law too much in terms of a rigid structure of elements forming a determined order and that it does not leave enough room for the process in which this legal system functions and for the role which its functioning assigns to the individuals who appeal to it. It is the functioning of the judiciary which obliges the Muslim jurists to discuss the tensions and the opposition between the various elements of the legal system. These tensions and oppositions oblige the individual believer to weigh the authority of the qadi's judgments by pitting it against his or her duties before God and, if need be, to prefer the religious duties to the judiciary's verdict. It forces the individual to take important ethical decisions. But starting from the assumption that Islamic Law is nothing but a system of duties which leaves to the individual believer nothing but obedience to divine commands the Weberian theory cannot see that Islamic Law, like most legal systems, obliges those that appeal to it to choose their own options and to take ethical decisions. The Weberian theoretical tradition in which the reference to Islamic Law has always played an important role has so far turned out to be unable to analyze the structural and functional importance of the Muslim jurists' differentiation between *forum externum* and *forum internum*. It has neither paid attention to its role for the interiorization of ethical and legal norms, nor to its function for the formation of individual identity and of religious ethics and it has neglected the reconciliation which it effects between the judiciary's function for the preservation of the public order and the law's claim to guide the individuals' ethical conduct. Only a theoretical approach which centers on the action of the participants in a legal system will be able to do justice to the ethical dimension of the doctrine of Islamic Law. As long as the deduction of individual action from abstract theoretical concepts concerning the elements of a religious system and their assumed structural relations replaces such an approach, the many insights of the Weberian tradition will not help us to a better understanding of the Muslim jurists' preoccupations and their quest for a reconciliation between law and ethics.

Notes

- 1 See for example Wolfgang Schluchter, *Max Webers Sicht des Islams* (Frankfurt am Main: Suhrkamp, 1987), pp. 38-45.
- 2 See as examples of such reasoning G.-H. Bousquet, *Précis de Droit Musulman* (2e édition, Alger: Maison des Livres, 1950), p. 50 and O. Spies & E. Pritsch, 'Klassisches islamisches Recht' in B. Spuler (ed.), *Handbuch der Orientalistik, Erste Abteilung Der Nahe und Der Mittlere Osten, Ergänzungsband III, Orientalisches Recht* (Leiden, Köln: E.J. Brill, 1964), pp. 222-223. For a very different understanding of the early Muslim community as an 'ethical society' and of the law as the 'rigid frame for the Muslim ideals of ethical duty and human relations' see Hamilton A.R. Gibb, 'Structure of Religious Thought in Islam', in *idem*, *Studies on the Civilization of Islam* (London: Routledge, 1962), pp. 196-200. But Gibb also sees Muslim law as a 'doctrine of duties', *ibid.*, p. 198. Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984), pp. 142-143 is the only author I know who restricts the concept of unilateral obligations to the field of acts of devotion ('*ibādāt*') and insists that 'in his relationship with other men, man's rights and duties are defined and determined in accordance with a scale of justice consisting of a set of principles in which freedom, equality, toleration and brotherhood are included'. Josef Schacht goes a step further when he insists that Islamic law 'is, in the last resort, the sum total of the personal privileges and duties of all individuals' (Josef Schacht, *An Introduction to Islamic Law* [Oxford: At the Clarendon Press, 1964], pp. 4-5) and concludes that for a sociology of law two extreme cases exist: 'One is that of an objective law which guarantees the subjective rights of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals. The opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands. Islamic law belongs to the first type...' (*ibid.*, p. 208). On the other hand he opens his book by the statement that 'The sacred law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects' (*ibid.*, p. 1). He reconciles the two statements in the following way: 'Islamic law is part of a system of religious duties, blended with non-legal elements. But though it was incorporated into the system of religious duties, the legal subject-matter was not completely assimilated, legal relationships were not completely reduced to and expressed in terms of religious and ethical duties, the sphere of law contained a technical character of its own, and juridical reasoning could develop along its own lines. There exists a clear distinction between the purely religious sphere and the sphere of law proper, and we are justified in using the term Islamic law of the legal subject-matter which, by being incorporated into the

- system of religious duties of Islam, was either materially or formally, but in any case considerably, modified' (*ibid.*, p. 201).
- 3 Given the central importance assigned by the Muslim jurists to the idea of *ibtilā'*, probation, as the religious foundation of the legal act (see my forthcoming book on *Contingency in a sacred law* (Leiden: Brill, 1998), one should not accept Weber's premisses without further investigation.
- 4 Schluchter, *op. cit.*, p. 40.
- 5 Max Weber, *Wirtschaft und Gesellschaft* (Köln und Berlin: Kiepenheuer und Witsch, 1964), vol. I, p. 200. See also pp. 587, 592, 599, 603, 609, 610, 613. For a learned defence of this tenet by the most important occidental authority on Islamic law in this century see Josef Schacht, *op. cit.*, p. 4. For its function in an interpretation of Weber's work see Schluchter, *op. cit.*, pp. 77-79, 81, 98.
- 6 Max Weber, *op. cit.*, vol. I, p. 600. Schluchter, *op. cit.*, p. 78-79.
- 7 Max Weber, *op. cit.*, pp. 581-582, cf. *ibid.*, pp. 577-578.
- 8 Max Weber, *op. cit.*, p. 505. The same point is made by Schacht, *op. cit.*, pp. 113, 206.
- 9 Max Weber, *op. cit.*, pp. 571-572. On this point the evidence produced by the legal historian diverges from Weber's position, see Schacht, *op. cit.*, pp. 4, 203. But Schacht also points out 'the heteronomous and irrational side of Islamic law', *ibid.*, pp. 203-204.
- 10 For reasons of convenience the simplified spelling 'qadi' is used instead of the more precise transcription *qādī*.
- 11 Baber Johansen, 'Die sündige, gesunde Amme. Moral und gesetzliche Bestimmung (ḥukm) im islamischen Recht', in: Baber Johansen & Axel Havemann (eds.), *Gegenwart als Geschichte Islamwissenschaftliche Studien Fritz Steppat zum fünfundsechzigsten Geburtstag* (Leiden: Brill, 1988), pp. 264-282. See also Ahmad ibn Idrīs al-Qarāfī, *Al-Ihkām fī tamyīz al-fatāwā 'an al-ahkām wa-taṣarrufāt al-qādī wa'l-imām* (ed. 'Abd al-Fattāh Abū Ghudda, Aleppo: Maktab al-maṭbū'āt al-islāmiyya, 1387/1967), pp. 55-56.
- 12 Baber Johansen, 'Wahrheit und Geltungsanspruch: zur Begründung und Begrenzung der Autorität des Qadi-Urteils im islamischen Recht', in Centro Italiano di Studi sull'Alto Medioevo (ed.), *La giustizia nell'Alto Medioevo (secoli IX-XI)* (Spoleto: Presso La Sede Del Centro, 1997), pp. 975-1065.
- 13 Schacht, *op. cit.*, p. 67.
- 14 On all these developments see the unpublished PhD (Princeton, 1993) of Nurit Tsafir, *The Spread of the Hanafi School in the western regions of the Abbasid Caliphate up to the end of the third century A.H.* See also Heinz Halm, *Die Ausbreitung der šafi'itischen Rechtsschule von den Anfängen bis zum 8./14. Jahrhundert* (Wiesbaden 1974). The classical work of Emile Tyan, *Histoire de l'Organisation Judiciaire en Pays d'Islam* (Leiden: Brill, 1960) is, therefore, outdated in important aspects but cannot be replaced by any of the newer works.
- 15 The details and the periodization of this process are a matter of debate. See now Miklos Muranyi's review of Norman Calder, *Studies in early Muslim jurisprudence* (Oxford 1993), in *Islamic Law and Society* (under print). See also Muhammad Qasim Zaman, 'The Caliphs, the 'Ulamā', and the Law Defining the Role of the Caliph in the early 'Abbāsīd Period', in *Islamic Law and Society* (under print). For a different point of view see Christopher Melchert, 'George Makdisi and Wael ibn Hallaq', *Arabica*, tome XLIV, fasc. 2 (avril 1997), pp. 308-316. This article was written before the publication of the texts mentioned above.
- 16 Tsafir, *op. cit.*, passim. Tyan, *op. cit.*, pp. 124, 129-130, 135 ff.
- 17 See Baber Johansen, 'Formes de Langage et fonctions publiques: stéréotypes, témoins et offices dans la preuve par écrit en droit musulman', *Arabica* (in print).
- 18 Baber Johansen, 'Wahrheit und Geltungsanspruch' (see above note 12), pp. 1003-1012.
- 19 *Ibid.*, pp. 1023 et passim.
- 20 Baber Johansen, 'Die sündige, gesunde Amme', *op. cit.*, p. 276.
- 21 Al-Qarāfī, *Al-Ihkām*, pp. 137-138, 146-155. Abū Bakr Muḥammad ibn Abī Sahl as-Sarakhsī, *Kitāb al-Mabsūt* (photomechanical off-print of the Cairo edition of 1324/1907), vol. XVI, pp. 67-68, 83. Abū Bakr ibn Mas'ūd al-Kāsānī, *Kitāb Badā'i' as-ṣanā'i' fī tartīb ash-sharā'i'* (photomechanical offprint of the Cairo edition of 1910, Beirut, n.d.), vol. VII, p. 4.
- 22 Abū Bakr Muḥammad ibn Abī Sahl as-Sarakhsī, *Uṣūl* (ed. Abū 'l-Wafā' al-Afghānī, Beirut: Dār al-Ma'rifa, n.d.), vol. I, pp. 165-166, 279-280, 283-285, 289-292, 295-305, vol. II, pp. 32, 36ff. 130, 140, 193. Idem, *Al-Mabsūt*, vol. XVI, pp. 68-70.
- 23 Schacht, *op. cit.* pp. 37, 60f.
- 24 *Ibid.*, p. 61.
- 25 As-Sarakhsī, *Uṣūl*, vol. I, pp. 162-163, vol. II, pp. 128-129, 138-139. Idem, *Al-Mabsūt*, vol. XVI, p. 62. Al-Kāsānī, *op. cit.*, vol. VII, p. 5.
- 26 As-Sarakhsī, *Uṣūl*, vol. I, pp. 126-127, 356-357.
- 27 Baber Johansen, 'Casuistry: Between Legal Concept and Social Praxis', *Islamic Law and Society*, vol. 2, no 2 (June 1995), p. 154, note 66.
- 28 Al-Kāsānī, *op. cit.*, vol. VII, p. 4. *Masā'il al-ijtihād* is the term used by al-Qarāfī, *op. cit.*, pp. 20, 22, 23, 28, 65. The same author also uses *masā'il al-khilāf*, cases on which the dissent is established (*ibid.*, pp. 65, 66, 67, 75, 121).
- 29 Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-mustassfā min 'ilm al-uṣūl* (Cairo: al-Maktaba at-tijāriyya, 1356/1937), vol. II, pp. 109, 121.
- 30 Al-Kāsānī, *op. cit.*, vol. VII, p. 4. As-Sarakhsī, *Al-Mabsūt*, vol. XVI, p. 85.
- 31 For the prevalent opinion (*ghālib ar-ra'y*) as the basis of the analogy, see as-Sarakhsī, *Al-Mabsūt*, vol. XVI, p. 112. It is also the basis of *istihsān*, the equity solution, see as-Sarakhsī, *Uṣūl*, vol. II, p. 200. See also al-Kāsānī, *op. cit.*, vol. VII, p. 4.
- 32 Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert*

- Hidschra. Eine Geschichte des religiösen Denkens im frühen Islam*, Band II (Berlin: de Gruyter, 1992), pp. 161-165, Bd. V (Berlin: de Gruyter, 1993), pp. 117-119. Daniel Gimaret, *La doctrine d'al-Ash'ari* (Paris: Editions du CERF, 1990), p. 545.
- 33 *Ibid.*, pp. 519, 545-546. See also al-Ghazālī, *op. cit.*, vol. II, pp. 105, 121-123 and compare *ibid.* p. 107 for the 'aqliyyāt.
- 34 *Ibid.*, vol. II, p. 109: *bal al-ḥukm yatba'u ṣ-ṣann wa-ḥukm allāh ta'ālā 'alā kull mujtahid mā ghalaba 'alā ṣannihī*.
- 35 Al-Ghazālī, *op. cit.*, vol. II, pp. 109, 121.
- 36 Al-Qarāfī, *op. cit.*, pp. 65. See also pp. 28, 44, 55, 66, 85, 121-122.
- 37 Weber, *op. cit.*, vol. I, pp. 581-582. See also pp. 577-578.
- 38 As-Sarakhsī, *Al-Mabsūt*, vol. XVI, pp. 62, 75, 84. Al-Kāsānī, *op. cit.*, vol. VII, pp. 5-6.
- 39 This reasoning holds true, in particular, for those jurists who attribute the status of God's judgment to the qadi's judgment on cases in the field of dissenting legal opinions. Al-Qarāfī sees only two reasons which would oblige a judge to revoke his performative statement: 1) the fact that it contradicts a clear and unequivocal text of the revelation; 2) a clear and unequivocal mistake as to the use of the law, see al-Qarāfī, *op. cit.*, pp. 174-175. The Ḥanafites do recognize the same reasons for the cassation of a qadi's judgment, see as-Sarakhsī, *Al-Mabsūt*, vol. XVI, pp. 62, 75, 84, 108. So do the Shāfi'ites, see Yahyā ibn Sharaf an-Nawawī, *Al-Minhāj*, printed at the margin of Muḥammad ash-Shirbīnī, *Mughnī al-Muhtāj ilā ma'rifaṭ ma'ānī alfāz al-minhāj* (Cairo: Muṣṭafā al-Bāb al-Ḥalabī, 1377/1958), vol. IV, p. 396. But the Ḥanafites clearly encourage the qadi to uphold the judgments which he pronounced even if they no longer correspond to his present understanding of the case, see as-Sarakhsī, *ibid.*, vol. XVI, pp. 84-85 and al-Kāsānī, *op. cit.*, vol. VII, pp. 5-6.
- 40 Al-Qarāfī, *op. cit.*, pp. 28, 56, 85, see also pp. 65, 75, 78. Ash-Shirbīnī, *op. cit.*, vol. IV, pp. 396-397. Al-Kāsānī, *op. cit.*, vol. VII, pp. 4, 5, 6, 14.
- 41 As-Sarakhsī, *Uṣūl*, vol. II, pp. 91, 107, 129, 130-131, 142. Idem, *Al-Mabsūt*, vol. XVI, pp. 69-70, 76. Al-Kāsānī, *op. cit.*, vol. VII, p. 4.
- 42 See above note 39 and as-Sarakhsī, *Al-Mabsūt*, vol. XVI, p. 84. Aḥmad ibn Muḥammad al-Qudūrī, *Al-Kitāb*, printed at the margin of 'Abd al-Ghanī al-Ghanīmī, *Al-Lubāb fī sharḥ al-Kitāb* (Beirut: al-Maktaba al-'ilmiyya, 1400/1980), vol. IV, pp. 87-88.
- 43 As-Sarakhsī, *Al-Mabsūt*, vol. XVII, p. 28, vol. XX, pp. 135-136. In vol. XVI, p. 61, he states that the qadi is obliged to try and persuade the parties to find a compromise. Al-Kāsānī, *op. cit.*, vol. VII, p. 2 also sees one of his main tasks in the 'settlement of conflicts' (*qaṭ' al-munāza'āt*) and so does the Mālikite al-Qarāfī, *op. cit.*, pp. 55, see also p. 77.
- 44 Baber Johansen, 'Le jugement comme preuve: preuve juridique et vérité religieuse dans le droit islamique hanéfite', *Studia Islamica*, LXXII (1990), pp. 5-17.

- 45 See Melchert, *op. cit.* (see above note 15) for the debate about the historical dates.
- 46 Max Weber, *op. cit.*, vol. I, pp. 513, 515, 520, 533, 542.
- 47 These legal acts are, a) the contract of marriage (*nikāh*), b) repudiation (*talāq*), c) revocation of the repudiated wife during her waiting period (*ruj'ā*), d) consensual divorce (*khul'*), e) the husband's oath of abstinence (*ilā'*) and the different forms of the slave's emancipation such as, f) '*itq*', g) '*iadbīr*', h) '*istilād*'. See as-Sarakhsī, *Al-Mabsūt*, vol. XXIV, p. 56 and compare pp. 59, 85.
- 48 For an attempt to define the speech acts of the juristic rhetoric of Islamic law in terms of Austin's theory, see Pierre Larcher, 'Quand, en Arabe, on parlait de l'Arabe. (III) Grammaire, Logique, Rhétorique dans l'Islam postclassique', *Arabica*, XXXIX, Fasc. 3 (Novembre 1992), pp. 358-384. See also Robert Brunschvig, *Etudes d'Islamologie*, (Paris: Maisonneuve, 1976), vol. II, p. 350 and G. Bohas, J. P. Guillaume & E.D. Kouloghli, *The Arabic Linguistic Tradition* (London: Routledge, 1990), p. 130, see also p. 121. See also Van Ess, *op. cit.*, Bd. I, pp. 35-36, Bd. II, p. 278 and Baber Johansen, 'Entre révélation et tyrannie: le droit des non-musulmans d'après les juristes musulmans', in Laurent Mayali (ed.), *Identité et Droit de l'Autre* (A. Robbins Collection Publication, University of California at Berkeley, 1994), pp. 129-131.
- 49 Linant de Bellefonds, *Traité de Droit Musulman Comparé* (Paris: Mouton, 1965), vol. I, pp. 74-76.
- 50 Chafik Chehata, *Etudes de Droit Musulman* (Paris: Presses Universitaires de France, 1971), vol. I, p. 215.
- 51 Linant de Bellefonds, *op. cit.*, vol. I, pp. 69-71, 75-76. Chafik Chehata, *op. cit.*, vol. I, pp. 139, 215-216. Baber Johansen, 'The Valorization of the Human Body in Muslim Sunni Law', in Devin J. Stewart, Baber Johansen & Amy Singer, *Law and Society in Islam* (Princeton: Markus Wiener, 1996), pp. 73-74.
- 52 See above note 51 and Baber Johansen, *Contingency in a sacred law* (Leiden: Brill, 1998), forthcoming.
- 53 If not mentioned otherwise, all references to the jurists' debate are to my 'Wahrheit und Geltungsanspruch' (see above note 12).
- 54 I borrow this expression from J. L. Austin, *How to do things with words* (Second edition), J.O. Urmson & Marina Sbisa (eds.) (Cambridge: Harvard University Press, 1975), pp. 3, 47, 91 and I translate the Arabic term *khābar* by it.
- 55 As-Sarakhsī, *Al-Mabsūt*, vol. XVI, p. 182.
- 56 Johansen, 'Wahrheit und Geltungsanspruch', *op. cit.*, pp. 1028-1034.
- 57 Johansen, 'Die sündige, gesunde Amme', *op. cit.*, pp. 264, 270, 271, 274, 275-279, 281.
- 58 See as-Sarakhsī, *Al-Mabsūt*, vol. VI, p. 116 'God (alone) sees into his conscience' (*wa 'llāhu ta'ālā muṭṭali' 'alā ḍamīrihi*). *Ḍamīr* in this context is

identified with the intention of the speaker which is valid 'between him and God' but not 'in the qadi's verdict'. *Ibid.*, p. 121 'God only sees into his conscience' (*wa 'llāhu ta'ālā muṭṭali' 'alā mā fī damīrihi*) in the very same meaning. *Ibid.*, p. 123: 'one has no access to the content of his conscience except through himself and (therefore) one accepts his statement about it' (*wa-mā fī damīrihi lā yūqafu 'alayhi illā min jihatihī fa-yuqbalu qawluhū fīhi*). *Ibid.*, vol. XVI, p. 4: concerning the tenant who claims an excuse for the dissolution of his contract as-Sarakhsī says: 'nobody but himself knows what he had in his conscience, the conscience of the tenant, therefore his statement (concerning his intention) prevails (over that of the lessor) and he (the tenant) has to take an oath on it. *Ibid.*, vol. XVI, p. 30, concerning the same type of case: 'he claims the excuse by which to resiliate his part of the tenancy contract. This (excuse) is something that exists in his conscience (only) and nobody else can know it. Therefore, one accepts his statement concerning this matter if it is accompanied by an oath' (*li-annahū yadda't 'l-'adhr alladhi yafsahu 'l-ijāra fī naṣībihī wa-dhālika shay' fī damīrihi lā yaqīfu 'alayhi ghayruhū fa-yuqbalu qawluhū fīhi ma'a yamīnihi*).

59 Such an argument constitutes a convincing support for Larry Rosen's assertion that according to Muslim law the qadi's judgment mainly serves to open the field between the parties for a renegotiation of their claims out of court, see Larry Rosen, *The anthropology of justice: Law as culture in Muslim society* (Cambridge, University Press, 1989), pp. 17, 41, 43, 55, 56, 61, 65-66. On the other hand it should be evident from this article that I do not share Larry Rosen's opinion that law, judiciary decision and morality are identical in Islam.

60 Al-Qarāfi, *op. cit.*, pp. 110-122.

61 *Ibid.*, pp. 110-113.

62 As stated above, the Ḥanafite school of law pushes this to the extreme of a pure and rigid formalism. The other Sunnite schools of law are reluctant to follow the Ḥanafites on this way. They do not, for example, accept the validity of such acts under duress (*ikrah*) or if the speaker ignores the meaning of the formula which he uses. But they also state that the intention and the purposely act are not necessary conditions of the validity of the legal acts which change the personal status in household and family.

63 Baber Johansen, 'Vérité et torture: *ius commune* et droit musulman entre le xe et le XIIIe siècle', in Françoise Héritier (sous la direction de), *De la Violence* (Paris: Odile Jacob, 1996), pp. 123-168.