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Formal Rationality in Islamic Law and the Common Law

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FORMAL RATIONALITY IN ISLAMIC LAW AND THE COMMON LAW

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I. INTRODUCTION

Rationality in a legal system suggests a consistent set of legal propositions as well as methods for modifying, limiting, and expanding the laws which are governed by some type of logical apparatus. It is a desirable characteristic because it furthers one of the primary ends of a legal system: It facilitates social interaction by enabling members of society to calculate the consequences of their conduct.¹ It is not an easy concept to define, however. Different legal systems may be termed rational in different ways. A judge who avoids existing legal rules and appeals to a sense of justice or morality to solve the problem of a particular case may promote a rational legal system just as much as a judge who follows existing legal principles to reach a solution. A jurist who accepts certain legal rules without question may be no more rational than the jurist who seeks to limit or extend rules as new cases present themselves.

Rationality may take different forms, more or less formal, more or less innovative. These different forms shall be examined to determine the type of rationality which characterizes the Islamic legal system compared with the common law. Max Weber² and Lawrence Friedman³ provide the basic

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¹ See H. BERMAN & W. GREINER, *THE NATURE AND FUNCTIONS OF LAW* 31-33 (4th ed. 1980).

² M. WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (2d ed. 1925), *partially translated in* M. RHEINSTEIN, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 61-64 (1954).

³ L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 234-47 (1975).

framework. Their classification systems for rational and irrational lawmaking and lawfinding are fine models for legal analysis and are used extensively in this Article. Their categorization of Islamic law, on the other hand, misses the mark. It is my belief, illustrated by an example of legal reasoning in Islamic contract law,⁴ that this widely known but little understood system is a prime example of innovative logically formal rationality (as that term will be defined in this Article) at a point in history when few other legal systems could claim the same.

II. WEBER'S SYSTEM OF CLASSIFICATION

Weber classifies legal reasoning (which he calls lawmaking and lawfinding) according to four different categories: rational, irrational, formal, and substantive.⁵ These categories are defined briefly below with examples drawn from Anglo-American law for illustration.

Formal irrationality exists when law is made or found in a way that is beyond the control of reason, such as by oracle, ordeal, or appeal to a prophet. A striking example of this kind of law existed in the oath and ordeal of the folklaw in both the Frankish Empire and Anglo-Saxon England from the sixth to the tenth centuries. The oath procedure required the correct words to be spoken without mistake and the proper ceremonial acts to be studiously performed. The ordeal sought to establish guilt or innocence based on whether one sank in water or one's hand blistered from the hot iron.⁶

Substantive irrationality is characterized by the absence of reason in the lawmaking or lawfinding process. This category refers to arbitrariness, emotions, or evaluations which are made without any reference to rules or general norms. The decree by a sovereign authority on the basis of whim or caprice and the decision by a judge based on his emotional feelings for one of the parties are both examples of this type of lawmaking.⁷

The two categories of legal reasoning that consist of substantive and formal rationality appear in the common law as policy considerations and legal logic. *Substantive rationality* (policy considerations) is the category of legal reasoning which appeals to general principles of a system external to the legal system, such as religion, ethical thought,⁸ power policy, or

⁴ The analysis of Islamic contract law is based on a study by Chafik Chehata in *ETUDES DE DROIT MUSULMAN, L'Acte Juridique et le Fait Juridique en Droit Hanéfite* at 157-253 (1971).

⁵ See M. RHEINSTEIN, *supra* note 2, at 61-64.

⁶ H. BERMAN & W. GREINER, *supra* note 1, at 573.

⁷ Friedman feels that most legislation is nonrational in the Weberian sense of the term. See Friedman, *On Legalistic Reasoning—A Footnote to Weber*, 1966 WIS. L. REV. 148, 159.

⁸ In French law the general principles of ethical thought are appealed to as "super-eminent principles." R. DAVID & J. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 137-41 (2d ed. 1978).

some other clearly conceived and articulated system. *Formal rationality* (legal logic) finds its basis in the logical derivation of concepts and rules from existing legal premises.⁹ Both types of legal reasoning are illustrated in the example below, drawn from the law of property concerning easements.¹⁰

If *A* and *B* each own neighboring pieces of land, called Appleacre and Blackacre, respectively, *A* may want to use *B*'s land, Blackacre, for passage to and from his own. *A* and *B* agree that *A* and all his successors in ownership of Appleacre shall have the right to walk and drive over Blackacre. This right is known as an easement. If, at a later time, *B* acquires Appleacre and then resells it to *X*, the question arises whether the easement still exists over Blackacre for the benefit of *X*.

The easement is considered a right in a thing belonging to another (*ius in re aliena*). By legal definition it cannot be a right in a thing belonging to oneself. Therefore, legal logic would dictate the destruction of the easement upon the acquisition of Appleacre by *B*, and *X* would not have the easement. This is legal reasoning in the category of formal rationality. It foregoes all considerations of economic, social, or other policies.

⁹ Weber describes the process by which German law became formally rational:

[The reception of the Roman law] strengthened that tendency of the legal institutions themselves to become more and more abstract, which had begun already with the transformation of the Roman *ius civile* into the law of the Empire. As Ehrlich has properly emphasized, in order for them to be received at all, the Roman legal institutions had to be cleansed of all remnants of national contextual association and to be elevated into the sphere of the logically abstract; and Roman law itself had to be absolutized as the very embodiment of right reason. The six centuries of Civil Law jurisprudence have produced exactly this result. At the same time, the modes of legal thought were turned more and more in the direction of formal logic. The occasional brilliant aperçus of the Roman jurists of the kind just noted were torn out of the context of the concrete cases of the Pandects and were raised to the level of ultimate legal principles from which deductive arguments were to be derived. Now there was created what the Roman jurists had so obviously lacked, viz., the purely systematic categories, such as "legal transaction" or "declaration of intention," for which ancient jurisprudence did not even have names. Above all, the proposition that what the jurist cannot conceive has no legal existence now acquired practical significance. Among the ancient jurists, as a result of the historically conditioned analytical nature of Roman legal thought, properly "constructive" ability, even though it was not entirely absent, was only of small significance. Now when this law was transposed into entirely strange fact situations, unknown in antiquity, the task of "construing" the situation in a logically impeccable way became almost the exclusive task. In this way that conception of law which still prevails today and which sees in law a logically consistent and gapless complex of "norms" waiting to be "applied" became the decisive conception for legal thought.

M. RHEINSTEIN, *supra* note 2, at 276-77.

¹⁰ This example is drawn in slightly modified form from Max Rheinstein's Introduction to MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 2, at li-1ii. See also R. CUNNINGHAM, W. STOEUBUCK, & D. WHITMAN, THE LAW OF PROPERTY 465 nn.12-13 (1984)(discussing minority and majority views regarding revival of easements).

Legal reasoning in the category of substantive rationality (policy considerations) would take into account such questions as whether it is desirable, in the interest of more efficient utilization of land, that such an easement come to an end at some time. If so, by what events should such termination be brought about? It may be preferable from the viewpoint of economic considerations of efficiency to look to the expiration of a maximum period of time firmly fixed by the law, rather than the accidental circumstance of title to both pieces of land becoming united in the hands of the same owner. In any case, the legal solution is not dictated by a formal chain of legal reasoning but rather by consideration of the underlying policy reasons behind the rule.

Weber further subdivides the category of formal rationality into logical and extrinsic. *Logically formal rationality* exists "where the legally relevant characteristics of the facts [in a decided¹¹ legal case?] are disclosed through the logical analysis of [its] meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied."¹² This category promotes the development of "legal propositions of high logical sublimation" and ultimately leads to "an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules."¹³ According to Weber, this attempt at systematization reached its high point in civil law by the construction of codes to govern all legal situations.

Extrinsically formal rationality, on the other hand, is the "adherence to external characteristics of the facts, for instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning."¹⁴ It seeks to construct legal relations and legal institutions by "a merely paratactic association analogy of extrinsic elements"¹⁵ without attempting a logical analysis of the meaning behind these legal relations.¹⁶ Highly comprehensive schemes of legal casuistry

¹¹ The term "decided" refers to any case whether decided by God in the Koran or sunna (Islamic law) or by the judge in precedent (common law).

¹² M. RHEINSTEIN, *supra* note 2, at 63.

¹³ *Id.* at 62.

¹⁴ *Id.* at 63.

¹⁵ *Id.* at 62.

¹⁶ A good example of the distinction between logically and extrinsically formal rationality may be taken from Justice Cardozo's opinion in *Allegheny College v. Nat'l Chautauqua Co. Bk.*, 246 N.Y. 369, 159 N.E. 173 (1927). In that case, Mary Yates Johnston gave a pledge of \$5,000 to Allegheny College with the following indorsement: "In loving memory this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry . . ." *Id.* at 370, 159 N.E. at 174. Two and a half years later, the sum of \$1,000 was paid on this pledge and the college set it aside for a scholarship fund. A year and a half later the pledge was repudiated, and an action was eventually brought by the college to recover the unpaid balance. Justice Cardozo found that the pledge became a contract upon the college's acceptance of the \$1,000 payment because there was consideration. *Id.* at 372, 159 N.E. at 176. The consideration was the

may develop within this category, but ultimately there is no systematization according to Weber. Rather, he states, "[o]nly that abstract method [of logically formal rationality] which employs the logical interpretation of meaning allows the execution of the specifically systematic task, i.e., the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions."¹⁷

III. FRIEDMAN'S SYSTEM OF CLASSIFICATION

Lawrence Friedman approaches the concept of legal reasoning from a different perspective than Weber; however, his four categories of legal reasoning overlap with the two rational categories of Weber. Friedman's categories are divided according to whether legal reasoning has an open or closed canon of legal propositions and according to whether innovation is denied or accepted within the system.¹⁸ A closed system exists when the decisionmakers distinguish between legal propositions and non-legal propositions, then base their decisions only on the former. An open system makes no distinction between the two. The term "innovation" is used in the sense that new legal premises may be expected to arise.¹⁹

Friedman does not address the categories of irrational lawmaking or

detriment suffered by the promisee (Allegheny College) when it assumed personal responsibility for giving effect to the condition that the fund be known as the Mary Yates Johnston Memorial fund. There was no express undertaking by the college to give effect to this condition, but Justice Cardozo found (through a technical fiction?) that the college had implicitly undertaken this duty. Thus, the concept of consideration, which is defined to include detriment explicitly assumed by the promisee, was extended in scope to include detriment implicitly assumed by the promisee in this case. This process of lawmaking may be called extrinsically formal rationality.

On the other hand, Justice Cardozo suggested that several New York cases could be read as enforcing a promise without consideration—or at least without consideration in the traditional sense of the term. Cf. Snyder, *Promissory Estoppel in New York*, 15 BROOKLYN L. REV. 27 (1949) (consideration was found in these cases). These cases involved the incurring of expense by the promisee with the promisor's knowledge on the reasonable belief by the promisee that the promise would be kept. According to Cardozo, the breach of such a promise was considered "more or less subconsciously" by the judges in these cases as a breach of faith and an unwarrantable disappointment of reasonable expectations. *Allegheny College*, 246 N.Y. at 371, 159 N.E. at 174. Thus, recourse could be made to a new doctrine of promissory estoppel to govern such cases—a doctrine which attaches through abstraction from the concrete facts of these decided cases and the logical interpretation of their meaning. This process of lawmaking may be called logically formal rationality.

Justice Cardozo distinguished the doctrine of promissory estoppel from consideration as involving a detriment which was merely the consequence of a promise rather than its inducement. His discussion indicates his desire (although not his action in this particular case) to build new rules through logical interpretation of the given precedents' meaning rather than by artificial expansion through technical fictions.

¹⁷ M. RHEINSTEIN, *supra* note 2, at 64.

¹⁸ L. FRIEDMAN, *supra* note 3, at 238.

¹⁹ *Id.* at 237.

lawfinding found in Weber's classification scheme. He narrows his inquiry to the "formal, authoritative exposition [of the decision-maker], which purports to show how and why a decision-maker reached his particular conclusion."²⁰ The four categories which Friedman constructs for various types of legal reasoning overlap Weber's two rational categories.

The first category, called *Sacred*, has a closed canon of legal propositions and denies innovation.²¹ The legal systems which most closely approximate this category, according to Friedman, are the conservative book-religions with a single sacred text—hence the name Sacred. Friedman includes in this category the basic features of Judaic and Islamic law as well as the concept of "mechanical" jurisprudence in the late nineteenth century common law which appealed to rules considered certain and unchanging.

Friedman's second category of legal reasoning also consists of a closed canon of legal propositions but accepts innovation. This ideal type is called *Legal Science*, the idea being that science is a cumulative phenomenon. "In the short run, the canon of premises is fixed, but the known canon of premises is not the same as the *potential* canon. Jurists can "'discover' new propositions, improve old ones, and show fresh relationships."²² This category is best exemplified by the civil law system in which judges link specific decisions to general codes of law. Within this category, Friedman also includes the aspect of nineteenth century common law wherein judges were considered "trained in the science or art of 'finding' and applying principles of law."²³

These two categories, which have a closed canon of legal propositions, approximate Weber's two categories of logically formal rationality²⁴ and extrinsically formal rationality. Each author merely emphasizes different aspects of the same form of rationality. Weber does not distinguish between the innovative and non-innovative aspects of his two categories of formal rationality. On the other hand, Friedman does not distinguish between the logical and extrinsic aspects of each of his two categories of a closed system.

Friedman's third category in which the canon of premises is open and innovation is denied, is called *Customary*.²⁵ Traditional or customary legal systems such as that of the Lozi of Northern Rhodesia fall within this category. Law is custom, experience, common sense, or morality with no distinction between what is a legal norm and what is a social norm. In contrast, Friedman's fourth category is called *Instrumental* and dis-

²⁰ *Id.* at 235.

²¹ *Id.* at 238-40.

²² *Id.* at 241.

²³ *Id.*

²⁴ Weber refers to logically formal rationality as legal science. M. RHEINSTEIN, *supra* note 2, at 64.

²⁵ See L. FRIEDMAN, *supra* note 3, at 242.

tinguishes between legal and non-legal norms.²⁶ The canon of premises is open to encompass both types of norms, with innovation now possible. Decisionmakers can, but are not obliged to, invoke non-legal norms to change rules or their application. Friedman finds that in the United States courts seem to be moving in this direction in the form of welfare legality.²⁷

Friedman explains that his Instrumental category resembles Weber's category of substantive rationality. The appeal to a set of norms external to the legal system is rational. Friedman develops the concept of substantive rationality further, however, by distinguishing between the extra-legal norm that is followed through felt obligation and that which is followed by choice. The former belongs to the Customary category; the norm of morality is applied because it exists, and one already feels bound by it legally. The latter belongs to the Instrumental category; the norm of morality is applied because of the significance or value in the norm itself, rendering it appropriate for inclusion in the legal system. These two categories might be termed non-innovative and innovative substantive rationality, respectively.

If one were to integrate the two classification schemes of Weber and Friedman, the result might be diagrammed as follows:

1 Innovative Logically Formal Rationality	2 Innovative Extrinsically Formal Rationality	3 Innovative Substantive Rationality
4 Non-Innovative Logically Formal Rationality	5 Non-Innovative Extrinsically Formal Rationality	6 Non-Innovative Substantive Rationality
Formal Irrationality		Substantive Irrationality

²⁶ See *id.* at 243-44.

²⁷ Friedman maintains:

Such a court would admit, as starting points for legal reasoning, policy norms of all sorts, scientific truths, and statements of enlightened opinion—whatever would help guide the court to a better result, a result more in keeping with public policy, general welfare, or the social good. Each particular rule would have *its* goal or reason, fixing its place in the general web of social policy. Reasoning would be free, frank, and rational, never technical or legalistic.

Id.

IV. A CLARIFICATION OF LEGAL LOGIC

This Article focuses on formal rationality—extrinsic and logical in Weber's terms, sacred and legal science in Friedman's. This is the area of legal logic. Clarifying the meaning of this term is important. Legal logic does not consist merely of a major premise, minor premise, and conclusion. This is the classic syllogism exemplified in the proposition: All people can think; Socrates is a person; therefore Socrates can think. Rather, legal logic (whether in the form of deduction, induction, or analogy) is actually a defective form of the purely scientific process of logical argument.

Donald Hermann²⁸ aptly describes the defects. The *deductive* model of legal reasoning is defective because it "(1) depends on the belief in pre-determined conceptions, (2) does not indicate a method of choosing between competing propositions, and (3) requires an impossible system of classification for characterizing the factual situations that will be formulated into minor premises."²⁹ The *inductive* model is likewise inadequate because the jurist formulates a rule for the purpose of resolving disputes, not to account for observed raw data. The data of legal reasoning is transformed by abstraction and characterization. Finally, the *analogical* model, which can be described in three stages, also lacks the restrictions of a truly scientific model. The three stages are: "(1) perception of relevant likenesses between the factual issue as defined by the court and previous cases; (2) determination of the *ratio decidendi* of the previous case; and (3) the decision to apply the previous case to the present controversy."³⁰ The analogical model is problematic in that the first step represents a psychological process which cannot be restricted solely by elements in the legal system; rather, it involves conscious and subconscious mental processes not governed by the legal system itself.

With this fluid concept of legal logic, it is a short step to the realization that the exercise of a formally rational mode of thought may easily coexist with substantively rational and even irrational modes of thought in the solution of a legal problem. Substantive rationality in the form of moral and economic values may consciously or unconsciously motivate the decisionmaker to choose a certain legal solution to a legal problem. Irrationality in the form of emotions or arbitrariness may also influence the process of reasoning by analogy through the decisionmaker's perception of relevant likenesses. This overlap between categories in the classification system is an important factor in a legal system, permitting flexibility to coexist with certainty, and humanity to coexist with mechanics.

Nevertheless, in an attempt to find the category of rationality into

²⁸ Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131, 1131-39 (1975).

²⁹ *Id.* at 1135.

³⁰ *Id.* at 1138.

which Islamic law falls, we are forced, as with every other legal system, to concentrate primarily on the modes of legal reasoning which are evinced by the jurists. Note also that it is the modes *evinced* by the jurists. There is no certain method to determine if the decisionmaker is actually motivated by substantively rational values or by emotions in deriving his judgment. His decision and argument are the only indicators. This data removes us from the arena of motivation, leaving only the decisionmaker's justification for analysis. If the decisionmaker deliberately appeals to rational values or to emotions to justify his judgment, the reasoning process may be classified as rational or irrational, regardless of what actually motivated his judgment.³¹ Motivation may be important; however, data from the Islamic system, as from any legal system where other data is not available, is drawn from final decisions alone, i.e., the justificatory process.

With this caveat Islamic law may be examined to determine the category of rationality within which it falls. In particular, the classification systems of Weber and Friedman provide the framework for demonstrating their own misconceptions concerning the Islamic system. Both have placed Islamic law within the category of non-innovative formal rationality. Yet the texts show differently.

V. CLASSIFICATIONS OF ISLAMIC LEGAL REASONING

According to Weber, Islamic law became absolutely fixed around the seventh or eighth century of Islam (13th or 14th century A.D.).³² Legal reasoning was subordinate to both fixed interpretative methods and vague authoritative commentaries. Innovation, if it took place, was through disputatious theoretical casuistry without contact with life.³³ Weber concludes:

As a consequence of these factors, together with the already mentioned inadequacy of the formal rationality of juridical thought, systematic lawmaking, aiming at legal uniformity or consistency, was impossible. The sacred law could not be disregarded; nor could it, despite many adaptations, be really carried out in practice. As in the Roman system, officially licensed jurists can be called on for their opinions by the Khadis, or parties, as the occasion arises. Their opinions³⁴ are authoritative, but they also vary

³¹ Notably, although two legal systems may be classified as formally rational within this perception, one system may be far more flexible than the other depending on the attitude of the decisionmaker toward restrictions on his judicial or juristic function and the propriety of judicial or juristic lawmaking. See A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 1142-61 (2d ed. 1977).

³² M. RHEINSTEIN, *supra* note 2, at 238-39.

³³ *Id.* at 219, 240-41.

³⁴ The jurists' opinions are termed "*fatwas*." The jurist who delivers a *fatwa* is called a *mufti*.

from person to person; like the opinions of oracles, they are given without any statement of rational reasons. Thus they actually increase the irrationality of the sacred law rather than contribute, however slightly, to its rationalization.³⁵

According to Weber, Islamic juristic reasoning appears to have been, at best, a lower form of formal rationality—of the extrinsic variety.³⁶ Furthermore, it appears to have been static and incapable of developing legal relations or institutions of any sophisticated character, i.e., it was non-innovative. In the diagram above, Islamic reasoning would fit within Box #5. Weber finds that since Islam's "immutable" tradition was taken seriously by the jurists, legal education remained limited to empirical and mechanical memorization and theoretical casuistry,³⁷ thus impeding legal unification and consistency.³⁸

How does this categorization compare with that of the common law? Weber finds that the common law did not achieve the highest form of formal rationality. At least "up to the time of Austin, there was practically no English legal science which would have merited the name of 'learning' in the continental sense."³⁹ Continental Europe came closest to the category of logically formal rationality, but "[q]uite definitely, English law-finding [was] not, like that of the Continent, 'application' of 'legal propositions' logically derived from statutory texts."⁴⁰ Weber attributed the difference between the civil and common law to the "purely empirical and practical training" of lawyers in the craft guilds⁴¹ known as the Inns of Court.⁴² These guilds aimed to produce "a practically useful scheme of contract and actions, oriented towards the interests of clients in typically recurrent situations,"⁴³ not to develop a rationally consistent system as sought in the continental university system of legal education:

³⁵ M. RHEINSTEIN, *supra* note 2, at 241.

³⁶ It is important to distinguish between Weber's conception of legal reasoning performed by the *mufti*, the agent for legal development in Islam, and his conception of legal reasoning performed by the *qadi*, who merely applied the law. We treat the former here. The latter was regarded by Weber as having unlimited discretion in his manner of judgment-making and thus was an example of substantively irrational law. See Weber's conception of *qadi* justice in *supra* note 2, at 213 n.48, 317, 318, 351-52, 353; see also B. TURNER, *WEBER AND ISLAM: A CRITICAL STUDY* 109 (1974). This misconception appears to have influenced several American judges. See J. Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63, 63-64 (1985).

³⁷ See M. RHEINSTEIN, *supra* note 2, at 219. But see G. MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* (1981) for convincing evidence to the contrary.

³⁸ See M. RHEINSTEIN, *supra* note 2, at 242.

³⁹ *Id.* at 316.

⁴⁰ *Id.* at 317.

⁴¹ *Id.* at 201.

⁴² For a discussion of the probable influence of Islam on the formation of the Inns of Court, see G. Makdisi, *The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, 34 CLEV. ST. L. REV. 3 (1985-86).

⁴³ M. RHEINSTEIN, *supra* note 2, at 201.

From such practices and attitudes no rational system of law could emerge nor even a rationalization of the law as such because the concepts thus formed are constructed in relation to the material, and concretely experienceable events of everyday life, are distinguished from each other by external criteria, and extended in their scope, as new needs arise, by means of the techniques just mentioned. They are not "general concepts" which would be formed by abstraction from concreteness or by logical interpretation of meaning or by generalization and subsumption; nor were these concepts apt to be used in syllogistically applicable norms. In the purely empirical conduct of legal practice and legal training one always moves from the particular to the particular but never tries to move from the particular to general propositions in order to be able subsequently to deduce from them the norms for new particular cases. This reasoning is tied to the word, the word which is turned around and around, interpreted, and stretched in order to adapt it to varying needs, and, to the extent that one has to go beyond, recourse is had to "analogies" or technical fictions.⁴⁴

The common law, at least before the nineteenth century, thus falls within the same category as Islamic law—extrinsically formal rationality; however, it differs from Islamic law. Although both legal systems started with a base of legal norms, Weber maintains that Islamic law was fixed in the sense that little, if any, development of legal relations or institutions took place. According to Weber, *fatwas* were given without any statement of reasons and therefore did not contribute to a process of rational development.⁴⁵ In the common law, on the other hand, analogies and fictions were used to develop a sufficiently elastic pattern of contracts and actions which were necessary to serve the needs of interested parties. The common law was therefore innovative and would be classified within Box #2 above, while Islamic law was non-innovative and would be classified within Box #5.

Weber's differentiation between the Islamic and common law systems is derived from his description of each system. He does not explicitly characterize one system as "innovative" and the other not. It is Friedman who uses this terminology to emphasize the dichotomy between the two systems. As we have noted,⁴⁶ Friedman classifies Islamic law as a closed set of premises denying innovation. Once the sacred text was fixed, "there could be no new premises; the 'gates of legislation' were 'closed'."⁴⁷ As "[t]he ancient texts became more and more out of date," Friedman continues,

⁴⁴ *Id.* at 201-02.

⁴⁵ As noted above, the *mufti* (jurist) who delivered a *fatwa* (legal opinion) is to be distinguished from the *qadi* (judge) who delivered a *qada'* (judgment). See *supra* note 36.

⁴⁶ See *supra* text accompanying note 21.

⁴⁷ L. FRIEDMAN, *supra* note 3, at 239 (footnote omitted).

such "systems ran heavily to casuistry, legalism, legal fiction, and a luxuriant growth of reasoning by analogy."⁴⁸ Rather than developing useful concepts to regulate the affairs of everyday life, however, Islamic scholars "debated such questions as the 'precise moment at which succession opens to the estate of a person turned to stone by the devil.'"⁴⁹ Thus Islamic law falls within the category of non-innovative formal rationality (Boxes #4 and #5 without differentiation between the two).

The common law, on the other hand, can be characterized partly as non-innovative formal rationality (mechanical jurisprudence) and partly as innovative formal rationality (judges as craftsmen of the law).⁵⁰ Within the latter category (Boxes #1 and #2 without differentiation between the two), Friedman maintains, discovery, perfection, and analysis of legal propositions led to a growth and sophistication unrealized in Islamic law.

Thus, both Weber and Friedman depict the common law in an innovative role while denying any innovation in Islamic legal reasoning. Islamic law, as opposed to the common law, had no growth potential; in this sense it was inferior to the common law. Weber classifies both legal systems in the category of extrinsically formal rationality. Friedman does not distinguish between extrinsic and logical. Summarizing by reference to the chart above, Weber would place Islamic law in Box #5 and the common law in Box #2. Friedman would place Islamic law in Boxes #4 and #5 combined and the common law (with the concept that judges are craftsmen of the law) in Boxes #1 and #2 combined. Friedman also finds that several courts in the United States "seem to be moving slowly and slightly" in the direction of innovative substantive rationality (Box #3), but he is not convinced that there is a strong pull in this direction.⁵¹

Although the common law still clings to archaic concepts such as *seisin*⁵² in the law of property, which betokens an extrinsically formal character of law, the recognized need for consistent and predictable logical concepts in law focuses the attention of law professors and students, as well as judges and lawyers, on legal rationales for decisions which make sense as an integrated whole. The common law is innovative and its rationality is logically formal (Box #1) as Friedman indicates. Furthermore, I believe, without attempting to prove at this time, that there has been a marked shift in concentration toward conscious recognition of the interplay between logically formal rationality (Box #1) and substantive rationality (Box #3) in judicial thought processes. American realists have guided American legal thought away from the archaic concept of mechanical

⁴⁸ *Id.* at 239.

⁴⁹ *Id.*

⁵⁰ See *supra* text accompanying notes 21-23.

⁵¹ See L. FRIEDMAN, *supra* note 3, at 244.

⁵² The concept of *seisin* was popular in feudal terms. It was "[t]he completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rights of homage and fealty." BLACK'S LAW DICTIONARY 1218 (5th ed. 1979).

jurisprudence to a more realistic perception that judges and jurists are and should be creative in integrating policy considerations within the fabric of the legal reasoning process.

Is it true, however, that Islamic law was non-innovative? In the next section legal reasoning in Islamic contract law⁵³ is examined to demonstrate the manner in which Islamic law not only strove for consistency, but also "'discover[ed]' new propositions, improve[d] old ones, and show[ed] fresh relationships."⁵⁴ The example from contract law suggests that the classification of Islamic law is not within Boxes #4 and #5 but rather within Box #1.

VI. A REEVALUATION

In the ideal type of extrinsically formal rationality, the law focuses on particular legal characteristics of a situation to determine the governing rule without regard for the rule's underlying rationale. No attempt is made for legal uniformity or consistency in the legal system as a whole. The ideal type of logically formal rationality—a gapless system of consistent norms governing every factual situation which might arise—is absent. It was not absent, however, in Islamic law. There is strong evidence that, even in the early years of Islamic law, the Islamic jurists were seriously concerned with achieving a system of internally consistent norms to govern new situations. Early in the private law of what is known today as contract and tort law, a basic, but vaguely defined, distinction existed between juristic acts and juristic facts. Efforts to achieve consistency in the law generated an investigation into, and a resultant controversy over, the meaning behind the external characteristics of these juristic acts and juristic facts. The result was a process of legal reasoning which may be characterized as innovative logically formal rationality.

In the early period, the notion of contract itself was not clearly defined. It appears to have consisted of two verbal declarations, backed by will.⁵⁵ Two centuries later this notion became more specific. The contract of sale was seen as a juristic act created by an offer and acceptance formulated in the past tense and backed by intelligence (*ʿaql*) and will (*qasd*). The juristic act was distinguished from the juristic fact (e.g., damaging the good of another) by the legal effect of incapacity. Minority, slavery, or insanity made the juristic act (but not the juristic fact) void.⁵⁶ Professor Chehata has concluded that the characteristic distinguishing juristic acts from juristic facts at this time was the existence of will as a necessary element

⁵³ See C. CHEHATA, *supra* note 4.

⁵⁴ L. FRIEDMAN, *supra* note 3, at 241.

⁵⁵ C. CHEHATA, *supra* note 4, at 164, discussing the oldest work on Hanafite law, the *Asl* of Shaybani (189/804).

⁵⁶ *Id.* at 166-68 (discussing the *MUKHTASAR* of Quduri (428/1037)).

in the former but not in the latter.⁵⁷ "Will" appears to have been defined as the intention to act, requiring intelligence but not "consent" as that term is understood today, i.e., as voluntariness.⁵⁸

By the sixth century of Islam, a new perspective on the distinction between juristic acts and juristic facts was offered. Not merely the legal effect of capacity, but the intrinsic nature of the act itself, distinguished the two. Until this time juristic acts were considered facts—facts of the tongue, but facts nevertheless—which were cognizable by the senses. Materiality of the juristic act was accented.⁵⁹ Kasani,⁶⁰ a Hanafite jurist, shifted emphasis to the abstract character of the juristic act—the legal effect conferred on the act by law. In a sales contract, the abstract fact was the transfer of property. This was distinguishable from the concrete fact of damage done to another's property which constituted a juristic fact.⁶¹ Kasani ultimately returned, however, to the rational element which conferred on the act its juristic nature.⁶² This element, established by capacity in the individual, determined which acts were juristic. Kasani also mentioned intention (*qasd*) although it is not clear whether this term signified an act of reason or an act of independent will.⁶³ Marghinani, a contemporary of Kasani, helped clarify the fact that the term *qasd* at the basis of the juristic act was intention, the act of will to make the verbal declaration.⁶⁴

A new development then occurred through the analysis of the non-serious declaration made as a joke. This declaration was considered devoid of legal effect. Babarti, one of the commentators on Marghinani's work, reasoned that this qualification of the non-serious declaration was due to the fact that *qasd* was absent from it.⁶⁵ This analysis promoted the idea that *qasd* was an act of will to produce the legal effect of the verbal declaration. In the non-serious declaration, the declarant intended to pronounce the required expression, but did not intend to make the declaration produce its effects of law. In order to explain the lack of legal effect given to such a declaration and yet retain consistency with the notion that *qasd* was a sufficient element to give legal effect to a verbal declaration, *qasd* now had to be reformulated. In addition to the elements of

⁵⁷ *Id.* at 168.

⁵⁸ *See id.*

⁵⁹ *See id.* at 171 (discussing the MABSUT of Sarakhsi (483/1090)).

⁶⁰ *See id.* at 176-82 (discussing the BADA'IC AS-SANA'IC of Kasani (587/1191)).

⁶¹ *Id.* at 179.

⁶² *Id.* at 179-81.

⁶³ *Id.* at 181. The term *rida* (consent) also appears in Kasani's work, but not as an element in the formation of the contract. Rather, consent is an element of the contract's validity. *See id.* at 182.

⁶⁴ *See id.* at 186 (discussing the HIDAYA of Marghinani (593/1197) (translated by C. HAMILTON, THE HEDAYA, OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS (S. Grady 2d ed. London 1870))).

⁶⁵ *See id.* at 187 (discussing the 'INAYA of Babarti (786/1384)).

reason and intention to pronounce the declaration, this concept was re-defined to include the intention to make the declaration produce its legal effects. Without this latter intention, as in the case of the non-serious declaration, the declaration was null and void.

Thus, capacity no longer sufficed to define the term *qasd*. One having capacity could still emit a non-serious declaration, and it would be void. Yet concern still remained about a contract formed under the threat of violence. Such a contract lacked consent (*rida*), but it was still considered formed. Some Hanafite jurists attributed the same legal effect of the non-serious declaration to the contract made under the threat of violence, considering it void.⁶⁶ Qadi Zada, another commentator on Marghinani's work, clarified the distinction between the two cases by distinguishing *qasd* from *rida*. The contract under violence had *qasd*, i.e., the intention to bind oneself. It did not have will (*rida*), the desire to enter into the contract or to have its legal effects. The non-serious contract, on the other hand, had neither of these two elements.⁶⁷ *Qasd* thus remained the necessary element for contract formation. The absence of *rida* did not prevent the contract from being formed; it merely prevented it from being valid until *rida* could be obtained through ratification.

Classical Hanafite law accepted this definition of intention at the basis of the juristic act as distinct from the concept of consent.⁶⁸ This definition gave a consistent interpretation to *qasd* as a necessary element of contract formation. There were three aspects to the concept of intention: (1) the intention to pronounce the declaration, (2) *qasd* as the intention to have its legal effects, and (3) *rida* as consent to the legal effects. The first and second terms were necessary to form the contract; the third was not. *Rida* was only necessary for the validity of the contract. In the case of violence, the first two elements existed, and therefore the contract was formed, albeit vitiated. In the non-serious contract, only the first term existed, making the contract null and void. In the case of a contract entered into by a drunkard, all three terms were absent; therefore, the contract was null and void.

One practical question arising from this analysis is whether the contract formed under threat of violence may have been considered a non-serious contract and thereby declared null and void. In Hanafite Islamic law a declaration could not be considered non-serious unless it had been preceded by another declaration which revealed its true nature. This necessity for an objective manifestation of the absence of intent prevented the contract formed under violence from being considered non-serious.⁶⁹

⁶⁶ *Id.* at 189.

⁶⁷ *See id.* at 190 (discussing the *NATA'UJ AL-AFKAR* of Qadi Zada (988/1580)).

⁶⁸ *See id.* at 190-96 (discussing the *RADD AL-MUHITAR* of Ibn 'Abidin (1252/1836)). *See also id.* at 250-53 (Chehata's conclusion to his study of juristic act and juristic fact in Hanafite Islamic law).

⁶⁹ *See id.* at 195-96.

The growing understanding among Islamic jurists of the difference between juristic act and juristic fact, and the elements necessary to form a juristic act, helped to establish and explain the legal effects of both the non-serious declaration and the declaration made under violence. Some jurists wanted to classify the two together and attribute to them the same legal effects.⁷⁰ By examining the meaning behind these acts, a solution was "discovered" and made consistent with the whole concept of juristic act. A system governed by extrinsically formal rationality would not have attempted to reconcile the legal effects of these declarations. Only through innovative logically formal rationality was an effort made to develop a consistent set of legal propositions and solutions. Terms were defined and redefined until a structure was finally evolved in which the elements of the formation of a juristic act were satisfactorily settled.

VII. CONCLUSION

As jurists, we should not hastily formulate our opinions about the nature of a legal system such as Islamic law, which is only in an incipient stage of research. Weber and Friedman offer wonderful structures within which to classify a legal system, but Islamic law is not yet ready to be classified. More work in the manner of Professor Chehata's study needs to be accomplished. However, the example of legal reasoning in contract law indicates that Islamic law may well fit within the category of innovative logically formal rationality. If further studies bear out this classification, it will confirm Islam's very own conception of its legal system. In Islam, the very term for jurisprudence—*fiqh*—means understanding, comprehension; and the manner in which it is reached—*ijtihad*—means the exertion of a diligent effort of individual judgment.

⁷⁰ See *id.* at 189.