

IUM LAW JOURNAL

VOLUME 10 NUMBER 1, 2002



International Islamic University Malaysia

**LEGAL ANALOGY IN ISLAMIC LAW AND COMMON
LAW: MASĀLIK AL-'ILLAH, OBITER DICTA AND
DISTINGUISHING COMPARED**

*Majdah Zawawi**

ABSTRACT

Legal analogy is the most common method of legal reasoning in most legal systems. However, there are differences in the application of legal analogy in the civil legal system if compared to its application in the Islamic legal system. The main aim of this article is to look into the discrepancies in applying legal analogy between these two legal systems, primarily by looking into the utilization of the method of masālik al-'illah under Islamic law as compared to the theory of ratio decidendi, and distinguishing under the civil law.

INTRODUCTION

Law making and law finding are the main tasks of judges in any legal system. Although under the common law system, law making is usually left to the legislature, judges nevertheless still play an important role in 'making law' when deciding cases that do not fall within the purview of specific statutes or when there is a need to define certain terms in a

* Lecturer, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia.

given statute.¹

In essence, the Common law system is based on “judge made law”, as it is a system which involves decisions given by judges which is applied by the lower courts through what is known as the doctrine of binding precedent. As history shows, this process originated from a rather haphazard method of reasoning,² which involves the determination of a decision by a lower court based on the earlier and binding decision of a much higher court and in certain cases where these courts also bind themselves.³ And so the development of case law or the doctrine of *stare decisis*.

In Islamic law, law making is the sole prerogative of Allah (s.w.t.) These laws are found in the Holy *Qur'ān* and the *Sunnah* of the Holy Prophet (s.a.w.) Nevertheless, these Holy texts do not state the law as it is. Therefore, Muslims are given the task to search for Allah's laws which is, as Weiss puts it,

“...buried in imprecise and sometimes ambiguous language of the sacred text.”

Muslim jurists and exegetes however prefer to look at the *Qur'ān* and *Sunnah* as embodying the general principles of the *Sharfah*, which for the most part was intended by Allah s.w.t as a guide for Muslims in all areas of life until the end of time.⁴ The general nature of the main sources of Islamic law, allows the principles embedded therein to be extracted by Muslim jurists to be applied to new existing cases.

In this way, a jurist or *qāḍī*, when exercising their effort to extract or derive (*isfīn bāt, istithmār*) legal ruling (*ḥukm*) from either the *Qur'ān* or the *Sunnah* are known to exercise their *ijtihād*.⁵ Technically, *ijtihād*

¹ Finding its origin in English law, reference to the statute was only done during more recent times. For further reading on the Common law system and its history see Stychin, Carl. F. 1999. *Legal Method. Text and Materials*. Sweet & Maxwell: London. p. 226.

² To borrow the phrase used by Vandeveld, Kenneth J. 1996. *Thinking Like A Lawyer*. Westview Press: Boulder. p. 49.

³ McLeod, Ian. 1993. *Legal Method*. MacMillan Professional Masters: London, p. 107.

⁴ See this promise of Allah (s.w.t.) as mentioned in *Surah Luqman* (31): 3.

⁵ *Ijtihād* comes from the root word *juhd* which means to exert, endeavor, toil or work hard. For a purely literal meaning to the word see, Baalbaki, *...* (The Islamic Legal System in Lebanon)

illustrates a situation where a *Mujtahid* or a qualified Muslim scholar makes an effort to derive (*isṭinbāt*) a legal ruling on a particular issue from existing sources of the *Sharḥah*.⁶ Alas, the roles of Muslim jurists and *qāḍīs* in exercising their *ijtihād* have generally been misunderstood. The term “*qāḍī* justice” has been used by some writers⁷ to signify an arbitrary, unprincipled as well as unsystematic law making process based merely on the unfettered discretion of the *qāḍī*.⁸ Max Weber also shares in these claims whereby Islamic law has been described by him as a law which was derived from “irrational methods of law making and law finding” which causes aims at legal uniformity or consistency impossible.⁹

On the contrary, *ijtihād* is not based purely on the personal opinions of the jurists but it actually refers to the endeavor of a jurist or *qāḍī* to formulate a rule of law on the basis of evidence (*dalīl*) found in the sources.¹⁰ *Ijtiḥād* comes in many forms.¹¹ However, the importance of *ijtiḥād* is even more evident when there is a need to apply the original ruling in the *Qur'ān* or the *Sunnah* to new cases which, have not been mentioned specifically in these main texts. In this paper, focus is thus given to *qiyās* as a method of *ijtiḥād* which allows for the transference of an original ruling to a new assimilated case which is done by utilizing a systematic form of deriving *ḥukm* if compared to other forms of *ijtiḥād*.

⁶ For a more detailed explanation see Zaidan, Abdul Karim. 1996. *Al-Wajiz fi usul al-Fiqh*. Muassasah al-Risalah: Lebanon. p. 401. See also Kamali, Muhammad Hashim. 2000. *Principles of Islamic Jurisprudence*. 2nd Edition. Ilmiah Publishers: Kuala Lumpur. p. 367.

⁷ In the United States, various Judges have used this term in a negative way to signify arbitrary law making which is based on the whims and fancies of the *qāḍīs*. See Makdisi, John. “Legal Logic and equity in Islamic Law”. *The American Journal of Comparative Law*. 33 : 64.

⁸ *Ibid*. See also from the same author, “Formal Rationality in Islamic Law and the Common Law”, (1985-86) *Cleveland State Law Review* 34 : 1 p. 98.

⁹ Makdisi, John. “Legal Logic and Equity in Islamic Law”. *The American Journal of Comparative Law*. 33 : 64. *Ibid*.

¹⁰ Weiss, Bernard. “Interpretation In Islamic Law : The Theory of Ijtiḥād”. [1978] *The American Journal of Comparative Law*. 26 : 199.

¹¹ This includes, *qiyās*, *istihsan*, *istislah*, *istishab* and *sadd azzarai'* to name a few. For a comprehensive reading on the forms of *ijtiḥād* in English see Kamali, Muhammad Hashim. 1989. *Principles in Islamic Jurisprudence*. Pelanduk Publications: Kuala Lumpur.

A brief discussion on *qiyās* shall be made whereby concentration shall be given to the explanation of the concept of *masālik al-illah* which is the method utilized by a *mujtahid* in order to arrive at the correct '*illah*' when applying *qiyās*. Thereafter, a comparison between *masālik al-illah* and *ratio decidendi* shall be done. From there, we shall be able to conclude that the concept of '*qāḍī* justice' as portrayed by Western Orientalists is in fact baseless.

APPLICATION OF *QIYĀS*

Qiyās, may be considered as one of the most organized method of deriving *ḥukm* (legal principles) from the three main Islamic law sources, the *Qur'ān*, *Sunnah* and *Ijmā'*. Nevertheless, the exercise of *qiyās* may only be done in the absence of definite legal ruling in the Holy *Qur'ān*, *Sunnah* or *Ijmā'*. That is why it is considered as an ideal method of finding solutions to complex, contemporary problems where the *ḥukm* have not been expressly mentioned in the *Qur'ān*, *Sunnah* or *Ijmā'*. As such, some contemporary Muslim scholars, such as Mohd Daud Bakar has even gone to the extent of considering it as, "an everlasting *ijtihād*, which if discontinued shall cause the application of the rules of *Sharḥ* to human acts to be impossible."¹²

Commonly translated as analogical reasoning, *qiyās* is actually a much wider concept,¹³ however, the present discussion shall only concentrate on a type of *qiyās* known as *qiyās al-ṭard* and shall not include the other types of *qiyās*. Technically, *qiyās* is the extension of a *Sharḥ* value from the original case (*aṣl*) to a new case (*furū'*) due to the same effective cause ('*illah*) as the former.¹⁴ The backbone of *qiyās*

¹² Bakar, Mohd Daud. "A Note on Qiyas and Ratio Decidendi In Islamic Legal Theory". *IIUMLJ* 1989, p. 73.

¹³ It includes other forms of legal reasoning such as deduction, induction, a fortiori arguments in both its forms a *Minori ad maius* (*qiyas al-awla*) and a *maiori ad minus* (*qiyas al-adna*) and ratio ad absurdum (*qiyas al-aks*). For further reading see Hallaq, Wael. "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and Common Law". *Cleveland State Law Review*. 34, 1985–1986. p. 80.

¹⁴ Kamali, Muhammad Hashim. *Principles of Islamic Jurisprudence*. Pelanduk Publications: Kuala Lumpur. p. 248. In its literal form, *qiyas* is used to describe a form of measurement. It is also used to compare two things. See also Zaidan, Abdul Karim. *Al-Wajiz fi Usul al-Fiqh*. p. 194.

lies mainly in its *'illah*¹⁵ or effective cause which is similar to the common law principle of *ratio decidendi*. However, in applying *qiyās*, the *'illah* is, as we shall see, just as elusive as finding the *ratio* of a given case. This element of illusiveness has caused Imam Malik for example, to reject the use of *qiyās* in their *ijtihād* as it is considered to be speculative, especially in cases where the *'illah* is not explicitly stated.¹⁶ Aside from that, the danger of confusing the *'illah* and the *ḥikmah* of a particular *ḥukm* adds on to the suspicions towards the effectiveness of *qiyās*.¹⁷ Under such circumstances, how can a *qāḍī* be sure which *'illah* is the correct one to enable application of the *ḥukm* to the assimilated case? In answer to this, Muslim jurists have devised a method of identifying the correct *'illah* known as the *masālik al-'illah*.

MASĀLIK AL-'ILLAH

Masālik al-'illah is a three tiered system that consists of *takhrīj al-'illah*, *tanqīh al-'illah* and *tahqīq al-'illah*.¹⁸ Briefly stated, *takhrīj*

¹⁵ *'Illah* has been described in several ways, applicable descriptions include, an accident by which the quality of an object from one condition to another when it applies to it. E.g. from health to illness and from strength to weakness. It refers to a cause of change in the existing condition of a thing. Another view is *'illah* is a thing which affects an action or its abandonment. E.g. the coming of Zayd is the *'illah* for the going of Amr. Literally it means sickness or disease as a result of a certain infirmity which prevents a person from doing work. For further elaboration see Hassan, Ahmad. "The Legal Cause In Islamic Jurisprudence". (1980) *Islamic Studies* 19 : 247, at p. 248. See also Zuhaili, Wahbah. 1986. *Usul al-Fiqh al-Islami*. Dar al-Fikr: Damascus. p. 606 and for a detailed reading on the conditions of *'illah* see Zaidan. *Al-Wajiz*. p. 200.

¹⁶ There are basically two types of *'illah*, i.e. *'illah mustanbatah* which is more easily detected as it is rather explicit and *'illah mansusah* where the *'illah* is not easily detected. See Bakar, Mohd Daud, "A Note on Qiyās and Ratio Decidendi In Islamic Legal Theory". p. 80.

¹⁷ For example, the *'illah* for the prohibition in asking for the hand of an already engaged woman and in attempting to but over an existing contract of sale is the violation of brotherhood and unity between Muslims, which is also the *ḥikmah* behind the prohibition.

¹⁸ Another word for *'illah* is *manat*. Thus some writers have used the term *manat* to describe *'illah*. For a more detailed reading on the concept of *masālik al-'illah* see Safi, Louay. 1996. *The Foundation of Knowledge*. IIUM & IIT: Petaling Jaya. p. 58. For a simplified explanation of the concept also see Bakar, Mohd Daud. "A Note on Qiyas and Ratio Decidendi In Islamic Legal Theory". p. 82.

al-illah involves the extraction of all possible *ilal*¹⁹ from the original case. Imagination (*ikhālah*) and suitability (*munāsabah*) are matters that must be taken into consideration at this stage.²⁰ For example, in trying to identify the *illah* for the prohibition of drinking wine in *Surah al-Mā'idah* verse 90, at the stage of *takhrīj al-illah*, jurists will attempt to extract all possible and suitable *ilal* which can be found in the verse. Therefore, this would include the consideration of matters such as wine, intoxicating effect or drinking.

Once the possible *ilal* are extracted, the next step would be to apply the *tanqīh al-illah* which means the purification of the *illah*.²¹ This is where the correct *illah* is determined, whereby the first step in determining this would involve the determination of the conditions of *illah*. This would include that the *illah* must have an evident attribute (*wasf zāhir*), is constant and regular in nature (*wasf dhābit*), it must also be transferable and extendible (*muta'ādiyah*) as well as co-extensive (*muṭṭarid*) and co-exclusive (*mun'akis*).²² At this stage, any irrelevant qualities are dismissed and only the most suitable *illah* which fulfills these conditions is considered. Therefore, in the example of the prohibition of drinking wine, the process of eliminating all unsuitable *ilal* may be done. As such, wine can be excluded as a possible candidate since it fails to fulfill the conditions of *muta'ādiyah* (transferable and extendible) as well as *muṭṭarid* and *mun'akis*. Similarly in the case of drinking. Therefore, we find that only the element of intoxication has fulfilled all the conditions of a valid *illah* and is in a situation to accommodate the application of that *illah* to all similar cases in the future if and when it is found.

¹⁹ Plural of *illah*.

²⁰ For example, the *Sunnah* on the payment of *kaffarah* for a man who has sexual intercourse with his wife during the daytime of *Ramadhan*. The possible *illah* in that case could be the act of breaking fast or the sexual act itself or the month of *Ramadhan* or the act of having sex in the daytime of *Ramadhan*.

²¹ Which has also been termed as 'scrutinizing of the intent'. Safi, Louay. *The Foundation of Knowledge*. p. 59.

²² For further explanation see Bakar, Mohd Daud. "A Note On Qiyās And Ratio Decidendi in Islamic Legal Theory". p. 79. Apparently these condition vary from one jurist to another. What has been mentioned here are the main conditions which are present in all the views.

illah
illah
ne
of
fac
ve
il
il
th
ca
nc
w
th
pu
ta

tc
th
p
ir
ir
c

I

l
v
t

The next step is to determine the applicability of this possible *‘illah* to the new ruling. This is done through the application of *taḥqīq al-‘illah*. This is the stage where affirmation is made that the *‘illah* in the new case is similar to the original case thereby justifying the transference of *ḥukm* from the original case to the assimilated case. Similarity as to facts may be relevant but are not conclusive.²³ As such, this depends very much on the suitability of the application of the *ḥukm* based on the *‘illah*. In order to confirm that a particular selected element is the actual *‘illah*, it must be applicable to the new existing case as well as it fitted in the original setting (*aṣl*). Reverting to the example given above, the new case could be to confirm the status of using ecstasy pills and whether or not it could be prohibited in the same manner as wine, indeed, if the *‘illah* was the intoxicating effect that such a pill would have on the user, then that would allow the transference of the *ḥukm* from the prohibition and punishment of wine drinking to the prohibition and punishment of persons taking ecstasy pills.

This method of *masālik al-‘illah* allows the application of *qiyās* to be made in a systematic and uniformed manner though based primarily on the *ijtihād* of the *qāḍī*. The strict exercise of *masālik al-‘illah* is also proof that there is no such thing as the exercise of ‘unfettered discretion’ in *ijtihād* under Islamic law. At this point, it would be interesting to look into the common law concept of legal analogy and from there a comparison can be made between the two systems.

LEGAL REASONING IN COMMON LAW

The sources of Common law are mainly the statutes and case law and traditionally, Common law judges have declared that their duty was to find the law rather than create them²⁴ and that making laws are the sole prerogative of the Parliament. This somehow echoes the role of

²³ For example, the *‘illah* for the prohibition of proposing to a woman who is already engaged to another man is similar to buying over goods which have already been bought by another person, though the facts are different if the *‘illah* is the same, it allows the transference of the *ḥukm* from the original case to the new assimilated case.

²⁴ Elliott, C & Quinn, F. 2000. *English Legal System. (3rd Edition)* Longman: Harlow. p. 16.

judges under the Islamic system, the only difference being in the law maker. Nevertheless, there are several areas in which Common law judges clearly do make the law.

History shows that the bulk of English law which is the basis for Common law is and has always been based on case law and are determined by judicial decisions.²⁵ Although statutes were later passed, Parliament occasionally attempts to embody whole areas of the Common law in statutory form.²⁶

Aside from that, legal reasoning is necessary even with the existence of a statute as there may be various interpretations to the wordings of the statute, as in cases of interpretation of *Quranic* verses and *Sunnah* which are *zanni*²⁷ in nature. However, when a law is clearly stated in a statute, the most common method of legal reasoning employed would be that of the deductive form which is known as *sylogism*.²⁸ This is the simplest form of legal reasoning.

Aside from statutes, it is case law which forms a substantial part of the Common law and in such circumstances the simplistic form of *sylogism* would be insufficient, as no major premise is likely to be clear from just one case decision.²⁹ Thus, an examination of several cases would be necessary to find a major premise. A judge would have to reason from a particular case to a general proposition which explains induction as another form of legal reasoning.³⁰ Although induction and deduction,

²⁵ *Ibid.* p. 17.

²⁶ *Ibid.*

²⁷ Generally, *Quranic* verses and the *Sunnah* are *qati'* or unequivocal in meaning. However, there are instances where the *Quranic* verse or *Sunnah* is very general, therefore any part which remain unspecified or unqualified may be considered as speculative (*zanni*) and is open for further specification and interpretation. See Kamali, Muhammad Hashim. 2000. *Islamic Law in Malaysia Issues and Developments*. Ilmiah Publishers: Kuala Lumpur. p. 215.

²⁸ A *sylogism* is a reasoned argument in which there are two statements leading to a conclusion. An example of a *sylogism* is all men must die. A is a man. Therefore, A must die. Procter, Paul (Ed). 1978. *Longman Dictionary of Contemporary English*. Longman: London.

²⁹ Farrar, John & Dugdale, Anthony. *Introduction to Legal Method*. p. 74.

³⁰ This is how legal principles are developed under common law. This method is clearly seen in the development of tort cases. A well known example would be Lord Atkin's 'neighbourhood principle' which was laid down in the case of *Donoghue v Stevenson* (1932) A.C. 562.

as seen in the above two situations are some of the most common methods of legal reasoning in Common law, it is the existence of the doctrine of binding precedent or *stare decisis* that makes legal analogy an inseparable part of legal reasoning in Common law.

The doctrine of binding precedent works in such a way where all courts bind all lower courts and in some cases some courts also bind themselves.³¹ This basically means that, lower courts are bound to follow the decisions which have been made in previous cases by a higher court. This is where legal analogy comes to play. As in the application of *qiyās*, legal analogy is applied to 'like cases alike'. The basic course of reasoning is the extension of a legal rule from one case to another due to a similarity, which is deemed by the judge to be a material similarity.³² The doctrine was formulated to ensure consistency in meting out judgments, which is considered to be important in ensuring justice. It also aims at ensuring efficiency in giving decisions.

RATIO DECIDENDI

Due to the development of the English legal system which recognizes the doctrine of *stare decisis*, a Common law judge and lawyer in applying the above mentioned legal analogy would be interested in finding the *ratio decidendi* of a particular case. The *ratio*, in some ways is similar to the concept of *‘illah* under Islamic law. The main difference however, between these two concepts lies in the fact that the ratio is the factor which binds the judge in a lower court which is trying a new case to apply the ruling of a previous decision made by a court of higher jurisdiction. In Islamic law, the concept of binding precedent is not applicable.

Another noticeable difference would be, while Islamic law employs the concept of *masālik al-‘illah* to determine the correct *‘illah* to be applied, there is no corresponding method of determining the correct *ratio* in a given case. As such, identification of a particular *ratio* is something like a person who might not be able to define an elephant but

³¹ McLeod, Ian. 1993. *Legal Method*. MacMillan Professional Masters: London. p. 107.

³² Hallaq, Wael. *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*. p. 85.

would know one when he sees it.³³ The absence of such an important method is rather ironic in the face of the magnanimous aim of the doctrine of binding precedent i.e to ensure consistency and efficiency.

Interestingly, analogical reasoning in Common law involves two processes, mainly, the analysis of a cluster of cases and the justification of the consequences of the analysis. The process of analysis of cases in Common law is similar to the process of *tanqīh al-ʿillah* under Islamic law. This is the stage where concepts of each case are compared and material or significant factors are identified for the purpose of developing or restricting a legal principle.

Meanwhile, the concept of justification could be said to resemble *tahqīq al-ʿillah* whereby it involves the evaluation of the consequences of the analysis. The judge usually gives the reasons or justifications for arriving at a certain decision. This would result in a judgment, which is coherent to existing principles and authorities.

Some scholars have attempted to formulate certain tests to determine the *ratio* of a case. Professor Goodhart for example in his article, "Essays in Jurisprudence and the Common Law", attempted to lay down five rules for finding the *ratio* of a case.³⁴ Briefly stated, the test lays down that the principle of a case is not found in the reasons given in the opinion and neither is it found in the rule set forth in the opinion. It is also not necessarily found by a consideration of all ascertainable facts of the case and to the judge's decision. The principle of the case is found by taking account:

- (a) the facts treated by the judge as material and;
- (b) his decision as based on the material fact.

Aside from that, it is also necessary to establish what facts were held to be immaterial by the judge as this would only form an *obiter* and not a *ratio* of the case.

This test was criticized by Professor Julius Stone³⁵ who maintained that it is not a question of the materiality of the facts but rather a question of the analogical relevance of the prior holding to the

³³ Farrar & Dugdale, *Introduction to Legal Method*. *Ibid.* p. 86.

³⁴ Stone, Julius. "The Ratio of the Ratio Decidendi". (1959) M.L.R. p. 597.

³⁵ Stone, "The Ratio of the Ratio Decidendi". *Ibid.*

later case.³⁶ He added that Goodhart was wrong in assuming that there would only be one ratio in a case. In actual fact, there could be several *rationes decidendi*. However, he reiterates the importance of maintaining a technique or process of abstraction and generalism in order to allow a judge to consider the earlier case in the light of the exigencies of the case before it.

In the meantime, there is no fixed method of determining the *ratio*. It is purposely (gathered from Stone's statements) left to remain as such in order to maintain a flexible notion and enable each judge to find and apply it to existing cases and relating his judgment to the facts of each given case as they come.

WAYS OF ESCAPING A *RATIO*

Obiter Dicta

As mentioned before, under the doctrine of *stare decisis*, judges are placed with the obligation of applying legal principles from a higher court through the similarity of the *ratio* of that prior case to that of the recent case before him. However, a judge in a new case will only be bound by the *ratio* of a previous case if it is a lower court. Next, he will only be bound by the existence of a *ratio*. A conclusion based on a hypothetical fact for example is not a ratio but is merely a dictum, which is not part of the judgment and is not binding on subsequent judges.

Literally, *obiter dictum* is a Latin word which means 'a thing or things said by the way'.³⁷ Professor Goodhart defined it as "a conclusion based on a fact the existence of which has not been determined by the court."³⁸ *Obiter dicta* (or *dictum* in its singular form) comes in many forms. Aside from the above definitions, another form of *obiter* could be seen in cases where three or five judges sit together and there exists a dissenting judgment amongst them. Such dissenting judgments are also known as *obiter dictum*.

Within the category of *obiter dicta*, there exist varying degrees of authority. If it is totally irrelevant to the case, it is known as *gratis*

³⁶ Farrar & Dugdale, *Introduction to Legal Method*. p. 89.

³⁷ Bruce, Richard. 1988. *Success in Law*. p. 14.

³⁸ Farrar & Dugdale. *Introduction to Legal Method*. p. 90.

dicta and has no legal value. However, if it is related to a collateral issue, it may be considered a judicial *dictum* and is of persuasive value and with the passing of time could even become binding.³⁹

Due to the 'looseness' in the method of determining the *ratio* of a case, some judges have found it convenient to interpret some rulings as *obiter dicta* to resist being bound by it. Mr. Dias has argued that "the discretion in such cases between *ratio* and *dicta* is but a device employed by subsequent courts for the adoption or rejection of the doctrine expressed in previous cases according to the inclination of the judges".⁴⁰ Nevertheless, where the *ratio* has been clearly stated, no such 'inclination' could be exercised as it would amount to an exercise of 'whim'.

An *obiter dicta* if compared to the concept of *masālik al-illah* could be said to be the result of *tanqīh al-manat*, where upon scrutiny of the correct *illah* is determined. If applied under Islamic law, an *obiter* would fall under matters which could not be considered as the correct *illah*. As it does not reach the status of *ratio*, it is thus not binding on the judge to follow, and so in Islamic law, a *dicta* would be an 'inapplicable *illah*' extracted from the original ruling and thus would not justify the transference of the *hukm* from the original case to the new assimilated case. This could be due to the fact that it had failed to comply with any of the conditions for a valid *illah* as mentioned above.

Distinguishing

A judge may also be able to avoid from being bound by a certain principle by distinguishing the precedent in the old case to the new one. In distinguishing cases, instead of following or refusing to follow an earlier case, the judge may distinguish or differentiate it from the case before him. This is different from refusing to follow or overruling a previous case where these options are only available to courts of similar jurisdiction or a higher court which is not bound to follow the decision of the earlier case.

In distinguishing, certain factual differences are found which justify the court not following the *ratio* in the earlier case while still accepting the earlier case as good law. That decision would thus remain

³⁹ Farrar & Dugdale, *Introduction to Legal Method*. p. 90.

⁴⁰ *Ibid.*, p. 91.

binding on any other cases which might fall within its purview.

According to Glanville Williams, there are two types of distinguishing:

- (a) restrictive distinguishing – which regards some facts of a new case as material whilst the earlier case regarded it as immaterial.⁴¹
- (b) Non-restrictive distinguishing – where the court finds the facts in the later case does not fall within the purview of the later case. However, in recognizing this difference, the court does not seek to curtail the *ratio* of the earlier case.

It must be noted at this point that the method of distinguishing as applied by common law judges is also similar to *tanqīh al-‘illah* and *tahqīq al-‘illah* under Islamic law where the *qāḍī* first identifies the correct *‘illah* then justifies it by applying it to existing problems. The only difference would be while *tanqīh al-‘illah* and *tahqīq al-‘illah* are used in order to determine and justify the correct *‘illah* in order to allow the application of that *ḥukm* from the original case to existing cases, distinguishing is done to obtain the exact opposite effect. Distinguishing is used not to allow the application of *ratio* but instead to avoid the application of the *ratio* contained in an earlier case to a new existing case.

Another difference to be noticed is in considering *tanqīh al-‘illah* and *tahqīq al-‘illah*, the judge is not too much concerned with the facts of the case. In distinguishing however, it is the factual differences that are utilized by the judge to provide justification for not following the *ratio* laid down in a prior case. Distinguishing also involves a departure from an old existing rule due to matters of morality, social policy or common sense.

The recognition of similarity and differences between cases lies at the root of common law reasoning⁴² as in Islamic legal reasoning. Though similarities exist in the nature of the concept of *masālik al-‘illah* and the concepts of obiter dicta and distinguishing, the underlying

⁴¹ This is against Prof. Goodhart's view that the judge can decide what are material facts whilst Prof. Williams argues judges in doing so does not have an unlimited discretion.

⁴² Farrar & Dugdale, *Introduction to Legal Reasoning*, p. 93.

principle behind their conception is ultimately different. *Masālik al-ʿillah* is a systematic approach, designed to enable *qāḍīs* and jurists to determine the correct *ʿillah* to be applied to cases with similar *ʿillah* as that existing in the original case. As such, it advocates uniformity in exercising a form of *ijtihād* known as *qiyās* although a certain amount of personal reasoning is used.

This juxtaposes the reason for the formulation of *obiter dicta* and distinguishing. It is done not to promote a systematic approach to finding the right *ratio* but in fact is employed as an excuse for judges not to apply the *ratio* of a previous case to a new case. It does not promote uniformity but is in fact a result of the “vagueness surrounding the concept of *ratio*.”⁴³

English common law writers have often attributed this vagueness as a need for maintaining the generality of principles in order to avoid rigidity in application of the law to existing cases.

Also included as methods for avoiding the application of precedent includes the declaration that the *ratio* is obscure, or by finding the previous decision as ‘*per curiam*’.⁴⁴ Another method is by declaring that the *ratio* is too wide or that there exists conflicting decisions at the same level and finally by saying that the case has been overruled by statute.⁴⁵

CONCLUSION

Under the Islamic system, the rigorous application of the concept of *masālik al-ʿillah*, a more systematic approach to the determination of the correct *ʿillah* is ensured thus resulting in a just ruling.

Which brings us to the conclusion that Max Weber has in fact been mistaken when he stated that Islamic law was based on irrational rules made by *qāḍīs* based merely on their unfettered discretion. It is not the method of reasoning in Islamic law that is irrational and is devoid of uniformity. These negative attributes could in fact be prescribed to the common law judges. Through devised methods such as distinguishing

⁴³ Farrar & Dugdale, *Introduction to Legal Method*, 93.

⁴⁴ Where the judge neglected to notice important cases or statutes. Basically it means, lack of care. Keenan, Denis. 1990. *English Law*. 143-144.

⁴⁵ *Ibid*

and claiming certain rulings as *obiter dicta* and *per curiam*, they have avoided a form of uniformity in applying legal reasoning. This would be the result of the lack of a systematic approach to determining the *ratio* in each case.

Indeed Wael Hallaq was correct when he said;

“ The *ratio decidendi* and the *‘illah* have remained the most illusive doctrines in Common law and Islamic law.”

However, through the procurement of the method of *masālik al-‘illah*, Muslim jurists and *qāḍīs* can be better assured of determining the correct *‘illah* if compared to the Common law judge in trying to determine the correct *ratio*. True enough, Islamic law is more consistent in the application of logical principles⁴⁶ which proves the fallacy of the allegations as to the arbitrary nature of “*Qāḍī* justice”. Admittedly, Muslim jurists and *qāḍīs* in this new millennium must be prepared to approach perplexing novel problems arising in today’s society with a more open attitude. Gone are the days where almost every problem could be solved simply by opening the pages of the *Qur’ān*. In this modern age, Muslims jurists must be prepared to exercise their *ijtihād* and search deeper for God’s laws. Through the exercise of *qiyās* for example, a systematic, reliable and uniformed approach based on definite sources could be the best tool in deciding new cases while ensuring that justice will not be compromised to the whims and fancies of judges.

⁴⁶ Hallaq, Wael. “The Logic of Legal Reasoning”, p. 95.