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Two Theories of Shī'ī Jurisprudence

BY

ROBERT GLEAVE



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For Sarah and

In Memory of Norman

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CHAPTER ONE

INTRODUCTION

This book is about Twelver Shīʿī legal theory; more specifically, it is about a debate within Twelver Shīʿī legal theory, normally termed the Akhbārī-Uṣūlī conflict; more specific still, it concerns the manner in which two Shīʿī thinkers, each a protagonist of one of the parties in this dispute, constructed two very different theories as to how the law, revealed by God to the Prophet Muhammad, and known in its entirety by the Shīʿī Imams, is interpreted and promulgated to humankind.

Twelver Shīʿī belief is characterised by a conviction that during the Prophet's lifetime, ʿAlī (his cousin and son-in-law) was designated as leader of the Muslim community, and Twelver Shiʿites, unlike other Shīʿī groups, consider there to have been twelve such leaders (Imams) descended from (and including) ʿAlī who were the rightful leaders of the Muslims. These Imams shared some of the characteristics of the Prophet Muhammad (such as sinlessness—*ʿiṣma*) and their words and actions are considered (along with those of the Prophet) by Twelver Shiʿites as sources of legal and religious guidance (Sunna). Their words and actions are recorded in books of reports, termed *aḥādīth* (sing *ḥadīth*), or, more commonly, *akhbār* (sing *khabar*). The Imams differed from the Prophet in that they did not bring a revealed text (as the Prophet had done in the form of the Qurʾān, and usually associated with the term *waḥy*) though they were blessed with a complete knowledge of the law (Sharīʿa), given by God to humanity; and therefore their actions have revelatory status (they reveal the law to humanity).

The Imams were unable to assume their legitimate position as leaders due to the usurpation of power by the Sunni Caliphs. Only ʿAlī was successful in becoming Caliph, and then only for a short period of time (35/656–40/661). Since they represented a threat to the Sunni Caliphs (who possessed political power), the Imams and their followers were persecuted; this persecution forced the Imams at times to exercise what has been termed dissimulation (*taqiyya*). *Taqiyya* can be defined as outwardly conforming to the law of the

Sunnis and their Caliph, whilst inwardly remaining implacably opposed to their erroneous religious system. The Imams recommended such pretence to their followers, and as we shall see, *taqiyya* represents a particular problem for Twelver Shīʿī jurisprudence. Due to the doctrine of *taqiyya* (though the extent to which it was practiced was a matter of dispute), the Imams' words are always, potentially, irrelevant to the true law: they may have been mere pretence on the part of the Imams. The persecution was so intense, Twelvers believe, that the Twelfth Imam went into hiding (*ghayba*) and will reappear at some future point to rid the world of this persecution and establish true and legitimate leadership. The disappearance of the Imam, together with his continued claim on legitimate leadership, also represents a particular problem for Twelver Shīʿī jurisprudence: namely, who is to lead the community in the absence of the Imam? Though this issue emerged as a greater concern in Twelver writings of applied legal theory (*furūʿ al-fiqh*), rather than legal theory proper (*uṣūl al-fiqh*), the latter is also discussed in this book. Since Twelver Shiʿism is the only strand of Shiʿism that I am concerned with here, and for the sake of brevity, from hereon, the terms Shiʿism (a religious belief system), Shiʿite (an adherent to that belief system) and Shīʿī (an adjective) all refer to Twelver Shiʿism.[1]

The origins of the belief system outlined above are the subject of much scholarly debate. Leaving this issue to one side, Shiʿite scholars, after the Twelfth Imam's disappearance (in 260/874), developed the range of literary genres present in the Sunni scholarly tradition. Of particular concern here are the genres of legal writing, such as legal theory, applied legal theory and their subsidiary genres, including treatises (*rasāʾil*), summaries of previous works (*mukhtaṣarāt*) and commentaries (*shurūḥ*). In these writings, Shīʿī legal scholars developed a conception of God's law (Sharīʿa) not greatly dissimilar from that found in contemporary Sunni sources. Given the present state of research, it is difficult to generalise about the relationship between these theoretical genres (which outlined an ideal conception of the Sharīʿa) and the law as it was applied by judges (*quḍāt*) and the officers of the various Shīʿī-influenced states which appeared at

[1] Introductions to the Twelver Shiʿite belief system have proliferated in recent years. The most comprehensive remains Momen, *Shiʿi Islam*. See also Halm, *Shiism*; Jafri, *Origins and Development* and the collection of essays by Nasr, Dabashi and Nasr, *Shiʿism* (and by the same authors, *Expectation*).

different times after the Imam's disappearance. In my opinion, we are yet to have a clear idea of the relationship between the genres of theoretical legal writing. Some research has been completed on the relationship between the theoretical genres (*uṣūl al-fiqh*, *furūʿ al-fiqh* and certain types of *fatāwā*) and the practical implementation of the law in history (as evidenced in court records, judges' decisions and other types of *fatāwā*) within the Sunni tradition.[2] I am most concerned here with the role and importance of legal theory. The writers of *uṣūl al-fiqh* (both Sunni and Shīʿī) normally present their works as descriptions of how a jurist might deduce rulings (or opinions) in areas where the revelatory sources of the law (ie the Qurʾān and the Sunna of the Prophet, and for Shīʿīs, the example of the Imams also) provide no clear rulings. Some writers also present their works as explanations of how the law, which is already known to be true, was deduced by past scholars, who neglected to include their legal reasoning in their writings or rulings. *Uṣūl al-fiqh*, then, is presented as having a prescriptive aim (prescribing the method of interpretation that a jurist should use) and a justificatory aim (justifying the law, as it is already known). Whether these professed aims are accurate descriptions of the function of *uṣūl al-fiqh* in relation to the other legal genres is a debated point.[3] Elsewhere, with respect to the two writers featured in this book, I have tried to demonstrate that different writers utilised elements of legal theory in different ways when deducing the law. It is, I would argue, difficult to make generalisations concerning the relationship between *uṣūl al-fiqh* and either the law as practiced, or the law as ideally conceived by the jurists in their works of *furūʿ al-fiqh*.

My approach in this book is to view *uṣūl al-fiqh* as a largely independent genre, works of which were written and taught in an educational setting, the main aim of which was to hone the intellectual skills of students. Undoubtedly many of those students went on to

[2] The principal exponent of the view that there was a close relationship between theory and practice in Islamic Law is Professor Wael Hallaq. See Hallaq, "From *Fatwās* to *Furūʿ*" and "Murder in Cordoba".

[3] For discussions of this issue, see Hallaq, "*Uṣūl al-fiqh*: Beyond Tradition" and *Legal Theories*, p. 162–206, where he presents the idea of the "worldliness" of writings of legal theory. For a different view, see Calder, "Towards a Theory of *ifṭāʾ*", p. 160, n. 3, where he argues: "A full account of the 'function' and value of *uṣūl* would have also to take account of the tendency to make of it a closed and independent science". I have attempted to delineate this relationship with respect to Shīʿī jurisprudence in Gleave, "Marrying Fatimid Women", esp. p. 68, n. 74.

become judges (*qāḍīs*) and jurisconsults (*muftīs*), though with the present state of research, it is difficult to assess whether the skills they learned in their classes of *uṣūl al-fiqh* were actually applied to practical legal issues. The most likely assessment, in my view, is that the influence of legal theory upon a judge's or jurisconsult's legal decisions varied, though the factors which affected this phenomenon are at present unclear and beyond the scope of this work.

If the bibliographic references are to be believed, Shi'ites began to write works of legal theory in the fourth century AH/ninth century CE, though none of these works have yet been discovered to be extant.[4] The earliest extant work is found only in abbreviated form—the *Tadhkira bi'l-uṣūl al-fiqh* of al-Shaykh al-Mufīd (d. 412/1022).[5] The earliest works of *uṣūl al-fiqh*, with the recognisable elements of the genre as found in the Sunni tradition of the time, are al-Sharīf al-Murtaḍā's (d. 436/1044) *al-Dharī'a ilā uṣūl al-sharī'a* and Shaykh al-Ṭā'ifa Muḥammad b. Ḥasan al-Ṭūsī's (d. 460/1067) *'Uddat al-uṣūl*. Much work remains to be done on the development of early Shī'ī *uṣūl al-fiqh*, but it seems clear that one of the emphases of early Shī'ī theory was a rejection of *ijtihād* and *qiyās*, two elements of Sunni theory.[6] Though the term *qiyās* was, in later Sunni works, applied to a range of interpretative procedures,[7] it can be defined, for the purposes of understanding the Shī'ī polemic, as analogical reasoning. Through *qiyās*, laws given in the sources might be extended to cases not mentioned in the sources, by determining the reason (*'illa*) why God decreed a certain known law, and discovering the same *'illa* in a novel case.[8] *Ijtihād*, often used synonymously with *qiyās* in the earliest Sunni and Shī'ī sources, designates the efforts of a suitably qualified individual (a jurist) to find a ruling in a novel case.[9] Shī'ī scholars, it appears, rejected these two procedures because the results were merely the jurist's opinion (*zann*), whilst they, with the words of their Imam, had a certain source of knowledge of the Sharī'a (the *akhbār*). This view was challenged in the works of the seventh and eighth century AH/thirteenth and fourteenth century CE jurists such as al-Muḥaqqiq Ja'far al-Ḥillī (d. 676/1277) and most famously al-'Allāma al-Ḥillī (d. 726/1325), who incorporated, first in a modified form, and then in a full-blown form, the theory of *ijtihād* in their legal writings. For 'Allāma in particular, much of the law was less than certain, and during the absence of the Imam, Shī'ī jurists were left to base their rulings on their own *ijtihād*, resulting in opinions (*ẓunūn*) rather than certainty (*'ilm*, *qaṭ'*).[10] Until the eleventh century AH/seventeenth century CE, *ijtihād* was a central element of Shī'ī theory and the opinion of the *mujtahid* (the one qualified to perform *ijtihād*) was accepted as having probative force for the majority, non-scholarly community (termed *muqallid*, literally, "one who follows"). *Qiyās*, at least formally, never reached such a position of acceptance for Shī'ī writers, which must be partly due to the uncompromising manner in which the Imams are reported to have condemned its use. The extent to which the incorporation of *ijtihād* into legal theory affected the writing of *furū' al-fiqh* is at present under-researched. What is clear is that theoretical juristic authority was justified in works of Shī'ī *uṣūl al-fiqh* (just as it was in Sunni works) by reference to this theory, and as the theory developed, so did the theoretical authority of the jurist class.[11]

In the eleventh century AH/seventeenth century CE, there emerged a challenge to this theory, dominant in Shī'ī *uṣūl* writing since the time of 'Allāma. This challenge came in the form of what has been termed the Akhbārī "school" or "movement" or "trend".[12] Character-

[4] For a brief account of the non-extant works of Shī'ī *uṣūl al-fiqh* listed in Ibn Nadīm's *Fihrist*, see Moussavi, *Religious Authority*, p. 76–79.

[5] The *Tadhkira* is found in the *Kanz al-fawā'id*, a work by Mufīd's pupil, Karājakī. See Karājakī, *Kanz al-fawā'id*, 2, p. 15–30. Due to it being in abbreviated form, it can hardly be considered a work of *uṣūl al-fiqh* by the standards later set by the genre in Shī'ī jurisprudence. On its contents, see Brunschvig, "Les *uṣūl al-fiqh* imāmites", p. 204–208. Stewart (*Islamic Legal Orthodoxy*, p. 133–134) argues, quite persuasively, that the title of the work has been lost and the current title was that given by Karājikī, not Mufīd himself.

[6] See Modarressi, "Rationalism and Traditionalism", p. 143–146; Calder, "Doubt and Prerogative", p. 59–61; Moussavi, *Religious Authority*, p. 23–32 and p. 75–84.

[7] See Hallaq, "Juridical *Qiyās*", p. 286–289, where he argues that *qiyās* included arguments other than analogy.

[8] Summaries of the use of analogy can be found in Goldziher, *Zahiris*, p. 11–25; Kamali, *Principles*, p. 197–228; Weiss, *God's Law*, p. 551–645; Hallaq, *Legal Theories*, p. 83–95.

[9] The emergence of the doctrine of *ijtihād*, and juristic opinion generally, is analysed in Goldziher, *Zahiris*, p. 6–40; Hallaq, "Was the Gate", p. 4–7 and *Legal Theories*, p. 117–124.

[10] See Calder, "Doubt and Prerogative"; that it was epistemology which drove the rejection of *ijtihād* by Shī'ī jurists, and a modification of that epistemology which led to its acceptance, seems clear. That this modification was the result of practical considerations is argued by Zysow, "Ejtehād".

[11] For an account of juristic authority, and a comparison of Sunni and Shī'ī views, see Stewart, *Islamic Legal Orthodoxy*, p. 209–217.

[12] For "school", see Modarressi, "Rationalism and Traditionalism", p. 156 and

isations of the Akhbārī "school", if it can be called such, vary amongst commentators. There are those who portray the school as beginning with the work of Muḥammad Amīn al-Astarābādī (d. 1036/1627) entitled *al-Fawā'id al-madaniyya*. These writers generally view a rejection of *ijtihād* as central to Akhbārī doctrine, and, of course, such a rejection is only possible after a theory of *ijtihād* was incorporated into Shī'ī legal theory. As evidence for this view, such writers cite a number of biographical works in which Astarābādī is explicitly associated with the founding of the Akhbārī school.[13]

An alternative view is that Akhbarism predated Astarābādī, and encompassed more that just the rejection of *ijtihād*. Madelung cites a sixth AH/twelfth century CE text in which the term *akhbārī* is used to refer to a Shī'ī group which resisted the incorporation of Mu'tazilī ideas into Shī'ī thought (ie it began as a criticism of *kalām*).[14] Newman has linked Akhbarism, at least in its extreme or pure form, with a rejection, not just of *ijtihād*, but of juristic authority more generally. Hence for Newman, Akhbārīs of a more extreme kind, rejected the role of the jurist in the collection of community taxes, the implementation of legal punishments and the congregation of Friday prayer (all of which were matters of some debate, since strictly speaking they were tasks reserved for the Imam).[15] Newman also hints that such extreme Akhbārīs rejected the legitimacy of any government during the *ghayba* of the Twelfth Imam and considered cooperation with the existing political power to be forbidden. The issue of authority in the absence of the Imam had been discussed from the earliest times of the Shī'ī movement, even it seems when the Imams

passim; for "movement", see Moussavi, *Religious Authority*, p. 92; for "trend", see Stewart, *Islamic Legal Orthodoxy*, p. 182. Stewart argues that Akhbarism was an anti-*madhhab* (ie anti-school) trend, see *ibid*, p. 194–197.

[13] Browne, *Literary History*, 4, p. 374: Astarābādī "is generally accounted as the founder of the Akhbārī school"; Calder, "Structure of Authority", p. 231, n. 18: "I think the Akhbārī movement is best understood as beginning where Shī'ī historians see it beginning, with the attack of Astarābādī on 'Allāma's innovation"; see also similar comments in "Doubt and Prerogative", p. 68, n. 31. See also the notes in Newman, "Akhbārī-Uṣūlī Dispute, Part 2", p. 250, n. 1 and p. 251, n. 3. Moussavi describes Astarābādī as providing a "new juridical base for Akhbarism", Moussavi, *Religious Authority*, p. 92.

[14] Madelung, "Imamism and Mu'tazilite Theology", p. 21, n. 1.

[15] Newman, "Akhbārī-Uṣūlī Dispute, Part 2", p. 261: "The *muḥaddith* and the *mujtahid-muḥaddith* are the 'pure' and 'moderate' Akhbārī respectively", together with p. 260: "the *muḥaddith* also abjured the extension of the authority of the *faqīh* over non-judicial affairs of daily import to the community and the accommodation with the established political institution".

were present. If the Akhbārī school is portrayed in this manner, then inevitably it predates Astarābādī's work.[16]

This difference of opinion amongst commentators is, it seems to me, a debate concerning the use of the term *akhbārī*: is there sufficient evidence in pre-Astarābādī texts to justify positing the existence of a recognisable, coherent school of thought within Shi'ism termed "*akhbārī*"? I shall not attempt to offer a definitive answer to this question here, but it is clear that the answer will depend on the manner in which Akhbārī beliefs are described, and how willing one is to subsume other terms, such as *ḥashawiyya* and *aṣḥāb al-ḥadīth*, under the heading "Akhbārī". Furthermore, is it not presumptuous to assume that a single, coherent set of ideas was associated with the label *akhbārī* during Shī'ī history? What is needed is a detailed analysis of the term, as it is used in Shī'ī and non-Shī'ī works, from the earliest period onwards, and that has yet to be undertaken.

This study, since it concerns legal theory, inevitably tends towards the former of the two characterisations outlined above. This, I think, is more true to the portrayal of Akhbarism in Shī'ī texts, notwithstanding the use of the term *akhbārī* in pre-Astarābādī writings. Both

[16] This, indeed, is the pretext of Newman's extensive examination of the "Akhbārī" and "Uṣūlī" schools in his doctoral thesis entitled, "The Development and Political Significance of the Rationalist (Uṣūlī) and Traditionalist (Akhbārī) Schools in Imāmī Shī'ī History from the Third/Ninth to the Tenth/Sixteenth Century", see particularly the introduction, p. 1–56. The title, of course, prejudges the issue of whether there were recognizable schools during this period, and also whether the schools' doctrines had political significance. This, in my opinion, over simplistic view, has become almost axiomatic for writers on Iranian and Shi'ite religious history. See Algar, *Religion and State*, p. 35: The Akhbārīs' "whole tendency was to restrict the role of the *'ulamā'*, both theoretically and practically."; Kohlberg, "Aḵbārīya", p. 718: He speaks of the Akhbārīs' "refusal to consider any role for intermediaries between believers and the Hidden Imam." More circumspect is Hairi, *Shī'ism and Constitutionalism*, p. 66–67: The Akhbārīs "seriously questioned the position of the *'ulamā'* as *mujtahids*". The denial of *mujtahid* authority should not necessarily be seen as a denial of scholarly authority. Litvak, *Shi'i Scholars*, p. 14: "Akhbaris rejected the excercise of *ijtihad*, and with it the extension of the Imam's authority to the ulama". Moussavi's comments are more instructive; Moussavi, *Religious Authority*, p. 93: Astarābādī's denial of *mujtahid* authority "should not be viewed as a denial of any juristic authority for the jurists during the absence of the Imam". Stewart, though he criticises the use of the term jurist (Stewart, *Islamic Legal Orthodoxy*, p. 196, n. 75) when Astarābādī means *ḥadīth* transmitters, generally concurs that the Akhbārīs had a conception of scholarly authority, which was to "stress the need to consult the transmitters of the traditions of the Imam concerning legal cases which arise during the occultation" (Stewart, *ibid.*, p. 196). If this is meant to convey that Akhbārīs had no concept of a *faqīh* (jurist), this is certainly not the case with Baḥrānī, see below, p. 222–237.

Akhbārīs and Uṣūlīs had an interest in portraying their ideas as having a long and distinguished pedigree, projecting them back to the earliest times, and after Astarābādī, both groups of scholars were involved in a heavy, at times laboured, re-interpretation of Shīʿī history to support their own views.[17] Establishing such a pedigree, or more accurately, presenting one's ideas as being unoriginal and historically prior to one's opponents, is part of the conservatism which characterises much of classical (and indeed modern) Islamic literature. It should not dictate the manner in which an assessment of the Akhbārī school, outside of the Shīʿī tradition, is formulated. Of course, it is acceptable to describe, in general terms, Akhbārīs as traditionalists, for they argued that the *akhbār* of the Imams were sufficient sources of knowledge, and a jurist's opinion as to the law was not only unnecessary, but represented an encroachment on the centrality of the Imam's position. Certainly there were scholars with such views before Astarābādī, but, I would argue, the term *akhbārī* (both in sympathetic and antipathetic texts) only gains a coherent and exclusive meaning after Astarābādī and his critique of the Shīʿī legal theory dominant in his time. The fact that in the sources the Akhbārī-Uṣūlī conflict is normally referred to as the Akhbārī-*mujtahid* dispute is, in my view, further evidence that the attitude towards *ijtihād* was considered the essential criterion in deciding whether a scholar was, or was not, an Akhbārī.[18]

Whether or not the Akhbārī school predates Astarābādī, it is clear that after Astarābādī it underwent a period of growth and increased popularity amongst the students and teachers in the major Shīʿī centres of learning. A number of important Iranian and Arab scholars in Iran during the Safavid period are identified as Akhbārīs, as were some scholars outside of Iran. In the shrine cities of Najaf and Karbala (termed the ʿAtabāt), in eastern Arabia (Bahrain and Ahsa) and elsewhere in the Shīʿī world, the Akhbārī school established itself as a viable alternative to the Uṣūlī *mujtahids*. In the twelfth century AH/eighteenth century CE, Akhbārī dominance in the Shrine Cities resulted in the suppression of Uṣūlī thought.[19] Some sources describe Uṣūlī *fiqh* being taught in secret, discrimination against Uṣūlīs and students of Uṣūlī *fiqh* having to hide their books with kerchiefs whilst walking in the streets for fear of attack.[20]

It was in this atmosphere that the two scholars whose writings form the subject of this book rose to prominence; namely, Yūsuf b. Aḥmad al-Baḥrānī and Muḥammad Bāqir b. Muḥammad Akmal al-Bihbahānī. Biographical sources describe the former as an Akhbārī, and credit the latter with the revival of the Uṣūlī *mujtahid* school in the Shrine Cities. The sources also describe how the two met, disputed with one another, vied for intellectual hegemony and competed for students. Elsewhere, I have examined how the biographical sources utilise the same historical data (with some variations) to give quite different portrayals of Baḥrānī and Bihbahānī.[21] Some describe them as bitter enemies, whilst others portray their relations as characterised by a *noblesse oblige*, where each viewed the other with learned respect. An account of how Bihbahānī led the prayers at Baḥrānī's funeral gives credence to the latter representation.[22] The writers of the biographical dictionaries were writing from a position of the Uṣūlī victory over the Akhbārīs in the early thirteenth cetury AH/nineteenth century CE, and this perspective clearly coloured their presentation of the last days of Akhbārī dominance in the Shrine Cities. They were also, generally, writing within a tradition of scholarship which dictated the structure of their works and the selection of information for inclusion. These factors mitigate an accurate reconstruction of both the lives of the two scholars, and their relationship, if indeed such a project is appropriate. What follows, then, is a brief resume of their careers as found in these sources.

We are fortunate in having a short autobiography of Yūsuf b. Aḥmad al-Baḥrānī, found at the end of his own biographical dictionary,

[17] Stewart (*Islamic Legal Orthodoxy*, p. 202–207) assesses whether the Akhbārī version of history is an accurate one. I do not think this is a particularly useful exercise.

[18] Newman notices the use of the term *mujtahid* in Samāhijī's text, but explains it through possible terminological variety: "Uṣūlī may not have been uniformly used in the late Safawid period", Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 38, n. 6. I would argue that the use of the term, in Samāhijī's text and elsewhere, is an indication that the key point of difference between Akhbārīs and their opponents was *ijtihād*.

[19] See Cole, "Shi'i Clerics" and *Roots*, p. 31–32. Though Cole argues elsewhere that Akhbārī dominance was not established in Iran, see his "Ideology, Ethics and Philosophical Discourse", p. 32–34.

[20] The main source for such an account is Tunukābunī's *Qiṣaṣ al-ʿulamāʾ*, though this text is, to an extent, problematic as a historical source (see Gleave, "Tunukābunī's *Qiṣaṣ al-ʿUlamāʾ*"). See Tunukābunī, *Qiṣaṣ*, p. 201 and also Khwānsārī, *Rawḍāt*, 2, p. 95.

[21] See Gleave, "Akhbārī-Uṣūlī Dispute".

[22] See Ḥāʾirī, *Muntahā*, p. 335; Kashmīrī, *Nujūm*, p. 283; Khwānsārī, *Rawḍāt*, 8, p. 206.

Lu'lu'at al-Baḥrayn.[23] In that autobiography, which forms the basis of many of the subsequent biographies of his life, he describes his turbulent childhood in Eastern Arabia. He was born in Mahuz, a village on the island of Bahrain, in 1107/1695–6. Initially, he studied with his grandfather and father, but after the political upheavals in Bahrain, including the attacks by the Omanis (termed *khawārij* by Baḥrānī) and the Persians, he moved to Qatif on the mainland, where, after the death of his father, he studied with Shaykh Ḥusayn al-Māhūzī. His scholarly training was hampered by the responsibilities left to him by his father, including looking after his step-brothers and sisters, but he quit Bahrain for Iran soon after the fall of the Safavids in 1135/1722. At this point he must have been in his late twenties. He gained some protection from local governors in Shiraz, and later in Fasa. In Fasa he began his major work of applied legal theory, *al-Ḥadā'iq al-nāḍira*. Having completed much of the first chapter on ritual purity, he was forced to flee once more, probably due to the disturbances which followed the death of Nādir Shāh Afshār (in 1159/1747). He went to the 'Atabāt, where he quickly rose to prominence as a teacher and writer, gathering a substantial number of pupils around him. This was the time of the preeminence of Akhbārī thought in the Shrine Cities, and Baḥrānī is characterised as the greatest Akhbārī writer of this period. He continued his work on *al-Ḥadā'iq*, though he wrote a large number of other treatises on aspects of legal theory, applied legal theory, biography, some minor works on *kalām* and a work entitled *al-Kashkūl*, which is often compared to the collection of anecdotes of the same name by Shaykh al-Bahā'ī.[24] After 36 years of teaching in Karbala and Najaf, Baḥrānī died in 1186/1772.[25] Though his *al-Ḥadā'iq* was left unfinished, his students reconstructed parts of the remaining sections from his lectures.

Muḥammad Bāqir b. Muḥammad Akmal al-Bihbahānī (also named al-Waḥīd al-Bihbahānī) was born in Isfahan in 1116/1704–6 or 1118/1706–7.[26] He was, then, ten years Baḥrānī's junior. He studied

[23] Baḥrānī, *Lu'lu'a*, p. 442–449.
[24] See Algar, *Religion and State*, p. 34.
[25] For the earliest biographies of Baḥrānī, see Ḥā'irī, *Muntahā*, p. 334; Kashmīrī, *Nujūm*, p. 279; Tunukābunī, *Qiṣaṣ*, p. 201–204; Khwānsārī, *Rawḍāt*, 8, p. 203–205.
[26] For the earliest biographies of Bihbahānī, see Ḥā'irī, *Muntahā*, p. 29; Kashmīrī, *Nujūm*, p. 305; Tunukābunī, *Qiṣaṣ*, p. 261–264; Khwānsārī, *Rawḍāt*, 2, p. 93–95. See also the lengthy work, which places Bihbahānī in historical context, Davānī, *Vaḥīd-e Bihbahānī*.

with his father, who took him to the Shrine Cities at an unspecified date, where he stayed and studied. How long after his arrival in Karbala he began to teach Uṣūlī thought, is unknown, but it cannot have been immediately, for the Shrine Cities were dominated by Akhbārīs, and Bihbahānī was probably only a young student. It is recorded that he began teaching in secret, but after gaining a following, and after inducing some of Baḥrānī's students to join his circle, he began to challenge Baḥrānī publicly, debating with him over matters of both *uṣūl al-fiqh* and *furū' al-fiqh*. After Baḥrānī's death in 1186/1772, when Bihbahānī was 70 years old, the stage was set for his unchallenged intellectual leadership in Karbala and Najaf. Through his efforts, Uṣūlī ideas began to be taught in most of the *madrasas* (seminaries) of the Shrine Cities, and Akhbārī students converted, it seems, in great numbers. He trained a generation of *mujtahids* who dominated religious life in both Iraq and Iran, spreading Uṣūlī thought and eliminating the last remnants of Akhbārī legal doctrine. Considering his importance in reviving the Uṣūlī school, his writings have not been published in large number, and many remain in manuscript form. He never wrote a work of *furū' al-fiqh*, though he did write a number of commentaries on parts of previous works as well as a large number of treatises on specific areas of law. His main literary output was in the area of legal theory, which included his famous *al-Risāla fī'l-ijtihād wa'l-akhbār* and *al-Fawā'id al-ḥā'iriyya*, though his energy was channelled, in the main, into teaching and building a significant power base of supporters, both within and outside of the scholarly communities of the Shrine Cities. He died in 1206/1791–92, and is accorded the titles *mujaddid* (renewer) and *mu'assis* (re-founder) of the Uṣūlī school in some sources.[27]

The two works which form the focus of this book do not by any means exhaust the writings of either scholar. Since both wrote extensively on *uṣūl al-fiqh*, *fiqh* and other scholarly disciplines, it has been convenient at certain points to refer to their other works as a means of clarification.[28] However, the bulk of the following analysis is based on:

[27] See, for example, Khwānsārī, *Rawḍāt*, 2, p. 93.
[28] These works include Baḥrānī's *al-Durar al-najafiyya* (a compendium of various legal questions) and *'Aqd al-jawāhir al-nūrāniyya* (answers to questions from Shaykh Ḥasan). Additional works by Bihbahānī include a collection of treatises, recently published, entitled *al-Rasā'il al-uṣūliyya*, which includes *al-Risāla fī'l-ijtihād wa'l-akhbār*,

1) Baḥrānī's introduction on *uṣūl al-fiqh*, found in volume one of his *al-Ḥadā'iq al-nāḍira fī aḥkām al-ʿitra al-ṭāhira.*[29]
2) Bihbahānī's *al-Fawā'id al-ḥā'iriyya*, which includes, in the printed edition, his additional comments entitled *al-Fawā'id al-jadīda.*[30]

The reason for selecting these two works is that they represent the authors' fullest accounts of their legal theory. Both, it appears, were completed towards the end of their lives,[31] and although there are no direct quotations from one in the other, there is some evidence to suggest that Bihbahānī's work is a refutation of the legal theory laid out in *al-Ḥadā'iq*, or at least, that it is a refutation of the scholarly tradition of which Baḥrānī's writing forms an important part. Before embarking on an analysis of the works, it is perhaps useful to gain an understanding of their overall structure.

The introduction to Baḥrānī's respected and still popular work of *furūʿ al-fiqh*, *al-Ḥadā'iq al-nāḍira* (hereon abbreviated to *H*), is divided into twelve sections, each called a *muqaddima* (or prologue, hereon abbreviated to M). The Prologues are of varying length, and this variety, to an extent, represents Baḥrānī's perception that some areas of *uṣūl al-fiqh* require more detailed analysis than others. The Prologues concern the following subjects:

Introduction and prayers (*H*, 1, 2–4)
M1: concerning the historical accuracy of the *akhbār* (*H*, 1, 4–14)
M2: concerning the division of the *akhbār* into four categories of varying reliability (*H*, 1, 14–26)
M3: "on the sources of the legal rulings" (*H*, 1, 26–68)
M4: "on caution" (*H*, 1, 68–77)
M5: "on the ruling concerning the one ignorant of rulings" (*H*, 1, 77–87)
M6: "on contradiction and preference amongst [conflicting] *akhbār*" (*H*, 1, 87–112)

together with his introduction to the biographical dictionary, *Minhaj al-maqāl*, by Naṣr Allāh al-Astarābādī, entitled *al-Taʿlīqāt al-Bihbahāniyya.*

[29] See Ṭihrānī, *Dharīʿa*, 6, p. 289–290.

[30] *Ibid*, 16, p. 329.

[31] This is demonstrated by references to previous works in both books. In the *Ḥadā'iq*, *Durar* is referred to at *H*, 1, p. 35, p. 78 and p. 125. In *al-Fawā'id*, there are references to the various *rasā'il* at *FH*, p. 133, p. 215, p. 310 and to *al-Taʿlīqāt* at *FH*, p. 143.

M7: "that the positive and negative commands designate, literally, obligation and prohibition" (*H*, 1, 112–118)
M8: concerning the legal-literal meaning of words (*H*, 1, 118–121)
M9: concerning the literal application of descriptions (*H*, 1, 121–125)
M10: "on explaining the probative force, or lack of it, of the rational indicator" (*H*, 1, 125–133)
M11: "on all the legal principles and guiding rules upon which all juristic rulings are based" (*H*, 1, 133–166)
M12: "concerning the difference between the *mujtahid* and the Akhbārī" (*H*, 1, 167–170)

My analysis in the following pages generally follows Baḥrānī's presentation. By adopting his schema, I hope to convey to the reader the general structure and formulation of argument in an Akhbārī exposition of *uṣūl al-fiqh*.

The first eleven Prologues can be grouped into four categories:

1) M1–3 concerning the sources of law
2) M4–6 concerning the legitimate means of resolving uncertainty in the texts of the sources
3) M7–9 concerning linguistic exegesis
4) M10–11 concerning the means of deriving rulings on matters of apparent textual silence.

I analyse this structure more thoroughly in my concluding remarks. Suffice to say here that this structure follows what is, for Baḥrānī, a logical progression of ideas: textual sources—ambiguity in those sources—non-textual sources. This progression clearly aims to provide the reader with a comprehensive theory of law, through which the Sharīʿa might be known.

Bihbahānī's *al-Fawā'id al-ḥā'iriyya* is a very different composition. It consists of two parts, sometimes called *al-Fawa'id al-ḥā'iriyya* (hereon *FH*)[32] and *al-Fawā'id al-jadīda* (hereon *FJ*).

FH is divided into an introduction, 36 chapters concerned with different areas of legal theory (each called a *fā'ida* and numbered, hereon referred to as FH1, FH2 etc) and a conclusion. The 36 chapters are each given a short title. There seems to be no strict organising

[32] Some sources refer to these as *al-Fawā'id al-qadīma.* I follow the system of the editor of the volume which contains the two works.

principle behind these chapters, though they can be roughly grouped as follows:

FH1: on *fiqh* generally
FH2–5: on the relationship between reason and revelation
FH6–13: on the causes of uncertainty in *fiqh*
FH14–19: on linguistic exegesis
FH20–23: on contradictions in revelatory sources
FH24–33: comments on the four sources of law
FH34–35: further comments on linguistic exegesis
FH36 and conclusion: on *ijtihād*

FJ is similarly presented, consisting of 35 chapters, each titled. Its chapters follow a similar pattern to those of *FH*. My attempt to group the chapters is slightly forced, and it is perhaps more accurate to describe both books (*FH* and *FJ*) as random comments, which are possibly answers to unmentioned questions.

Though most areas associated with Muslim legal theory are discussed by Bihbahānī, and a position declared, compared with Baḥrānī, the discussion is quite chaotic. I have, therefore, allowed Baḥrānī's presentation to dictate the structure of this book, and will present Bihbahānī's position, as laid out in the different chapters of *FH* and *FJ*, as a response to Baḥrānī's theory. Nearly all of the issues dealt with by Baḥrānī are also discussed in Bihbahānī's work, at times in a manner which indicates that Bihbahānī has undoubtedly read the Prologues, or at least heard Baḥrānī teach the ideas contained within them, and is therefore presenting a refutation.[33] The texts have a polemic flavour. Baḥrānī critiques previous *mujtahid* scholarship; Bihbahānī critiques Akhbārī criticisms of *mujtahid* scholarship. In polemic texts like these, it is not surprising that areas of agreement are ignored or only mentioned in passing. The aim of the author is to refute an opponent's position, and hence the perceived weaknesses of that position constitute the major focus of attention. This is less true for Baḥrānī than for Bihbahānī, as Baḥrānī's presentation resembles more closely the models of the genre of *uṣūl al-fiqh* known from the classical period. However, there are lacunae in both accounts, particularly in the area of linguistic exegesis.[34] At times, therefore, it

[33] See, for example, the story related in Davānī, *Vaḥīd-e Bihbahānī*, p. 124–125 in which Baḥrānī and Bihbahānī argue about *dalīl al-ʿaql* all night in the courtyard of the *ḥaram*.

[34] See below, p. 147–164.

has been necessary to place the passages analysed in their theoretical context, since the passages themselves are not self-explanatory.

In order to introduce the method of legal reasoning found in the two works of the two authors, I have selected one topic which can be isolated conveniently.[35]

The topic concerns ignorance: more specifically, ignorance of God's law. If a believer commits a transgression of the law because he is ignorant (*jāhil*) of the law, what is his status? To what penalties (either in this life or in the next) is he subject? Is he forgiven his unwitting transgression, or is ignorance no defence? Both Baḥrānī and Bihbahānī discuss this issue and produce quite different answers.

Baḥrānī on the status of the one ignorant of God's law

M5 is entitled "on the ruling concerning the one who is ignorant of God's rulings" (*fī ḥukm al-jāhil bi'l-aḥkām*). The term translated as "ruling" here (*ḥukm*) could be translated as "assessment".[36] The reason why I translate *ḥukm* as ruling here rather than assessment is that in certain circumstances assessment can have the connotation of personal opinion based on a consideration of the evidence. Such a conception has no place in Baḥrānī's legal theory. Ruling, I feel, captures the authority Baḥrānī places, not only on the legal rules made by God (and made known through the Prophet and the Imams), but also on the supposedly simple application of these rules in a human context. Therefore, when the term ruling in this book, I am referring to the Arabic term *ḥukm*; and for the sake of consistency, I use this translation when discussing Bihbahānī's legal theory, where the element of personal opinion is more evident.

Baḥrānī begins his examination of the one ignorant of God's rulings by describing the various Shīʿī positions on this issue. In choosing to begin his discussion in this manner, he is utilising a standard presentation technique in Muslim legal theory. There are, he states, three positions:

[35] Reinhart's comment that areas of *uṣūl al-fiqh* are interconnected is accurate ("In Islamic Legal Thought, everything seems connected to everything else", Reinhart, *Before Revelation*, p. 125); however, I intend to use this topic to introduce the legal theories of Baḥrānī and Bihbahānī. As will become clear, this issue of the status of the ignorant *mukallaf* is a *camera obscura* with which to view their two theories.

[36] See *ibid*, p. 185, n. 2.

> [1] The predominant position amongst the scholars is that he [the ignorant one] is not forgiven [for his transgressions] . . . they [the supporters of this view] deduce from this that the ritual duties of an ignorant person are invalid, even if they happen to accord with the law in reality. [An ignorant person] for them is one who is neither a *mujtahid* nor a *muqallid* [one who follows a *mujtahid*].
> [2] . . . A group of modern scholars, and many after them, have argued that the ignorant one is forgiven. The most recent scholars rule that the prayer of the ignorant believers (*al-ʿawāmm*) is valid, whatever it may be [ie whether it accords with the law or not].
> [3] Some restrict [the forgiveness] to when it accords with reality only. [*H*, 1, 77–78]

The word "reality" here (*al-wāqiʿ*) refers to God's law: that is, the legal reality which forms a fundamental element of Baḥrānī's (and for that matter Bihbahānī's) legal system. God has decreed the correct manner in which the duty of, say, prayer should be performed. Since God is ultimate reality, these rulings are a legal reality to which all humankind is subject. The three positions on the status of the ignorant believer (*al-ʿāmmī al-jāhil* or *al-mukallaf al-jāhil*) centre around different answers to the question "what happens when a believer's actions transgress the law of God, not because he or she knows the law and wishes to avoid obeying it, but because he or she does not know what, in reality, God has ruled?" Or to put it another way, "what are the legal consequences for someone who is under the false impression that he has fulfilled the requirements of the law?"

For example, cleaning under one's fingernails is considered by some to be an essential element of the ritual purification of an individual preparing for prayer. However, to complete one's ritual purification correctly, one must not only perform certain actions: one must also intend that by performing these actions, one is effecting one's ritual purification in accordance with the law of God. It is this intention (*niyya*) which distinguishes cleaning the fingernails for the sake of personal hygiene and performing the same action as part of one's preparation for prayer. The first may be laudable, but does not form part of an act of worship (*ʿibāda*). The second is part of the means whereby an individual believer may perform his duty of prayer in a valid manner. Using this example, the three positions in the above quote can be illustrated in reverse order.

The third group considers ignorance to be forgiven (or excused—ie have no legal consequences) if the action performed out of ignorance accords with the law. By this, I take Baḥrānī to mean that if a *mukallaf* does not know that cleaning one's fingernails is an element of the purification ritual, then if, when preparing to pray, the *mukallaf* happens to clean his fingernails, then his prayer is valid. That is, the *mukallaf* need not intend to prepare for prayer when he cleans his fingernails, but the fact that he has cleaned his fingernails is sufficient to ensure the validity of his prayer. For this group, then, as long as the correct actions are performed, with or without intention, then the duty is fulfilled and the *mukallaf* gains credit with God. Indeed, for this group, it seems possible for the *mukallaf* to have an evil intention in cleaning his fingernails (eg he wishes to attack someone more effectively after he has finished prayer), but the fact of performance satisfies the law. Hence the *mukallaf* is forgiven for not fulfilling the law in terms of intention, as long as he fulfils it in terms of action.

The second group argues further that even if the *mukallaf* fails to clean his fingernails through ignorance that this is an essential element of the purification ritual, he is excused any legal consequence of this failure: his prayer is valid. The intention to perform a valid prayer overrides any mistakes in the performance of the duty which came about through ignorance of the law in reality. Whilst the third group accepted a prayer as valid if the actions were performed, even though the intention was absent, the second group dispenses with the requirement of correct action, as long as the intention to perform prayer exists.

The first group argues that the status of the *mukallaf* depends on where the ignorance of the law in reality has originated. A *mukallaf* may be ignorant of the duty to clean one's fingernails because he has refused to seek guidance on the matter from an acknowledged authority (a *mujtahid*), or he may be ignorant of the duty because a *mujtahid* has wrongly informed him. The latter mistake is forgiven because the ordinary believer could not have done otherwise. The first type of ignorance is inexcusable. One who refuses to obtain for himself the guidance necessary to fulfil the law of God is not forgiven his errors. Even if by chance, some of his actions accord with the rulings of God, his intention is faulty. For the first group, all legal knowledge relevant to the *mukallaf*'s obedience to God's law comes through the *mujtahid* who is best qualified to present the Sharīʿa to the *mukallaf*. If a *mukallaf* acts without consulting the *mujtahid*, he will have no knowledge of the law, and hence is not only extremely

unlikely to perform the appropriate actions, but will also have failed the requirement of intention. Without the *mujtahid*'s guidance, the individual does not know which actions he should intend to be part of his ritual performance, and which are dispensable. For this group, the *jāhil*, or ignorant one, is someone who has opted out of the system whereby legal knowledge is gained ("he is neither *mujtahid* nor *muqallid*"). He therefore has no legal knowledge even if, by chance, his actions might appear to conform to the law. As will become clear, in Bihbahānī's legal theory this does not mean that the *mujtahid*'s view is equivalent to the law in reality. Bihbahānī recognises that scholars can, at times, be wrong about legal matters. The important element is that, as far as the *muqallid* (ie the *mukallaf*) is concerned, the legal advice of the *mujtahid* is all the law he needs to comply with his obligations before God. The *mujtahid* may know that his advice is merely his best effort to present the law, but this distinction has no relevance for the *mukallaf*.

In these three positions, one is dealing with different definitions of ignorance. Whilst the second and third groups are describing ignorance of the law "in reality", the first group is describing ignorance of the *mujtahid*'s version of the law. That is, the law is conceived as having two tiers: reality and perception (which at times may coincide, and at others may not—the crucial point being one does not know when this coincidence occurs—that knowledge is limited to God alone).

As will become clear, Baḥrānī's own stance in this dispute is a nuanced version of the second position. He begins his discussion of the three positions by arguing that the dispute originates in apparently conflicting reports from the Imams concerning the status of the *jāhil* (*zawāhir al-akhbār fi'l-mas'ala lā takhlū ʿan tanāquḍin*). Some reports imply the validity of the first position, such as:

> Imam Ṣādiq said, "People only perish because they do not ask." [*H*, 1, 78]

This is taken as evidence for the first position because it implies that if they ask, people will not perish. Those who should be asked are the Imams (when present) or the *mujtahids* (when the Imams are absent).[37]

[37] Whether such an implication is valid is disputed. The reasoning here is a type of conditional implication (*mafhūm al-sharṭ*), one of the *mafāhīm al-mukhālafa* discussed below, p. 153 and p. 179–180. The reasoning is as follows: only if the people do not ask will they perish, therefore if they ask, they will not perish. This type of reasoning is accepted by Baḥrānī, not because of its rational validity, but because the Imams themselves legitimated its use. However, with respect to this particular report (*khabar*), he considers the implied order to ask to mean "ask the Imam" and not necessarily the *mujtahid*.

Other reports support the second opinion:

> [Someone asked the Imam], "A man forgets that he is in a state of ritual purity for pilgrimage and [forgets that he] has declared his intention to perform pilgrimage, or is ignorant [of the rules concerning the preparation for pilgrimage]; is his *ṭawwāf* and *sa'y* [a reference to two pilgrimage rituals] valid?" He said, "His intention (*niyyatuhu*) compensates him. When he has expressed an intention to do [pilgrimage], then his pilgrimage is complete, even if the new moon has not set in." [*H*, 1, 79]

Even when the person performs the pilgrimage rituals incorrectly, even when he does it at the wrong time, if his intention is sound, then he is considered to have fulfilled the duty. If this is the case with pilgrimage, then by analogy, it is the case with other legal obligations. There are no *akhbār* quoted which support the third position, and Baḥrānī discusses it no further.

Baḥrānī, throughout his Prologues, traces the origins of disputes to perceived contradictions in the *akhbār*. If these perceived contradictions can be resolved, the dispute disappears. Through his subsequent argumentation, Baḥrānī considers himself to have resolved the contradictions, and thereby eliminated the dispute. This technique exemplifies a number of important elements of Baḥrānī's theory. First, the source of the authority is nearly always Imamic reports. The *akhbār* of the Imams, and not human reason (*ʿaql*), or indeed the Qur'ān and Prophetic Sunna directly, are the basis of his proofs. The primacy of the evidence of the *akhbār* over other possible sources of evidence is characteristic of Baḥrānī's argumentation. Second, he rarely engages in direct, *ad hominem* criticism of his opponents, preferring to label them as "a group of our colleagues" or "some of our fellow Shīʿa" or similar locutions. Other Akhbārīs had engaged in personal criticism of *mujtahid* scholars, vilifying and at times ridiculing their work. Baḥrānī, though considering his *mujtahid* opponents to be incorrect, wishes to demonstrate that their theories are simply unsupported by the *akhbār*. Third, positions which appear to have no support from the *akhbār*, such as the third position outlined

above, are not discussed further. Since they are unjustified by the most important type of evidence (Imamic reports), they do not even deserve criticism. They are, in effect, not even potentially valid Shīʿī positions.

After citing eleven *akhbār*, and referring to many more, Baḥrānī begins his own exposition:

> It is possible to combine [the messages of] these *akhbār* into a number of points, the most obvious of which is that, just as the term *jāhil* [ignorant] designates one who neglects the ruling completely, it also designates one who does not know the ruling, whether he has doubt [*shakk*—as to its existence] or an opinion [as to its existence]. [*H*, 1, 82]

These two types of ignorance (*jahāla*) are exemplified by a report. ʿAbd al-Raḥmān b. Ḥajjāj asked Abū Jaʿfar for his ruling concerning a man who had married a woman during her waiting period (*ʿidda*). The *ʿidda* is the period after a woman divorces, during which she is not permitted to re-marry. The man did not know the woman was in her waiting period, and the question, therefore, concerns whether or not illegitimate sexual intercourse had occurred (*zinā*):

> He [the Imam] said, "No. If it was out of ignorance, then he may resume sexual relations with her, after the *ʿidda* has finished. The people are forgiven for ignorance of what is beyond [their knowledge]." [ʿAbd al-Raḥmān] said, "For which ignorance is the man forgiven: ignorance that it was forbidden, or ignorance that she is in her waiting period?" He said, "One of the types of ignorance is less important than the other: that is, ignorance that God has made it forbidden. This is because [with this sort of ignorance] he was unable to perform *iḥtiyāṭ* (caution)." [*H*, 1, 73–74]

This report summarises Baḥrānī's epistemology: there are two types of ignorance: ignorance that marriage during the *ʿidda* is forbidden and ignorance that the woman was in her *ʿidda*. These correspond to two types of knowledge: knowledge of a ruling and knowledge of how to apply that ruling. This distinction is of great importance to Baḥrānī, and one which reappears throughout his legal theory. If a person knows of no ruling concerning an action (that is, if he perceives the sources of revelation to be silent), then he is in an entirely different position from one who knows what the ruling is, but does not know how to apply it to a specific case. The difference is as follows:

1) the one who knows the ruling, but does not know if it applies in a particular case, can be cautious; ie he can act as if the ruling is in force and thereby ensure compliance with the law;
2) the one who knows nothing of the law (even if there is a ruling, he perceives revelatory silence) is not in a position to be cautious. If he were cautious in all cases of perceived revelatory silence, he would treat all unsanctioned actions as forbidden. Life would be intolerably difficult.

Now, the person in the second position is excused by the Lawgiver, whilst the first is not. The second could not have avoided his transgression, whilst the first could have fulfilled the law by being cautious:

> It is understood from the *akhbār* that the one *jāhil* according to [the first meaning above] is not excused. Rather it is obligatory for him to investigate and search through the legal indicators or ask [the woman]. If there is no ruling found, then he must suspend making a ruling, or issuing an opinion, and rest upon the shore of caution in his action . . .
>
> As for the one *jāhil* according [to the second meaning above], there is no doubt that he is forgiven. [*H*, 1, 82–83]

Hence the person who did not know that it was forbidden to marry a woman during her *ʿidda* is forgiven; but the one who knew this rule and did not investigate (and if no clear rule was forthcoming, did not act with caution) is not forgiven.[38]

From this it becomes clear that Baḥrānī supports none of the positions outlined at the start of M5. He disagrees with the first because the *jāhil* is forgiven, providing he is ignorant of the ruling and not just of its application. He disagrees with the third, because intention to fulfil the law is, it seems, of crucial importance to him.

He is closest to the second position, but also has some differences with the proposers of this view:

> Their position is that the prayer of the [ignorant] commoner is valid, whatever it be like, even if it includes deviations from the obligatory actions. This is, in my opinion, in general terms, unproven. If the *jāhil* is forgiven merely because he is ignorant, and his prayer is as valid as that of a jurist who has all the requisite qualifications, and who performs all the obligatory actions, then legal obligation is completely destroyed. What then is the point of the Lawgiver giving a ruling and

[38] For a fuller discussion of *iḥtiyāṭ*, see below, p. 112–115.

> distinguishing between *halāl* and *harām*? [What is the point] of following rulings at all? [What is the point] of him sending Prophets and Books?[39] [*H*, 1, 83–84]

The second position must be modified because to accept it makes revelation, law and moral duties pointless. One may as well remain in ignorance. Hence Baḥrānī wishes to restate the second position with more precision. The one ignorant of a ruling is excused the transgression, but this does not make his actions correct: it makes them forgiven for being incorrect. Individuals should be taught those rulings of which they were previously ignorant:

> It is known that those who live in the desert, or in the countryside, are not acquainted with the law and its rulings, unlike those who live in cities and areas which have scholars and preachers, congregational prayer and Friday prayer and [law and order which] orders the good and prohibits evil, and such things. For this reason, the Lawgiver has prohibited living in the first area [ie the desert or countryside] and recommended moving to the latter. Simply by doing this [ie moving], one acquires the ways of the law, and learns acceptable morals, and information about the Prophetic rulings. [*H*, 1, 85]

Hence the ignorant desert dweller may be forgiven, but his state is not recommended. He is encouraged to move to a city where he can be taught by scholars, and thereby become a better believer. This passage exemplifies another aspect of Baḥrānī's theory—that of juristic authority: the scholar has the responsibility for spreading knowledge of the law amongst the community.[40]

In sum, Baḥrānī's position is as follows: whether the *jāhil* is excused his failure to fulfil the law (that is, whether there are legal consequences for his failure) depends on the type of ignorance which led to the failure. If it was ignorance of the existence of a ruling, he is forgiven. If it was ignorance of whether a known ruling is pertinent to the current circumstances, he is not forgiven because he could have followed a cautious course of action (ie presumed the ruling to be pertinent, even though it may not have been). If he acts with caution (*iḥtiyāṭ*) he will, on a personal level, be certain of his fulfilment of the law, even though some of his actions may be superfluous.

[39] This criticism of the second of Baḥrānī's positions is repeated by Bihbahānī. See below, p. 26.

[40] See below, p. 222–237. Baḥrānī's endorsement of the role of the scholars in disseminating knowledge of the law, is also evidence that Akhbarism did not necessarily reduce the role of the *'ulamā'*.

Baḥrānī adopts this position, which is closest to the second outlined at the outset of M5, not because it is the most rational (though he clearly considers it to be), but because it best accords with the revelatory evidence, which, for him, consists of the Imamic reports.

Bihbahānī on the status of the one ignorant of God's law

Bihbahānī's discussion of the issue of the ignorant *mukallaf* is found in FJ14. His position can be identified as the first of those rejected by Baḥrānī. Central to his argument is the need for an ordinary believer (*'āmmī*) to attach himself to a learned scholar and follow that scholar's opinion on the law. This assertion, of course, has implications for juristic authority: the *'āmmī* himself is unable to investigate the law, and hence must rely on someone who has acquired the necessary skills. The necessary skills are termed *sharā'iṭ al-ijtihād* and are discussed in Chapter Six. Here it is only necessary to say that Bihbahānī considers a scholar who has fulfilled certain academic and personal criteria to be qualified to investigate the sources of law (including the Qur'ān, the *akhbār* of the Prophet and the Imams) and decide whether or not they contain a ruling, or a hint of a ruling. Such a person is one qualified to perform *ijtihād* and is termed a *mujtahid*.

Bihbahānī's discussion of the issue, unlike Baḥrānī's, is not structured around the detailed derivation of rules from specific Imamic reports. It is a more discursive discussion in which an argument is developed and linked to other areas of Bihbahānī's thought, with Imamic reports used at appropriate times to support a particular proposition. It is not presented as a simple piece of revelatory exegesis, but as an argument in which evidence is used at the appropriate times. It is not that the revelatory evidence is important for Baḥrānī and not for Bihbahānī. It is that the manner in which the author's view is presented differs. Baḥrānī wishes the reader to view his position as a systematisation of the revelatory evidence, whilst Bihbahānī aims to establish his position as rationally sound, supported by references to revelation. This difference is not merely stylistic—it is based on doctrinal considerations which reoccur through the two scholars' respective legal theories.

Bihbahānī begins his account with a discussion of what it is to know that one has a legal obligation (*taklīf*). From this, one can then

determine what it is to be ignorant of such an obligation. Each person must expend effort to discover what God has made obligatory, and what he has made forbidden. If one falls short in this duty to discover obligations and prohibitions, one has transgressed the law:

> If one falls short of this knowledge [of the law] when it is possible to gain it, the obligation [to do a thing] does not cease to be an obligation, merely because of this negligence. It is the same with a prohibition. [*FJ*, 415–6]

Bihbahānī takes the example of a slave-owner who gives his slave a scroll on which all the duties of the slave are listed. He says to the slave, "I will punish you if you know what my orders are and then disobey them." The slave knows that the master's orders are on the scroll, but if he does not open it, then he is surely punished for his transgressions: "a general knowledge that one has an obligation is [in itself] knowledge of an obligation".[41] Bihbahānī accepts that if it is impossible to know that one has an obligation to perform an action, then "there is no doubt that the duty has lapsed at that point."[42] If the person is in such a radical state of ignorance then he is to treat the action as permitted. But Bihbahānī considers such radical ignorance as rare:

> It is one of the essential elements of the Islamic religion, that the religion of Islam has many obligations and many prohibitions. These together are most numerous. It also appears in the Qur'ān and the assuredly-transmitted *akhbār* that "searching for knowledge is a duty on every male and female Muslim". [*FJ*, 416–7]

Since only a *mujtahid* is qualified to investigate whether there is a ruling from the Lawgiver on a particular issue, and since the *ʿāmmī* knows there are many obligations in Islam, there is no logical reason to forgive either of them for total ignorance of the law. The *ʿāmmī* has a clear means of finding a ruling, that is, by following the *mujtahid*. If he fails to use this means, he is at fault:

> There is no doubt that the *ʿāmmī* cannot know *fiqh*, by any means, except by following [*taqlīd*, ie following a *mujtahid*]. [*FJ*, 417]

The *mujtahid*, through his investigation and search, produces an opinion (*zann*) as to the law. This may not be the law in reality, but it

[41] Bihbahānī, *FJ*, p. 416.
[42] *Ibid.*

is his considered opinion, and this is all we can work with in this world:

> We are legally obligated [to follow] the apparent duties, not the actual duties. By the apparent duties, I mean what appears to the *mujtahid* to be the law in reality. [*FJ*, 417–8]

For Bihbahānī, as for Baḥrānī, there are two tiers to the law: the law in reality and the law as perceived. Bihbahānī, however, restricts the latter to the *mujtahid*'s perception. As moral agents, charged by God to perform a duty (*taklīf*), we can only work within the second sphere of the law. The *mujtahid* searches the texts for an indicator (*dalīl*); this indicator is a clue as to what God's (or the Prophet's or the Imam's) ruling was on a particular matter. When he thinks he has found such an indicator, he produces his opinion. Of course some clues are more obvious than others. Some are so obvious that they are considered identical to the law in reality.

That the *mujtahid* may be wrong is unperturbing for Bihbahānī. His reasoning is that though a *mujtahid*'s answer is not protected from error, the duty to investigate the sources is established as certain, and the follower of the *mujtahid* is similarly protected from blame. It is, for Bihbahānī, known with certainty that one must follow the *mujtahid*'s *zann*:

> *Zann* is not valid, unless it is based on a legal indicator [found by the *mujtahid*]. . . . In reality, the action [based on *zann*] is certain, not mere opinion, for there is certainty in the procedure [of gaining the *zann*]. [*FJ*, 419]

There is a procedural certainty that a ruling based on a legal indicator found by a *mujtahid* is authoritative, even though the opinion may not accord with reality:

> It has been transmitted in the *akhbār* that one is only to refer to the Imam and no one else. It is not permitted to act on the basis of mere whim and opinion, and follow anyone else other than the Imam, even the jurists. However, following the jurists is, in reality, following the Imam, because one only follows them on [the Imam's] order and his permission. [*FJ*, 419]

Following the *mujtahid* is similar to believing the testimony of two witnesses. Though it is possible that the testimony of two witnesses does not accord with what actually happened, God has laid down that the testimony of two witnesses is sufficient to establish legal

proof. Similarly, the *mujtahid*'s investigation may not result in the law in reality, but the procedure he follows, and the duty of the *muqallid* to follow him, is established. The law "in reality", thereby, drops out of the picture.

Some scholars, Bihbahānī reports, have attempted to make a distinction among the duties imposed by the law. The law is divided into ritual duties (*ʿibadāt*), fulfilment of which is a matter between God and the believer, and social duties (*muʿāmalāt*), which concern the relationship between human beings, and are therefore issues of public concern which must be decided publicly. Some have argued that ignorance regarding *ʿibadāt* is forgivable, whilst that regarding *muʿāmalāt* is not. This position is based on the belief that ignorance and transgression in *ʿibadāt* are not matters of public concern, whilst they are regarding a transgression in *muʿāmalāt*. Bihbahānī rejects this view, making no distinction between the two sets of duties when discussing the matter of forgiveness for ignorance and transgression. His reason for doing so is that for both areas of the law, the *mujtahid* can still be consulted.

Bihbahānī, naturally, devotes much more space to discussing *ʿibadāt*, since he agrees with his opponents concerning *muʿāmalāt*. His argument is as follows: ritual duties require intention (*niyya*) to be valid; the person who is ignorant of some elements of prayer (a ritual duty) will be unable to intend to perform those elements. If, by chance, he performs them, he will still have failed to fulfil the duty, because he will have failed to intend an action which, accidentally, complies with the law:

> Intention is a condition in correct ritual performance. If he does not know that a particular action in the ritual performance is demanded of him, then when he performs it, how can he intend to perform it, and thereby follow God the Most High? [*FJ*, 420]

Hence elements of ritual law, as well as social law, are subject to the *mujtahid*'s opinion. Without his opinion, the *mukallaf* is ignorant of the law as it appears to the *mujtahid*. If the *mukallaf* was forgiven these errors, with impunity, "it would necessitate the abolition of the duty to search for knowledge, awareness and sufficiency in obedience".[43]

Bihbahānī ends his discussion with a criticism of the Akhbārīs:

[43] *Ibid.*, p. 425.

> One amazing thing is that a certain Akhbārī has argued that it is not permitted, in legal questions, to refer to anything other than the text of the Imam. It is not sufficient [for him] to refer to consensus, or to any other indicator of the *mujtahid*. Yet he argues that it is sufficient for the ignorant commoner to refer to his own opinion and preference. [*FJ*, 427]

This Akhbārī is quite possibly Baḥrānī, who does, as we shall see, argue for both of these positions.[44] The incompatibility, for Bihbahānī, is that whilst the Akhbārīs reject any action which is not based on the *akhbār* as invalid, they allow the ignorant *mukallaf* to transgress the law and not be punished. Baḥrānī, of course, conquered this apparent contradiction by distinguishing between two types of ignorance—ignorance of a ruling and ignorance of how a ruling applies to a particular case. In only one of these was forgiveness granted.

Bihbahānī does not address Baḥrānī's division of ignorance directly, but he clearly sees it as irrelevant. The *mujtahid*, if he perceives no legal indicator relevant to the case in hand, can declare an action to be permitted. If he perceives a possible indicator, then he must immediately perceive that it is an indicator of a possible ruling. That ruling is his opinion of the law in reality, and this he passes on to the *muqallid*. The *muqallid* merely obeys. Bihbahānī considers it impossible for a *mujtahid* to perceive there to be an indicator, but not have an opinion, however weak, about what it indicates or whether it applies to a particular case. Baḥrānī's second type of ignorance is, therefore, considered obsolete.

Conclusion

For Bihbahānī and Baḥrānī, then, the term *al-ʿāmmī al-jāhil* (the ignorant believer) means quite different things. For Baḥrānī, an ignorant believer is one who is ignorant of the law "in reality". He is only forgiven if he is ignorant of the existence of a ruling given by the Lawgiver (ie God, through the Prophet and Imams) which regulates an action he may have performed. If he knew of the ruling, but assumed it to be inapplicable to his particular circumstances, he is not forgiven, and his action has legal (and ultimately eschatological) consequences. He is not forgiven because he could have exercised

[44] See below, p. 55–60 and p. 249–250.

caution (*iḥtiyāṭ*), and treated the ruling as if it was applicable to his circumstances, even though he was unsure whether it was or not. For Bihbahānī, an ignorant believer is one who has opted out of the only valid means of gaining knowledge of the Sharīʿa: the *mujtahid/muqallid* system. The *muqallid* asks the *mujtahid* for legal information, and the *mujtahid* supplies it. For the *muqallid*, the only law that matters is the *mujtahid*'s opinion. He can only fulfil his legal duties by following his *mujtahid*. These opinions are the only legal reality he needs. The *mujtahid*, however, has a wider perspective: he knows that his opinion is not identical with the law "in reality"—that is, the law of God. His task is to reach an opinion which he considers to be the best approximation of the law. Both he and his *muqallid* are bound by this opinion.

In comparing Baḥrānī's and Bihbahānī's views, it is clear that there are some similarities: both recognise that there is a distinction between the law "in reality" and the law as it is perceived. Our perception must always be recognised as less than certain, and it is this that one must deal with through legal theory. For this reason, a measure of doubt as to the content of the law "in reality" is inevitable for both thinkers. Their means of overcoming this doubt are, however, quite different: for Baḥrānī, the doubt can be dispersed by performing more than is possibly obligatory; that is, by acting with caution (*iḥtiyāṭ*). Certainty as to the content of the law is not always obtainable, but certainty as to the law's fulfillment is obtainable. For Bihbahānī, the doubt is dispersed by a certainty that the action is performed in accordance with a certain procedure: the procedure of asking for and following a *mujtahid*'s opinion. The procedure is certain, even if the *mujtahid*'s opinion is not.

Underlying the two solutions, are two theories of knowledge. Baḥrānī feels certainty is obtainable (but only in action, not in the law itself); Bihbahānī does not (for him, "the door of knowledge is closed").[45] Baḥrānī is fearful of doubt, whilst Bihbahānī embraces it, albeit within a structure which prevents epistemological anarchy.[46]

[45] That epistemology was central to the dispute is well argued in the best summary of Akhbārī doctrine, Kohlberg, "Aspects".

[46] If one wishes for a cognate discussion in the (better documented) Sunni tradition of *uṣūl al-fiqh*, the Ẓāhirī-Sunni dispute appears the closest, particularly in its epistemological aspects. See Goldziher, *Ẓahiris*, passim, particularly p. 103–190. On uncertainty and opinion (or "probabilism" as Weiss terms it), see Weiss, *Spirit*, p. 88–112.

CHAPTER TWO

TEXTUAL SOURCES OF LAW

Whatever the reasons for the emergence of the Shīʿī doctrine of the occultation of the Imam (*ghaybat al-imām*), the juristic ramifications were extensive. In theory, the Imam when present, held theological, legal and ultimately political authority. In his absence, the community was forced to find alternative means of gaining knowledge of God's intentions. With remarkable alacrity, the Shīʿī scholars developed a substitute for a charismatic Imam: texts. The residue of three centuries of community experience was endowed with the authority of the absent one. Though the Shīʿa had engaged in some polemic with their opponents concerning the authenticity of the Quranic text, this was set to one side.[1] The texts, which recorded the sayings and actions of the Prophet (*ḥadīth*) were supplemented with those of his legitimate successors, the Imams (*akhbār*), and these together became authoritative sources of guidance in the absence of the guide himself. There is little doubt that the designation of the example of the Prophet and Imams as "*Sunna*" was in imitation of Sunni legal developments dating from al-Shāfiʿī (d. 204/820), and perhaps earlier.[2] The Sunnis had developed a third source from which God's law might be derived: the consensus (*ijmāʿ*) of the community. The various Shīʿī evaluations of *ijmāʿ* as a source of knowledge (theological or legal) typify the development of early Shīʿī *uṣūl al-fiqh*. Initial rejection of the Sunni model gave way to the incorporation, albeit in modified form, of the themes found in early Sunni works of legal theory.[3] By the time of Ibn Idrīs al-Ḥillī (d. 598/1202), the sources

[1] For an examination of Shīʿī attitudes towards the Qurʾān, see Eliash, "The Shiʿite Qurʾān"; Kohlberg, "Some Notes"; Lawson, "Notes for the Study" and Gleave, "Shiʿite Exegesis".

[2] The literature on the development of the concept of *sunna* in early Islamic thought is extensive. The importance of Joseph Schacht's work cannot be underestimated (Schacht, *Origins*, *passim*, but especially p. 58–82) and has inspired a gamut of criticisms and refutations. The Shīʿī identification of text with *sunna* is less well documented in Western languages, but, see Lecompte, "Aspects de la littérature", particularly p. 101; Calder, "Structure of Authority", p. 171–176; Modarressi, *Introduction*, p. 2–6 and Momen, *Shiʿi Islam*, p. 173–175.

[3] Brunschvig, "Les *uṣūl al-fiqh* imāmites", p. 201–204. Many of the early (inextant)

of Shīʿī law were characterised as *kitāb*, *sunna*, *ijmāʿ* and *dalīl al-ʿaql*, a typology which mimicked that of the Sunnis with the exception of *qiyās* (analogy) which was replaced by *dalīl al-ʿaql* (literally "the indicator of reason", a term which was itself the subject of some debate).[4] *Qiyās*, if not by name, then certainly in substance, was incorporated into Shīʿī legal theory; the inclusion of *ijmāʿ* in Shīʿī legal theory was also an imitation of Sunni *uṣūl* thought. The structure and central themes of Shīʿī works of *uṣūl al-fiqh* (though not necessarily the conclusions of the authors) reflected the generic characteristics of writings of non-Shīʿī legal theory. Though Imāmī *uṣūl* was characteristically Shīʿī, the terms of reference and the generic features of Shīʿī *uṣūl* works were heavily influenced by non-Shīʿī Muslim discussions.

The Akhbārī school challenged the four-fold characterisation of the sources of Shīʿī law. Astarābādī, and the jurists who followed his line, rejected *ijmāʿ* and *dalīl al-ʿaql*, claiming *kitāb* and *sunna* as the only legitimate sources of knowledge of God's law. That this restriction was a prevalent element in Akhbārī-*mujtahid* polemic is evidenced by its appearance in a number of "lists" cataloguing differences between the two schools.[5] In the famous list of Samāhijī, the second point of difference between *mujtahids* and Akhbārīs is the following:

> The *mujtahids* say that the indicators which we have are four: *kitāb*, *sunna*, *ijmāʿ* and *dalīl al-ʿaql*. The Akhbārīs say only *kitāb* and *sunna*. Some of them even restrict them to *sunna* alone, because [the meaning of] *kitāb* is unknown to them, for it is not permitted to interpret (*tafsīr*) it [ie The Book] without [first] consulting [the Imams].[6]

Baḥrānī himself mentions this as the first, and hence for him probably the most significant, difference between the Akhbārīs and the *mujtahids*:

works of Shīʿī *uṣūl al-fiqh* concentrated on a refutation of the "Sunni" doctrine of *qiyās*. Hence, even in these polemic documents, Shīʿī legal theory was basically reactionary.

[4] Modarressi ("Rationalism and Traditionalism", p. 141, n. 1) states that Ibn Idrīs was the first to list these sources in this order (Ibn Idrīs, *Sarāʾir*, 1, p. 42). For *dalīl al-ʿaql*, see below, p. 87–89. Amongst Sunni writers, Ghazālī is, it would seem, unusual in proposing *dalīl al-ʿaql* as the fourth source (Ghazālī, *Mustaṣfā*, p. 80 and p. 159–165). The possibility of Ghazālī's formulation influencing Ibn Idrīs should not be ruled out.

[5] See also Modarressi, "Rationalism and Traditionalism", p. 141, n. 1.

[6] Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 24–25.

> Amongst the clearest of what they [the two parties] believe is a difference in substance: for the *mujtahids*, the indicators are four: *kitāb*, *sunna*, *ijmāʿ* and *dalīl al-ʿaql*—the last of these being *al-barāʾa al-aṣliyya* and *al-istiṣḥāb*.[7] The Akhbārīs accept only the first two. There is clear dispute on this issue. [*H*, 1, 167–8]

The remainder of this chapter concerns Baḥrānī's and Bihbahānī's thoughts on the first three sources of law: *kitāb*, *sunna* and *ijmāʿ*. These are distinguished from the fourth source by their textual quality—that is, they consist of statements imbued with legal authority. The fourth source, *dalīl al-ʿaql*, is properly speaking a collection of interpretative principles, and is, therefore, analysed in the next chapters.[8]

The issue for both our authors is how and when the written documents we possess (ie the words in the Qurʾān, the *akhbār* and the statements upon which there is consensus), might be considered legitimate representations of God's intentions (either directly in the Qurʾān, or indirectly through the Prophets, Imams or the community), and thereby become indicators of the law. We are not concerned here with how they are to be interpreted, but with how these texts become worthy of interpretation and how they gain the potential to prove or disprove certain legal norms. This probative force which the texts may (or may not) possess is termed *ḥujjiyya*, meaning literally "ability to act as a proof".[9] This chapter describes how these putative sources gain the status of proofs (and hence indicators) of God's law.

Baḥrānī's Theory of The Textual Sources of the Law

The usual order in which the sources are mentioned (*kitāb*, *sunna*, *ijmāʿ*) reflects an order of authority. Though mentioning the sources in this order was common amongst Shīʿī jurists from Ibn Idrīs onwards, Baḥrānī, in his analysis of these three sources in the first three Prologues, adjusts the sequence to *sunna*, *kitāb*, *ijmāʿ*. As will become clear, his theory places the *sunna* in a pre-eminent position, and this, it appears to me, is the most plausible explanation for this

[7] For a discussion of the meaning of these terms, see below, p. 91–102.

[8] See below, p. 87–145 and p. 146–182.

[9] The term *ḥujjiyya* is also translated as "authoritativeness" (see Hallaq, "Sunni Consensus", p. 428). "Probative force", however, captures, more specifically in my view, the ability of the source under discussion (*kitāb*, *sunna*, *ijmāʿ*) to act as a proof in the process of legal reasoning.

modified order. Structure reflects message, and since, for Baḥrānī, *sunna* forms the legal hub around which his jurisprudence revolves, it is perhaps not surprising that he considers the status of the texts which represent the *sunna* (the *akhbār*) first, and that he devotes around two thirds of his discussion of the textual sources to it. I follow Baḥrānī's order of analysis in what follows.

M1 and M2 deal exclusively with the status of the *akhbār*—the reports of the words and deeds of the Prophet and the Imams. Though the words and deeds of both the Prophet and the Imams are considered *sunna*, that is, an example to be followed, it is the reports of the Imams which receive most of Baḥrānī's attention. The reason for this will become clear.

M1[10] represents Baḥrānī's attempt to establish an intimate connection between historical event and written record. For him, the *akhbār* are accurate reports of historical happenings. He begins with a discussion of *taqiyya*. *Taqiyya*, which has been translated as "pious dissimulation", is the term given by Shiʿites to the activity of hiding one's true beliefs so as to avoid persecution in a hostile environment. Shīʿī theologians and jurists agree that, at times, the Imams practised *taqiyya*, not through fear for their own lives, but through fear that the community might be persecuted because of their actions or that it might be left without a leader. They also advised their followers to practise *taqiyya* as a means of preserving community well-being.[11]

Taqiyya presents a particular problem for Shīʿī jurists when examining the *akhbār* as a means of gaining knowledge of the *sunna*. When an Imam is reported as having made a particular statement, or performed a particular action, how is one to know that this statement or action is a reflection of the *sunna* and not due to *taqiyya*? If a statement is confirmed as *taqiyya*, does it immediately lose its status as "a text which indicates the *sunna*"? Might it be an indicator of the correct course of action (ie *sunna*) in circumstances of oppression; that is, can a *taqiyya-khabar* be an indicator of correct *taqiyya* behaviour? Furthermore, how certain does one have to be of the *taqiyya* nature of the action described in the *khabar*? Is mere suspicion sufficient? These are crucial matters for the Shīʿī jurist, for they add a further test to the system of *ḥadīth* criticism propounded by the Sunnis, and accepted with some modification by the Shīʿa. After a

[10] Baḥrānī, *H*, 1, p. 4–14.
[11] For *taqiyya* in general, see Kohlberg, "*Taqiyya*".

Sunni jurist has determined the historical accuracy of a report (by means of *isnād* criticism),[12] excepting the possibility of abrogation, that report immediately becomes an indicator of the law. After a Shīʿī jurist has determined the accuracy of a report, the indicative capacity (*dalāla*) of the report is still in some doubt, for it may be the result of *taqiyya* and therefore not a true source of the law. The Shīʿī jurist, then, is not only concerned with the historical accuracy of a report of an Imam's words or deeds. His primary concern is the ability of the report to act as a proof, that is, its probative force (*ḥujjiyya*): does the report have the status of being a source, and hence an indicator of the law, or is it an indication of how the law was presented to others (non-Shīʿīs)? Every report is potentially *taqiyya*, and hence potentially redundant as an indicator of the law. Baḥrānī discusses the juristic implications of *taqiyya* reports further in his account of contradictions in the sources (*taʿāruḍ al-akhbār*).[13] A report is worthy of interpretation by virtue of its existence, whether or not it is *taqiyya*. This aspect of Baḥrānī's thinking brings into sharp relief the difference between his theory and that of Bihbahānī, where, as we shall see, a report is only worthy of interpretation after it has passed a series of preliminary tests.[14]

It is obvious, Baḥrānī begins, to anyone who has considered the history of the early Shīʿī community, that the Imams experienced suffering and oppression (*miḥna wa baliyya*), and hence they were forced to remain in "the seclusion of dissimulation" (*zāwiyyat al-taqiyya*). They also encouraged the Shīʿa to accept such a lifestyle until the Imam's return. Only a few of religion's requirements (*aḥkām al-dīn*) were known to the Shīʿa and the prevalence of *taqiyya* meant that the true *akhbār* of the Imams were mixed with the *akhbār* of *taqiyya* (*imtizād akhbārihi bi-akhbār al-taqiyya*). Muḥammad b. Yaʿqūb al-Kulaynī (the early Shīʿī collector of *akhbār* (d. 328/939 or 329/940)) himself admitted to having been mistaken concerning his method of distinguishing between *taqiyya* and non-*taqiyya akhbār*. His method had been based on the transmission of the report (*al-tarjīḥāt al-marwiyya*). *Taqiyya* reports, Kulaynī originally thought, could be recognised by the fact that enemies of the Imams were present on the occasion described in the report. He was followed in this by "some of our

[12] On which, see below, p. 42–45.
[13] Baḥrānī, *H*, 1, p. 87–111 and, see below, p. 112–121.
[14] See below, p. 67.

fellow Shīʿa". However, Baḥrānī argues, the Imams contradicted themselves even when there was no enemy present: "You see them answering one question with numerous answers, even when the questioner was not an enemy" (*mukhālif*, ie a Sunni).

One group of Shīʿī colleagues, in particular, receives Baḥrānī's criticism:

> Our colleagues, may God be pleased with them, have restricted *taqiyya* interpretation (*al-ḥaml ʿalā al-taqiyya*) to when the questioner was a Sunni (*min al-ʿāmma*). This is in conflict with what a perspicuous mind and a diligent understanding would conclude from their (peace be upon them) *akhbār*. We recognise that we should expand on this idea by relating some of the *akhbār* which prove it, so that the reader does not think that we oppose these colleagues without reason, and thereby label us erroneous and mistaken. [*H*, 1, 5]

Following this statement, Baḥrānī lists six reports from various Imams found in the early works of Shīʿī authors (Kulaynī's *Kāfī*, Ṭūsī's *Tahdhīb* and *ʿUdda*, Ṭabrasī's *Iḥtijāj* and Ṣadūq's *Maʿānī al-akhbār*).[15] All the *akhbār* refer to occasions when the Imam gave different answers to the same question on different occasions. From these examples, Baḥrānī argues that contradictions within the *akhbār* are solely due to *taqiyya*. If it can be determined which contradictory reports are *taqiyya*, one can decide which to reject. Baḥrānī confidently states that "deciding between *akhbār* [which contradict each other] on the basis of one of them being *taqiyya* is the strongest means of deciding between the *akhbār* (*tarjīḥāt*) after comparison with the Holy Book".[16] He continues:

> Most of the contradictions which occur in our *akhbār*, no all of them, on consideration and research, come about simply because of *taqiyya*. [The existence of these contradictions] has caused uncertainty to enter into [the minds of] a group of modern scholars (may God be pleased with them). They have thought that these contradictions have come about solely because of the inclusion of the *akhbār* of liars within our *akhbār*. Hence they have used this insight to distinguish between sound and weak and useful and useless *akhbār*. [*H*, 1, 8]

[15] The first two works in this list (Kulaynī's *al-Kāfī* and al-Shaykh al-Ṭūsī's *Tahdhīb*) are two of the Four Books which are the nearest Shīʿī scholars have come to delimiting a "canon" of the *akhbār*. For Baḥrānī's discussion of the importance of the Four Books, see below, p. 45–46. The third work (al-Ṭūsī's *ʿUddat al-uṣūl*) is probably the earliest comprehensive work of Shīʿī *uṣūl al-fiqh*. The fourth, *al-Iḥtijāj* of Aḥmad b. ʿAlī al-Ṭabrasī (d. 548/1153) is also a collection of *akhbār*. The last (Shaykh al-Ṣadūq, Muḥammad b. ʿAlī b. Bābūya's (d. 381/911) *Maʿānī al-akhbār*) is one of Ibn Bābūya's collections of reports which failed to gain acceptability as one of the "canonical" Four Books.

[16] Baḥrānī, *H*, 1, p. 8. See below, p. 112–121 for Baḥrānī's methods of *tarjīḥ*.

The opponents, unnamed here, but again a reference to the Uṣūlīs, mistakenly thought that when two reports contradicted each other, one must be historically accurate and the other inaccurate. The means of distinguishing between the two is to examine the *isnād*. For Baḥrānī, this misses the crucial point that both can be historically accurate, but one (or both) was given by the Imam "due to dissimulation" (*bi'l-taqiyya*).

Baḥrānī, by citing these *akhbār*, proves to his own satisfaction that three of the commonly held beliefs amongst his Shīʿī colleagues are mistaken:

1) that one can recognise *taqiyya akhbār* by the identity of the questioner
2) that one can recognise *taqiyya* reports by determining that no Sunni was present
3) that one can eliminate contradictions between different reports of the Imams through discrediting one as unhistorical due to a faulty chain of transmission.

His rebuttal of the last of these propositions is the most significant for it undermines the role of *isnād* criticism in determining whether or not a report can function as an indicator of the divine law. The uncertainty (*shubha*) which has afflicted the proponents of the third position is made worse by two factors: first, their belief that "opponents, degenerates and those well-known as liars" from heretical Shīʿī groups and the Sunnis have fabricated reports, and second, a report from the Imam in which he says, "For every one of us [the Shīʿa], there is one who spreads lies about us".[17]

Baḥrānī attempts to demonstrate that his opponents' suspicions are unfounded by briefly describing the transmission of the *akhbār* from the time of the *akhbār* being recorded in the Shīʿī collections. For Baḥrānī, one can be certain of the historical accuracy of all the *akhbār* because God has ensured their sound transmission from the time of the Companions of the Imams to the time of the "three Muḥammads";[18] a period of more than 800 years. God achieved this

[17] Baḥrānī, *H*, 1, p. 8.

[18] The "three Muḥammads" refers to the three later collectors of *akhbār* whose

by "illuminating the tombs [of the Imams] in such a way that the reports (*aḥādīth*) have only reached us after eyes have carefully guarded their surety and bodies have wasted away in their careful revision".[19] The poetic flourish of the last two phrases illustrates Baḥrānī's penchant for expressing himself in rhyming couplets; such phrases are often difficult to translate and sometimes mask his meaning.[20] Here he envisages a supernatural intervention whereby the true reports of the Imams' actions and words are preserved through God inspiring the Shīʿa to preserve only those *akhbār* which are historically accurate. Baḥrānī, it seems, is relying on the established Muʿtazilī-Imāmī argument that God could not leave his community devoid of a guide after the *ghayba*, for to do so would entail injustice on God's part.[21] The Almighty ensures the existence of a guide by preserving only the true *akhbār*. One might legitimately ask why God (and the Imams) allow *taqiyya* reports to be preserved if they do not reflect God's law. Surely the continued existence of *taqiyya* reports entails the risk that God's law will go unheeded, and that the Shīʿa will be led astray? If so, does this not infringe upon God's quality of justice? Unfortunately, Baḥrānī does not address this possible criticism.

Preservation of the true reports of the Imams is demonstrated not only by reference to divine assurance, but also by historical evidence. Baḥrānī draws on the account of the 400 *uṣūl* (*al-uṣūl al-arbaʿmi'a*).[22] According to Shīʿī historiography, these were compendia of *akhbār* which preceded the existent collections:

> [The Companions] wrote the 400 *uṣūl*, all of which were recorded from the answers [of the Imams to questions]. [The Imams] used to declare that the transmissions which [the Companions] had deemed to be inaccurate, were accurate. [*H*, 1, 9]

works were used in later Shīʿī law instead of the canonical Four Books. Most of the traditions in these later collections are also found in the earlier collections. The three Muḥammads were: Muḥammad Muḥsin Fayḍ al-Kāshānī ((d. 1091/1680) and author of *al-Wāfī*), Muḥammad b. Ḥasan al-Ḥurr al-ʿĀmilī ((d. 1104/1692) and author of *Wasā'il al-Shī'a*) and Muḥammad Bāqir al-Majlisī ((d. 1110/1699) and author of the voluminous and widely respected *Biḥār al-anwār*).

[19] Baḥrānī, *H*, 1, p. 8–9.

[20] Baḥrānī regularly reverts to rhyming couplets and the usage of metaphorical language, particularly when describing divine intervention or other esoteric processes. This use of metaphor contrasts with his own literalist hermeneutic in the interpretation of revelation. His usual direct style is clearly insufficient to describe some of the more elevated elements of his juristic theory. For other examples, see below, p. 137.

[21] For the idea of a divine guide, and the (rational) necessity of an Imam who is occluded but present, see Sachedina, *Messianism*, p. 75–108.

[22] See Kohlberg, "*al-Uṣūl al-Arbaʿu Mi'a*".

Baḥrānī then recounts various reports of how, at different times, the 400 *uṣūl* were presented to the Imams for correction and certification. He further states that the Imams ordered their followers to "avoid liars and refer any report supposed to be from them to the Holy Book, the prophetic *sunna*, and to reject anything that contradicts either of these."[23] The accuracy of the *akhbār* is further confirmed by citations from al-Kashshī's *Rijāl* in which al-Mughīra b. Saʿīd, the *bête noir* of early Shiʿism, is criticised as an unreliable transmitter.[24] Although he tried to include fallacious *akhbār* in his collection, the Imams recognised this and warned the Shīʿa. Baḥrānī cites further *akhbār* from Kulaynī's *Kāfī* which demonstrate that the Imams urged the Shīʿa to collect their sayings in writing to prevent corruption and to preserve their example for future generations.

The evidence for the historical preservation, as well as the rational necessity of the divine protection of the *akhbār* are, for Baḥrānī, sufficient proof, indeed conclusive proof, that the *akhbār* are, *in toto*, sound. God himself inspired the early collectors, preventing error in transmission. The Imams checked the 400 *uṣūl* and coached their followers to recognise false reports, to the point of giving the names of untrustworthy transmitters. They were aware that fallacious *akhbār* would lead future generations astray. Baḥrānī asks rhetorically:

> Is it possible . . . that just, honest people [like the early transmitters], when they heard thoughts like these from their Imams, would, after [such advice], approve of a report, the certainty of which they could not guarantee, and in the clear meaning of which they could not have confidence? Rather, it is certain and clear that transmitters like these had a custom (*ʿāda*). They did not mention or relate in their writings anything, if its provenance was not as clear to them as the truth . . . The Imams confirmed everything that may and may not be in the Sharīʿa for [the transmitters] . . . They [the Imams] are the preservers of the Sharīʿa, and its transmitters, guardians and protectors, and they have successors in this process in their reliable Companions and the select few. They enlighten them (*yūḥūna*) with the secrets of the rulings (*aḥkām*) and set them aright upon the hidden depths of all that is forbidden and permitted. [*H*, 1, 10][25]

[23] Baḥrānī, *H*, 1, p. 9.

[24] See Madelung, "al-Mughīriyya", p. 347–348. Al-Mughīra b. Saʿīd (d. 120/738) was an extremist Shiʿite, whose views made him unacceptable as a transmitter of *hadīth*. Muḥammad b. ʿUmar al-Kashshī (d.mid fourth/tenth century) compiled one of the most important early works of biography (*rijāl*). See below, n. 33.

[25] See above n. 20 for an explanation of this poetic style. From this it would appear that, for Baḥrānī, the Imams, either personally or through some mystical

Finally, Baḥrānī lists the transmitters specifically rejected by later Imams as unreliable or liars, saying:

> It is obvious and indisputable that, considering the notoriety of the people mentioned here, not a single one of those who followed the Imams' instructions in transmission of *akhbār*, would have relied upon [the unreliable transmitters'] reports, wrote them in their *uṣūl* except when other factors [external to the transmission itself] had necessitated their surety and established them as proofs. [*H*, 1, 13]

He enlists support for this view from al-Shaykh al-Bahā'ī (Muḥammad b. Ḥasan (d. 1031 or 1032/1622 or 1623), an interesting choice since Bahā'ī was considered to have been an arch Uṣūlī), and ends M1 with an example from Ṣadūq's *ʿUyūn akhbār al-riḍā*[26] in which a report with an *isnād* which included unreliable transmitters is given probative force (*ḥujjiyya*) because it had already been included in one of the 400 *uṣūl*, and therefore its accuracy had been guaranteed by an Imam.

Two observations need to be made before moving on to other matters. First, the issue of *taqiyya* has been eclipsed by Baḥrānī's concern to establish the historical accuracy of all the *akhbār*. His intention in M1 was to discredit attempts to reduce the probative force of the *akhbār*, either by the simple means of identifying *taqiyya akhbār* (based upon the identity of the Imam's interlocutor), or, more treacherously, by *isnād* criticism. Both procedures, he feels, are satisfactorily rebutted by his arguments. A consequence of these discussions is, though, that Baḥrānī is forced to conclude that the Imams allowed *taqiyya akhbār* to be included in the 400 *uṣūl*, that is, they did not present their followers with an unequivocal account of the law, allowing contradictory *akhbār* to continue in existence, and hence permitting the possibility of the Shīʿa following a ruling indicated in a *taqiyya* report. Since a *taqiyya* ruling is not a reflection of the true Sharīʿa, but only a reflection of the Imam's dissimulation, then the conclusion must be that the Imams allowed the Shīʿa to fail in their duty to follow the law. Baḥrānī attempts to salvage his position in the face of this powerful theological objection in M5, analysed in the next chapter. However, the uncomfortable theological objection

"enlightenment" (*waḥy*), ensured that the Companions passed on the true indicators of the Sharīʿa. Whether or not the *taqiyya* reports are included in this is unclear.

[26] A famous collection of *akhbār*, but also one which failed to be included in the canonical Four Books. See above, n. 15.

remains; for Baḥrānī, the Imams allowed *taqiyya* reports to be preserved, and hence the possibility of the Shīʿa falling into error is ever present. One might argue that this contravenes God's obligation to provide the optimum.

Second, Baḥrānī has yet to delimit which texts constitute the *akhbār*. In M1, he cites passages from numerous sources: from the early collections of the Shīʿa and from works of jurisprudence (such as al-Ṭūsī's *ʿUddat al-uṣūl*). He also maintains that the *akhbār* were preserved and protected from corruption until the time of the three Muḥammads. He draws, then, on a broad range of Shīʿī sources, indicating that he considers them all to be authoritative. He seems to have a rather indistinct conception of which texts constitute the *akhbār*, and hence the *sunna*, being willing to accept the authority of reports taken from a variety of sources. In M2, he gives a more precise account of which texts constitute the *akhbār*.

That *akhbār* should be analysed on a report by report basis, and not on a collection by collection basis, had been the settled position in Shīʿī jurisprudence before the rise of Akhbarism. In M2, Baḥrānī embarks upon a sustained attack on this procedure, and, in particular, the practice of "dividing the *ḥadīth* into four categories" (*tanwīʿ al-ḥadīth ilā al-anwāʿ al-arbʿa*). "All of our colleagues", claims Baḥrānī, agree that either al-ʿAllāma or Jamāl al-dīn Aḥmad b. Ṭāwūs ((d. 6673/1273 or 1274) and teacher of al-ʿAllāma) instituted this practice in Shīʿī legal theory. Before these two writers, scholars relied upon the methods laid down by al-Shaykh al-Ṭūsī in his *ʿUddat al-Uṣūl*. Those who support the method of al-Ṭūsī comprise of "all of the *muḥaddiths* and a recent groups of *mujtahids* such as our Shaykh al-Majlisī". If Baḥrānī is consistent in his use of terms, *muḥaddith* here refers to the early collectors of *akhbār* as well as the later Akhbārīs. By describing the Akhbārīs as *muḥaddithūn* he gives them an intellectual pedigree and confirms their doctrine as consistent with that of the early (pre-ʿAllāma) Shīʿa. The later (and innovatory) *mujtahids* support the four-fold categorisation of reports.

The four categories under discussion here are *ṣaḥīḥ* (sound), *ḥasan* (good), *muwaththaq* (confirmed) and *ḍaʿīf* (weak).[27] By Baḥrānī's time

[27] The definitions of these terms, and the category into which a report falls is the very stuff of juristic dispute. I have taken as my guide Shaykh Ḥasan b. Shahīd al-Thānī's (d. 1011/1602) work *Maʿālim al-dīn*. This work continues to be a basic text for training Shīʿī scholars.

the definitions of these categories appear to have stabilised in the juristic tradition. *Ṣaḥīḥ* refers to a report, the *isnād* (chain of authorities) of which stretches back to the Prophet or an Imam in an unbroken chain of transmitters, all of whom are known to be truthful and honest (a quality designated by the terms *thiqa* and *ʿādil*). *Ḥasan* refers to a report, the *isnād* of which reaches back to the Prophet or the Imams, but in which the transmitters are not proven to be sound. *Muwaththaq* refers to those *akhbār* which are related, with a complete *isnād*, but included in the *isnād* is a non-Imāmī transmitter (who is nonetheless considered sound). *Daʿīf* is used to describe any *ḥadīth* which fails the above criteria, including those *akhbār* transmitted by unknown or untrustworthy transmitters.[28] For classical Shīʿī jurists (from al-ʿAllāma onwards), the historical accuracy (and hence the probative force) of reports found in the collections of *akhbār* was determined by an analysis of their *isnāds*. Though implicit in these procedures was a means of determining historical authenticity, much more important was that these procedures determined the probative force of a report—that is, whether it might be used as a proof and whether it possessed the force required for the ruling contained within it to overrule a conflicting ruling found in another *khabar*. It is here that the problem of *taqiyya* appears once more. An historically accurate report is not necessarily a proof, since it may have been issued under *taqiyya*. It is sound but does not have probative force. Similarly, a report may be abrogated (though this applies only to Prophetic reports).[29] What *isnād* criticism does is establish that the report is to be considered in the exegesis of law; it also lays down the maximum probative force which a report may acquire. It does not guarantee that its ruling forms part of the law; it merely guarantees that it is considered along with other *akhbār* in the formulation of a ruling or assessment. Baḥrānī's rejection of the categorisation, indeed the whole process of *isnād* criticism, is an indication not so much of his concern with the historical accuracy of these texts (though he would undoubtedly argue that these are accurate accounts of past events), but with confirming that these texts are "worthy of interpretation" or that they have potential probative force; or more accurately, that they are texts which are to be subjected to the legitimate hermeneutical procedures (of which there are many).[30] His position is that once considered worthy of interpretation, all these texts occupy an equal epistemological status. They do not bring with them a baggage of probability, which can then be used to resolve internal inconsistencies within the corpus of *akhbār*.

[28] Ḥasan b. Shahīd II, *Maʿālim*, p. 296–297.

[29] Brunschvig, "Les *uṣūl al-fiqh* imāmites", p. 205; though the doctrine of *bada'* was an attempt to account for God appearing to change his mind, and was in some way linked to *naskh*, it appears that it was more theological than legal in its subject matter. See Sachedina, *Messianism*, p. 153–156.

Baḥrānī states his allegiance at the outset of M2:

> The right procedure (*al-ḥaqq al-ḥaqīq*) is to follow what the most recent scholars have argued, like our Shaykh al-Majlisī and those that take [their doctrine] from him. They follow the middle path between the disputed positions.[31] [*H*, 1, 14–15]

Majlisī's position was that of the *muḥaddithūn*, whose procedure was that of al-Shaykh al-Ṭūsī. Al-Ṭūsī, according to Baḥrānī, proposed that *ṣaḥīḥ* means a report which has been confirmed by external evidence (*al-qarāʾin wa'l-amārāt*). What this might mean is not immediately clear; however, the thrust of Baḥrānī's position is that the soundness of a report is not to be determined by *isnād* criticism:

> We intend in [this book] to desist from discussing the *isnāds* of the reports, and thereby criticising them. Perhaps an ignorant observer might think that we do this through [intellectual] weakness, negligence or for some other reason. We thought we should here demonstrate that this [lack of discussion of *isnāds*] is simply due to the fact [first] that, for us, those reports have already been proven to be sound, [second] that they came from the Imams and [third] that they are certainly authentic. [*H*, 1, 15]

Baḥrānī gives six arguments against the four-fold classification of *akhbār*, and it becomes clear that the external evidence (*qarāʾin, amārāt*) which guarantees the authenticity of the reports is, as in M1, that the collection of the *akhbār* into books was a process immune from corruption. The *qarāʾin* which validate the *akhbār* as sound, are the careful procedures followed by the early collectors, underwritten by the divine assurance that no corrupt reports are included in the collections.

[30] See below, p. 147–164.

[31] Exactly what the disputed positions are is unclear at this point. If they are between Akhbārīs and Uṣūlīs, it is unclear how Majlisī (as described by Baḥrānī) follows a middle path. Baḥrānī, as will become clear, follows an Akhbārī line.

Baḥrānī takes the four-fold categorisation to be best expressed in the writings of two members of the *mujtahid* camp: al-Shaykh al-Bahā'ī (who was cited in evidence for Baḥrānī's position in M1) and Ḥasan b. Shahīd II (author of the *Maʿālim*). In the quotations cited by Baḥrānī, these two authors argue that categorisation is necessary because the length of time which elapsed between the Imams and the writers (a period of 700 years) was such that the evidence (*qarā'in*) which might have proved the validity of the *akhbār* was lost: "They resorted to action on the basis of opinion (*zann*) for [they argued] knowledge (*ʿilm*) had been lost." Al-Shaykh al-Bahā'ī adds that in utilising the categorisation, they are merely following the precedent of earlier scholars who were faced with the same problem.

Baḥrānī's six arguments against the position adopted by al-Shaykh al-Bahā'ī and Ḥasan b. Shahīd II are as follows:

1) The arguments in M1 demonstrate that *taqiyya* is the cause of contradictions within the corpus of *akhbār*, not the inclusion of weak reports by heretical Sunnis or non-Imāmī Shiʿites.
2) The evidence that they adduce when categorising a report is based upon an assessment of the reliability (*al-tawthīq wa'l-jarḥ*)[32] of the transmitters. However, the information on the transmitters is taken from books of *rijāl*[33] composed by early Shīʿī scholars (*al-qudamā'*). Why, asks Baḥrānī, do they follow the *qudamā'* in their assessments of transmitters, but not in their views as to the authenticity and probative force of the *akhbār*? Since the early scholars of *rijāl*, such as al-Ṭūsī, considered the *akhbār* to give certainty (*qaṭʿ*, *yaqīn*) as to the rulings of the Imam, why do the later scholars feel the need to doubt their authenticity?

> If it is argued that declaring the *akhbār* to be sound, as the early scholars did, is a matter of *ijtihād* [and hence personal opinion] which we are not compelled to follow, then we say that their reports concerning the status of a transmitter, be he sound, or a liar or whatever, is also a matter of *ijtihād* [and hence a matter of personal opinion also]. [*H*, 1, 17]

[32] It is clear that this is identical to *al-jarḥ wa'l-taʿdīl*, on which, see Robson, "al-Djarḥ wa'l-taʿdīl", p. 462.

[33] Books of *rijāl* are basically biographical dictionaries which include entries, not just on the Companions of the Prophet (and in Shiʿism of the Imams also) but also members of the scholarly elite including contemporaries of the writer. For early Shīʿī *rijāl* works, see Sachedina, "Kashshī's *Rijāl*".

Mujtahids, like al-Shaykh al-Bahā'ī and Ḥasan b. Shahīd II, are guilty of an epistemological inconsistency, taking one statement of the early scholars as mere opinion, arising from *ijtihād,* and hence not authoritative, whilst accepting other statements as authoritative. Such inconsistency is unacceptable to Baḥrānī.

3) The scholars, Baḥrānī argues, have ignored the role of the 400 *uṣūl*. Baḥrānī cites passages from the writings of Shahīd II (Zayn al-dīn al-ʿĀmilī (d. 965/1558)) to support his position, outlined in M1. The 400 *uṣūl* represent an accurate account of the Imams' actions and words, and they were used as a basis for the early collections of *akhbār*. Baḥrānī takes the argument one step further and states that "the best of what was collected from [the 400 *uṣūl*] are in *al-Kāfī*, *al-Tahdhīb*, *al-Istibṣār* and *Man lā yaḥḍuruhu al-faqīh*" (ie the Four Canonical Books).[34] Baḥrānī also cites Ḥasan b. Shahīd II and al-Shaykh al-Bahā'ī whose pronouncements on the validity of the 400 *uṣūl* seem to support his own view, even though other elements of their juristic theory are at variance with his views. Indeed al-Shaykh al-Bahā'ī is cited as having recognised other early *akhbār* collections as originating with the 400 *uṣūl*, including *Madīnat al-ʿilm*, *al-Khiṣāl*, *al-Amālī* and *ʿUyūn akhbār al-riḍā*.[35] Baḥrānī, then, is puzzled as to why, after such faith in the 400 *uṣūl*, these scholars insist on the categorisation of reports into four categories:

> If the situation is as they claim concerning the authenticity of the *akhbār* of the Imams, what is the reason for them following this innovatory practice? [*H*, 1, 20]

Particularly surprising for Baḥrānī is that al-Shaykh al-Bahā'ī explicitly states, in his *Mashriq al-shamsayn*,[36] that all the collections of *akhbār* come from the Imams, and yet in the same work advocates the four-fold categorisation. The proponents of the typology, once again, are inconsistent in their arguments.

4) "If what they say is true and what they decree is sound, then it follows that the Sharīʿa is ruined and religion is nullified."[37] This

[34] Baḥrānī, *H*, 1, p. 18.

[35] *Madīnat al-ʿilm*, *al-Khiṣāl* and *ʿUyūn akhbār al-riḍā* of Ibn Bābūya; *al-Amālī* of al-Shaykh al-Ṭūsī.

[36] Baḥrānī gives a summary of al-Shaykh al-Bahā'ī's passage (Bahā'ī, *Mashriq*, p. 488) in which the *sanad* of the Four Books is demonstrated to be sound.

[37] Baḥrānī, *H*, 1, p. 21.

is a pure consequentialist argument. The typology leads inevitably to the rejection of a number of *akhbār* in the Four Books. This gives credence to the Sunni accusation that the Shīʿī *akhbār* are full of lies. Without the *akhbār* to direct and guide the community, true religion will be unable to survive.

5) The method of determining the transmitter's reliability is flawed, and hence the basis on which a report is classified into one of the four categories is ineffective. Baḥrānī gives four reasons why this is so: (i) The transmitters were scattered over a large geographical area. Baḥrānī informs the reader that from Imam al-Ṣādiq there were 4000 transmitters alone, and there were more from the later Imams. With such a mass of transmitters, how can the Uṣūlīs be certain that a particular transmitter is sound or unsound, when it is possible, indeed likely, that he has a namesake? This is a similar argument to that used in the first criticism. (ii) How many times does a transmitter have to be described as sound by the different *rijāl* authors?

> You know that between the authors of these books [of *rijāl*] and the transmitters of the *akhbār* was a long period of time, how can they [the authors] be certain of their [the transmitters'] characters to such an extent that they can say they were trustworthy or corrupt? [*H*, 1, 22]

The means whereby one might determine the reliability of a transmitter are themselves unreliable, and the evidence upon which a transmitter might be praised or condemned is suspect. Hence the categorisation is unsound. (iii) The proposers of the four-fold categorisation are inconsistent in that they sometimes accept *akhbār* which should (according to their rules) be categorised as unsound. Baḥrānī cites a number of examples. (iv) Finally, amongst the Uṣūlīs themselves, there is a dispute over who is reliable and who is unreliable. Since they cannot agree over which transmitters are trustworthy, their procedure produces more problems than it solves. These four criticisms are presented as cumulative evidence which further demonstrates that the categorisation is an invalid means of determining the reliability of the *akhbār*.

6) The proposers of the categorisation claim that the method is necessary due to the existence of "isolated reports (*khabar al-wāḥid*) which are bereft of external evidence" proving their validity. By this, they mean that there are *akhbār* in the four collections which

are not related by a sufficient number of people to bring about certainty in the mind of the believer (a process known as *tawātur*[38]), and also that there is no external reason (circumstantial evidence, for example) to consider them authentic. They are, then, of less than certain authenticity. Such *akhbār* need to be assigned a probability of occurrence in order that they might be assigned a probative force. Without the four-fold categorisation (or something similar), this would be impossible. Baḥrānī's response is brief:

> You have already learned . . . that the *akhbār* in our famous books do include external evidence (*qarā'in*) that prove they are sound. Hence it is clear that the cause of the aforementioned division does not exist in the *akhbār* of these books. [*H*, 1, 23]

The external evidence which proves the authenticity of the *akhbār* is, one assumes, the circumstances of their collection outlined in M1. The history of the early Shīʿī community is once again utilised by Baḥrānī. As we have seen, his interpretation of this history is made to do much of the argumentative work in his account of the probative value of the texts of the *sunna*.

Baḥrānī, then, uses these six criticisms of the procedure of classifying the *akhbār* to re-affirm his own position as given in M1: that the *akhbār* are, *in toto*, sound. He goes further than this and identifies the content of the 400 *uṣūl*, works written by the early Shīʿa and supposedly linked to the Imams themselves, with the content of the Four Books (the third point above). He has concretised the possibly ambiguous concept of "*akhbar*" with a specific set of texts which are then endowed with a history of provenance and authority. The Four Books are thereby canonised as inscrutable sources of the *sunna*.

In the conclusion of M2, Baḥrānī tackles the issue of non-canonical *akhbār* collections. He states that some scholars have limited their rulings to those found in the Four Books because "other books have not reached the accuracy or critical appraisal which makes reliance upon them obligatory".[39] This is, according to Baḥrānī, the correct position (*al-ḥaqq al-ḥaqīq*). He then quotes a passage from Niʿmat Allāh al-Jazā'irī (d. 1112/1700), in which Jazā'irī claims authenticity for a number of other early collections of *akhbār*—*ʿUyūn akhbār*

[38] On *tawātur* generally, see Weiss, "Knowledge of the Past" (and also *God's Law*, p. 274–291) and Hallaq, "Inductive Corroboration".
[39] Baḥrānī, *H*, 1, p. 25.

al-riḍā, *al-Amālī*, *al-Iḥtijāj* and *al-Fiqh al-raḍawī*.[40] After this citation, Baḥrānī states:

> He [Jazā'irī] was skilled in what he formulated, wrote and established. His explanation is clear and one should rely upon it. [*H*, 1, 25]

Baḥrānī then cites Majlisī's introduction to his encyclopaedic *akhbār* collection, *Bihār al-Anwar*. Majlisī is quoted as saying that he was given a copy of *al-Fiqh al-raḍawī*, part of which was written in the hand of the Imam himself. The *akhbār* found in it agreed with those found in *Man lā yaḥḍuruhu al-faqīh*, but had no *isnāds*. This then proves that collections external to the Four Books can contain true reports.

In the conclusion (*tatimma*) to M2, Baḥrānī gives out contradictory signals. In the first part he accords certain authenticity to the Four Books (and nothing else), and in the second part he states that he agrees with those scholars who have validated other non-canonical books. A combination of these two seemingly contradictory views is possible, but not explicitly stated by Baḥrānī: all the *akhbār* in the Four Books are to be considered sound (without investigation), and *akhbār* in other collections are to be treated on a book by book basis (or possibly a report by report basis) and investigated. This investigation could be on the basis of comparison between the material in the non-canonical collections and that in the canonical collections (a procedure implied by Majlisī's comment that the reason for authenticating *al-Fiqh al-raḍawī* was that many of the *akhbār* were replicated, but without *isnāds*, in the *Man lā yaḥḍuruhu al faqīh*). Though Baḥrānī's position is difficult to determine with absolute certainty, due to his elliptical style, it would seem that he is quite willing to accept as authentic *akhbār* outside of the canon, but not on a *de rigeur* basis. Material from outside the canon must be tested, whereas that inside the canon is of guarenteed authenticity.

Baḥrānī's position, then, on the textual sources of the *sunna* stands in contrast to the established view in Shī'ī jurisprudence. He endeavours to prove that the quantity of texts which have probative force is great, and that these texts are of certain authenticity, describing the words and actions of the Imams with complete accuracy.[41] They

[40] *Al-Fiqh al-raḍawī*, supposedly authored by the eighth Imam, 'Alī al-Riḍā (d. 203/818).

[41] Baḥrānī's position, then, would seem similar to that of Ibn Ḥazm, who argues that all reports with sound transmissions, whether *khabar wāḥid* or not, bring certain knowledge. See Ibn Hazm, *Ihkām*, 1, p. 115–133 and Turki, *Polemique*, p. 100–112:

are, therefore, all worthy of interpretation; they are all to be considered when attempting to determine a ruling. However, they are, it seems, not of equal probative force, since some were issued under *taqiyya*. Determining which *akhbār* are *taqiyya* is a procedure which belongs to the hermeneutical process, not *isnād* criticism. The practice of *isnād* criticism is, therefore, roundly condemned, as it is an expression of doubt in the authenticity of the *akhbār*. In M1 and M2, Baḥrānī is concerned only to demonstrate that the *akhbār* are historically accurate and sound (*saḥīḥ*). Historical accuracy leads one to accept potential probative force, but actual probative force seems to be postponed until the issue of *taqiyya* is settled. The *akhbār*, both canonical and non-canonical, are, then, to be interpreted to establish which of the reports have probative force.

More significant though is the epistemology underlying Baḥrānī's analysis. The *akhbār, in toto,* give rise to certain knowledge (*'ilm*) as to the historical accuracy of the events they describe. This certainty establishes them as having potential probative force. They gain decisive probative force when they are determined as non-*taqiyya* reports. This epistemology is also evident in Baḥrānī's criticisms of the Uṣūlī position. How can we be certain that the accounts found in the books of *rijāl* are accurate? And if we cannot be certain of this, how can we determine the probative force of a report on the basis of *isnād* criticism? The Uṣūlīs' position, then, is inconsistent: they claim that one can be certain that a report is of uncertain authenticity, but by their own arguments, this type of certainty is generally unobtainable. It is better, argues Baḥrānī, to accept the certain authenticity of the *akhbār*, and thereby avoid such inconsistencies. To support such a view, he refers to the early, pre-'Allāma juristic tradition, rejecting the erroneous findings of the later Shī'ī jurists. This prioritising of the early period is a theme which recurs throughout his work.

In M3, Baḥrānī turns his attention to the status of *kitāb, ijmā'* and *dalīl al-'aql*. Strictly speaking, *dalīl al-'aql* is a term used to designate a number of methods of hermeneutical analysis, and is the subject of the next chapter. Here I concentrate only on the first two sources in this list. Once again, Baḥrānī is primarily concerned with the possibility of establishing these texts as worthy of consideration in the derivation of a ruling. Being worthy of interpretation, they immediately

"toute Tradition [*Khabar al-wāḥid*] implique la connaissance certain et la mise en pratique.", *ibid.*, p. 100.

become potential proofs (*hujaj*) of the law. Hence before the methods of exegesis of these texts are discussed, the status of the texts must be established. An analysis of these is to be found in the first two sections of M3 on *kitāb* and *ijmāʿ* respectively.[42]

The status of the Qur'ān, or The Book (*al-kitāb*), as a text worthy of interpretation might appear axiomatic in Muslim legal discussions. One of the defining features of these discussions is the commitment to this text as the ultimate revelation from God, and hence a source, or indicator, of God's will. However, within the Shīʿī tradition, and in particular it seems within the Akhbārī-Uṣūlī dispute, its status was discussed in some detail. Baḥrānī outlines three positions found amongst the Shīʿa. It is not the status of the Qur'ān as revelation that is being discussed here (all parties affirm this), but its ability to provide guidance for action and performance:

1) The Uṣūlīs, unanimously according to Baḥrānī, claim that the Qur'ān is a text "on which one should act and rely" in legal matters (*al-ʿamal bihi fī l-aḥkām al-sharʿiyya waʾl-iʿtimād ʿalayhi*). Some even list 500 verses which are pertinent (*muʿallaq*) to legal matters.
2) Some Akhbārīs claim that not a word of the Qur'ān, even such seemingly clear statements as "*qul huwa allāh aḥad*" ("Say he is God, one", [Q.112.1]) are able to be understood correctly except with the aid of the explanation of the Imams (*tafsīr aṣḥāb al-ʿiṣma*), ie the *akhbār*.
3) Other Akhbārīs claim that one can understand the Qur'ān clearly without the need for the Imams' *tafsīr*. Baḥrānī states that according to this view, the exegete is "equal" with the Imams in "interpreting the difficult parts of [the Qur'ān] and clarifying the inclarities in it" (*taʾwīl mushkilātihi wa ḥall al-mubhamātihi*).

Baḥrānī does not discuss the Uṣūlī view any further, concentrating on the two Akhbārī views and describing them, rather disparagingly, as "between excess and negligence" (*bayn ifrāṭ wa tafrīṭ*). The debate here concerns which texts are the subject of exegesis: the first Akhbārī view asserts that the *akhbār* alone are to be interpreted, since *kitāb* is essentially incomprehensible, whilst those who hold the second view argue that both *kitāb* and the *akhbār* can be analysed. The central issue at stake is "Where does one look, *ab initio*, for the law—to the Qur'ān or to the *sunna* of the Imams?"

[42] *Ibid.*, p. 26–40.

The reason for the dispute amongst the Akhbārīs is, according to Baḥrānī, that the *akhbār* give no clear indication as to the correct position on this matter. The *akhbār* give differing advice to the Shīʿa concerning the relative accessibility of the knowledge found in these sources. Some exhort the Shīʿa to follow only the *tafsīr* of the Imams; others recommend recourse to The Book directly. Baḥrānī considers the *akhbār* supporting the first position to be more numerous.[43]

The first Akhbārī position is supported by five (suitably interpreted) Quranic verses and five reports from the Imams. Amongst the Quranic verses is:

> God is a sufficient witness between myself and yourselves, and those who know The Book. [Q13.43]

The Imams, when speaking about this verse, state:

> [By those who know The Book] He [God] means us.

The identification of elliptical phrases in the Qur'ān (such as "those who have knowledge in their hearts" Q.29.49 and "those expert in knowledge" Q.3.7) with the Imams is a standard element, perhaps a defining element, of Shīʿī exegetical writings. It is not surprising to find it utilised here. It is important to recognise that such evidence is, in effect, a *petitio principii*. The *tafsīr* of the Imams is used to justify recourse to the *tafsīr* of the Imams, but the Qur'ān could not be used as a proof by this group of Akhbārīs in any other manner. To appeal directly to a Quranic verse as proof of their view on the incomprehensibility of the Qur'ān without the *akhbār* would, of course, be a contradiction.

The *akhbār* which are marshalled in support of this view include the famous *thaqalayn ḥadīth* of the Prophet: "I have left you two weights: The Book of God and my offspring, the people of my house"; and the statement of ʿAlī: "The Qur'ān is the silent book of God and I am the speaking book of God". Such reports are said to demonstrate the indispensability of the *akhbār* when understanding God's revelation.

The opponents of this position cite "those *akhbār* which have come

[43] It is unlikely that conflicting *akhbār* were the real reason for this dispute, though Baḥrānī may wish to portray it as such. The underlying reason would be the vexed question of the relationship between the Imams and God: what was its nature and in what ways did it differ from the Prophet's relationship with God? On this, see Sachedina, *Messianism*, p. 17–25 and Momen, *Shi'i Islam*, p. 147–160.

[to us] concerning the comparison of the *akhbār* to the Qur'ān [in cases of contradiction, which advise] the adoption of that which agrees with the Qur'ān and the rejection of that which disagrees with it."[44] If one is to compare the *akhbār* to the Qur'ān, to determine which are accurate or non-*taqiyya* (as the Imams have recommended), then surely this would only be possible if one could understand the Qur'ān directly?

> The point of dispute is that, if one cannot understand a thing from [The Book] without their [the Imams'] *tafsīr*, then this denies the utility of comparing [the *akhbār* with The Book]. The reply is that there is no inconsistency here because their *tafsīr* is only an "account of God's intention" (*ḥikāya murād allāh*) and adopting their *tafsīr* is really adopting The Book. [*H*, 1, 30]

In the rather vague expression, "account of God's intention", Baḥrānī seems to assert that the text of the Qur'ān is open to a number of interpretations (in this sense it is not clearly comprehensible on its own). The *akhbār* from the Imams determine which of these interpretations is God's intended meaning. Hence the text of the Qur'ān can be read and analysed, but a definitive answer as to its meaning (ie its legal relevance) is impossible without the Imams' explanation, found in the *akhbār:*

> As for when there is no *tafsīr* from the Imams referring to [a particular interpretation of the Qur'ān], then it is obligatory to suspend one's judgement (*tawaqquf*). [*H*, 1, 30]

Without a *tafsīr*, one cannot make a ruling; one is forced to suspend making a decision. The process of *tawaqquf* is described in Chapter Three.[45]

What is clear from Baḥrānī's assessment of the first Akhbārī position is that it is not unsympathetic. He defends their view against possible attack and considers their view to be supported by more *akhbār*. This slippage (from describing the position, to supporting it) is also evident in his account of the second Akhbārī position—that the Qur'ān can be understood without the aid of the Imam's *tafsīr*. The second Akhbārī view is based upon four Quranic verses (once again, the *petitio principii* is obvious):

[44] Baḥrānī, *H*, 1, p. 30.
[45] See below, p. 105–112.

1) We have revealed The Book in which everything is explained. [Q16.89]
2) We have left nothing out of The Book. [Q6.38]
3) Those who seek knowledge can learn it [the Qur'ān] from them. [Q4.83]
4) Will they not consider the Qur'ān or are their hearts locked? [Q47.23]

Baḥrānī states that the first two verses are evidence that the *aḥkām* are to be found in the Qur'ān. However, they are not evidence that one can derive these directly from the Qur'ān, because "the verses in The Book which refer to legal rulings are, all of them, *mujmal* (without conditions), *muṭlaq* (unrestricted), *'āmm* (general) and *mutashābih* (unclear),[46] from which one cannot be guided except by recourse to the *sunna*".[47] Hence they are not indicators in themselves. The examples given here by Baḥrānī all exemplify the Imams' ability to explain unclear verses in the Qur'ān, such as the number of hills upon which Abraham was ordered to place portions of the four birds in Q2.260 (the number designated by the Imams was 10); or the number of battlefields upon which God helped his people in Q9.25 (the Imams declared it to be 80). These examples demonstrate the need for the *sunna*.

The third verse, Baḥrānī argues, must be taken in the context of the preceding verse, "If they [those who are ignorant of God's command] refer [their presumptions] to the Prophet and those in charge, then those who seek knowledge can learn it [ie the truth] from them [ie the Prophet and those in charge]". According to the Imams Bāqir and Riḍā, these verses refer to the Imams, and stipulate the need to submit to them. Hence they prove the reverse of what the second group of Akhbārīs claim: the verses prove that the Imams' *sunna* is essential to understanding the Qur'ān. The fourth verse does indeed prove that one should obey the orders of God, but it is general and does not give extensive details of this order.

From this it is clear that Baḥrānī favours the first Akhbārī position: legal rulings cannot be derived with any accuracy from the Qur'ān. To gain knowledge of the legal rulings, the *sunna* (encapsulated in the *akhbār* of the Imams) is essential.

[46] For an examination of the meaning of these terms, see Weiss, *God's Law*, p. 389–447 and Hallaq, *Legal Theories*, p. 45–47.
[47] Baḥrānī, *H*, 1, p. 31.

Baḥrānī's position is, though, more nuanced than the first Akhbārī position, as is evidenced by the closing paragraphs of the first section of M3.[48] He states that the true position on these matters (*al-qawl al-faṣl wa'l-madhhab al-jazl*) is that of al-Shaykh al-Ṭūsī who, in his *Tibyān*,[49] divides the verses in the Qur'ān into four categories:

i) those which God alone understands, and "it is not permitted for anyone to discuss them"
ii) those which are clear to anyone who knows Arabic (e.g. Q92.151)
iii) those which are *mujmal* (without conditions) and for which one needs the "explanation of the Prophet" (*bayān al-nabī*)
iv) those which have two possible meanings (*maʿnayn*). Only one is correct and in accordance with the practice of the Prophet and the sinless Imams.

This four-fold taxonomy is juxtaposed by Baḥrānī with a different taxonomy, given in a report from Imam ʿAlī. For Imam ʿAlī, verses can be divided into three categories:

1) those which a learned or ignorant person can understand
2) those which only one who is "pure in mind" can understand
3) those which God, his Prophets and "those steeped in knowledge" can understand.

Baḥrānī marries these taxonomies by stating that: first, al-Ṭūsī's second category (ii) is Imam ʿAlī's first 1); second, al-Ṭūsī's fourth category (iv) is ʿAlī's second 2). The explanation of this identity involves the fact that the only ones who are "pure in mind" are the Imams, and ʿAlī must have been referring to the Imams when he said these words; third, al-Ṭūsī's third category (iii) is ʿAlī's third category 3). That is, al-Ṭūsī's *mujmal* verses are described by ʿAlī as those verses which only God, his Prophets and "those steeped in knowledge" can understand. The final locution is, predictably, code for the Imams.

The Imams are the key to understanding two of ʿAlī's categories and two of al-Ṭūsī's categories. However, the Imams gain this status by different means. In ʿAlī's second category (al-Ṭūsī's fourth) they understand the verses because they are "pure in mind". In ʿAlī's third (al-Ṭūsī's third) category they understand them because they have inherited this ability from the Prophet:

[48] *Ibid.*, p. 32–35.
[49] Ṭūsī, *Tibyān*, 1, p. 5–6.

> No one understands [their meaning] except for God, his Prophets by his revelation to them (*al-waḥy ilayhim*) and the Imams due to inheritance (*al-wirātha*) from the Prophets. This is different from [Imam ʿAlī's] second category. [*H*, 1, 34]

Here we have two ways in which the Imams gained knowledge of the meaning of Quranic verses—first, through their having "pure minds", and second, through inheritance from the Prophets. These modalities of exegetical ability are quite different for Baḥrānī. In the first, the Imams interpret the Qur'ān in their capacity as sinless beings. In the second, their interpretation is part of the apostolic succession, of which the former Prophets and the later Imams are a part. For the believer, however, there is no need to distinguish between these two modalities. Though the process may be different, the believer follows the same course of action: adherence to the Imams' exegesis of the Qur'ān. Of course, the Imams' interpretation of the Qur'ān is to be found in their actions and words, the historical reports of which are the *akhbār*.

This leaves one category unaccounted for: the first category of al-Ṭūsī (i): those verses understood by God alone). Imam ʿAlī seems to have missed these out:

> Perhaps his [Imam ʿAlī's] neglect in mentioning the first category of the Shaykh is due to the rarity of their occurrence in the holy Qur'ān—they are restricted to the famous five;[50] or perhaps his intention is only to mention the types of verses which God has preserved from the machinations of those who wish to change [the verses in the Qur'ān]. [*H*, 1, 34]

The second of these possible explanations may be a reference to the Shīʿī belief that some verses in the Qur'ān had been expunged or altered by the Sunnis. Baḥrānī, it appears, considers some verses to have been "concealed" by God, to prevent Sunni attempts to alter them.[51]

In sum, then, of the four categories described by al-Ṭūsī (a taxonomy to which Baḥrānī pledges his allegiance), one is irrelevant (since it can only be understood by God) and two can be understood only through the *akhbār* of the Imams and the Prophet. Some verses can be understood by the believer without the aid of the

[50] A reference to those things known only to God mentioned in Q31.34.
[51] See above, note 1.

akhbār, but these are few and "general and unrestricted" (*mujmal wa ʿāmm*). An example of such a verse is given by al-Ṭūsī:

> You shall not kill those whom God has forbidden [you to kill] except [if you have] the right. [Q.9.151]

This verse is tautologous in that it states that one can only legitimately kill on those occasions when God has given permission. It does not tell the reader who one has the right to kill; for that one needs the *akhbār*. The verse, on its own, is merely an exhortation to obey God's rulings on killing.

Baḥrānī's position, then, is a compromise between the two Akhbārī positions notwithstanding his criticisms of them at the outset of M3.[52] There are verses which can be understood without the aid of the Imams' *tafsīr*. However, it is the first of the Akhbārī positions that is clearly the most influential, for the unmediated meaning of these verses is of little probative value (though of hortatory use in encouraging the believer to follow God's commands). The only sure means of gaining knowledge of the commandments of God (as opposed to mere *ẓann*) is through understanding the Quranic verses in the light of the *tafsīr* of the Imams. Textually speaking, this *tafsīr* is to be found in the reports of the Imams' actions and words—the *akhbār*, and in this way the *akhbār* remain the principal source of the law and maintain their position as having ultimate probative force in the derivation of the rulings of the Sharīʿa. In this, Baḥrānī can be seen to be in line with the Akhbārī position outlined by Samāhijī 100 years earlier when he stated:

> The *mujtahids* permit taking the clear meanings of the Qur'ān without the necessary agreement of the *ḥadīth* with it . . . The Akhbārīs do not permit taking the clear meanings of the Qur'ān, except when its *tafsīr* has come from them (peace be upon them), or when it agrees with their reports (*aḥādīthahum*). [*H*, 1, 29][53]

Baḥrānī himself mentions the two conflicting Akhbārī views in M12:

[52] It is puzzling that Baḥrānī criticises both the Akhbārī positions when his own view is so clearly a fusion of them. His criticism of the Akhbārīs recurs in M12 (*H*, 1, p. 170; on which, see below, p. 249). At other points he refutes Uṣūlī doctrines (such as those of ʿAllāma, and more recently, Shaykh Ḥasan and al-Shaykh al-Bahā'ī) and praises Akhbārī writers (such as Astarābādī and Jazā'irī). It appears that he is trying to outline an Akhbārī position, but avoid labelling it as such through fear of polemic.

[53] See Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 29.

> Deriving indicators is reliant upon The Book and the *sunna* alone for the Akhbārīs. Although there is dispute amongst the Akhbārīs. Some, such as al-Astarābādī, who was the rejuvenator of the school of the Akhbārīs in the later period, explained in his book, *al-Fawā'id al-Madaniyya*, that it is not permitted to do anything [ordered] in The Book without it being explained by the sinless ones (upon whom be peace). Others restrict this to clear verses, and still others go so far as to be almost like the Imams (upon whom be peace) in explaining the [meaning of] unclear verses. [*H*, 1, 169]

On this issue Baḥrānī stands squarely within the Akhbārī tradition of exegesis, favouring Astarābādī's position.

Shīʿīte discussions of the validity of *ijmāʿ* demonstrate a certain ambivalence. With juristic authority centred, in theory, upon the Imam, it is difficult to see how the consensus of the community (whether in the form of *vox populi* or the agreement of the scholarly elite) might have probative force if the Imam is absent. In Sunni works of *uṣūl al-fiqh*, the justification was based upon the report, "My community will not agree upon an error". Though this report was of less than certain authenticity, and therefore of dubious probative force, it was generally accepted that there were sufficient other reports, identical in meaning though not in words, which raised *ijmāʿ* to the epistemological status of certainty.[54] *Ijmāʿ*, then, was dependent upon the *sunna* for its legitimation. With the imitation of the structure of Sunni juristic works in the Shīʿī tradition, Shiʿites began to discuss the possible validity of the principle of *ijmāʿ*. The settled position by the tenth century AH/sixteenth century CE was that consensus was a proof as long as it included the opinion of the Imam. It was the inclusion of the Imam's opinion which ensured the consensus of a proof and not the consensus itself.[55] In the time before the *ghayba*, *ijmāʿ* was a proof if the Imam's opinion could be shown to have been included. Such early consensus was, however, difficult to verify. After the *ghayba* the problem was compounded by the Imam's absence, for his opinion was *de jure* unobtainable. Some jurists attempted to save *ijmāʿ* as a proof by saying that the unanimous opinion of the *mujtahids* must be a proof, since the Imam, though hidden from view,

[54] See Bernard, *L'accord unanime*, p. 13–16 (where Abū Ḥusayn al-Baṣrī argues that the traditions do not bring certainty, but are authoritative for guiding action); Hallaq, "Sunni Consensus", p. 438 and p. 444–448; Weiss, *God's Law*, p. 201–210.

[55] See Brunschvig, "Les *uṣūl al-fiqh* imāmites", p. 205 and p. 209; Calder, "Structure of Authority", p. 187–205; Sachedina, *Messianism*, p. 135–149.

must be a *mujtahid*. Others were reluctant to accept this reasoning, stating that the Imam may be present but unknown: there was a possibility of unknown *mujtahids* (*mujtahidīn majhūlīn*) in the community. *Ijmāʿ*, then, could not be a certain (*qaṭʿī*) proof; it could only be considered as presumptive (*zannī*). As we shall see, in Bihbahānī's theory of consensus, this does not necessarily rob *ijmāʿ* of its probative force, since if one accepts *zannī* proofs, one can also accept *al-ijmāʿ al-zannī*. Baḥrānī, however, does not accept *zannī* proofs, and hence he rejects *ijmāʿ* as a source of law, though this rejection is not unqualified.

The Shīʿī position is perhaps best summarised by al-Muḥaqqiq in a much cited passage included by Baḥrānī at the outset of the second section of M3:

> As for *ijmāʿ*, it is a proof (*ḥujja*) for us through the inclusion of the sinless one. [If the opinion of] one hundred of our jurists (*fuqahāʾunā*) does not include his opinion, then it is not a proof. If [his opinion] is included in merely two [scholars], then it is a proof, not because of their agreement, but because of his opinion [being included].[56]

Baḥrānī adds:

> So the proof is his opinion, not the agreement alone. The discussion concerning the power of such *ijmāʿ* to prove [elements of the law] is dependent unambiguously on a report which is attributed to the sinless one. [*H*, 1, 35]

In Sunni *uṣūl*, *ijmāʿ* is a proof because the Prophet had sanctioned the procedure as a means of establishing certainty in a matter which previously had been disputed. In Shīʿī *uṣūl*, *ijmāʿ* appears to be a convenient means of discovering the previously unknown opinion of the Imam, be he absent or present.

Baḥrānī then goes on the offensive. His first opponents are those who claim that *ijmāʿ* is a certain (*qaṭʿī*) source. This is not possible, he says, because it is difficult (*mutaʿadhdhir*) to verify (*taḥaqquq*) the Imam's presence, and because it is difficult (*ʿaṣīr*) to convene the scholars in such a way as to ensure the Imam's inclusion:

> It is known for certain (*yaqīnan*) that the scholars are dispersed and scattered (*tashattut al-ʿulamāʾ wa tafarruquhum*) across the area of the world. They are isolated in the countries of the Sunnis and they endeavour not to expose anyone [of them] in their beliefs and doctrines. [*H*, 1, 35]

[56] The passage is from Muḥaqqiq, *Muʿtabar*, p. 6.

The model of *ijmāʿ* that Baḥrānī refutes is that of scholarly consensus. His opponents consider it to form a certain indicator (*al-dalīl al-qaṭʿī*). Baḥrānī does not reject the *ijmāʿ* of the scholars because of its supposed elitism.[57] He rejects it on epistemological grounds alone. Theoretically *ijmāʿ* is invalid because of the Imams' (and the scholars') *taqiyya*. Practically it is impossible due to the Shīʿa being in diaspora. If the opponents were to argue that *taqiyya* is only a practical barrier, and hence *ijmāʿ* should retain its theoretical validity, Baḥrānī answers that to remove the cause of *taqiyya* (ie the oppression), removes the need for a source of law outside of the Imam's opinion. The Imam is only in hiding to prevent the further oppression of his community. It is important to note that Baḥrānī does not dispute that the Imam's opinion may be found amongst the scholarly elite, instead he argues that it is impossible to know that consensus has been reached.

Baḥrānī next states that he is refusing to discuss two issues normally associated with *ijmāʿ*:

1) Is there compulsion on the Imam to appear and correct the people (*raʿiyya*) when they agree upon an error? This issue is clearly linked to the Muʿtazilī-Imāmī argument concerning the obligation on God to provide the best (*al-aṣlaḥ*) for his people.
2) Does the Imam insert (*alqā*) his opinion amongst the opinions of the scholars to ensure that they do not agree upon an error? If this is so, should we not search the books of the scholars to discover those opinions which are not attributed to anyone in particular, for such opinions must be the opinions of the Imam? This rather quixotic procedure is attributed to "one of the moderns".

Baḥrānī's reason for not discussing these issues is unclear. He states, "It is not appropriate to incline towards them", that is, he appears to consider them unworthy of his time or comment.

Baḥrānī then makes his clearest statement on *ijmāʿ*:

> Counting *ijmāʿ* as an indicator [of God's law] is nothing more than simply calculating numbers . . . for if [the Imam] is known to be included, then there is no discussion or debate—it is called *ijmāʿ* and

[57] If Akhbarism was anti-hierarchical, as proposed by Newman and others (Newman, "Akhbārī-Uṣūlī Dispute, Part 2", p. 258–259), then one would expect this to be Baḥrānī's line of attack. However, his argument is purely epistemological and seems to have no specific implications for the authority of the scholarly elite.

> it is a proof. If [he is not known to be included], then it is *ẓann*. [*H*, 1, 36]

Since statements which are *ẓannī* have no probative force for Baḥrānī, *ijmāʿ* is not a proof.

There may be an indication of the Imam's agreement with the scholars in the form of a report (*khabar*), but in such cases, the scholars are merely following (correctly) the opinion of the Imam, as indicated in the *khabar*. For Baḥrānī, there is no independent validity to *ijmāʿ* and all the *akhbār* have the same epistemological value.

Baḥrānī does, however, recognise the probative force of consensus in certain circumstances:

> If a group of scholars, in the period close to the Imam, like the time of Ṣadūq, Kulaynī and the other masters of transmission, give a *fatwā* which we do not find in any report [from the Imam], and there is no report from the Imams which opposes it, then this is also certain (*yaqṭaʿu*) on account of the widespread knowledge that this is a proof and that the opinion of the Imam is included in the scholars' opinions . . . Because of this, a group of our scholars relate that when the texts appeared insufficient to the early generations on a certain issue, they resorted to the *fatwās* of ʿAlī b. al-Ḥusayn b. Bābūya.[58] [*H*, 1, 36–37]

The *ijmāʿ* of the early generations is also a certain proof because they were known to be acting on the basis of the Imam's opinion. However, it is only certain if there is no report from the Imam contradicting it. The opinion of the early luminaries is considered authoritative because it reflects the unrecorded opinion of the Imam. Once again the practice of the early community is prioritised over the later (innovative) ideas of al-ʿAllāma and his followers.

For Baḥrānī, then, *ijmāʿ* is a text which is worthy of interpretation, but only the *ijmāʿ* of the early generations, and only then when there is no report from the Imam which contradicts it. The *akhbār*, even in their silence, have the ultimate arbitration role in the validation of the *ijmāʿ*. In fact *ijmāʿ* is not an independent means of discovering the Imam's opinion. The Imam's authority continues—it is merely presumed that the early community lived in obedience to him after the occultation. The practice of the community is a reflection of the Imam's opinion. This bears some resemblance to the justification

[58] ʿAlī b. al-Ḥasan b. Bābūya (d. 329/949), father and teacher of Shaykh al-Ṣadūq.

of the *ijmāʿ* of the Companions in Sunni *fiqh*, more specifically the Medinan *ʿamal* of Mālikī doctrine.[59]

The *ijmāʿ* of the later generations, however, is not authoritative. The problem of "unknown *mujtahids*" prevents *ʿilm* from emerging from such consensus. Baḥrānī quotes, and explicitly concurs with, Ḥasan b. Shahīd II's judgement:

> The true position is that there is no way of knowing *ijmāʿ* has occurred, except in the period of the Companions [to the Imam—*ṣaḥāba*]. At that time, the believers were small in number and it was possible to know them all.[60] [*H*, 1, 37]

In the final part of his examination of *ijmāʿ*, Baḥrānī examines the *akhbār* which are claimed by some to prove the validity of the principle of *ijmāʿ*. The three reports relate to statements by the Imams in which they recommend subjecting conflicting reports to the consensus (signified by terms such as *mā ajmaʿa al-muslimūn, al-mujmaʿ ʿalayhi* and *ittifāq al-jamīʿ*). Baḥrānī replies that the most these *akhbār* prove is that *ijmāʿ* can be employed as the deciding factor on occasions of conflict within the *akhbār*. It does not validate the principle of *ijmāʿ* upon the *fatwā* of a *mujtahid*. This "*ijmāʿ* upon one of two conflicting reports" is acceptable to Baḥrānī and he designates it *al-ijmāʿ fī'l-akhbār*. It is *al-ijmāʿ fī'l-fatwā* which he considers to be "an invention and innovation of the Sunnis". Indeed *al-ijmāʿ fī'l-akhbār* was practised by al-Shaykh al-Ṭūsī himself (prioritising the early generation again). On *al-ijmāʿ fī'l-fatwā* Baḥrānī states:

> In general, there is no ambiguity or doubt that there is no means of proving [the validity] of this *ijmāʿ* in *kitāb* or *sunna*, and this [practice] is merely following the whims of Sunnis and their innovations. However, all of our scholars have negligently followed them in this practice, just as they have followed them in all of their *uṣūl*, in contradiction to the *akhbār*. [*H*, 1, 39]

Consensus, then, for Baḥrānī, is only valid:

1) with respect to the opinion of the early generations (though this is, in effect, a preservation of the Imam's own view)
2) for the determination of the correct ruling in a case of contradiction between the rulings contained in two or more *akhbār*.

[59] See Schacht, *Origins*, p. 61–73 and Hasan, *Ijmaʿ*, p. 98–101.
[60] Ḥasan b. Shahīd II, *Maʿālim*, p. 242.

Excepting such circumstances, the consensus of the scholars (and this is the only type of consensus entertained by Baḥrānī) does not constitute a text worthy of interpretation, because it does not bring certainty as to the Imam's view. It is rejected, then, on purely epistemological grounds.

Bihbahānī's Theory of the Textual Sources of the Law

Baḥrānī's theory of the probative force of the textual sources of law rested upon a series of binary oppositions: the *akhbār* are either, *in toto*, sound, authentic (and hence have potential probative force) or they are weak and religion is ruined; either the *akhbār* are essential to understanding the Qur'ān or they are superfluous (and hence interpreting the text is equivalent to arrogating oneself to the role of Imam); either there is certainty of the Imam's inclusion in a consensus (and hence the Imam's words are the proof) or there is only the possibility of his inclusion (and hence the community is basing its ruling on mere conjecture). That he advocates the first position in all of these antithetical pairings should not be surprising, bearing in mind the epistemological underpinnings of his legal theory. Bihbahānī's epistemology is more sophisticated in that there is a sliding scale from doubt to certainty, and hence a recognition of possible probative force when there is an absence of certainty and only probable authenticity.

As mentioned in Chapter One,[61] Bihbahānī's work of *uṣūl al-fiqh* is less systematic than Baḥrānī's Prologues. A direct comparison between his theory and that of Baḥrānī requires some selection. Bihbahānī discusses the potential of the Qur'ān to be used as a proof in the deduction of the law in FH29 entitled *fī ḥujjiyyat al-qur'ān*. He begins by criticising the Akhbārī view:

> The Akhbārīs deny [the probative force of the Qur'ān] absolutely. This is most strange because this proof is the speech of God. The speech of the Prophet and the Imams is only a proof because it elucidates (*kāshif*) the speech of God the Most High. [*FH*, 283]

This, however, is only one of the views attributed to the Akhbārīs by Baḥrānī, though admittedly it is near to Baḥrānī's own position.[62]

[61] See above, p. 13–14.
[62] See above, p. 48.

It is possible that the view that one could interpret the Qur'ān directly, without the aid of the *akhbār*, was a minority Akhbārī view, or more likely, such a view was too close to Bihbahānī's own Uṣūlī view, and not as useful in his polemic. Bihbahānī asks rhetorically, "How can one decide that it is not a proof on the basis of what one presumes [to be the meaning of] an isolated report? Furthermore, if [this report] is a clear text (*naṣṣ ṣarīḥ*) which proves the inability of the Qur'ān to act as a proof, how is it permitted to act upon it?". Bihbahānī argues, then, that the reports which seem to cast doubt on the probative force of The Book are isolated, and hence they cannot challenge the Qur'ān, which appears to have *mutawātir* status.[63] Even if the report clearly indicates that the Qur'ān has no probative force in itself, it still cannot prove this view because it is an isolated report.

Bihbahānī employs a number of arguments to demonstrate his position:

1) *Akhbār* based arguments: The Imams have said that any *ḥadīth* which does not agree with the Qur'ān should be "thrown against the wall". They also said, "If you do not find evidence (*shāhid*) from the Qur'ān for a report, do not act upon it." The point here is that the Imams clearly considered the Qur'ān to be an independent source which should be interpreted separately from the *akhbār*. If they did not have this view, then comparison would be impossible.
2) *sunna*: The Prophet said he left two weighty objects (*thaqalayn*): the Qur'ān and his family. By saying this he made them both proofs until the day of resurrection. Interestingly Baḥrānī utilised this Prophetic report to prove the exact reverse.[64]
3) Shī'ī tradition: All the *fuqahā'* of the Shī'a, Bihbahānī claims, have seen the Qur'ān as an independent source which has probative force. Here he implicitly excludes the Akhbārīs from the elite category of the *fuqahā'* of the Shī'a.
4) *Reducto ad absurdum* argument: The Qur'ān is certainly the word of God. Debating whether it is a proof is, in effect, debating whether or not God's word is authoritative and worthy of obedience (*ittibā'*). To contemplate (*ta'ammul*) such a possibility is to

[63] See below, p. 65–66.
[64] See above, p. 49–50.

negate the difference between the unbeliever and the believer. Such a theologically absurd suggestion is unthinkable.

5) Which is of more certain validity, the text of the Qur'ān or the text of a report? In terms of both content (*matn*) and provenance (*isnād*) the Qur'ān is surely more authoritative, and hence should hold power over the reports.

The final three points, run together in a prosaic manner by Bihbahānī, exemplify the difference between Baḥrānī and Bihbahānī. For Baḥrānī, the *akhbār*, even isolated reports, are of certain validity and of equal epistemological status with the Qur'ān (perhaps they hold an even greater status, bearing in mind his elliptical comments concerning the authenticity of the text of the Qur'ān).[65] For Bihbahānī, the Qur'ān, both in content and provenance, holds an incontrovertible position whereas the status of the *akhbār* is debatable.

Baḥrānī divided the verses of the Qur'ān into categories determined by the believer's ability to understand their meaning. Bihbahānī divides them according to the level of indicative potential (*dalāla*)[66] of the verses:

i) those verses of certain indicative force (*qaṭ'ī*)
ii) those verses of probable indicative force (*zannī fi ghāyat al-quwwa*).
iii) those that are *zannī* and oppose an indicator of similar indicative force (ie a *zannī* indicator) in the *akhbār*.

There are two interesting differences between Bihbahānī and Baḥrānī on this division of Quranic verses. First, Bihbahānī does not consider the possibility of a certain indicator from the *akhbār* contradicting an indicator (certain or probable) from the Qur'ān. This implies that he does not consider it possible for the *akhbār* to give certain indicators, or at least, not certain indicators which contradict the Qur'ān (I return to this later). Second, the decisive factor in classifying the verses was, for Baḥrānī, the method by which the Qur'ān's meaning might be discovered directly: (through the Imams

[65] See above, n. 52.

[66] A distinction needs to be made between *dalāla* and *ḥujjiyya*. In Bihbahānī's writings I take *dalāla* to refer to the potential of a text to provide a *dalīl* or an indicator of God's law. *Ḥujjiyya*, on the other hand, refers to the epistemological status of a text *vis-à-vis* the law. A text may contain a *dalīl*, and it may be obvious and certain what this *dalīl* implies for the law (ie the text may have *dalāla qaṭ'iyya*), but if the text itself is of uncertain probative force (ie it does not have a strong *ḥujjiyya*) due to some other weakness, then it cannot contain an indicator of God's law.

and Prophet), or not (since the meaning was known only to God). For Bihbahānī, the criterion is the clarity of indication of the text; he considers some verses to have a meaning which is simultaneously present and unclear. Verses are classified according to the manner in which they aid (or mitigate) the discovery of a ruling; their utility to the *mujtahid* is the deciding factor. That the verses have indicatory potential is not questioned; it is the clarity of that indicatory potential which is debated.

Bihbahānī analyses the third category in some detail. He concludes that the Qur'ān must overrule the report because, "it [the Qur'ān] is unambiguously understood (*mafhūm*) [to be] the words of the Lawgiver, which contradict the implication of words, of which we are uncertain whether [or not] they come from the Lawgiver, for they may come from the transmitter." The Qur'ān, then, even if its meaning is unclear, overrules the *akhbār*, for the latter are epistemologically inferior to the former.[67]

Sometimes the Qur'ān indicates a ruling in a clear, unambiguous manner, and the reader is certain as to the Lawgiver's meaning (as in category i) above). At other times the Qur'ān is less clear in what it indicates, but there is always one meaning which is more likely than the others (category ii) above). In yet other cases, there is a probable meaning, which contradicts a probable meaning of a report from the Prophet or the Imams. In such cases the Quranic probable meaning overrules the report's probable meaning, due to the former's superior epistemological status:

> It is possible that it is the transmitter's words, and that it is not from the Imam at all, or that it is from him but is transmitted by meaning only. [*FH*, 285]

This is a reference to the ways in which a text can be transmitted—by the exact words or by the meaning. Though the Imams permitted "transmission by meaning" (*al-naql bi'l-ma'nā*) as a dispensation (*rukhṣa*), and indeed Bihbahānī considers this mode of transmission to be the most common, they only permitted it if the transmitted meaning did not contradict the certain or probable meanings of verses within the Qur'ān. There is, then, no hindrance to understanding the Qur'ān directly, without the Imam's *tafsīr*, and without the *akhbār*. For "there is no doubt that even a child knows that in

[67] See above, p. 61.

'do not come nigh to adultery' [Q17.12], God means that adultery is forbidden."

Bihbahānī then tackles three arguments, presumably used by Akhbārīs to justify their view that the Qur'ān cannot be understood separately from the Imam's *tafsīr*:

1) The Imams forbade *tafsīr bi'l-ra'y*, by which they meant *tafsīr* without reference to the *akhbār*. Bihbahānī replies that this is a reference to those who interpret without any contextualisation of the Quranic verses. It is possible to interpret the Qur'ān directly and it not be *tafsīr bi'l-ra'y* because "perhaps in the situation of the revelation of the verses (*ḥāl nuzūl al-āyāt*), there is evidence (*qarā'in*) of the meaning [of the verse]." So Bihbahānī's answer is that *tafsīr* without any external aid is forbidden, but the essential exegetical aid need not be the *akhbār* of the Imams.
2) Assigning certainty to the meaning of a verse excludes the possibility of there being an "interpretative report" (*ḥadīthan yafassiruhu*). Bihbahānī replies that it does not; it merely implies the rejection of a "report which opposes what the Qur'ān indicates" (*madlūl al-qur'ān*). This is a reference to the *tarjīḥāt*—the ways in which a *mujtahid* can decide between conflicting rulings.
3) Some have argued that the obvious meaning of the Qur'ān (*ẓāhir al-qur'ān*) has no probative force, because the Qur'ān we have is not the original document (*ṣarīḥuhu*). Since the Qur'ān is corrupt, so the argument goes, we must concentrate upon the *akhbār*, since they are uncorrupted. Bihbahānī replies that there is indeed corruption in the text of the Qur'ān, but that this does not impede legal understanding of the text.[68] There is, admittedly, dispute amongst the Qur'ān reciters and the early Sunnis as to whether or not one might act on the basis of a transmission of the Qur'ān outside of the accepted seven (or ten) variants, but the Shī'a position on these matters is made clear from the *akhbār*:

> It is clear from the many *akhbār* that [corruption] occurred . . . Our position is that it is permitted to act upon one of the famous seven variants [of the Qur'ān]. The indicator for this position is the statement, or rather the order, of the Imams that "You must recite as the people recite until the day of the return of the *qā'im*". [*FH*, 286]

[68] This supports Lawson's statement that the Shī'ī view of the Qur'ān is that it is "simultaneously flawed and inerrent—inerrant for the purposes of *fiqh* but deficient as an explicit guide to the recognition of the locus and bearer of *walāya*." Lawson, "Notes for the Study", p. 295.

If two of the seven readings give different rulings, then, according to Bihbahānī, one is permitted to choose whichever ruling one desires (*ayhumā shā'a*).

Hence the Qur'ān may not be uncorrupted, but it still has probative force. In a rather self-contradictory manner, the reason for its continued probative force as a source of law independent from the *akhbār,* is that the Imam himself (in a report) said that this was so. For Bihbahānī, as for Baḥrānī, the probative force of the Qur'ān is proven by a report (ie a *khabar*) from the Imam.

In sum, then, for Baḥrānī, the Qur'ān cannot be understood in any legally relevant sense except with the hermeneutical aid of the *akhbār*, the *tafsīr* of the Imams. For Bihbahānī, the Qur'ān is an entirely separate source of rulings—indeed it can act as a criterion for determining the validity and authenticity of a report. It need not be interpreted solely in the light of the *akhbār*, though there is a need for hermeneutical aid (such as the circumstances of revelation) in the pursuit of full understanding. The problems surrounding the authenticity of the Quranic text do not mitigate Bihbahānī's position, since the Imam has legitimated the use of any of the seven variants of the Qur'ān when deriving legal rulings.

What Bihbahānī has demonstrated to his own satisfaction is the probative force (*ḥujjiyya*) of the Qur'ān as a source of law. That is to say, if understood correctly, the Qur'ān, or more accurately verses from it, act as a proof (*ḥujja*). The means whereby it might be interpreted correctly—that is the hermeneutic through which the Qur'ān should be understood—is discussed below in Chapter Four.[69] The central point is that, as a proof, a Quranic verse provides an indicator (*dalīl*) of the law. These indicators can be obvious (*ẓāhir*) and hence certain (*qaṭ'ī*), but in many cases they are less than obvious. In such circumstances, the text is authoritative, but what the text indicates is unclear and hence the subject of personal opinion (*ẓann*). This distinction between the probative force of the text as a source of law, and the ruling which the text indicates, is crucial for Bihbahānī. Whilst the former is established in the case of the Qur'ān, the latter remains to be demonstrated on a verse by verse basis. It is quite

[69] See below p. 164–181.

possible to accuse Bihbahānī of casuistry here. One might argue that there is little difference between saying that a text has probative force, but what it proves is a matter of dispute and uncertainty, and saying that the probative force of a text is disputed and uncertain, but for Bihbahānī the distinction is highly significant for he claims that the probative force of the text is known (*maʿlūm*), and hence it has the potential to provide certain indicators of the law. If the probative force of the text is less than certain, then under no circumstances can it provide certain indicators. Even if what the text indicates can be ascertained with certainty, the ruling which the text indicates will remain less than certain because the text from which it is drawn is less than certainly authentic.

For most Muslim legal theorists, Bihbahānī included, other texts which achieve the level of certainty of the Qur'ān are not numerous. Apart from the Qur'ān and certain reports from the Prophet (and for Shīʿī jurists, from the Imams also), most texts are of less than decisive probative force. It is clear that, for Bihbahānī, some of the *akhbār* have gained the status of certain authenticity, though he gives no indication as to their number in *FH*, or the means by which they obtain this status. He does use the term *mutawātir* to describe some reports (such as the *thaqalayn* report of the Prophet), but unfortunately he does not explain how the process of *tawātur* operates within the context of his legal theory. One is left to assume that it has a meaning commonly ascribed to it in Muslim legal writings, summarised by Weiss:

> According to the theory [of *tawātur*], any text that was transmitted on a scale wide enough to preclude the possibility of collaborative fabrication had to be authentic.[70]

The debates concerning how wide such a scale has to be do not seem to concern Bihbahānī, at least not in *FH* or *FJ*.

It is texts which fail the test of *tawātur* which occupy Bihbahānī's attention. The Qur'ān and an unspecified number of *akhbār* are *mutawātir*; the rest of the *akhbār* are known as *khabar al-wāḥid*. Literally *khabar al-wāḥid* means "report of one" or an isolated report. This nomenclature is not to be understood literally. A *khabar al-wāḥid* is not only a report transmitted by one person, but refers to all reports which fail the test of *mutawātir*, as is clear from the central late Shīʿī *uṣūl* text of Ḥasan b. Shahīd II:

[70] Weiss, "Primacy", p. 89.

> *Khabar al-wāḥid* is that which has not reached the level of *tawātur* whether its transmitters are many or few. Its subject matter is not accorded the status of knowledge (*ʿilm*) in itself.[71]

For Bihbahānī, texts which constitute potential indicators of the *sunna* are divided into *mutawātir* and *khabar al-wāḥid*. The probative force of the former is not questioned, not even discussed, in *FH* since their authenticity is as certain as that of the Qur'ān. The issue which Bihbahānī turns his attention to with regard to these texts concerns establishing the circumstances under which a report which has failed the test of *tawātur* can act as a proof. How does one establish the *ḥujjiyya* of a *khabar al-wāḥid*, and what sort of *ḥujjiyya* is it?

Bihbahānī endeavours to establish the probative force of the *khabar al-wāḥid* category. It is essential to bear in mind that he is not seeking to establish *khabar al-wāḥid* as a decisive source of the *sunna*, with comparable probative force to the Qur'ān and the *mutawātir sunna*. Rather, in line with his epistemology outlined in Chapter One, he hopes to establish *khabar al-wāḥid* as texts worthy of consideration in the process of making a ruling—the process known as *ijtihād*. This is not to say that they are to be the only texts entertained in this process or that they will be the most influential of those texts. Bihbahānī seeks to demonstrate that *khabar al-wāḥid* has probative force, but that this force, relative to other proofs, may be weak or strong. Baḥrānī described the *akhbār* as, *in toto*, sound, and hence of equal probative force. The problem of conflicting proofs (*ḥujaj*), or more accurately conflicting *dalīls* found in the proofs, can, for him, only be explained by *taqiyya*. Bihbahānī has a more sophisticated theory, stating that *akhbār* are of differing degrees of probative force because they have differing degrees of authenticity. The means whereby such *akhbār* might be reconciled, or rather the *dalīl* of one *khabar* might be reconciled with the *dalīl* of another, is a matter of hermeneutics, and does not strictly concern establishing a *khabar* as having probative force.

It is generally the case that, for Muslim writers, the probative force of any potential proof of the law is established by three separate criteria: provenance (or coherence of *isnād*—*siḥḥa*), extent of dissemination (*shuhra*) and dogmatic validity of content (*matn*/*maʿnā*). That the first two of these criteria became the most common means of establishing (or disproving) the historical authenticity and hence

[71] Ḥasan b. Shahīd II, *Maʿālim*, p. 261.

the probative force of reports is evidenced by the proliferation of works of *al-jarḥ wa'l-taʿdīl* and *rijāl*, and the extensive discussions concerning *khabar al-wāḥid* and the meaning of *tawātur* in works of *uṣūl al-fiqh*. As we have seen, Baḥrānī does not concern himself with the first two criteria, as he considered all the *akhbār* to be historically accurate and hence of potential probative force. As we shall see, his means of reconciling contradictory *akhbār* relies almost exclusively upon the content (*matn*) of the reports.

Bihbahānī begins FH10, entitled *ḥujjiyyat al-khabar al-wāḥid*, by stating that *akhbār al-āḥād*, due to their lack of *shuhra*, give rise to *zann* not *ʿilm*. By this he means that their authenticity (ie whether the event described in the report happened or not), and hence their probative force (ie their ability to act as a proof of God's law) is less than certain. Furthermore, some jurists have disputed whether a proof which is less than certain is admissable. "The dispute concerning the probative force of [*akhbār*] like *akhbār al-āḥād* is well known".[72] Certain indicators only come from certain proofs, and only texts of certain authenticity (ie the Qur'ān and *mutawātir* reports) can act as certain proofs. It is clear that in discussing *khabar al-wāḥid* Bihbahānī is dealing exclusively in *zann*. Whilst Bihbahānī is keen to demonstrate that *khabar al-wāḥid* can be used as a proof, it is a proof of lower epistemological status than, say, the Qur'ān. For Baḥrānī, since there is no recognised distinction between *mutawātir* reports and *akhbār al-āḥād*, they occupy the same epistemological ground.

That *khabar al-wāḥid* should be considered a proof is established by three arguments:

1) The fact is, Bihbahānī states, the door of knowledge is closed, and therefore jurists have to operate with *zann*. The *zannī* nature of *khabar al-wāḥid* is not in itself a bar to it being considered as a proof.
2) *Ijmāʿ* (the probative force of which is discussed below[73]) has been obtained on the basis that *khabar al-wāḥid* can act as a proof: "it is only clear from *ijmāʿ* that [*akhbār al-āḥād*] have probative force in general, not that every *khabar al-wāḥid* is a proof. Rather, *ijmāʿ* has been reached that not all [*akhbār al-āḥād*] are proofs".[74] Hence a *khabar al-wāḥid* can act as a proof, but will not do so in every case. Its probative force is always dependent, first, upon the relative force of the other *akhbār* associated with the matter in question; second, Bihbahānī stipulates that the transmitters of the *khabar* be "trustworthy" (*thiqāt*). This second factor exemplifies the difference between *shuhra* and *isnād*. Whilst *khabar al-wāḥid*, by definition, has failed the *shuhra* test, it has not necessarily lost all chance of being a proof. If it has a coherent provenance (*siḥḥa*) then it may yet be a proof.
3) Q49.6: "If a sinner comes to you with some news, ascertain its truth." For Bihbahānī, this verse demonstrates the reverse also: if someone who is not a sinner comes with news, one need not ascertain its truth: one is permitted to believe the news immediately. Hence a report with a sound *isnād* can be accepted.

[72] Bihbahānī, *FH*, p. 141.
[73] See below, p. 69–85.
[74] Bihbahānī, *FH*, p. 141.

Bihbahānī summarizes the results of this proof in the following passage:

> It is clear from the verse and from the *ijmāʿ* which is claimed by al-Shaykh al-Ṭūsī in *al-ʿUdda* that there is a condition of justice (*ishtirāṭ al-ʿadāla*). But this is not *ʿadāla* as the author of the *Madārik* and his followers understand it to be. [They say] that the *khabar* of one who is not just is not a proof under any circumstances. Rather, the verse means that action on the basis of a report from one who is not just is [only valid] after *tathabbut*[75]... the condition of justice is a condition of acting on the *khabar* without the need to perform *tathabbut*. [*FH*, 142]

Whether this clarifies the problem is debatable. A *khabar al-wāḥid* can be either *ṣaḥīḥ* (that is, made up of trustworthy transmitters in a coherent *isnād*), or less than *ṣaḥīḥ* (that is, *muwaththaq, ḥasan* or *ḍaʿīf*). The former can be a basis for action—that is, it has the potential to be a proof. The latter may also have the potential to be a proof, but only when the *akhbār* within the category have been tested further by a process known as *tathabbut*.

The two immediate issues that arise from this position concern the meanings of *ʿadāla* (justice) and *tathabbut* (confirmation). With regard to the first Bihbahānī states:

> *Ẓunūn* [plural of *zann*] are sufficient for establishing justice, which is a condition [of *siḥḥa*—the reader is referred to passages where Bihbahānī argues for the permissibility of acting on *zann*][76]... generally speaking,

[75] See below, p. 71 for a definition of this term.
[76] I have summarised these arguments above, p. 24–25.

> the crucial point in [*'adāla*] is based upon *ẓunūn* . . . the sufficiency for *'adāla* of *ẓunūn* is due to the fact that if it was not sufficient, then the door of responsibility (*bāb al-taklīf*) would necessarily be closed. [*FH*, 142]

One discovers a transmitter to be just or trustworthy through consulting the books of *rijāl*. The evidence culled from these books establishes his probity. One does not, however, need to know for certain that he was just; one only needs *ẓann* that he was so. Since *khabar al-wāḥid* is only of *ẓannī* probative force, and since the indicator drawn from it acts as a *ẓannī* indicator, it would be logically inconsistent, Bihbahānī argues, to demand *'ilm* of the transmitter's probity. The probative power of the individual report will vary according to the number of times *ẓann* has encroached upon the process. *Ẓann* afflicts the *khabar al-wāḥid*, but it can also afflict the determination of the probity of the transmitters in the *isnād* (and also in the interpretation of the text itself).[77] It is the varying levels of certainty that are juggled by the *mujtahid* in the derivation of a ruling. This procedure, whereby a *khabar al-wāḥid* which is *ṣaḥīḥ* is considered to be a proof, is, Bihbahānī proclaims, "the principle of the *fuqahā'* through time and in different locations until the time of the author of the *Madārik*."[78]

From this criticism, it becomes clear that Bihbahānī is attempting to make out a middle way between the extreme textualism of the Akhbārīs and the extreme rationalism of Uṣūlīs such as the author of *Madārik al-aḥkām* (Muḥammad b. 'Alī al-'Āmilī known as Ṣāḥib al-Madārik, (d. 1009/1600)). The former consider all *akhbār*, including *khabar al-wāḥid*, to be proofs of the divine law; they are all equally valid. The latter consider all *khabar al-wāḥid* to be weak and therefore ineffectual as proofs. Bihbahānī's position is that they are proofs, but *ẓannī* proofs. They have to be weighed (*tarjīḥ*) by the *mujtahid*. The ruling (*ḥukm*) to which the indicator (*dalīl*) within a report points, is only to be adopted if it is the most probable of the different indicators. Such *akhbār* texts are worthy of interpretation, but not necessarily decisive texts in the *mujtahid's* search for a ruling.

What, then, of the other *khabar al-wāḥid*—those that are categorised as *muwaththaq*, *ḥasan* or *ḍa'īf*? For the first two at least, there is also a possibility of them obtaining probative force. They can obtain this

[77] See, for example, below, p. 173.
[78] Bihbahānī, *FH*, p. 143.

force by the process of *tathabbut*. The means of *tathabbut*—that is, the means whereby a *khabar al-wāḥid* which is *muwaththaq* or *ḥasan* can be utilised as a proof—are listed in FH22. They constitute a list of tests for the transmitters of a *muwaththaq* or *ḥasan* isolated report. The more of these texts the transmitters pass, the greater the *ẓann* of the *khabar al-wāḥid*. The tests number around 50 (around 50 as some collapse into one another). I give a selection here:

> Amongst the causes and indicators [of *tathabbut*] are:
> that the transmitter be one, about whom they say, "He is trustworthy in *ḥadīth*" (*huwa thiqa fī'l-ḥadīth*)
> that he be one about whom they say, "I relate from him"
> that he be one about whom they say, "There is no problem with him" (*lā ba's bihi*)
> that he be one about whom they say, "There is no problem in his doctrine or his transmission" (*lā ba's bi-madhhabihi aw bi-riwāyatihi*). [*FH*, 225]

If all of the transmitters in the *isnād* of a report are described in this manner, then the report is *ṣaḥīḥ*. Bihbahānī is concerned with those reports where this is not the case—where some of the transmitters are described in this manner, but not all. This list is a sort of code, a means whereby the terms utilised by *rijāl* authors might be understood and used to strengthen a *khabar al-wāḥid* through shoring up the credentials of the transmitters. This process will not move the report out of the category of *muwaththaq* or *ḥasan*, but it will entitle it to be considered as a proof. The procedure, however, is called *al-tathabbut al-ẓanniyya*: it only makes the probative force of a report more probable; it does not make it a certain proof. Hence Bihbahānī states:

> From what has been said, it is clear that the *muwaththaq* [report] is a proof . . . due to its attainment of *al-tathabbut al-ẓannī* . . . As for *al-ḥasan*, many of them are proofs and *al-tathabbut al-ẓannī* makes this clear . . . this method is the method of the *mujtahids*, past and recent, with the exception of only a few. [*FH*, 143]

By these means, *khabar al-wāḥid* which are not *ṣaḥīḥ* become potential proofs, albeit of a weak (perhaps the weakest) kind, and gain only a low probability of being indicators of the divine law.

Finally, there is the category of *ḍa'īf*—are there any means whereby a *khabar al-wāḥid* which has a highly defective *isnād* can gain probative force? Surprisingly, the answer to this question is also in the affirmative. The weak *khabar al-wāḥid* can have its defective *isnād*

"repaired" (*injibār*) through it being demonstrated that the ruling to which the report's indicator points, was followed by the Companions of the Imams. The weak *khabar al-wāḥid* can become a proof, not through the strengthening of the *isnād* (as with *muwaththaq* and *ḥasan*), but through an examination of its contents (*matn*) and the transmitters' conformity with early Shī'ī practice.

Bihbahānī mentions this process in FH10 saying, "The report which has been 'repaired' by the actions of the Companions is stronger than *ṣaḥīḥ*".[79] He devotes a whole section to the issue in *FJ*, realising perhaps that he has not explained the process fully in *FH*. FJ31 is an extensive examination of how a weak *khabar al-wāḥid* can be "repaired". The process of comparing the report's ruling is termed *shuhra* by Bihbahānī (linked with but not identical to the *tawātur* criterion). By this he means that the ruling was well-known (*mashhūr*) amongst the Companions. Bihbahānī says that "All who have considered *khabar al-wāḥid* to be a proof, both ancient and modern, have agreed that the weak report, repaired by *shuhra* [amongst the Companions], and by mechanisms like this, is a proof".[80] The "ancients" considered the repaired report and the sound report to be equal. The "moderns" consider the repaired report to have a greater probative force, and in cases of conflict, the repaired report overrules the sound *khabar al-wāḥid*.

Bihbahānī considers Muḥaqqiq and 'Allāma to have agreed with such a position, and "All the writings of the *fuqahā'* are based upon this principle".[81] Bihbahānī himself considers the position of the "moderns" (ie that the repaired report is stronger than *ṣaḥīḥ*) to be of "greater utility" (*azyadu fa'ida*). Bihbahānī's opponents here are not Akhbārīs but extremist Uṣūlīs (he explicitly mentions the author of the *Madārik* again). They deny probative force to a repaired report because they consider *khabar al-wāḥid* to be a proof only if it has a sound *isnād* (ie the *'adāla* condition) or if it is confirmed by some other epistemologically stronger source (such as the Qur'ān or *sunna mutawātira*—a process known as *tabayyun*). "God has elucidated one of two ways to accept a report—*'adāla* and *tabayyun*", they argue.[82]

Bihbahānī's position is that *'adāla* and *tabayyun* are not the only

[79] *Ibid.*, p. 143.
[80] *Ibid.*, p. 487.
[81] *Ibid.*, p. 488.
[82] *Ibid.*, p. 489.

means by which an isolated report can become a proof. There are others, in particular, reparation (*injibār*) for reports that are less than sound. There appears to be no reason why *ḥasan* and *muwaththaq* reports may not also be repaired, however, Bihbahānī discusses only *ḍa'īf* isolated reports. *A fortiori* it would appear that they must be capable of being "repaired". The opponents use two distinct arguments in their refutation of *injibār*. First, they claim that the practice of the Companions does not necessarily reflect the practice of the Imams, that is, there is a less than certain link between the two. Hence a *khabar munjabir* cannot be a proof, whereas validation of a report by *tabayyun* or *'adāla* confers a higher epistemological status upon that report, making it a more convincing indicator of a ruling. Bihbahānī's reply is that, in the case of *tabayyun*—that is, confirmation by another (authentic) text—certainty is obtained:

> There is no doubt that *tabayyun* achieves certainty (*al-yaqīn*) without [need of] *'adāla*, which otherwise would be a condition [of granting probative force]. [*FJ*, 489]

However, in the case of *'adāla* being used as a means of obtaining the probative force of an isolated report, it is less than certain. He refers the reader back to the discussion in *FH*, where he demonstrates that ascertaining the probity of a transmitter is, in itself, an uncertain business.[83] Under the best circumstances it leads only to *zann*, hence the indicator is only ever *zannī*, and the ruling derived from the report is also only ever *zannī*. However, for Bihbahānī, the lack of epistemological certainty is not a cause of lament, but is to be embraced by the *mujtahid* in his search for a ruling.

If *zann* infects *'adāla*, then the fact that *zann* also afflicts the equation of early practice with the Imam's position does not, in itself, discount the report as a potential source of law: it does not extinguish its ability to act as a proof in certain circumstances:

> The actions of the contemporaries of the Imams and those who were close to their covenant were always based upon [the reports] of sound transmitters (*akhbār al-thiqāt*) and [if not, then] there were other factors (*qarā'in*) [demonstrating the probative force of reports from] other transmitters [who were less than sound]. They used to reject some reports, even if they were *tawātur*, because there were those who used to lie about the Imams. These three types of report [ie those from

[83] See above, p. 69–70.

> sound transmitters, those from less than sound transmitters and those from liars] are hidden to us. It is not possible for us to know (*ʿilm*) about them [ie which they are] as has been shown in the [previous] sections. In some way the rulings of the Imams are hidden from us. The way of knowledge (*ʿilm*) is closed and the means of distinguishing these three types is by *zann*, just as in the rulings themselves. [*FḤ*, 490]

The contemporaries of the Imams may have been able to distinguish between reports which were sound or weak or downright lies, but we cannot. The way of *ʿilm* is closed, and we must rely on *zann*. Indeed, when there is a clash between a sound report (perhaps even a *mutawātir* report) and a repaired report (which accords with early Shīʿī practice), then the latter can overrule the former because it is more likely to be correct. On the balance of probabilities, the contemporaries of the Imams were more likely to act in accordance with the Imams' wishes than the report of a liar is to be an authentic account of the Imam's words.

Is it, then, a condition of the repaired report obtaining probative force that the actions of the Companions be clearly based upon the ruling in this report? That is, must the Companions' actions not only conform to the report, but be shown to be based upon the report (ie that they cite the report to justify their actions)? Bihbahānī's answer is that it need not be so. Once again, there need only be a likelihood that the actions of the Companions are based upon the report, because there is only a probability that this is the Imam's ruling anyway. If the actions of the Companions do not contradict the report's ruling, then the report is established as a proof.

The second major criticism of the probative force of the repaired report is that it is, in effect, consensus. This is the position attributed to the author of the *Madārik*:

> From all that has been said already, the falsity of what he says in the *Madārik* is clear. [He says that] *shuhra*, when it reaches the point of being an *ijmāʿ*, is a proof [but the *ijmāʿ* is the proof], not the report. [*FḤ*, 490]

Bihbahānī's reply is that the repaired report can be a proof before it reaches the point of *ijmāʿ*. Though, as we shall see, *ijmāʿ* has extensive probative value for Bihbahānī, it is not the only type of probative force. The repaired report can have probative force before it reaches the level of (unanimous) *ijmāʿ*. When it is demonstrated that the early Companions acted in a manner conformant with the ruling in the report and concurrently there is the possibility (or perhaps the likelihood) that they acted in this manner because of the ruling, then the report has probative force, and the ruling gains authority. There need not have been an explicit expression of agreement with the ruling, though if there was such an expression this would raise the epistemological status of the ruling. Bihbahānī even admits that we need not be certain—that is, we need not have *ʿilm* that the Companions acted in the manner attributed to them by the early historiographers; we need only a probability that they acted in this manner. Uncertainty, or rather the category of *zann*, which occupies a status less than certainty but not necessarily improbability, pervades Bihbahānī's analysis of this issue. He rejects the attempts of extremist Uṣūlīs to demand a high level of certainty (as they had done concerning the link between the actions of the Companions and the actions of the Imams and the demonstration that the Companions acted in this manner because of the ruling rather than merely in conformity with the ruling) whilst in other areas settling for mere *zann*. This, he argues, is inconsistent. If the door of knowledge is closed (*insidād bāb al-ʿilm*), as he and the other Uṣūlīs agree, then it is closed across the whole spectrum of procedures in *uṣūl al-fiqh*. The *mujtahid's* task is not to discover the truth, but to consider all the sources which have probative force, weighing them against each other (*tarjīḥ*) in an attempt to find the most probable ruling. The means by which they are weighed is discussed in the next chapter.

In Baḥrānī's account, analysed above, all the reports in the Four Canonical Books, and some in non-canonical works, were considered historically accurate (authentic) accounts of actual events in the lives of the Imams. The recognition of authenticity, however, did not lead to an immediate recognition of probative force. The barrier to such a causal mechanism was the prevalence of *taqiyya*. A report may be historically accurate, and therefore authentic, but it may not have the ability to act as a proof because the Imam may have been dissimulating at the time. *Taqiyya* reports are not, for Baḥrānī, to be recognised by simple criteria (eg the questioner being Sunni or the presence of Sunnis on the occasion described). Imams, at times, gave *taqiyya* rulings outside of these circumstances. Now, for Bihbahānī, the issue of *taqiyya* also poses a problem. He had argued for a necessary link between possible historical authenticity and potential probative force. As we have seen, the level of historical probability entails the level of probable probative force. This

system does not avoid the possible destructive effect of the Imam's dissimulation. Unless *taqiyya* reports can be isolated easily, the potential probative force of the *akhbār* is in danger of being reduced further. Strictly speaking, *taqiyya* is, for Bihbahānī, not a method whereby one ruling might be preferred over another (*tarjīḥ*). Determining a report as non-*taqiyya* entitles it to be interpreted (assuming it is not a weak, "repaired" report). Unless it passes the test of being non-*taqiyya*, it has no potential probative force whatsoever.

In FJ2, Bihbahānī examines the "issue of a ruling being issued under dissimulation". He begins:

> Know that a ruling is only *taqiyya* when it agrees with the doctrine of the Sunnis, either all of them or part of them. This is based upon what is well-known concerning the opinion of the ancient and modern scholars. However, one of the Akhbārīs does not agree, and he allows [the ruling] to be *taqiyya*, even if it does not agree with one of the Sunni doctrines. Rather [he allows it] merely as an addition to the doctrine of the Shī'a so that they do not know [the true ruling], will not adopt [it] and so not be killed. [*FJ*, 353]

The view of the unnamed Akhbārī described here is, though expressed in different terms, consonant with Baḥrānī's view described above. The central point of the Akhbārī position is that *taqiyya* reports are difficult to identify since the Imams did not, it appears, follow a consistent procedure when issuing such rulings.

Bihbahānī gives four reasons for the illegitimacy of the Akhbārī viewpoint, two from revelation and two from reason:

1) Revelation:
   i) The *akhbār* state that a ruling which disagrees with the Sunnis is right (*rushd*) and correct (*sawāb*). This does not mean that a ruling which agrees with the Sunnis is not sound or correct, merely that all rulings which disagree with the Sunnis are sound and correct.
   ii) The Imams stated that one of the tests of authenticity was "comparison with Sunni doctrine" (*madhhab al-'āmma*). If it were possible for two rulings both *contra* Sunni doctrine, to be *taqiyya*, then there would be no point in the ruling. The Imams did not give pointless advice.[84]

[84] This argument is actually found after the second rational argument: 2)ii).

2) Reason:
   i) The Sunnis have always insulted and attacked the Shī'a. The reason for them doing so was that Shī'ī practice differed from Sunni practice. *Taqiyya* was a means whereby these attacks might be avoided. If the Imams were to tell their followers to perform actions which were not in line with Sunni doctrine, but were also not in line with the true Sharī'a, this would serve no useful purpose (*naf'*). Therefore the Imams must have only issued *taqiyya* rulings which agreed with the Sunnis. [a variation on 1)i)]
   ii) The Akhbārī position allows the possibility of there being two rulings on an issue which are both equally valid and have equal probative force. There is no means of deciding between the two. This effectively means that both are true, but Bihbahānī states that "for us, the truth is one and the rest are false". If both are to be treated as true, then the people are likely to follow the easier (*ashal, akhaff*) ruling, and not the correct ruling.

These arguments prove that the Akhbārī view is untenable (*fāsid*), but they simultaneously prove that Bihbahānī's view is correct. His *'aqlī* arguments are based upon the Mu'tazilī-Imāmī view that God's rulings have a purpose. The Imams did not (indeed, as God's agents, they could not) give misleading rulings unless there were valid reasons for doing so. The valid reason in these cases was fear of community persecution, which legitimised *taqiyya*. If the conditions which necessitated *taqiyya* cannot be demonstrated, then *taqiyya* could not have occurred.[85] Finding a report to be *taqiyya* immediately disqualifies it from having probative force, on that our two theorists agree. The difference between them lies in their optimism concerning the possibility of determining *taqiyya* on a case by case basis. Bihbahānī is much more optimistic than Baḥrānī: a simple comparison with Sunni doctrine is sufficient to demonstrate that a report is potentially *taqiyya*. It becomes irrefutably *taqiyya* when contrasted with a report which contains an opposing ruling which does not agree with the Sunnis. *Tarjīḥ*, in its true sense, occurs between non-*taqiyya* reports. For Baḥrānī, the reader may recall, *tarjīḥ* occurs only between *taqiyya* and non-*taqiyya* reports; determining *taqiyya*, when it is possible, is, for Baḥrānī, the only means of determining probative force because all the *akhbār* are of equal historical authenticity.

[85] Baḥrānī also stressed this point in his argument. See above, p. 33–34.

Finally, for Bihbahānī, determining the probative force of the indicator contained within the report is normally a matter of *isnād* criticism; but with *taqiyya* reports this determination concerns the content (*matn*) of the report. The report, therefore, still has to be subjected to exegesis before it can be determined as *taqiyya*. The *mujtahid* has to discover that the report is *taqiyya* before he can allow it to be a potential indicator of the law; and he can only do this by analysing the report itself, by means of the hermeneutic described in the next chapter. Ironically then, although it appears as though Bihbahānī is going to rule out a large number of reports from being interpreted on the grounds of dissemination, provenence and content (*shuhra, isnad, matn*), when analysed closely it becomes clear that all reports are to be interpreted, just as they are for Baḥrānī. The difference between the thinkers lies in Bihbahānī's view of the differing levels of probative force available from reports of differing levels of probable authenticity.

When examining Bihbahānī's theory of the probative force of the *sunna* one sees a complex taxonomy. The first test whereby a text qualifies for examination is *taqiyya*: this involves an examination of the content (*matn*); to examine the *matn* one must resort to the hermeneutic principles so as to understand what the text means. Once it is established that the report is not *taqiyya*, then it is necessary to determine whether the report is widespread (*mutawātir*) or isolated (*khabar al-wāḥid*). The former is certain, the latter gives rise to opinion only. This categorisation involves examination of the report's dissemination (*shuhra*). Isolated reports can, in turn, be divided according to varying degrees of coherence in their provenance (*isnād*). The most coherent (*ṣaḥīḥ*) give rise to a strong probability of authenticity, and hence probative force. The less coherent (*muwaththaq* and *ḥasan*) are not rejected outright, but can gain probative force through a further and detailed analysis of their provenances (*al-tathabbut al-zannī*). However, it appears that they never gain the power to overrule those isolated reports which are more coherent (*ṣaḥīḥ*). The weak reports have no probative force in themselves. If the rulings contained within them are in accordance with the practice of the early community, they can be "repaired" (*injibār*) and thereby become stronger, not only than the *muwaththaq* and the *ḥasan*, but also than the *ṣaḥīḥ*. This test, like the first (for *taqiyya*), involves scrutiny of the *matn*, and to understand the *matn*, one has recourse to the hermeneutic principles Bihbahānī outlines elsewhere in *FH* and *FJ*. In this Bihbahānī can be seen to agree with the extremist Uṣūlīs (such as Ṣāḥib al-Madārik) in their suspicion of the authenticity of isolated reports as a whole, but he disagrees with them regarding whether or not such reports can act as proofs. They can act as proofs, but with reduced force. Bihbahānī also agrees with the Akhbārī position that such reports can act as proofs, but disagrees with the Akhbārīs in that he believes they do not have a probative force equal to that of *mutawātir* reports—their ability to act as proofs is conditioned by the strength of other proofs which give rulings on the issue. Hence all the reports, from whatever source, are considered as texts worthy of interpretation, for they all need to be interpreted before they can be rejected (*taqiyya* reports), or accepted as certain (*mutawātir* reports), or provisionally accepted, subject to the relative strength of other indicators (*khabar al-wāḥid*).

For Baḥrānī, the failure of community consensus (*ijmāʿ*) to achieve certainty (*qaṭʿī, yaqīn*), and hence probative force, was the result of the uncertainty concerning the inclusion of the Imam's opinion. For Bihbahānī, *ijmāʿ* has much greater potential. In FH30, Bihbahānī gives a purely rational argument for the authority—or probative force—of consensus. During the Prophet's life, the people followed his *sunna*. However, they did not pass on (in the form of reports) everything which the Prophet said or did (ie our account of his *sunna* is incomplete). They did though continue to practice his *sunna* after his death. Similarly, the Shīʿa followed their guide (the Imam) in all matters, but they did not record (in the *akhbār*) all the elements of this obedience. Instead they maintained the practice of the Imams within the community. If, argues Bihbahānī, one can gain knowledge of the practice of the Companions of the Imams, one can, at the same time, gain knowledge of the approved practice of the Imams. The uniform practice of the early community becomes a source of knowledge even if there is no historical evidence which suggests that this was also the Imams' practice, and "this we call *ijmāʿ*," states Bihbahānī:

> In the time of the Imams, the truth was clear to the people since it had become a fundamental aspect of the Shīʿī faith. The situation of the Shīʿa at such a time was like the situation of the community at the time of the Prophet. Then, perhaps, the necessary knowledge became hidden in the second, third and fourth generations and so on

> until our time. However, by looking at the situation in the generation when the ruling was necessary knowledge, then perhaps certainty as to the truth of the ruling can be reached. [*FH*, 299]

If the reports of the early community's practice are sufficiently widespread, we can gain "certain, necessary (*ḍarūrī*) knowledge" of the early Shīʿī practice (and hence that of the Imam), "just like the knowledge of the existence of Mecca or Basra", even though we have not been there. This is clearly identical to the process of *tawātur*—these are reports, the transmissions of which are sufficiently numerous to preclude the possibility of collusion.

Bihbahānī does not restrict himself to justifying the consensus of the early community. He endeavours to prove, again by rational argumentation, that the consensus of later generations, if it can be known, is also probative. Over the passage of time, he argues, disasters (*ḥawādith*) have led to an obfuscation and a concealment of the matters on which there was consensus. If it can be demonstrated that there was, at a point in the past, a consensus upon an issue, then this past consensus must reflect the practice of the early Shīʿa, and therefore is evidence of the Imam's own *sunna*.

Concerning the *ijmāʿ* of the current generation of scholars—that is, consensus on an issue that has been previously disputed—Bihbahānī writes:

> When we see the Ḥanafīs agreeing unanimously upon a question, and the Shāfiʿīs upon another question which is not the same as that of the Ḥanafīs, then we decide that each of the two opinions is from their leader. What then do you think about the agreement of all the Muslims or the saved sect? When we see the followers of a *mujtahid* agree upon a way or a ruling, which distinguishes them from other groups, we conclude that this is from their *mujtahid*. So what do you think about the agreement of all the Muslims or the saved sect? [*FH*, 299]

If agreement is reached by a certain group upon an opinion which is unique to a certain group, then it is rational to view this opinion as one of the group's essential characteristics. What distinguishes one group from another is its founders, hence a unanimous opinion amongst the group must have its origins in the opinion of its founder. In the case of the Shīʿa the founder is, of course, the Imam. Hence consensus, even if it does not (explicitly) include the opinion of the Imam, accords with his opinion and is therefore a proof. Attractive as this argument might appear, Bihbahānī, it seems, has not recognised that by forwarding it, he is, in effect, excluding all those in the past who have held opinions which disagree with the present consensus, even though their exclusion (which implies their heresy) was not known at the time of their writing.

From these arguments, Bihbahānī concludes that *ijmāʿ* has probative force:

> There is, then, in general, no dispute amongst the Shīʿa that *ijmāʿ* is a proof. Dispute would, rather, be impossible for them because it is a means of uncovering the opinion of the sinless one. It is a means to a proof, like a report, and is a certain method (*ṭarīq qaṭʿī*). [*FH*, 302]

It is like a report because, like a report, it describes (albeit by implicit approval) the Imam's opinion.

To recap then: the following types of *ijmāʿ* bring certain immediate knowledge:

1) Unanimous practice of the early community.
2) Unanimous practice of a later generation, which even if followed by dispute, can be shown to be the continuation of the practice of the earliest generation.
3) Unanimous agreement of a later generation upon the legal status of a particular practice, even if there has been debate in the past (despite the fact that such a position entails that those who disagreed with the eventual agreed opinion are *ex post facto* excluded from the community).

Now a *mujtahid's* ability to use these *ijmāʿs* is dependent upon him knowing that they have occurred:

> What is obtained from agreement at the highest level of both the select few (*khawāṣṣ*) and the common folk (*ʿawāmm*) is called necessary (*ḍarūrī*) knowledge—the necessary elements of religion and law . . . At a slightly lower level, the knowledge of the elite is also called *ijmāʿ*. At the lowest level is *ẓann*, which is [the name] given to something which is widespread (*shuhra*) [but not unanimous], and the *ijmāʿ* which is related by one person only, [these are] called *ijmāʿ ẓannī*.

The agreement of all the community, when it is known, establishes that the opinion on which they are agreed is a "necessary element of religion and law". The *ijmāʿ* of the elite, meaning here the *ʿulamāʾ*, is also evidence for knowledge, but it is not necessary, but acquired knowledge (*kasbī*, *iktisābī*). Bihbahānī says that it is acquired because it requires reasoning to understand that the consensus of the elite is

an indicator of the Imam's opinion. However, after consideration it is impossible not to conclude that the consensus of the elite is also a proof. Finally, there are indicators that a consensus has occurred (or perhaps will occur) which do not bring certainty—they are termed *ijmāʿ ẓannī* and they occupy the remaining sections of Bihbahānī's discussion of consensus.

In FH31, Bihbahānī examines those types of *ijmāʿ* which give only *ẓann*. More accurately, Bihbahānī discusses those facts which indicate that an *ijmāʿ* has occurred. The first is an absolute majority of opinion amongst the scholars:

> Know that *ijmāʿ* is perhaps obtained by the agreement of the majority (*ittifāq al-akthar*) . . . this [type of *ijmāʿ*] is numerous in the law (*al-fiqh*). [*FH*, 309]

The key word here is "perhaps" (*rubbamā*)—indicating the possibility that majority agreement is an indicator of a consensus having occurred. The majority opinion is not a proof in itself—it is evidence (though not decisive evidence) that a consensus has taken place. Such majority opinions are widely used in the elucidation of the law (*kathīr fī'l-fiqh*).

Bihbahānī also states that the most popular opinion (which may not be an absolute majority) is also a possible indicator of consensus, as is a consensus which is constructed (*murakkab*) from the past writings of the scholars. This latter category is presumably established by means of a survey of previous opinions on a question, and by recognising the most popular past opinion, this opinion becomes a probable indicator of consensus. The results of procedures such as these, however, are never certain, and only indicate the probability (or the reasonable assumption) that a consensus has been reached. Their probative force is only *ẓannī*. Bihbahānī adds a word of warning—these procedures should be known only to the *mujtahids*, since only they can perform the weighing of different indicators (*tarjīḥ*) which will lead to a considered opinion. The followers of a *mujtahid* (the *muqallidūn*) are charged (*taklīf*) merely with following the *mujtahid's* opinion on the matter.

On the issue of a past *ijmāʿ* which is known only on the basis of an isolated report (*khabar al-wāḥid*), Bihbahānī considers the probative force of such a consensus to be *ẓannī*, since the report itself is of only possible authenticity:

> The consensus transmitted by an isolated report is, in truth, a type of isolated report. [*FH*, 311]

And later in FJ10, he states:

> [The evidence] which proves the probative force of the isolated report includes consensus transmitted by an isolated report. [*FJ*, 399]

The epistemological status of the report of a consensus dictates, *mutatis mutandis*, the epistemological status of the consensus.

Finally, Bihbahānī considers elements in juristic argumentation that are not *ijmāʿ* even though some jurists may use phrases which indicate that they might be:

> Know that what they frequently claim as *ijmāʿ* is only general assent (*waffāq*), not that it is a means of uncovering the opinion of the Sinless One . . . they say, "the grammarians agree (*ajmaʿa*)" or "the legal theorists (*uṣūliyyīn*)[86] agree" or "the Companions came together (*ijtamʿa*) on the validity of what was soundly reported by so and so" or "the Shīʿa agreed to act in accordance with the reports of so and so" . . . it is obvious that these instances of *ijmāʿ* function as explanations when deducing opinions (*ẓunūn*), preferences (*rajahān*) and persuasive arguments [and not as *ijmāʿ*]. [*FH*, 313]

This does not mean that such "general assent" has no probative force—merely that it is not "legal" *ijmāʿ*. The considered opinion of the grammarians or the legal theorists is a persuasive piece of evidence, and their opinion may take precedence in certain circumstances over the opinion of others (*aqwā min kathīr al-ẓunūn*), but this is not *ijmāʿ* in its legal sense.

Later in *FJ*, Bihbahānī criticises two misguided opinions regarding consensus. In FJ8, he attacks Ṣāḥib al-Madārik's "denial of the probative force of transmitted consensi", that is, consensi transmitted from previous generations. As Bihbahānī portrays him, the author of the *Madārik* rejects these past consensi because they do not necessarily contain the Imam's opinion (interestingly, this is also the point made by Baḥrānī in his refutation of *ijmāʿ*).[87] "Knowing the opinion of the sinless one is impossible in our time or [in the *ghayba* in general]", and the possible existence of unknown *mujtahids* compounds the problematic nature of *ijmāʿ* during the occultation.

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[86] This is not a reference to the Uṣūlī school, but the more common usage of *uṣūlī*, designating "one who writes *uṣūl al-fiqh*".

[87] See above, p. 56.

Bihbahānī's response is that this is indeed the case with a transmitted consensus. The Imam's opinion is difficult to obtain. However, this does not exclude the transmitted *ijmāʿ* from consideration—it merely makes it *ẓannī* not *ʿilmī*. As in the discussion of *khabar al-wāḥid*, the author of the *Madārik* is criticised for epistemological inconsistency, accepting *ẓann* in some areas but not in others. How ever, Bihbahānī goes on to state that an *ijmāʿ* which is transmitted through a large number of individuals—one that prevents collusion—can be a certain (*qaṭʿī*) proof, since it can be rationally demonstrated that it reflects (though not necessarily explicitly includes) the Imam's opinion:

> *ʿIlm* reached through conformity (*tazāfur*) and constant hearing (*tasāmuʿ*) is achieved in *ijmāʿ* just as it is achieved in the necessities of religion. [*FJ*, 388]

The process of *tawātur* ensures the truth, and therefore the probative force of *ijmāʿ*.

The Akhbārī position, refuted in FJ10, is that *ijmāʿ* cannot be a proof because the scholars who participate in it are not sinless. If they are not sinless, then there is a possibility that they could agree upon an error. Bihbahānī refers the reader back to his arguments (both revelatory and rational) in *FH*, and adds a further counter argument: the Akhbārīs who attribute sinfulness and error to the scholars involved in an *ijmāʿ*, do not seem willing to accept error on the part of the scholars who collected the *akhbār*. He goads the Akhbārīs:

> In general, the *faqīh* for [the Akhbārī] merely by transmitting a *ḥadīth* becomes sinless. Rather, the whole list of transmitters in the chain are sinless because they relate *ḥadīth*. But when they agree and concur upon a ruling, then they are mistaken! [*FJ*, 396]

In sum, then, consensus for Bihbahānī can be categorised into different forms. The fundamental distinction is between an *ijmāʿ* that acts as a certain proof (*ijmāʿ qaṭʿī*) and those that do not (*ijmāʿ ẓannī*). Within each of these categories there are different types of indicators which point towards an *ijmāʿ* having occurred. These same indicators might possibly demonstrate that an *ijmāʿ* will occur. The recognition of the indicators of a future *ijmāʿ*, however, becomes a self-fulfilling prophecy since according a current majority opinion probative force urges a future generation to consider it as a probable consensus, and hence they will form an *ijmāʿ*, which will act as a proof. What is clear is that in matters of law, the latter (*ẓannī*) category are numerous (*huwa kathīr fī'l-fiqh*) and, therefore, as with indicators found in *sunna*, the probative force of *ijmāʿ* is variable and disputed on a case by case basis.

Conclusion

Whether the two assessments of the textual sources of law described in this chapter have their basis in differing conceptions of community hierarchy is unclear. Certainly it would appear that Bihbahānī's view has the potential for a strict delimitation of the roles of the *mujtahid* and the commoners. The self-justification of *mujtahid* power in Bihbahānī's *Fawā'id* is all pervasive, affecting his assessment of the probative power of the Qur'ān, *sunna* and especially *ijmāʿ*. Whether or not this potential is absent from Baḥrānī's system is analysed in Chapter Six.[88]

What is perhaps more striking is that the Akhbārī-Uṣūlī dispute described in this chapter concerns two radically different epistemologies: one in which knowledge is the goal, and the other in which knowledge is recognised as an ideal, but a rare, commodity. The rules of *ḥadīth* criticism had been devised with the latter epistemology in mind. Bihbahānī works within this tradition to expand the number of texts which can act as proofs, but also to relegate the probative force of many of these reports. Proof is not either absent or present in a report. In his nuanced epistemology, a report's force can and does vary, depending upon the probable authenticity of the source. The taxonomy of probabilities comes into play when considering contradictions between the sources, as we shall see in the next chapter.

Baḥrānī's search for certainty forced him to move the goal posts, or rather to pull them up and play a different game. *Ḥadīth* criticism is a dangerous science in which improbability is permitted to infect the law. By expanding the sources of the *sunna*, he is forced to relax the tests of authenticity meticulously developed in the main tradition. With this in mind he sets about eliminating possible challenges to the position of the *sunna* (such as *ijmāʿ*), or seriously reducing

[88] See below, p. 222–237.

their potency (as in his discussion of the Qur'ān). The result is a description of the sources of law which can truly be labelled as Akhbārī, since the *akhbār* play a central exegetical role.

Both authors have established which texts have probative force and which do not; their assessments in quantitative terms do not differ. In qualititative terms, however, there is a significant difference: all the texts, for Baḥrānī, are of equal probative force. For Bihbahānī, the dissemination, provenance and content of the report cause the quality (the probative force) to vary. Once the jurists have delineated the texts to be interpreted, the debate moves on to the rules and techniques of exegesis, and this, as we shall see in the next chapter, is no less epistemologically driven.

CHAPTER THREE

SILENCE, OBSCURITY AND CONTRADICTION IN REVELATION

After *kitāb*, *sunna* and *ijmāʿ*, Shīʿī jurists added a fourth "source" of law. This they termed *dalīl al-ʿaql* (literally "the indicator of reason"; it was also known as *al-dalīl al-ʿaqlī*—"the rational indicator"). The incorporation of this fourth source of law was, in part, an imitation of the Sunni four-fold typology of sources (though in the standard Sunni typology, it was *qiyās* which was named as the fourth source). The characterisation of this fourth source as *dalīl al-ʿaql* was due to the incorporation of much of Muʿtazilī theological doctrine by Shīʿī scholars in the Buyid period (334/945–447/1055). The relative importance of external influences (Sunni, Muʿtazilī or other thought) and internal generation in explaining the emergence of a distinctive Shīʿī tradition of *uṣūl al-fiqh* is a contentious issue and one which is not directly relevant to my discussion here. By the time of Baḥrānī and Bihbahānī, all Shīʿī *uṣūl* works included a section on *dalīl al-ʿaql*. Even Akhbārīs, who, it is claimed,[1] did not consider *dalīl al-ʿaql* (or, indeed, *ijmāʿ*) to be a source of law, included a discussion of its validity within their works, even if their findings were largely negative.[2]

That human reason, without the aid of revelation from God, could discover certain truths was a central tenet of Muʿtazilism, and indeed was incorporated into some traditions of Sunni theology and legal theory. There were, of course, extensive disputes about what sort of "truths" reason might discover, and whether these were relevant to the well-being (moral or spiritual) of the believer. However, these discussions had legal ramifications, and those Shīʿa who held that morally (or legally) relevant information could be derived from reason were compelled to add *ʿaql* (reason) to *naql* (transmitted revelatory texts) as a means of obtaining knowledge. In the Shīʿī tradition,

[1] See Kohlberg, "*Taqiyya*", p. 397; Algar, *Religion and State*, p. 35; Amoretti, "The Heyday of the Safavid Era", p. 651–652; Madelung, "Imamism and Muʿtazilite Theology", p. 21, n. 1.

[2] See, for example, the section on *ʿaql* in Muḥammad Amīn al-Astarābādī, *al-Fawā'id al-madaniyya*, p. 14–18.

ʿaql—human reason—was considered by many writers to have the ability to establish three broad areas of knowledge:

1) Perhaps most famously, reason can detect the moral/legal properties of some (though not all) actions by individuals. Revelation might declare lying to be morally reprehensible, but human reason, it was argued, had discovered this ethical truth prior to (chronologically) or independent from (logically) the delivery of knowledge from the Divine Being. This ability of human reason is termed *al-taḥsīn wa'l-taqbīḥ* (literally "declaring (something) to be good or evil").
2) Reason can also "prove" certain maxims or principles. These maxims could then be used, in conjunction with the revelatory texts, to derive specific or detailed rules. For example, reason was held (by some authors) to be able to prove that when an action is not assessed as good or evil by revelation (ie it is not mentioned in the texts) or by reason (ie by *al-taḥsīn wa'l-taqbīḥ*), then that action is to be considered licit (*mubāḥ*). Similarly, if an action is assessed at one point in time (to be right or wrong), then that assessment remains valid unless it is established that circumstances have changed in such a way that the original assessment is no longer valid. These two principles (termed *al-bara'a al-aṣliyya* and *istiṣḥāb al-ḥāl* respectively) were said to be proven by reason alone. Revelation was unnecessary to demonstrate that a jurist should act in accordance with them, though, as we shall see, the principles could also be derived from revelatory texts.
3) Finally, reason can also be used to detect linguistic and other "facts" associated with the manner in which words are used, and when a meaning other than the literal meaning is implied or inferred. For example, when God said, "Ask the village" [Q12.82], through reason, one can deduce that his intended meaning was "Ask the people of the village". Similarly, God's prohibition, "Do not say *uff* to your parents." [Q17.23] is taken to mean "Do not *even* say *uff* to your parents"; that is, actions of greater severity than saying *uff* (such as hitting) are included in this prohibition. These implications are, in a strict sense, deviations from the precise meaning of the words, but reason (for Shīʿī jurists) can deduce when and how such deviations are justified.

These three broad areas of knowledge gained by reason are termed *ʿaqliyyāt*. Baḥrānī discusses 2) and 3) first, in M3–9, and 1) in M10.

In this chapter, I discuss the maxims or principles which may, or may not, be used to discover rulings when the revelatory texts are unclear—either because they appear to contain no ruling, or because they contain an indicator, but it is unclear what the rule contained in the indicator might be, or because they contain more than one indicator and these indicators are contradictory. This is the second of the three parts of *dalīl al-ʿaql* outlined above. In Chapter Four, I discuss the hermeneutics of Baḥrānī and Bihbahānī. By this I mean their theories of language—how it operates and how the rules of its operation might aid the understanding of the revelatory texts. This is the third of the three parts outlined above. In Chapter Five, I turn to human reason and its potential as a source of legal/moral rules. That is, is a rationalist morality possible in the views of Baḥrānī and Bihbahānī? This is the first of the three parts outlined above. This may not appear a logical order in which to examine these areas of legal theory, but I am structuring my discussion around Baḥrānī's own presentation of these issues and, as will become clear, he selected this structure for specific doctrinal reasons.

That these three areas of knowledge were a matter of some dispute amongst Shīʿī thinkers is clear from Baḥrānī's own introduction to his section on *dalīl al-ʿaql* in M3:

> Concerning *dalīl al-ʿaql*: some have described it as *al-barā'a al-aṣliyya* and *istiṣḥāb*. Others have limited it to the latter. A third group describe it as *laḥn al-khiṭāb, faḥwā al-khiṭāb* and *dalīl al-khiṭāb* [types of linguistic inference]. A fourth group, after *al-barā'a al-aṣliyya* and *istiṣḥāb*, include *al-talāzum bayn al-ḥukmayn* including in this *muqaddimāt al-wājib, istilzām al-amr bi'l-shay' al-nahy ʿan ḍiddihi al-khāṣṣ* and *al-dalālat al-iltizāmiyya*.[3] [*H*, 1, 40–41]

The differing opinions as to the constituent elements of *dalīl al-ʿaql* are here seized upon by Baḥrānī: the supporters of *dalīl al-ʿaql* are disunited, and therefore the acceptance of *dalīl al-ʿaql* as a fourth source is in doubt. As much was admitted by Muẓaffar Riḍā when he stated:

> From what al-Shaykh al-Muḥaddith al-Baḥrānī says in his *Ḥadā'iq*, it is clear that there is no clarity on what is meant by *dalīl al-ʿaql*.[4]

[3] These terms are discussed below in Chapter Four, p. 153–154.
[4] Riḍā, *Uṣūl al-fiqh*, II, 3, p. 124.

Baḥrānī on Silence, Obscurity and Contradiction in Revelation

Though writers of *uṣūl al-fiqh* in the Shī'ī tradition normally begin their works with an examination of language, Baḥrānī differs from this standard format. As analysed in the last chapter, he discusses the sources of law first, then concentrates on the issues of obscurity and contradiction in these sources, and then, only in M7–9, does he finally discuss language and linguistic interpretation in any detail. These Prologues, together with a brief section on language in M3, are discussed in the next chapter.[5] My intention is to stay as close to Baḥrānī's presentation as possible; so however logical it may seem to me (and to other *uṣūl* writers) to discuss language before obscurity and contradiction (because one cannot judge texts to be obscure or contradictory before one has determined how language operates), Baḥrānī was of a different mind. By relegating his discussion of language to this position, he is, in my opinion, making it clear that he views the interpretation of the sources as relatively unproblematic. The fact that the texts do not cover every circumstance, and that at times they are contradictory, is a much more pressing problem. I return to this point in the next chapter.[6]

In the last part of M3 and the three subsequent Prologues Baḥrānī discusses the issue of uncertainty in the texts. The most important causes of uncertainty for a believer, as far as Baḥrānī is concerned, are:

1) that the texts appear silent on an issue
2) that the texts appear to contain an indicator, but the ruling (or assessment)[7] contained therein is unclear
3) that the texts appear to contain mutually exclusive rulings of the same action.

The first relates to revelatory silence, the second to obscurity and the third to contradiction. For Baḥrānī, these three are considered together because they are examples of the same problem: the failure of the texts to provide a clear ruling.

I have used the word "appear" in the above typology because, for Baḥrānī, whether the texts are actually silent, obscure or contradictory is much less important than how they appear to the moral/legal agent who is subject to the law (the *mukallaf*). As we saw in Chapter One, Baḥrānī is primarily concerned with the law as it appears to the believer, and not the law "in reality".[8] Since God cannot ask a *mukallaf* to obey a rule of which he is ignorant (for to do so would make God unjust), the *mukallaf's* knowledge of the content of the law is, for Baḥrānī, crucial in determining his culpability for transgressions. The distinction between the *mukallaf's* knowledge (*'ilm al-mukallaf*) and the law itself is also evident in Baḥrānī's treatment of silence, obscurity and contradiction.

[5] See below, p. 147–164.
[6] See below, p. 147.
[7] See above, p. 15, for my justification of the use of ruling as a translation for *ḥukm*.

Revelatory Silence

For Baḥrānī, that the texts of revelation may contain no indicator communicating God's assessment or ruling concerning an action, does not imply that there is no ruling for an action. "God has a legal ruling for every circumstance, even to the compensation due for a scratch."[9] The Sharī'a is complete, and its author (God) has a ruling for every aspect of human existence.

Baḥrānī never states what these rulings might be, but it is clear that he means the established five categories used to assess human action: prohibited (*ḥarām*), disapproved (*makrūh*), permitted (*mubāḥ*), recommended (*mustaḥabb*) and obligatory (*wājib*). The Lawgiver has, in theory, assessed every action, and placed it into one of these categories. By this, Muslim theorists mean that every action performed by every individual has been categorised by God, and that a believer will be judged at a time appointed by God on the basis of his actions. They also mean that God has ruled that actions of a particular type (eg drinking wine) fall into a certain category (eg drinking wine is forbidden). The extent to which reason can discover the moral/legal rulings concerning actions independent of revelation from God is discussed in Chapter Five.[10] Here Baḥrānī is concerned with the solution to the problem of revelatory silence—that is, the correct procedure in cases of revelatory silence, or more accurately, perceived revelatory silence. Baḥrānī, as we have seen in the last chapter, has a charitable view of the authenticity of much of the material

[8] See above, p. 16–18.
[9] See Baḥrānī, *H*, 1, p. 45.
[10] See below, p. 188–204.

in the *akhbār* collections, and hence, presuming there is no obscurity surrounding the rulings indicated by these reports, many rulings are known. There are, for Baḥrānī, fewer areas of human activity on which there is revelatory silence than for a theorist who is more stringent in his assessment of the authenticity of the material in the collections. However, it is inevitable that the texts will appear silent on some areas of human activity, and it is in these areas that the principles of *al-barā'a al-aṣliyya* and *istiṣḥāb al-ḥāl* are considered to be operative by some authors. Interestingly Baḥrānī does not discuss the case of revelatory silence directly in M3. There he is more concerned with revelatory obscurity. He does outline the principles upon which a *mukallaf's* action should be based in M11, and, to put Baḥrānī's discussion in M3 into context, an understanding of these is first necessary.

Baḥrānī endorses two principles relevant to the issue of perceived revelatory silence:

1) Anything that is not known to be impure, is pure until it is known to be impure.[11]
2) That which is not known to be forbidden, is permitted.[12]

Though the Sharī'a is complete, it is quite possible that the texts do not reflect all its rulings. This is due to *taqiyya*: "At times the Imams gave an incorrect answer, at times contradictory answers and at times no answer at all." The possibility of the Imams' silence concerning a ruling, makes textual (or revelatory) silence concerning a particular ruling also a possibility. The *mukallaf's* perception of silence may be silence "in reality" (rather than the *mukallaf's* inability to recognise an indicator) but this point is, for Baḥrānī, irrelevant. For him there is no distinction between a mistaken perception of silence, and actual silence, as far as the culpability of the *mukallaf* is concerned. His conviction that the ignorant *mukallaf* is forgiven (as outlined in Chapter One) leads him to concentrate on the term "known" in the above two principles, and the *akhbār* which support them: it is the *mukallaf's* knowledge that is stressed. If a *mukallaf* is ignorant of an indicator categorising an action or an item, then he is excused this ignorance and the transgressions of the law which flow from it.

[11] *Ibid.*, p. 134–140.
[12] *Ibid.*, p. 140–142.

Hence, if the *mukallaf* perceives there to be no indicator in the texts of revelation which assesses a particular action, he commits no culpable transgression of the law when he performs that action. He is permitted to act on an assumption of permittedness, and in cases of ritual purity, on an assumption of purity.

Dealing first with the assumption of purity (1) above), Baḥrānī cites the following Imamic report as evidence for the principle's validity:

> All things are pure, until you know them to be impure. When you know [the latter to be the case, the thing in question] has become impure. [*H*, 1, 134]

From this report, he argues, two points become clear. First, it is apparent, by the Imam's use of the term "known", that it is the knowledge of the *mukallaf* which is the crucial issue, not the comprehensiveness of the texts of revelation themselves. By the phrase "when you know it, then it has become impure", the Imam is clearly indicating that purity or impurity is dependent on the awareness of the individual:

> Impurity is not equivalent to impurity itself, being concerned with [a fact of] reality alone. Rather, [impurity] consists of both that [a thing] is impure and that the *mukallaf* knows it to be so. [*H*, 1, 136]

If the *mukallaf* is unaware of any indicator assessing an action, then he is justified in proceeding on the basis of an assumption of purity.

Second, this report refutes the position of some jurists (such as Shahīd II) that the prayer of a person who is in a state of ritual impurity, whether he knows it or not, is invalid. If Shahīd II was correct in this opinion, then God would necessarily be unjust. God would be asking an ignorant *mukallaf* to act on the basis of knowledge he does not have, and then punishing him (or at least not rewarding him) for his action:

> Proving something to be impure, and describing it as such, is not equivalent to it simply being designated as impure in reality and by order [of the Lawgiver] alone Rather a thing is impure in relation to the one who knows it to have been declared so and pure in relation to one who does not know this. The Lawgiver does not make a ruling in this matter dependent upon reality alone. [*H*, 1, 139–140]

However, there is a remaining issue to be resolved: how does one know when one must cease acting on this assumption? The simple answer is that when one has discovered an indicator, the assumption

becomes ineffective. However, Baḥrānī notes that Shīʿī discussions have generally considered this issue to be more complex. Does one, for example, need to be certain that one has found an indicator, or can one suspect (ie have a mere opinion—*zann*) that the texts contain an indicator relevant to the action, without having certainty? According to Baḥrānī, Astarābādī argued that as soon as one is certain that an indicator exists, the principle becomes inoperative. One need not be certain as to the content of the indicator, merely certain that it exists. This, as will become clear, is also Baḥrānī's position.

Baḥrānī lists three positions held by distinguished past jurists as to the level of certainty needed to make the assumption of purity inoperative:

i) Ibn Barrāj (Saʿd al-Dīn (d. 481/1088)) argued that there must be absolute certainty that an indicator has been found.
ii) Abū al-Ṣalāḥ al-Ḥalabī (d. 447/1055) argued that an opinion (*zann*) that an indicator has been found is sufficient.
iii) ʿAllāma argued that an opinion could invalidate the principle, but it had to be an opinion based upon a legal reason (*sabab sharʿī*).

Baḥrānī, it is clear, is dissatisfied with all these opinions. For him, this principle, the efficaciousness of which is established with certainty by means of the revelatory text quoted above, can only be rendered inoperative by certainty of the same level. He would appear, then, to support the first position. However, Ibn Barrāj defines certainty as rational certainty, and this does not persuade Baḥrānī. For example, a man selling a liquid may claim it to be pure; he may have two witnesses to this effect. However, rationally speaking, there is still room for doubt since the witnesses may be lying. Baḥrānī argues that God has made it clear that the testimony of two witnesses establishes a legal proof, and that the *mukallaf* must act on its basis and not on any rational doubts he may have about the probity of the witnesses. Acting on the basis of two witnesses establishes a certainty concerning obedience to the law, that is, a procedural certainty is established even though the witnesses may be lying. Ibn Barrāj's definition of certainty as rational certainty therefore makes his formulation unacceptable. The second position (that of Abū al-Ṣalāḥ) is unacceptable because *zann* is of a lower epistemological status than *ʿilm*, and the principle had been established with *ʿilm*. The third position is unacceptable because anything that is based on a "legal reason" is, by definition, certain for Baḥrānī.

Baḥrānī's own view is, then, that only certainty can make this principle inoperative—certainty that there is an indicator in the texts which categorises the item. The *mukallaf* needs to know that the item is classified by the texts as pure or impure. Once he knows this, the principle ceases to be an appropriate basis for action. This certainty is easier to obtain, in Baḥrānī's view, than the three jurists suppose because the number of texts which bring this certainty is larger than they had assumed.

The second principle concerning (the assumption that an action is permitted) is congruent with the above reasoning. This is justified by an Imamic report:

> All things have within them *ḥalāl* and *ḥarām*. They are initially *ḥalāl* for you until you know them to be *ḥarām* specifically. [*H*, 1, 140]

A *mukallaf* is justified in proceeding on the assumption that an action is permitted until he knows there to be an indicator which categorises it. These principles are proven both by reason (regarding issues relating to the justice of God) and by revelation (signalled by Baḥrānī's reference to a large number of Imamic reports). In this one has a practical example of how reason and revelation interrelate in Baḥrānī's legal theory, an issue discussed further in Chapter Five.[13]

With regard to both of these principles, which are operative when the *mukallaf* perceives there to be no indicator assessing an action, Baḥrānī is careful not to stipulate that the *mukallaf* need know with certainty the content of the ruling indicated by the text. He need only know that there is an indicator, and that the action or item is classified; he does not need to know into which category it might fall. As soon as this level of knowledge is gained, the principles are redundant, and another procedure, known as *iḥtiyāṭ*, comes into play.

These principles clearly restrict both excessive caution and excessive negligence with regard to epistemology. Excessive caution would dictate that one must avoid any action (or item) which is not explicitly categorised by the texts of revelation. These principles were revealed by the Imams, knowing that the texts might be incomplete,

[13] See below, p. 188–191.

in order to "repel the whispers of Satan" which might tempt the *mukallaf* to be excessively cautious. Excessive negligence, that is, action on the basis of *ẓann*, is also restricted, since the principles, in their application, yield certain results.[14]

Revelatory Obscurity

The assumption of permittedness in the absence of a relevant textual indicator has been termed *al-barā'a al-aṣliyya* (hereon abbreviated to BA).[15] Baḥrānī accepts this in some measure, and in this he is in agreement with the Shī'ī legal tradition of his time. His discussion is linked to the issue of the status of laws before revelation (*qabl wurūd al-shar'*), though he does not make this explicit.[16] From M11, discussed above, it is clear that Baḥrānī accepts that BA is an acceptable principle on which to base action when the *mukallaf* perceives there to be no classifying text. There are some theorists who argue that this assumption should also be operative in relation to areas of textual obscurity—that is, when an indicator is known to exist, but there is uncertainty as to its ruling. BA can be translated as "fundamental freedom", that is, that one should presume that an action is not obligatory or forbidden (ie that it is "free" of assessment) unless one is certain that it has been established as such. This argument relates to the issue of the "form of the command" (*ṣīghat al-amr*) and its implications are discussed in the next chapter.[17]

BA is used by some theorists to argue that if, for example, it is established that there is an indicator of a ruling, but its content is uncertain, then, as in the case of there being no (perceived) textual indicator, one should assume permittedness (or in the case of an item, one should assume purity). This extension of BA is rejected by Baḥrānī, and his reasons for doing so are outlined in the first section of the last part of M3.

Baḥrānī first defines the term *aṣl* (as found in the term *al-barā'a al-aṣliyya*). It has, he claims, four basic meanings. It can mean indicator (*dalīl*), as in "the indicator in such and such an issue is the

[14] See below, p. 234.
[15] For a discussion of this concept, see Löschner, *Die dogmatischen Grundlagen.*
[16] For an extensive discussion of the status of laws before the advent of revelation, see Reinhart, *Before Revelation.*
[17] See below, p. 158–160.

Qur'ān and Sunna"; it can mean "preponderant", as in "the preponderant interpretation of an utterance is the literal one"; it can mean "fundamental assumption", as in "the assumption is that trade between Muslims is sound"; and it can mean "continuance" (*istiṣḥāb*). It is the final definition which is of relevance to Baḥrānī's discussion of BA. According to this definition, the classification of an action with no indicator (or no perceived indicator) is "permitted" (*mubāḥ*). *Istiṣḥāb* in this context refers to the continuance of a pre-revelatory assessment of permittedness after revelation, when revelation appears to contain no clear evidence that the earlier judgement has been changed. Whether this continuance is a valid assumption is at the heart of the debate around BA.

Baḥrānī divides BA, thus defined, into two types:

1) the presumption that until an indicator is "proven" (*yuthbit*), there is an assumption that an action is not obligatory
2) the presumption that until an indicator is "proven", there is an assumption that an action is not prohibited.

By "proven" here, Baḥrānī means proven to be directly relevant to the case in hand.

The first type of BA is, for Baḥrānī, uncontroversial. To refute it would be to contradict the principle that God does not impose impossible duties upon the *mukallaf* (*taklīf mā lā yaṭāq*). If God were able to do this, he would be unjust, and in line with Imāmī-Mu'tazilī thinking on the matter, Baḥrānī considers this theologically unsound. He also cites *akhbār* which support such a view. Hence, for Baḥrānī, it is perfectly legitimate to assume that an action which has no clear indicator in the texts is not obligatory.

However, to go further and argue that the action is, therefore, permitted (ie not prohibited) is a matter of dispute. There are basically three views:

1) There are those who argue that a lack of a clear indicator indicates a lack of assessment. For this group, revelatory obscurity, once discovered, is unproblematic. The action in question can immediately be classified as permitted. Hence for them, "things" (*ashayā'*, ie actions and items) are either permitted or forgiven (*ḥalāl* or *ḥarām*).
2) There are those who argue that revelatory obscurity leads to the action being of uncertain classification. Though it is certain that

it is not obligatory, it is not certain that it does not fall into one of the other four categories (*mustaḥabb, mubāḥ, makrūh* or *ḥarām*). For this group, things can be classified into three groups: *ḥalāl, ḥarām* and *shubha*. The last of these terms can be translated as "uncertain".

3) There are those who argue that in the absence of a clear indicator, actions are forbidden. Baḥrānī considers this view to be weak and does not discuss it further. He immediately declares his allegiance to the second of the above positions. His reason for doing so is that "it is the one supported by the *akhbār* of the *ahl al-dhikr* (the Imams)".[18]

Baḥrānī's utilisation of the term *shubha* deserves some comment. He is not arguing that the matter has no classification (for the Sharīʿa is complete and all actions are classified by the Lawgiver); nor is he arguing that there is no textual indicator concerning the classification of the action. He is proposing that due to the inadequacies of our understanding, the classification indicated by the text is unknowable with the requisite certainty. This is not a case of obscurity due to conflicting indicators (we come to that later). It is a case of the absence of certainty concerning the classification indicated by an existent ruling. The Imams lived in difficult times, and though they knew the Sharīʿa in its entirety, they could not always communicate it with the necessary clarity:

> They were in a time of *taqiyya* and *fitna*. Perhaps they answered a question with the real legal ruling; perhaps they answered it with the opposite, out of *taqiyya*; and perhaps they did not answer it at all. [*H*, 1, 45]

Not knowing which of the first two Imamic responses is reported in a particular *khabar*, gives rise to *shubha*. Baḥrānī lists the revelatory proofs which justify the category of *shubha*, including a famous report from Imam ʿAlī:

> The permitted is clear, the forbidden is clear, but between them are uncertainties (*shubahāt*).

If BA is valid, then there is no such thing as an uncertainty, since all things which are *shubha* are assumed to be *ḥalāl*. This three-fold division of "things" (*tathlīth*) is stressed by Baḥrānī. With its Imamic

[18] *Ibid.*, p. 44.

sanction, it becomes an inviolable element of his epistemology. The second type of BA, whereby rulings that are obscure (but known to be existent) are considered to be rulings of permittedness, is rejected primarily because it conflicts with what Baḥrānī considers to be the plain meaning of the *akhbār* from the Imams.

In the final section of his discussion of BA, Baḥrānī considers a modified version of the second type of BA, which he also rejects. This "modern" position argues that though it is accepted that there is a ruling in cases where there is no clear indicator, because of the obscurity surrounding it, it must be concluded that the indicator is ineffective in placing an obligation upon the *mukallaf*. Whilst the earlier position argued that obscurity leads to the activation of the assumption of purity, for this refined position, obscurity entails, not the non-existence of a ruling, but the non-existence of a legal obligation arising from the ruling. The modern scholar who proposes this modified form of BA, does not use the phrase *ʿadam al-ḥukm*, but *ʿadam taʿalluq al-ḥukm* in his formulation.

Baḥrānī also refutes this position. He, first, reinterprets the Quranic and Imamic reports used by the modern scholar. The scholar cited, "He has created for you what is in the world" [Q2.29]. This does not mean that everything in the world is free of categorisation by God, Baḥrānī argues. The verse must be seen in the light of the Imams' interpretation of it, and Imam ʿAlī stated that this verse meant that "God has created what is in the world, so that you might contemplate it". The Imamic reports cited by the scholar include a report from Imam Ṣādiq: "All things are unrestricted until they are assigned a restriction". Baḥrānī states that, first, this report is isolated and the scholar in question normally rejects isolated reports as *zannī*. Second, this report does not apply to rulings, but to language (the use of the term *muṭlaq* for unrestricted, provides Baḥrānī with this possible avenue of criticism). Words and phrases in the texts of revelation are to be taken as general and unrestricted, unless there are other texts which provide restrictions. Finally, the argument that there is an ineffective ruling is, in truth, an evasion and no different from saying that there is no ruling.

In this section of M3, Baḥrānī refutes, to his satisfaction, the arguments of the supporters of BA when applied to textual obscurity. He also refers to his alternative method of determining the correct course of action in the absence of a clear indicator from the text. This he terms *al-tawaqquf wa'l-iḥtiyāṭ* ("suspension of judgement and

caution"). The significance of these terms in Baḥrānī's theory is clear from the fact that he devotes a whole prologue to their definition (M4), which is analysed below. Before he embarks on this element of his theory, however, he deals with two other controversial elements of legal theory: *istiṣḥāb al-ḥāl* and *qiyās*.

Baḥrānī moves on to discuss a particular instance of textual obscurity. If a ruling is clear from the texts, is it presumed that this ruling "continues" (*istaṣḥaba*) or is it time-limited? For example, a man prepares to pray, but finds no water with which to perform his ritual ablutions. He is permitted, according to a dispensation laid out in the Qur'ān, to perform the purification with sand (*tayammum*) instead. After ritual purification with sand, he begins to pray, but whilst praying he sees some water which was previously unknown to him. The question is, then, is he obligated to repeat his prayer, having performed ritual purification with the new-found water, or is his sand purification still valid? The issue, in this classic example used by Baḥrānī, concerns the nature of the ruling to perform *tayammum*. Does the dispensation continue to be valid after prayer has begun and water has been seen, or does the discovery of water invalidate the *tayammum*? If one accepts *istiṣḥāb al-ḥāl*, then, Baḥrānī states, the dispensation is unaffected. It is this principle that Baḥrānī turns his attention to in the second part of his section on *dalīl al-'aql* in M3.

Though the term *istiṣḥāb* has a number of different meanings, only one has a specific juridical reference, which Baḥrānī defines thus:

> If a ruling is established at one time, and then another [later] time comes under scrutiny, and there is no indicator which negates that [original] ruling, then it is deemed that it [the ruling] remains as it was. [*H*, 1, 51–52]

By this definition he means that if a general ruling from the Lawgiver is proven, without any doubt, to be applicable to an action, or a state of affairs, at a particular point in time, then, according to the principle of *istiṣḥāb*, the ruling is presumed to continue to be in force at a later time, providing that it has not been negated by a change in circumstances.[19] This would seem to be a perfectly reasonable principle on which to make legal rulings—rulings, once made, remain in force until there is good reason to replace them with alternative

[19] For a discussion of *istiṣḥāb*, see Weiss, *God's Law*, p. 658–661 and Hallaq, *Legal Theories*, p. 113–115.

rulings. Indeed this "assumption of continuity" as it is sometimes defined, would seem to be an inescapable element of any workable system of evaluation. However, there was, according to Baḥrānī, some debate about the validity of this principle. Most "traditionalists" (*muḥaddithūn*) and "some Uṣūlīs" (amongst whom, Baḥrānī claims were al-Muḥaqqiq and Sayyid al-Murtaḍā) considered it to be invalid, whilst others considered it to be "the preferred option" (including Ḥasan b. Shahīd II and Ṣāḥib al-Madārik).

When an indicator is found, and a ruling thereby deduced, is it essential that there be evidence (in the text from which the indicator was taken) that this ruling continues, unaffected by the mere passing of time? Or, put another way, is it permissible to assume that a ruling will continue through time, unless it is indicated in the text that it is time-limited in some way? Which assumption is considered primary here—the assumption of non-continuance or the assumption of continuance?

In the case of the man preparing for prayer who is forced to perform *tayammum*, Baḥrānī considers it to be uncertain that the assessment of purity after *tayammum* is not affected by the sighting of water, because the text contains no indicator proving that it is affected. Since it is uncertain (*shubha*), the believer should perform *iḥtiyāṭ*, and in this circumstance caution would clearly indicate abandoning the first prayer, and beginning again after purification with the sighted water.

Baḥrānī outlines six objections to *istiṣḥāb* in this example (and by implication in other instances). First, the assessment in the first instance is established by a textual indicator (the Quranic verse which permits purification by sand if water is unavailable), but the ruling in the second instance (that is, purification by sand is not affected by the sighting of water) needs a separate indicator. Since there is no clear indicator, the second ruling must be considered uncertain (*shubha*) and in cases of *shubha*, *iḥtiyāṭ* is obligatory. Second, the *mujtahid* (note the terminology here), who rules according to *istiṣḥāb*, claims that the first ruling can only be obliterated by a ruling of equal strength, arguing that there is no clear indicator for the re-assessment of the first ruling. Baḥrānī argues that though there is no clear indicator of a second ruling, there is a possibility (*imkān*) of a second, over-ruling ruling. This possibility makes the validity of the first ruling doubtful, and in such cases caution becomes obligatory.

The third objection is pure polemic. The *mujtahids* are guilty of

qiyās. *Qiyās*, or analogy, is, by common agreement, an unacceptable procedure for the Shīʿa. In particular, the *mujtahids* are guilty of "*qiyās maʿa wujūd al-fāriq*" (analogy with a discrepancy); there is a discrepancy between the early and late cases—namely the existence of an immediately permanent indicator. The discrepancy makes the two cases non-analogous, and hence any attempt at transferring the ruling in one case to the later case is unacceptable. The *mujtahids* are at fault, not only because they use *qiyās*, but because they use it incorrectly.[20]

Fourth, there is mere *zann* that the first ruling survives the change in circumstances, and *zann* is an insufficient basis on which to peform an action. Fifth, the case of the man sighting water whilst praying after *tayammum* is not a case of *istiṣḥāb* at all, but a case of contradictory *akhbār*. According to Baḥrānī, there are reports about what a believer should do in such circumstances, but they are considered weak by the *mujtahids*. Baḥrānī, who is less strict in his assessment of the validity of the *akhbār*, claims that, in this case, it is not that there are no indicators, but that there are conflicting indicators (since the *akhbār* in question, unfortunately, contain contradictory rulings from the Imam). Hence this is actually a case of *taʿāruḍ* (contradiction), not *istiṣḥāb*.[21]

Finally, Baḥrānī states (rather repetitively it might be argued) that there is a clear lack of certainty with regard to the second ruling and in such cases *iḥtiyāṭ* is obligatory:

> This *istiṣḥāb* is one case in which God's ruling is not known because there are no texts (*nuṣūṣ*) to prove it. *Akhbār* have been related, by numerous chains of transmission, that in such cases it is obligatory to perform *iḥtiyāṭ* and *tawaqquf*. (*H*, 1, 55)

The procedure of *iḥtiyāṭ* obviates the need for *istiṣḥāb* and gives the believer an assurance that he has not transgressed the law. Unless this continuance has a clear indication within the text in question, then a presumption of continuance is a violation of the certainty (*ʿilm, yaqīn*) of fulfilment, which is, after all, the whole basis of Baḥrānī's legal theory.

[20] On *qiyās maʿa wujūd al-fāriq*, see Kamali, *Principles*, p. 206. The conditions under which an analogy may be considered valid are discussed by al-Āmidī, see Weiss, *God's Law*, p. 563–570, particularly p. 566.

[21] On *taʿāruḍ*, see below, p. 112–121.

Analogy

One element of early Shiʿite polemic against Sunnis was their use of *qiyās*. *Qiyās*, or analogy, was seen by Shiʿites as, essentially, guesswork. The jurist makes a guess as to the causative element (*ʿilla*) in one case (*aṣl*) recorded in the textual sources, that is, the element which causes the ruling (*ḥukm*) given by God, the Prophet or the Imam in the sources. The jurist transfers the ruling from the first case to a novel case (*farʿ*) where the causative element is also said to exist. Early Shiʿites argued that determining the causative element was an uncertain process and hence the transference of the ruling was fraught with difficulty. The texts, then, do not always declare the causative element, and in the search for the *ʿilla*, the texts are unclear. To attempt to base a legal judgement on an obscurity within the texts is unacceptable, particularly for a theorist like Baḥrānī who places an emphasis on certainty and knowledge.

The problem for later jurists was that much of the law was deduced by analogy; however, *qiyās* (at least terminologically) could not be validated for polemic reasons. The solution was to devise an alternative series of terms for the *qiyās* process, which would enable the jurist to elucidate the law, but preserve the slogan "no *qiyās*".[22]

Baḥrānī's thoughts on *qiyās* are to be found at the end of M3, in a section termed *manṣūṣ al-ʿilla* (literally "the recording of the causative element").[23] For Shiʿites, if the causative element could be isolated with certainty, then the procedure of transferring the ruling was not the uncertain *qiyās* of the Sunnis, but a valid legal process. The only means through which the causative element can be known with certainty is if the Lawgiver himself gave an indication as to its identity—that is, if the *ʿilla* has been recorded (*manṣūṣ*). Baḥrānī examines the different Shīʿī opinions on the question of *manṣūṣ al-ʿilla*. Murtaḍā denied that the *ʿilla* could ever be established, whilst ʿAllāma and "a group of companions" claimed it could. For Murtaḍā, God gives rulings in two forms: a ruling may be a simple demand, or it may be a benefit (*maṣlaḥa*) for the people. These two elements may be present in one law, or only one of the two may be present. A believer, he claims, has no way of knowing which operates in a particular

[22] Anti-*qiyās* slogans were a common feature of early Shīʿī polemic, see Calder, "Doubt and Prerogative", p. 59–60.

[23] Baḥrānī, *H*, 1, p. 63–65.

law, and hence has no means of knowing whether or not an apparently beneficial ruling can be transferred to a new circumstance.

ʿAllāma and his companions, on the other hand, argue that those who deny *qiyās* do not deny the transferring (*taʿdiyya*) of an assessment *per se*. They object to the transference of an assessment when the *ʿilla* is unknown (or not known with certainty). The debate is, therefore, whether, for example, wine can be proven (with certainty) to be forbidden due to its intoxicating quality. If this is so, then the prohibition can be transferred to all substances which have this attribute.

Baḥrānī's position is that of Murtaḍā—he maintains that to discuss the reasons why the Lawgiver gives a ruling is fruitless, perhaps blasphemous. Instead one must say that when one has discovered the causative element with certainty, one has in fact discovered a general rule. So, when one discovers that wine is forbidden because it is intoxicating (a fact discernible from the text), one has in fact discovered a general rule that all intoxicating substances are forbidden. This general rule Baḥrānī rather confusingly terms the *aṣl*. The *aṣl* is known with certainty (*bi'l-ʿilm*). This process is termed *tanqīḥ al-manāṭ al-qaṭʿī*[24] by Baḥrānī. The processes of transferring an assessment is, therefore, analogy by syllogism. ʿAllāma's method of argumentation is:

1) Substance (or action) X is prohibited because of causative element Y, which is a necessary part of substance X (this is derived from a text).
2) Substance Z (a novel case) also has the necessary element Y, and is therefore also prohibited.

Baḥrānī's argument, though producing the same results, is as follows:

1) X is prohibited because of Y.
2) Therefore all cases where Y is present, are prohibited.
3) Z has element Y.
4) Therefore Z is also prohibited.

Why Baḥrānī prefers to express his argument thus is unclear, but he considers ʿAllāma's formulation to be incorrect, though not as

[24] *Tanqīḥ al-manāṭ al-qaṭʿī*, though difficult to translate, can be described as "the certain identification of the *ratio legis* in so far as it is isolated from attributes that are conjoined with it in the texts" (after Hallaq, *Legal Theories*, p. 201), or more simply, "isolating the *ʿilla* with certainty" (after Kamali, *Principles*, p. 213).

dangerously arbitrary as the Sunni method of *qiyās*. One possible explanation is that terms such as *tanqīḥ al-manāṭ* and *taʿdiyya* are less ideologically loaded than *ʿilla* and *qiyās* (the latter two terms being inextricably linked with Sunni theories of analogy).

Caution and Suspension of Judgement

An epistemological rigorism underlies Baḥrānī's rejection of BA, *istiṣḥāb* and *qiyās*. These procedures are rejected because they lead to uncertainty in the fulfilment of the law. If an agent (*mukallaf*) uses these procedures, he will be left in doubt as to his compliance with God's command. BA is, therefore, not valid. An action without a clear text-based ruling is uncategorisable and uncertain (*shubha*) and the *mukallaf* is charged with discovering the most cautious (*al-aḥwaṭ*) course of action. Since the most cautious action may go further than the ruling in the lost text, there can be no definitive ruling in such cases, only a preliminary, cautious assessment. This suspension of a definitive ruling is termed *tawaqquf*.

Iḥtiyāṭ (caution) and *tawaqquf* form the basis of Baḥrānī's legal recommendations for those cases which have no clear textual indicator (either because the indicator is unclear or because the texts are unclear as to the continuity of an assessment once made). Though *iḥtiyāṭ* has played a greater role in Shīʿī legal theory than in Sunni *uṣūl*, since al-ʿAllāma al-Ḥillī (and possibly earlier), it has been eclipsed by processes such as BA, *istiṣḥāb al-ḥāl* and various types of analogy (though none that are explicitly termed *qiyās*). In Baḥrānī's theory, caution comes to the fore. He begins, as usual, with an account of the differences of opinion over *iḥtiyāṭ*:

> Our colleagues have differed over whether [*iḥtiyāṭ*] is obligatory or merely recommended. The *mujtahids* argue the latter, whilst the Akhbārīs argue that it is obligatory in certain circumstances. It is perhaps clear from the thought of some modern *mujtahids* that [in their opinion] it has no legal validity at all. [*H*, 1, 65]

This is followed by a citation from the *mujtahid* camp (Muḥaqqiq).[25] In this passage, Muḥaqqiq argues that *iḥtiyāṭ* is only recommended, not obligatory. Muḥaqqiq uses an example: a dog licks a bowl, making it impure. How might one purify it? The *akhbār* give various

[25] The quotation is taken from Muḥaqqiq, *Maʿārij*, p. 216.

answers, all involving washing the bowl. Different reports record that one, three and seven washes are required. Muḥaqqiq argues that since the reports recommending three and seven washes are weak, one need only wash the bowl once. This is the most economic means of fulfilling the law (termed *barā'at al-dhimma*).[26] Three and seven washes are deemed unnecessary because "they require a hardship which the law does not indicate".[27]

Baḥrānī's rejection of Muḥaqqiq's position serves to justify his theory of *iḥtiyāṭ*. He makes four points concerning the latter's view:

1) This example is not a case of there being no indicator, but of there being conflicting indicators, and hence it should be dealt with differently.[28]
2) Muḥaqqiq argues that the other reports are weak, but as Baḥrānī has argued, they are, due to the validity of the early collections of *akhbār*, actually reliable.
3) Muḥaqqiq claims that BA supports his position, but Baḥrānī has already shown that BA, or at least the type utilised by Muḥaqqiq here, is invalid.
4) Muḥaqqiq claims that there is *ijmāʿ* on the issue. Baḥrānī counters this by saying that there is indeed *ijmāʿ* that at least one wash is required. There is, however, no consensus on whether more than one wash is needed.

These four points demonstrate succinctly how Baḥrānī's theory of caution is tied into the other elements of his legal theory. The comprehensive validity of the revelatory texts,[29] his rejection of BA and other presumptions[30] and his suspicion concerning the validity of *ijmāʿ* as a source of law[31] are conjoined with his demand for caution. The *mukallaf* must perform all possible obligatory elements of an action in order to ensure that his responsibility to God is fulfilled. This attitude is termed *ishtighāl al-dhimma* ("the exhaustion of the responsibility") and can be seen as the opposite of *barā'at al-dhimma*. In the example used by Muḥaqqiq, seven washes are necessary since this is the most cautious course of action.

[26] See Calder, "Khums", p. 41–42 and Kohlberg, "*walad zinā*", p. 255.
[27] Baḥrānī, *H*, 1, p. 65.
[28] Though, as we shall see, Baḥrānī's solution also involves *iḥtiyāṭ*, see below, p. 119–121.
[29] See above, p. 32–47.
[30] See above, p. 96–100.
[31] See above, p. 55–60.

The remainder of Baḥrānī's discussion of *iḥtiyāṭ* falls into three sections: an introduction (explaining when *iḥtiyāṭ* is obligatory and when recommended), a list of six rules by which one can deduce the most cautious course of action and, finally, a citation of six *akhbār* which are interpreted to prove the legitimacy of *iḥtiyāṭ*.

According to the Akhbārīs, *iḥtiyāṭ* is obligatory in certain circumstances. Baḥrānī's own position most closely correlates to the Akhbārī position. If the revelatory text has a clear indicator as to the duty imposed upon the believer, then *iḥtiyāṭ* is unnecessary. Uncertainty, however, leads to the need for *iḥtiyāṭ*.

Doubt (*shakk*) and uncertainty (*shubha*) in the law can emerge for a number of reasons (conflicting indicators, obscurity of indication etc). In such cases, Baḥrānī argues, *iḥtiyāṭ* is obligatory. Exactly what caution demands depends on the case in question, but in general terms it means selecting the course of action which places the greatest hardship on the individual, fulfilling both the certain and uncertain requirements of the law. By doing this, the believer will be certain of his compliance with God's commands. The duty to act with caution overrules the duty to follow the law, as described in the texts.

Baḥrānī makes a distinction between occasions when *iḥtiyāṭ* is obligatory (*wājib*), and when it is recommended (*mustaḥabb*). In terms of legal consequences, the distinction between the two categories appears to be in the punishment or reward given to the legal subject (*mukallaf*): in cases where caution is obligatory, the subject receives a reward for following *al-aḥwaṭ* and receives punishment for failing to do so. When caution is only *mustaḥabb*, he gains a reward for following *al-aḥwaṭ*, but no punishment for failing to do so.

How, then, does one recognise when *iḥtiyāṭ* is obligatory or recommended?

> [*Iḥtiyāṭ* is obligatory] when the subject hesitates over the assessment, be it due to the conflict of indicators, or their ambiguity and lack of clear indication, or the lack of a ruling altogether [in the texts], based on the rejection of BA,[32] or in cases where it is doubtful whether this or that element is included under one of the known general rulings of the assessment, or occasions like these . . .
>
> [*Iḥtiyāṭ* is recommended] when, although a legal indicator is established [for the classification of a particular action], there is doubt (*shakk*)

[32] Baḥrānī appears to contradict himself here, since he only rejects BA in cases of revelatory obscurity, not revelatory silence. See above, p. 96.

> over the probable existence of a contradictory [indicator]. It is highly probable, due to one of the permitted reasons, that [the action] is prohibited by the Lawgiver, even though the subject does not know this [with certainty]. Examples of this are the [permissibility of accepting] wages from the tyrant, and marrying a woman whom you have heard to be related to you by fosterage, but there is no legal proof of this. Also amongst these is when in the opinion of a jurist (*fī nazar al-faqīh*), the indicator [which appears to be effective] has been overruled (*marjūḥ*). [*H*, 1, 68–69]

This obliquely worded passage seems to indicate that the difference between the occasions when caution is obligatory and when it is recommended corresponds to the difference between when a ruling is clearly uncertain and when the ruling appears to be certain, but for some reason or other, there is a probability (*iḥtimāl*) that there is a contradictory ruling.

First, Baḥrānī deals with those cases where *iḥtiyāṭ* is obligatory, as these seem relatively unproblematic. He lists them as follows:

1) When it is uncertain whether an action is obligatory or recommended, then caution is obligatory, and the subject should perform the action. Similarly, if there is uncertainty whether an action is discouraged (*makrūh*) or forbidden, the subject should not perform the action.
2) When there is uncertainty whether an action is obligatory or forbidden, then caution is obligatory, and the subject should not perform the action.
3) When a general ruling is known, but there is uncertainty over what one needs to do to ensure compliance with the general ruling, then caution is obligatory and the subject should perform the action. For example, is it essential for the correct performance of Friday congregational prayer that the noon prayer is also performed? Caution would dictate that although a definitive answer is unknown, one should assume that it is essential to perform noon prayer.
4) When a general ruling is known with certainty from the sources, but there is uncertainty and doubt (*shakk*) over whether a particular action falls under this general ruling (ie there is a problem, not over knowledge of the law, but over its application), then caution is obligatory. Caution in such circumstances would dictate treating the action as if it is assessed by the general rule.

The reasoning here seems to be quite clear, and consistent with Baḥrānī's findings on BA, particularly that outlined in 2). If there is doubt over whether an action is obligatory or forbidden, then one should treat it as forbidden because the Lawgiver would not leave the *mukallaf* in a situation of uncertainty over obligatory actions. Baḥrānī seems uninterested in other possible uncertainties: for example, uncertainty over whether an action is *mubāḥ* (neutral) or recommended, or whether it is neutral or discouraged. Presumably, one counts the action as recommended and discouraged respectively.

The first three of the above cases relate to occasions when there is uncertainty over the ruling itself; the last relates to when there is uncertainty about the application of the ruling to a specific circumstance.[33]

The discussion becomes more complicated in cases of recommendation. The puzzling phrase is "the permitted reasons" (*al-asbāb al-mujawwaza*). The probability (*iḥtimāl*) that there is an unknown indicator which contradicts the apparently decisive legal indicator (*dalīl shar'ī*) is justified by "the permitted reasons", though to my knowledge, Baḥrānī does not describe them. The examples he gives provide the reader with a clue: a *mukallaf* has heard that a woman is related to him by fosterage, but there is no legal proof of this (legal proof would consist of witnesses). He is, therefore, recommended to perform *iḥtiyāṭ* (and not marry the woman). However, if he does marry the woman, he has not transgressed the law, since there is no proof of a fosterage relationship. It is unclear how accepting the wages of a tyrant (*jawā'iz al-jā'ir*) is an example of this, but it may be argued that though the texts indicate that it is not permitted to accept such a payment, avoiding such work would cause hardship to the community and suspension of important community activities (such as *qaḍā'*). Hence one suspects that there is an indicator which permits taking up employment with a tyrant, but that the indicator has been lost. It is recommended, through *iḥtiyāṭ*, that such a payment is not accepted, but one commits no sin or crime if the payment is accepted.

The final example is perhaps the most interesting. The opinion of a jurist that an apparent ruling has been overruled by another unknown indicator makes *iḥtiyāṭ* recommended. The opinion of the

[33] One sees this typology evident in the question of blame and punishment for ignorance of the law. See above, p. 20–21.

jurist (*nazar al-faqīh*) can reduce a clear indicator to a doubtful one. One is still recommended to follow the apparent ruling, but one has committed no sin or crime if one follows the jurist's opinion. This, for an Akhbārī who is supposedly critical of imitation of the juristic class, is surprising, and instructive. It demonstrates that Baḥrānī is trying to de-stigmatise the common practice of following a jurist's opinion (termed *taqlīd* in *ijtihād* theory), though it is recommended that one follow the ruling of the known text, rather than the jurist's opinion based on an unknown, but probably existent, text.

Baḥrānī goes on to concentrate on the juristic opinion:

5) If, as in case 1), there is uncertainty over whether an action is obligatory or recommended, then caution would dictate performing the action. However, if there is a juristic opinion that the action is only recommended, then following *iḥtiyāṭ* is only recommended. The action can be treated as obligatory or as recommended. The *mukallaf* has not sinned if he follows the jurist's opinion and does not perform the action, though it is recommended that he ignore the jurist's opinion, and perform the action.

Baḥrānī makes a comparison with the butcher in the Muslim market (*sūq al-muslimīn*). Though there is no means of knowing whether the meat he sells is *ḥalāl*, one is justified in treating it as *ḥalāl*. Caution might dictate that one distrust the butcher, but this would lead to a paralysis in religious life—each believer would have to undertake all activities himself. Similarly, with regard to the *faqīh's* opinion, though one is not certain that it is correct, one is justified in treating it as correct. Just as the believer is certain if he butchers his own meat, one is certain if one ignores the *faqīh's* opinion. However, this is not always possible, and the *faqīh* acts as a facility for believers unable to discover the clear rulings for themselves.[34] Finally, it is important to note that a recommendation to treat an action as obligatory does not make that action obligatory in reality. There appears to be a distinction between what the law is in reality, and what it is for its subjects.

The incorporation of this theory of *iḥtiyāṭ* makes the law two-tiered, perhaps three-tiered. First there is the law in reality (*fi'l-wāqi'*). One can, it seems, know some of this law, particularly in

[34] The implications of this for the authority of the scholarly elite are explored in Chapter Six, below, p. 222–227.

instances where the texts are clear, and significantly where there is no juristic opinion to the contrary. However, portions of this law (Baḥrānī does not indicate the proportion) are uncertain (*shubha*), such that the individual has doubt (*shakk*) as to the correct course of action. In these cases, it is obligatory to perform *iḥtiyāṭ*. When *iḥtiyāṭ* becomes obligatory, then the *mukallaf* is obliged to perform actions which may not be obligatory "in actuality". Hence things that are obligatory on the second tier need not be obligatory on the first tier. *Iḥtiyāṭ* brings certainty of the fulfilment of the law in areas of doubt, even though elements of the actions performed may be superfluous. The problem for the *mukallaf* is that he does not know which elements are superfluous, and hence must perform all elements to ensure total compliance. Baḥrānī also seems to add a third tier—when no indicator of the law is known to the *mukallaf*, he is justified in presuming an action to be licit. He may be incorrect in this assumption (there may be an indicator or the law may be otherwise), but the crucial point is that he is "forgiven" for this transgression, or justified in his action.[35]

The final section of M4 is an examination of the *akhbār* which, Baḥrānī claims, support his theory. These number ten; some prove *iḥtiyāṭ* generally, and others demonstrate one or other of points 1) to 5) outlined above. The following will serve as an example:

> From 'Abd Allāh b. Waddāḥ, "I wrote to the Imam: 'The disk of the sun disappears and night begins. The night sets in and the sun is hidden from us, but above the hills there is [still] redness [in the sky]. The cantors call us [to prayer]. Can I pray at that time, or break my fast if I am fasting, or do I break my fast when the redness, which was above the hills, has gone?' He wrote to me: 'I advise you to break your fast when the redness has gone, and to delay [the breaking of the fast] out of care for your religion.'" [*H*, 1, 74]

This is a case of *iḥtiyāṭ*. The one fasting should delay the breaking of his fast until he is certain that the sun has set. He can only be certain of this when all the redness has gone from the sky. Hence, as a general rule, *iḥtiyāṭ* is proven.

In this manner, a procedure for all areas of uncertainty (*shubahāt*)

[35] The juristic class, whose task, it appears, is to pass on the first- and second-tier guidance to the community, are therefore involved in a benign deception—describing some actions as obligatory when it is quite possible that they are not. See below, p. 224.

is produced. If the texts are unclear, *iḥtiyāṭ* will ensure full compliance with the law. Indeed in such cases, the Imams themselves have decreed that a cautious approach should be employed.

Contradiction in Revelation

In M6, Baḥrānī concentrates on another cause of uncertainty—contradiction (*taʿāruḍ*). He outlines the procedures to be followed (presumably by a jurist) when two texts of revelation indicate contradictory rulings. The full title of M6 is "On the contradiction (*taʿāruḍ*) and the means of expressing a preference (*tarājīḥ*) between legal indicators". In this chapter he does not consider a conflict of text and *ijmāʿ*, or a conflict of text and reason (*ʿaql*). He clearly does not consider these to be legal indicators in any meaningful sense.[36]

Baḥrānī outlines three types of conflict, which he deals with in three sections:

1) conflict between two Quranic verses (*āyatayn*)
2) conflict between a Quranic verse and a report from the Prophet or one of the Imams (*riwāyatayn*)
3) conflict between two reports (*khabarayn*).

Though he indicates that he is concerned with the conflict between the sources, he is actually concerned with conflict between the indicators (*adilla*) produced by these sources. The three sections are of increasing length, indicating the relative importance of each of the types of conflict. In addition, the procedures suggested for resolving these conflicts are accompanied by increasingly comprehensive proofs, indicating that the final category of conflict is considered the most controversial (and hence in need of the greatest demonstration).

Intra-Quranic conflicts are solved by five possible means to be carried out in this order:

1) abrogation (*naskh*) of one verse by another on the basis of information which can be gained from the *akhbār*
2) abrogation, even though the *akhbār* may not specify which verse is abrogated, on the basis of the date of revelation
3) particularisation (*takhṣīṣ*) or conditionality (*taqyīd*) of one verse by another

[36] He does discuss text/reason conflict in M10, analysed in Chapter Five.

4) *tawaqquf* and *iḥtiyāṭ*, if possible
5) choice (*ikhtiyār*) between the verses.

Though Baḥrānī's expression of these rules is succinct, accompanied by no evidence for their authority, much can be deduced from them. First, to discover whether one verse abrogates another, one does not look first to the date of revelation (the usual method), but towards the *akhbār*. From these one can establish whether or not one of the Imams ever indicated that one verse was abrogated by another. This places the *akhbār* in a predominant role; evidence from which supersedes the usual date-based method of determining abrogation. Second, if means 1) to 3) produce no satisfactory answer, then one must work out the most cautious course of action and suspend judgement. What is significant is that Baḥrānī recognises that this may not be possible, since he adds a fifth point, which is free choice on the part of the believer. The choice is made on the basis of "appropriateness" (*min bāb al-taslīm*).

There is a similar procedure outlined for Quranic-*akhbār* conflicts, and again, there is little supporting evidence. Abrogation, however, is not a possibility. Clearly, for Baḥrānī (as for most Shiʿites), Sunna cannot abrogate *kitāb*, or *vice versa*. Baḥrānī does not claim this procedure to be his own:

> What one of [or some of] our colleagues has [or have] mentioned is that:
> [i] if one of [the texts] is unconditional (*muṭlaq*) or general (*ʿumūm*), then it is obligatory to add the exception (or condition) of the other. [ii] if not, then *iḥtiyāṭ* is obligatory, if it is impossible to reconcile the two elements so that a strong opinion is obtained, or so that external factors (*qarā'in khārija*) are taken into account. [*H*, 1, 87]

The external factors mentioned here are described in the next chapter.[37] Baḥrānī also entertains choice as a possible point in the procedure, but he rejects it for reasons that are not entirely clear.[38]

The remainder of the section deals with the vexed question of the ability of an isolated report (*khabar al-wāḥid*) to particularise (*takhṣīṣ*)

[37] See below, p. 160–164.

[38] It is quite possible, though Baḥrānī does not state it explicitly, that the reason for the rejection of *ikhtiyār* as a means of resolving conflicts between the Qur'ān and *akhbār* is his view that the Qur'ān, apart from the few clear verses, cannot be understood without the aid of the *akhbār*. It is, therefore, not possible to choose the Qur'ān in such a conflict, for one would not know what one was selecting. On his view of the relationship between the Qur'ān and *akhbār*, see above, p. 48–55.

the general rulings in the Qur'ān. Is *takhṣīṣ al-qur'ān* possible for all *akhbār* or just for some?

There are those who consider such *takhṣīṣ* possible (including Baḥrānī himself), and those who consider it impossible (including Sayyid Murtaḍā and al-Shaykh al-Ṭūsī). Those who take the latter view do so because of the supposed epistemological inferiority of the isolated report. The Qur'ān is certain (*qaṭ'ī*) whilst the latter is not certain (being *ẓannī*). They argue that to allow the latter to affect the former would be to violate common-sense laws of epistemology. Baḥrānī's answer, unsurprisingly, is that all the *akhbār* are of equal validity, and hence produce certain knowledge (*'ilm*) as to God's law. To consider the isolated report as less than certain is to commit "the error of Sunnis". The Qur'ān can overrule the *akhbār*, as it is a test of whether or not the report is *taqiyya*. However, reports can never be rejected merely on the basis of the classification technique used by Uṣūlīs to weaken the status of certain elements of revelation. This technique has, Baḥrānī states, been shown to be false in the preceding section of the Prologues.[39]

The section on conflict within the *akhbār* constitutes the most extensive of Baḥrānī's examinations of intra-revelatory conflict. Resolving conflicts between the indicators derived from reports of the Prophet's and Imams' actions and words is the most controversial procedure. Baḥrānī has already demonstrated that all conflicts within the *akhbār* are due to *taqiyya*—that is, the Imams' dissimulation in times of oppression. They are not due to the inaccuracy of the reports themselves. Hence the methods of *isnād* criticism, and the tests of *tawātur* and *shuhra*, do not apply here. Another means of resolving conflicts between reports is interpretation (*ta'wīl*). The processes of *takhṣīṣ* and *taqyīd*[40] are two examples of *ta'wīl*. Though these are considered with respect to intra-Quranic conflict, and with respect to Qur'ān-*akhbār* conflict, Baḥrānī, apparently, does not consider them to be permitted in cases of two conflicting reports from the Imams. In fact, he rejects any attempt to interpret away conflicts between reports, describing them as "extensive interpretation" (*ta'wīl ba'īd*).[41] Contradictory texts should not be joined together (*al-jam'*), for to do so mixes the *taqiyya* with the true elements of the law.

[39] This position was described in Chapter Two, above, p. 39–47.

[40] These terms are discussed in more detail below, p. 174–178.

[41] Baḥrānī rejects the suggestion that al-Shaykh al-Ṭūsī sanctioned *ta'wīl ba'īd*, saying that if it appears that he did so in his introduction to the *Tahdhīb* (see Ṭūsī, *Tahdhīb*, 1, p. 2–3), this is due to his attempt to re-convert a disaffected Shī'a, and was purely a tactic to win him back to the true sect.

All contradictions within the *akhbār* are, then, due to *taqiyya*. To produce a clear indicator from the contradiction, one is required to locate the *taqiyya* report and reject it.[42] Once one report is known to be *taqiyya*, then the other report is "preferred" (*rājiḥ*). The means of identifying the preferred report were, Baḥrānī claims, laid down by the Imams, but there is a problem:

> The sure method, for us, is to rely on what comes from the people of the house of the Prophet [in this matter]; the *akhbār* contain different ways of expressing a preference (*tarjīḥāt*). However, these [reports] are not devoid of confusion. [*H*, 1, 90]

The irony is that the reports which outline the ways of establishing the preferred report are themselves contradictory. Baḥrānī lists fourteen such reports, summarised in the table below.

Baḥrānī's task is to devise a means whereby these reports might be seen as non-contradictory—unfortunately, he has no procedure for doing this, because the procedure is exactly what he is trying to prove. His opponents would undoubtedly assert that his argument (set out below) involves *ta'wīl*, and is therefore self-contradictory.

Baḥrānī's reasoning proceeds as follows:

1) The ruling of the Imams that one should take the report of the more just or more famous transmitters was only in force until the time of Kulaynī. As demonstrated earlier,[43] Baḥrānī considers Kulaynī and the other early collectors of reports to have used these criteria in their selection of reports. Thus to repeat the processes would be fruitless (and possibly dangerous, since we do not have access to the relevant information).
2) The advice to wait until one meets the Imam can only be relevant to the time when the Imam is present. The Imams would not leave the community without advice on how to solve contradictions until the parousia.
3) The ruling in report 13 (to take the "better" report (*akhyar*)) is merely a general piece of advice to accept the report not issued under *taqiyya*. Hence this report cannot be said to be in conflict with the other recommendations.

[42] It is, of course, possible that both are *taqiyya*, but Baḥrānī does not, to my knowledge, consider this possibility.

[43] See above, p. 43.

4) The ruling in report 14 is rejected since it gives the impression that a later report is less likely to be *taqiyya* than an earlier report. This contravenes theological dogma and hence report 14 itself must be *taqiyya*.

Having disposed of these marginal criteria, Baḥrānī concludes that only two of the reports remain to be interpreted. These are the Maqbūla and the Marfūʿa (reports 1 and 5 respectively). The remaining criteria are, then, as follows:

Maqbūla	Marfūʿa
mujmaʿ ʿalayhi	opposition to the Sunnis
agreement with *kitāb* (and Sunna)	the most cautious
opposition to the Sunnis	choice
irjāʾ (ie *tawaqquf*)	

The major points of divergence between these two lists are analysed by Baḥrānī:

> The Maqbūla and the Marfūʿa contain all relevant means of expressing a preference, but they differ over the order of these means. The former includes preference by probity, then by *mujmāʿ ʿalayhi*, then by agreement with *kitāb*, then by opposition to the Sunnis. The latter includes preference by fame first, then probity and truthfulness [of the transmitter], then by opposition to the Sunnis and finally the most cautious. The latter does not mention preference by agreement with the Qurʾān, just as the first does not mention preference by the more cautious. [H, 1, 97–98]
>
> The Maqbūla indicates *irjāʾ* and *tawaqquf* after the other means of expressing a preference have been exhausted. The Marfūʿa indicates choice . . . [*H*, 1, 99]

These perceived contradictions between the reports are then resolved by Baḥrānī:

> First, it is possible to answer that the order (*tartīb*) is unclear in both [reports], because in truth, it [the order] occurs in the words of the [reports], and not in the words of the Imam. The most that can be understood from [the reports] is that the order [given] is the order in which the criteria are mentioned, and that does not constitute a claim that this is the order in which preference should occur. [*H*, 1, 98]

The Imam, then, was merely listing the criteria whereby one report might be preferred over another. He was not listing the order in which one should perform the procedure for expressing a preference. The two lists can be put together to form a more complete

1) *Maqbūla* of Ibn Ḥanẓala (from Imam Ṣādiq)	2) From Dawād (from Imam Ṣādiq)	3) From Samāʿa (from Imam Ṣādiq)	4) al-Ḥasan (from Imam Riḍā)	5) *Marfūʿa* of Zurāra (from Imam Bāqir)	6) From Samāʿa (from Imam Ṣādiq)	7) Aḥmad (from Imam Riḍā)
a) *aʿdal* (the most just) b) *afqah* (the most learned) c) *aṣdaq* (the most truthful) d) *awraʿ* (the most pious) e) *mujmaʿ ʿalayhi* (on which there is consensus) f) Agrees with *kitāb* (the Qurʾān) g) Agrees with Sunna (of the Prophet) h) What opposes the Sunnis i) That which opposes the Sunni judges j) *irjāʾ* (suspension of judgement)	a) *aʿdal* b) *afqah* c) *aʿlam* (most knowledgeable) d) *awraʿ*	i) What opposes the Sunnis	i) *kitāb* ii) Our *ḥadīth* iii) Choice	a) Most famous transmitter b) *aʿdal* c) *awthaq* (most truthful) d) What opposes the Sunnis e) Caution (*iḥtiyāṭ*) f) Choice	i) *irjāʾ*	i) *kitāb* ii) Sunna iii) Choice
8) ʿAbd al-Raḥmān (from Imam Ṣādiq)	9) Ibn Bābūya (from Imam Ṣādiq)	10) Abū Ibn Mahziyār (from Imam Ṣādiq)	11) Ḥumayrī (from Imam Mahdī)	12) Mughīra (from Imam Ṣādiq)	13) Kulaynī (from Imam Ṣādiq) a) Take the later report	13) al-Muʿallā (from Imam Ṣādiq) a) Take the living transmitter (some reports have a variant of "take the more recent report")
a) *kitāb* b) Sunna	a) Opposite of the people	a) Choose	a) Choose, on the basis of suitability	a) Free choice		

Table 1: Representing the *akhbār* concerning the resolution of conflicts within revelation cited in Baḥrānī's M6. Each report lists the criteria for distinguishing between two reports which indicate different assessments for the same action.

list, but this does not constitute a procedure. It could be proposed that the report that fails more of the criteria on this composite list should to be rejected. This would be one way of expressing a preference. How would one proceed if the two reports failed an equal number of criteria? Baḥrānī concludes, therefore, that there must be an order, but the Maqbūla and Marfūʿa reports cannot be considered indicators of that order. The list of criteria upon which to decide a preference between conflicting reports are, then, (in no particular order): *mujmaʿ ʿalayhi*, agreement with *kitāb* and Sunna, opposition to the Sunnis, the most cautious, *irjāʾ* and choice.

Two of the criteria appear to be mutually exclusive: the Maqbūla recommends *irjāʾ* (suspension) whilst the Marfūʿa recommends *takhyīr* (choice). Surely these are contradictory? How does one reconcile the recommendations to choose (freely) and to suspend judgement (and then choose the most cautious)? Baḥrānī entertains a number of possible means of reconciliation:

1) *Irjāʾ* refers to when the Imam was present, *takhyīr* refers to the *ghayba*.
2) *Irjāʾ* refers to matters of worship, *takhyīr* refers to matters of human intercourse (*ḥuqūq al-ādamiyīn, muʿāmalāt*).
3) If there is no compulsion to perform either action, then *irjāʾ* is obligatory. If there is compulsion (ie if it is an action which must be performed) then *takhyīr* is obligatory.
4) *Irjāʾ* is used when one of the actions prescribed by the reports might be recommended and the other permitted. *Takhyīr* is applied only when both reports indicate permitted actions.
5) The Imams first allowed *takhyīr*, but then recognised that it was unworkable. They then suggested *irjāʾ*.
6) *Irjāʾ* is a warning against acting on one's own opinion. *Takhyīr* is really an exhortation to choose the most suitable report.
7) If the two actions prescribed in the two reports are not mutually contradictory—that is, if it is possible to perform both—then *irjāʾ* is applicable (ie one should suspend decision, and presumably do both out of *iḥtiyāṭ*). If they are mutually exclusive, then one has to choose (*takhyīr*) which to perform.

Most of these seven suggestions are attributed to different scholars, and most are refuted by Baḥrānī.[44] His own proposal is as follows:

[44] See Baḥrānī, *H*, 1, p. 100–103.

> One should use the report recommending *irjāʾ* [ie the Maqbūla] for *fatwās*, and the report recommending *takhyīr* [ie the Marfūʿa] for action: meaning that it is not permitted for a *faqīh* to give a *fatwā* or an assessment, even though it is permitted for him to act on whichever of the two reports he wishes, on the basis of [his assessment of their] suitability. A group of our modern scholars has argued this also. [*H*, 1, 100]

However, he adds a caveat:

> For me, this [position] and the first position [outlined in 1) above], after thought and consideration, can be traced to a single order. That is that one should perform *irjāʾ* for *fatwās* and *takhyīr* for action only when the Imam is in hiding, or when it is not possible to go to see him. [*H*, 1, 103–4]

To summarise—if all the other procedures listed in the two reports fail to produce a preference, then the jurist must suspend his decision and not give a *fatwā* (*irjāʾ* is treated as synonymous with *tawaqquf* by Baḥrānī). He must then choose a course of action "on the basis of suitability". What this "suitability" entails is, predictably, clarified by Baḥrānī:

> These probabilities (*iḥtimālāt*) cause the above mentioned ruling to be classified as within the area of ambiguities, which [in turn] necessitates resting on the shore of *iḥtiyāṭ*. They are numerous. [*H*, 1, 105]

The jurist, then, is to make his choice (*takhyīr*) on the basis of *iḥtiyāṭ*, which makes the *takhyīr* criterion identical with *al-aḥwaṭ*. In this way, the apparent *irjāʾ*/*takhyīr* contradiction is resolved.

It is here, finally, that it becomes clear for whom the advice of this Prologue is intended. It is for the *faqīh*, the jurist. Though he may recommend a course of action, that course of action must be based on the criterion of caution. He is not permitted to give a *fatwā* in which he puts forward his opinion as to the actual intention of the Lawgiver. He is only permitted, it seems, to give an opinion as to the most cautious course of action from the range of possible actions advised by the contradictory texts. This is clearly in line with the slogan put forward by Baḥrānī in his section on caution: *al-tawwaquf fī'l-ḥukm wa'l-iḥtiyāṭ fī'l-fatwā*.[45]

In the last section of the Prologue, Baḥrānī presents his view concerning the order of the three remaining criteria of preference—these are comparison with *kitāb*, opposition to Sunni doctrine and

[45] See above, p. 99 and p. 105.

that which has been agreed upon (*al-mujmaᶜ ʿalayhi*). His main argument is based on a passage from the introduction to Kulaynī's *al-Kāfī*,[46] not a report, but the statement of a collector of reports, which Baḥrānī summarises:

> It is obligatory, first of all, to refer to the Holy Book. This is because the *akhbār* are full of such advice . . . this means referring to the clear verses (*muḥkamāt*) and their texts, after knowing what abrogates and what is abrogated. As for the others [ie the other verses], it is essential that a *tafsīr* comes from the people of the house [of the Prophet]. If not, then one must suspend judgement (*tawaqquf*) . . .
>
> Then the preference is to compare [the reports] with the doctrine of the Sunnis, and take what opposes their doctrine, for the *akhbār* are full of such advice . . .
>
> Then, if it is not possible to compare it to their doctrine, one should take what is agreed upon, except that in the present time, it is difficult to acquire this *ijmāᶜ*. [*H*, 1, 109]

These three rules are subject to qualifications. One can only refer to The Book on matters on which The Book is clear and on matters which the Imams have explicitly explained.[47] One can only refer to the Sunnis when they are united in one doctrine (however, as the Maqbūla states, the Sunnis differ so much amongst themselves). The type of *ijmāᶜ* needed to fulfil the third criterion is difficult to certify in the present period. Hence, one can conclude, the number of cases of contradiction in which these three tests might prove effective is limited:

> When it is not possible to express a preference on the basis of these three rules, then the preference is to stop on the shore of *iḥtiyāṭ*. Even though the recommendation of Kulaynī to choose is not devoid of strength, the *akhbār* of *iḥtiyāṭ* are, both generally and specifically, more numerous, of clearer provenance and more decisive indication.[48] [H, 1, 110–111]

In theory, the three rules are decisive. In practice, most cases will result in *iḥtiyāṭ*. All of this advice is aimed at the jurist or *muftī* who must give a *fatwā* to the people concerning a certain issue. It is clear

[46] See Kulaynī, *Kāfī*, 1, p. 8–9.

[47] On the possibility of understanding the Qur'ān without the Imam's *khabar*, see above, p. 53–55.

[48] Baḥrānī is clearly contradicting himself here since he does not consider *shuhra* and *isnād* as criteria for deciding which *akhbār* are relevant and which are not. See above, p. 42–45.

that there is a hierarchical structure of power based on knowledge underlying Baḥrānī's presentation here.

Baḥrānī's theory, as it has been described until now, is an assault on uncertainty (*shubha*). *Shubha* can occur because the texts appear to be obscure. Baḥrānī's principal aim is to abolish this uncertainty through his extensive theory of *iḥtiyāṭ*. The Lawgiver has a rule for every action, but in some cases (one suspects a large number of cases) that rule is unclear. There is only one answer to every question of *fiqh* (*al-ḥukm al-sharᶜī fī kull masʾala wāḥid*), but this one answer is not always clear. Though we will never know the answers to all these questions (and, unlike the Uṣūlīs with their *ijtihād*, we should not try to find them), we can still discover means whereby God's law might be fulfilled—over-eagerly perhaps, but nonetheless fulfilled. Ultimately, doubt as to the content of the law (in actuality) is inevitable, though certainty as to its fulfilment is gained through *iḥtiyāṭ*.[49]

Bihbahānī on Silence, Obscurity and Contradiction in Revelation

The most convenient manner in which to compare Baḥrānī's and Bihbahānī's views on elements of *dalīl al-ᶜaql*, is to allow Baḥrānī's structured discussion to control the order in which I analyse the relatively unstructured thoughts of Bihbahānī in *FH* and *FJ*.

Revelatory Silence

In FH24, Bihbahānī succinctly states his thoughts on the general legitimacy of BA. He considers it a prop or support (*ʿumda*) in the derivation of legal assessments, though its use is limited to two distinct situations:

1) when there is no relevant text (*mā lā naṣṣ fīhi*)
2) when there is uncertainty as to how to apply an already established ruling (*al-shubha fī mawḍūᶜ al-ḥukm*).[50]

[49] One possible objection, which Baḥrānī does not consider, concerns the clarity with which one might know *al-aḥwaṭ*. What happens when it is less than obvious what the most cautious course of action is? This important issue is not, as far as I can tell, dealt with by Baḥrānī.

[50] This distinction corresponds to that made by Baḥrānī when he states that uncertainty can pertain to the ruling itself, or to the application of a ruling. See above, p. 109.

In both cases, the initial assessment (*al-aṣl*) is that the action in question is "free" (*barī'*) of categorisation and, therefore, considered permitted. The Lawgiver is uninterested in whether the agent performs or neglects to perform the action in question. This, Bihbahānī claims, is the position of the *mujtahids*.

He goes on to outline the Akhbārī position on the first of the above situations (*mā lā naṣṣ fīhi*). There are four separate Akhbārī doctrines (*madhāhib*):

1) In cases of *mā lā naṣṣ fīhi*, one should suspend judgement (*tawaqquf*).
2) One should consider the action as outwardly forbidden (*ḥarām ẓāhiran*), though it is possible that it is not forbidden.
3) The action is, in fact, forbidden (*ḥarām wāqi'an*)—ie any action which is not permitted by a text is forbidden.
4) *Iḥtiyāṭ* is obligatory.

The distinction between 2) and 3) involves the two-tier view of legal reality. An action may not be forbidden in reality (*wāqi'an*), but it should be treated as forbidden because its "real" status is unknown. This discrimination is also evident in Baḥrānī's typology. However, none of these positions really represents that of Baḥrānī. As far as Baḥrānī is concerned, when there is no knowledge of a textual indicator, then one can assume purity and permittedness. *Iḥtiyāṭ* becomes appropriate only when there is knowledge of the existence of an indicator, but uncertainty as to its meaning.

Bihbahānī does recognise that at times Akhbārī opinion falls outside the four doctrines listed above:

> Some [of the Akhbārīs] explain that these [four] doctrines apply to that which is possibly forbidden [*iḥtumila al-ḥurma*] . . . as for when obligation, or some other category is possible, then they, like the *mujtahids*, argue for BA. This is for matters on which there is a text. [*FH*, 240]

This, it appears, is precisely Baḥrānī's position, which provides further evidence that Bihbahānī has Baḥrānī in mind in his discussions in *FH* and *FJ*. If there is doubt as to whether an action is obligatory or some other category, then the action is never assumed to be obligatory. The reason for this, as explained above, is that the Lawgiver would not tolerate a situation in which an obligation is not clear to his subjects. He would, however, tolerate a situation where a prohibition is unclear.[51]

[51] See above, p. 97 and p. 109.

The *mujtahids'* arguments for BA are listed by Bihbahānī. They number four:

1) Reason, revelation and consensus all prove that there is no legally binding command from a just Lawgiver if there is no evidence (textual or otherwise) to support the existence of such a command. In Arabic this maxim is expressed *qabiḥa al-taklīf wa'l-mu'ākhidha mā lam yakun bayān*. Actions for which there are no indicators (*adilla*) are outside the Lawgiver's sphere of interest, and hence are *mubāḥ*. The rational argument is, Bihbahānī states, that no period is devoid of a proof of God's law in the form of an Imam. This Imam teaches the people right and wrong. If there is no evidence that an Imam has expressed an opinion, then the subject in question is of no interest to the Imam. The Imam is the channel for the supreme Lawgiver's (that is, God's) intentions and actions which are of no interest to the Lawgiver are *mubāḥ*. The revelatory arguments consist of "many verses and *akhbār*", though Bihbahānī does not list them. The consensus is made up of opinions attributed to the major figures of early Shī'ī thought (Ibn Bābūya, Kulaynī, al-Shaykh al-Mufīd and al-Shaykh al-Ṭūsī).
2) Muslims, from the time of the Prophet until the return of the Twelfth Imam, do not suspend judgement on every action for which there is no explicit text. Actions such as movement, rest, drinking, sitting and eating are circumscribed by certain revelatory texts, but the permission to move, or to sit, or to eat is not proven by specific texts. Such actions are considered free of assessment in themselves, though their performance is subject to restrictions (such as the prohibitions on drinking wine or eating pork). The Lawgiver has allowed these actions to be free in themselves (*al-barā'a al-aṣliyya*) as a dispensation (*rukhṣa*) to the believers.
3) The Prophet did not ask the Muslims to suspend judgement in certain areas of human activity. Instead he left some actions unassessed, and these had no legal consequence.
4) Reason dictates that an assessment remains in force until an indicator is found, or is revealed, that nullifies the first assessment and replaces it with a second. Since, in the cases of *mā lā naṣṣ fīhi*, there is no evidence that an assessment has been made, this lack of assessment continues (*istiṣḥāb*) until a textual indicator is found or revealed. The presumption is, then, that the action is unassessed.

For Bihbahānī, these arguments prove the validity of BA, though he adds some exceptions:

> Know, then, that conditions are mentioned concerning the validity of BA:
> [i] that *taklīf* is not proven by some other [ie non-textual] means [ie reason]
> [ii] that there is no harm (*iḍrār*) to a Muslim [in adopting BA] . . . There is a general dictum "harm and damage is forbidden", which is established by both reason and revelation.
> [iii] the thing adopted by [BA] must not be an act of worship [*ʿibāda*] because they are non-rational [*tawqīfiyya*]. [*FH*, 250]

These three conditions require some explanation. The first is related to the Imāmī-Muʿtazilī belief that reason (*ʿaql*) is a valid source of moral judgements alongside revelation.[52] The second refers to the general idea that the law exists to promote human well-being and not harm. Hence if the assessment reached by BA is adjudged to be harmful, then it is not justified to assume that it is *mubāḥ*. However, an assessment which is adjudged evil by reason (under condition [i]) will also fail condition [ii]—hence one might argue that there is considerable overlap between [i] and [ii]. The third stipulates that reason can have no power over the *ʿibādāt* (ritual elements of the law) which are by their nature non-rational (and occasionally irrational). There is no rational justification for performing the pilgrimage or prayer, except that these were commanded by the Lawgiver, and it is rational to obey him.

Having described both the Akhbārī and *mujtahid* positions and having produced arguments in support of the latter, Bihbahānī spends the rest of FH23 refuting the Akhbārī restrictions on BA. These refutations are based around the Akhbārī interpretation of a series of texts (*akhbār* and Quranic verses) which prove that when the texts of revelation are silent, the Lawgiver wishes the maxim "When an assessment is not known, [*tawaqquf*] is obligatory"[53] to be enforced.

In particular, the following report is utilised by the Akhbārīs:

> Permitted is clear, forbidden is clear and the uncertainties are between them. Whoever avoids the uncertainties is saved from the forbidden things, and whoever adopts the uncertainties, adopts the forbidden things, and perishes because he does not know (*lā yaʿlamu*). [*FH*, 242]

[52] See below, Chapter Five, p. 183–188.
[53] Bihbahānī, *FH*, p. 242.

This key text, used also by Baḥrānī in his defence, justifies *iḥtiyāṭ*. Bihbahānī attempts to nullify its importance by an alternative interpretation.

First, this report "does not indicate that *tawaqquf*, or considering [the action in question] to be forbidden, is obligatory. Rather, its apparent meaning is that if [the action] happens to be forbidden in reality (*fī'l-wāqiʿ*), then he perishes. If it is not, then he does not".[54] By this Bihbahānī means that when a person consistently performs uncertain actions, he is bound to perform a forbidden action at some point in time. If he takes such an approach, he will eventually fall foul of the law. However, this uncertainty (*shubha*) can be dispelled by investigation and hard work (*ijtihād*).

Second, the Akhbārīs argue that it is forbidden to perform *shubha* due to the risk of performing *muḥarramāt* (forbidden actions). The report actually demonstrates the reverse. It states that there is a difference between *ḥarām* and *shubha*—the former is clear whereas the latter is unclear. To say that *shubahāt* are *ḥarām* is, in effect, to disobey the Imam.[55]

Third, the phrase "He who adopts the *shubahāt*, performs the forbidden" cannot be taken as it stands (*lā yakūnu qawluhu bāqiyyan ʿalā ẓāhirihi*):

> The clearest interpretation is that the meaning [of this phrase] is that he is on the point of performing a forbidden action . . . although the report takes the form of a warning or a piece of guidance . . . it is like when they say, "Do not go into the desert, for a lion will eat you and a thief will rob you". [*FH*, 243]

Bihbahānī's point is that the apparent meaning of the phrase is that performing an action which is *shubha* is equivalent to performing an action which is forbidden. This cannot be the meaning intended by the Imam, for this would mean that the Imam has contradicted himself by contrasting *ḥarām* and *ḥalāl* on the one hand with *shubahāt* on the other. The intended meaning (*murād*) must be diverted (*majāz*). The phrase must be a warning not to rush into performing actions of doubtful legality; just as there is a warning not to go to the desert. You will not be eaten or robbed every time you go to the desert, but you put yourself at risk by so doing.

[54] *Ibid.*
[55] Baḥrānī's point, however, was not that they were forbidden, but that they should not be considered forbidden. See above, p. 98–100.

Fourth, the verse actually refers to actions which have contradictory rulings in the texts, not those which have no textual indicator (ie it refers to *taʿāruḍ*, not BA). Fifth, there is no evidence to demonstrate that once categorised as *shubha*, an action must remain so: "One of the indicators [ie *kitāb, sunna* or *ijmāʿ*] is sufficient to remove it from *shubha*, especially widely transmitted reports and consensus".[56] Sixth, the Imam makes it clear that if an agent performs a *shubha* action, he is not to be punished but censured. The Imam himself said, "In the *ḥalāl* of the world there is reward; in the *ḥarām* there is punishment; in the *shubha* there is censure".[57]

These six arguments prove, Bihbahānī claims, that the conception of BA outlined by Baḥrānī (and by previous Akhbārīs) is unjustifiable, rationally as well as textually. The proof text utilised by the Akhbārīs actually proves the opposite to their claims—that it is possible for a believer to make a ruling in areas where there is uncertainty. This, as we shall see, is due to the activation of *ijtihād*.[58] Bihbahānī recognises BA as active in two cases: when there is no apparent textual indicator, and when there is uncertainty as to the correct application of a known rule. Baḥrānī regarded *iḥtiyāṭ* to be operative in the latter circumstance. If an action could be obligatory, then it should be performed. If it could be forbidden, then it should be avoided. Bihbahānī would not disagree, but for him it depends on the type of uncertainty which bedevils the action. *Shubha* which is permanent and irremovable demands such caution; but there are many cases in which *shubha* can be dissipated.

Bihbahānī describes two types of *shubha*: limited (*maḥṣūr*) and unlimited (*ghayr maḥṣūr*). For example, if one knows that one of two cups is ritually impure (due, say, to contact with an impure substance), and one knows the rules concerning ritual purity, but one does not know which is impure, then this constitutes a case of limited uncertainty—limited to one of the two cups. If possible, one should avoid using either cup for one's ritual ablutions, not because the risk is high (and at 50% it is, indeed, a high risk), but because the risk is known. A known risk can be avoided.

Unlimited uncertainty is a different matter. For example, one finds a piece of meat. One knows that carrion is forbidden, but one does

[56] Bihbahānī, *FH*, p. 244.
[57] *Ibid.*, p. 245.
[58] See below, p. 133–136.

not know if this meat is carrion. In such cases BA is operative because the risk is unknown; "Each *mukallaf* is a *mukallaf* by his own knowledge, and if there is no knowledge there is no *taklīf* upon him":

> The lack of an obligation to avoid an action in cases of unlimited *shubha* has been agreed by all. There is no doubt in it, and it has been a central tenet of all Muslims in all places. [*FH*, 247]

Iḥtiyāṭ, then, has a role in Bihbahānī's legal theory, but only in cases of limited uncertainty—a known risk requires caution, an unknown risk legitimises a presumption of permission. Bihbahānī does not give great details concerning how this limited/unlimited distinction is useful for the operation of BA, but one can deduce that the limited *shubha* refers to cases of *taʿāruḍ* and hence in such cases BA is not applicable.[59]

Baḥrānī's argument against *istiṣḥāb* was based on the lack of certainty involved in the procedure. For him, *istiṣḥāb* involved the unjustifiable assumption that a ruling, once made, had temporal continuity even though there was no indication in the text that the ruling remained in force over time. This lack of indication makes the later ruling *ẓannī* and hence, according to his epistemological schema, invalid.

Generally speaking, Bihbahānī's account of *istiṣḥāb* admits that *ẓann* is involved, but, as we have seen, a *ẓannī* indicator is, for him, legitimate, providing there are no indicators which are stronger, or more likely. The assumption here is that unless the Imam explicitly stated that a ruling was time-limited (*muwaqqat*), it is assumed to be unaffected by the mere passing of time, and it is precisely this assumption that Baḥrānī found unacceptable.

Bihbahānī recognises four elements of the law-giving process which could be subjected to *istiṣḥāb*. First, *istiṣḥāb*—the assumption of continuity—could be applied to the elements associated with the ruling. Under *istiṣḥāb* one assumes that the words in the texts of *akhbār* have the same meaning for the Imams as they do for the contemporary reader. In other words, one assumes that an item associated with the ruling (the words of the text) has remained unchanged. Second, *istiṣḥāb* could be applied to the ruling itself. The example provided by Bihbahānī concerns someone who is uncertain whether or not a

[59] Bihbahānī outlines the procedures associated with *taʿāruḍ*, (*Ibid.*, p. 208–238) and, see above, p. 136–144.

particular action invalidates a state of ritual purity. According to *istiṣḥāb*, the previous state (purity) is assumed to continue, that is, one assumes that an action does not invalidate a state of ritual purity until it is proven to do so. Third, one could apply *istiṣḥāb* to cases of uncertainty in the application of a ruling to a specific circumstance. For example, one is certain that a particular action (eg urination) invalidates a state of ritual purity, but one is uncertain whether or not that action has occurred (ie one is uncertain whether or not a drop of urine has been emitted). *Istiṣḥāb*, in this case, decrees that one assume that it has not occurred, and the previous state of ritual purity continues. Whilst the defilement was uncertain, the purity was certain, and logically, an uncertainty cannot overturn a certainty. Fourth, *istiṣḥāb* could apply to a mutual exclusivity of assumptions. For example, a wet garment is hung out to dry. When it is found later, it has fallen from the line into some dry excrement. The garment is only considered to have been defiled if it was wet when it came into contact with the excrement. The problem is, which *istiṣḥāb* is assumed to be in force here—the presumption that the garment was wet when it fell into the excrement, or the assumption that it remains in its previous state (ie the state it obtained when it was hung out to dry, that is, purity)? *Istiṣḥāb* would seem to indicate that it is assumed to have been damp when it fell, and hence is impure.

Baḥrānī would, of course, consider *iḥtiyāṭ* to provide certainty in these cases, whilst *istiṣḥāb* brings only *zann*. Renewing one's state of purity would ensure that if something had occurred to invalidate purity, it was rectified.

Bihbahānī, also, does not accept all four examples of *istiṣḥāb*. The first three types of *istiṣḥāb* are valid, but the fourth is not. The fourth (the mutual exclusivity of assumptions) is not valid for two reasons: first, the change from wet to dry is a natural process which affects the ruling in this case. Such a natural process is, by using *istiṣḥāb*, assumed not to have occurred and this is not permissible. Second, *istiṣḥāb* here contradicts another principle, that of *aṣālat al-ṭahāra* (the assumption of purity). This latter principle is basically BA applied to matters of purity—an object is assumed not to invalidate a state of ritual purity unless there is certainty as to its power to cause impurity. In this example, the cloth which had come into contact with excrement is assumed to be pure unless certainty is obtained regarding its damp state when it fell from the line. *Aṣālat al-ṭahāra* is considered to be a stronger indicator than *istiṣḥāb*, and hence overrules the ruling based upon it.

The three valid examples of *istiṣḥāb* are demonstrated by both reason (*'aql*) and revelation. The rational argument is simply that "A thing that remains does not need an effective cause to remain" (*al-bāqī lā yaḥtāju fī baqā'ihi ilā al-mu'aththir*). In this case a ruling, once made, does not need an effective cause (*mu'aththir*) to remain in force. It is change in a ruling that requires a cause, and unless a cause is proven, the original ruling remains in force:

> When the legal ruling has been proven, proving the reverse of the ruling requires another legal indicator. [*FH*, 277]

The revelatory proofs include seven *akhbār* in which the Imams are said to have given rulings based on *istiṣḥāb*. The following is an example of this:

> A man asked Imam Ṣādiq, "I give a *dhimmī* my garment and I know he drinks wine [can I pray in it?]" Imam Ṣādiq replied, "Pray in it, and do not wash it on account of this. When you gave it to him it was pure, and you are not certain that it has been defiled. There is no harm in you praying in it unless you are certain that it has been defiled". [*FH*, 278–9]

This is an application of the third type of *istiṣḥāb* listed above. The Imam is advising that, although one knows that wine causes ritual impurity, one does not know that wine has been spilled on the garment by the *dhimmī*. The uncertainty does not concern the ruling, but the application of the ruling.

Bihbahānī concludes his discussion of *istiṣḥāb* by stating that some changes impede the operation of *istiṣḥāb*. As far as Bihbahānī is concerned, one cannot assume that the cloth hung out to dry was still damp when it came into contact with the excrement. One cannot assume this because there is a natural process occurring which prevents one from knowing that it was damp—the process of drying. That this process is presumed to have occurred is more persuasive than the ruling prompted by *istiṣḥāb*. If the case in question involves such a naturally occurring process, then the assumption of continuity cannot be applied. Bihbahānī's advocacy of *istiṣḥāb* involves a typology of change (*taghayyur*). Some changes affect the previously established ruling, and others produce no effect. The jurist's task is to recognise which type of change has occurred and modify his assessment accordingly:

> Know then that change is of different types:
> when *istiṣḥāb* is known to be valid
> when it is thought to be valid
> when it is doubtful
> when it is thought not to be valid
> when the *istiṣḥāb* of one ruling conflicts with that of another, and there is debate as to which is stronger and which weaker.
> The *mujtahid* must consider this. [*FH*, 281–2]

The criteria for distinguishing different types of change are not outlined by Bihbahānī, though they would appear to include some type of naturally occurring change (his examples are: excrement turning into worms, carrion turning into dust, oil turning into smoke).

In sum, then, Bihbahānī's argument against the Akhbārī rejection of *istiṣḥāb* is that the validity of such an assumption is proven by reason and revelation. This is undoubtedly *zannī*, but, for him, it is a justified assumption, and essential to the efficient working of the law. *Istiṣḥāb* is necessary in order to avoid the paralysis caused by the excessive caution of the Akhbārīs.

One area in which there is agreement between Baḥrānī and Bihbahānī is in their assessment of *qiyās*. When they use the term *qiyās* they mean the *qiyās* of the Sunnis. For both, this is illegitimate because it involves an uncertain determination of the *ʿilla*. This does not mean that rulings cannot be transferred from an established case to a novel case. For Baḥrānī, such a transference takes place through the procedure known as *tanqīḥ al-manāṭ*. Bihbahānī embellishes Baḥrānī's theory and states that transference (*taʿdiyya*) can occur in a number of ways, only one of which is *qiyās*. The law can be expanded from the specific to the general and *vice versa*, or from one case in revelation to a similar case unmentioned in revelation. However, there are restrictions on these procedures, the most important of which is *ʿilm*. In (Sunni) *qiyās* the identification of the *ʿilla* is *ẓannī*—opinion based. For both Bihbahānī and Baḥrānī the identification of the *ʿilla* must be certain. That this is the case for Baḥrānī is unsurprising given his rigid epistemology. That it is so for Bihbahānī is, at first glance, strange since his *uṣūl al-fiqh* includes an attempt to incorporate *ẓann* into the legal system. His argument against *qiyās* is, however, that it involves two, mutually compounding assumptions: first, the assumption that a particular element is the occasioning factor; second, that the novel case falls under the same rule as the original case. It is the combination of these two assumptions which makes *qiyās* illegitimate.

If *qiyās* is rejected, then how is transference achieved? Bihbahānī lists the ways:

1) There may be a consensus (*ijmāʿ*) that the explicit meaning of the words in the text of revelation give an indication of a general rule.
2) Reason may dictate that a specific ruling is generally applicable. For example, when a woman asked about the correct identification of menstrual blood, the Imam said, "If the rag comes out wrapped up, then it is [only] a circumcision wound". From this we can make a general rule concerning the distinction between menstrual blood and blood from a circumcision wound.
3) *Tanqīḥ al-manāṭ*. This term, used by both Bihbahānī and Baḥrānī, refers to an analogy in which the *ʿilla* is known with certainty. *Tanqīḥ al-manāṭ* "is like *qiyās* except that the *ʿilla* derived from it is certain (*yaqīniyya*)."[60]
4) *al-Qiyās al-manṣūṣ al-ʿilla*. Whilst Baḥrānī identified this with *tanqīḥ al-manāṭ*,[61] Bihbahānī makes a distinction. For Bihbahānī, *tanqīḥ al-manāṭ* is identified by reference to two texts of revelation which together enable the reader to identify the *ʿilla*. *Al-qiyās al-manṣūṣ al-ʿilla* refers to a single text which provides, not only the ruling, but the reason for that ruling. The *ʿilla* is, however, still identified with certainty.

> If a doctor says, "Do not eat this because it is sweet, or because it is bitter, one understands [from this one statement] that the doctor prohibits one from eating all sweet or bitter things". [*FH*, 147]

5) If the text expresses a general ruling, and is not a reply to a specific question, then the ruling is clearly universally valid, and hence can be transferred from the general to the specific.
6) *al-Qiyās bi-ṭarīq al-ūlā*. This is the *e maior ad minus* argument discussed in the next chapter.[62]
7) A principle agreed by all the *fuqahāʾ*, but not found in revelation, is accepted as universally valid.[63]
8) *Ittiḥād ṭarīq al-masʾalatayn*. If two cases mentioned in revelation are

[60] *Ibid.*, p. 147.
[61] See above, p. 104.
[62] For 5) and 6), see the next chapter, p. 174–179.
[63] Strangely, the term *ijmāʿ* is not used here, but it is clear that it is implied, see Bihbahānī, *FH*, p. 149.

conjoined, the resultant general ruling is universally valid. This is exemplified as follows:

i) A woman is prohibited illicit sexual intercourse during her *ʿidda*. [text]
ii) The *ʿidda* is a prelude to divorce, and the same rules apply during it as during marriage. [text]
iii) One can deduce that the woman is also prohibited such actions whilst married [conclusion][64]

This, it appears, is merely a test case, to see if such reasoning is possible. That there are actually other texts prohibiting such behaviour confirms that one can use two texts to derive a general principle. It proves that the law is an integrated system of rules.

9) If a rule is established for the replacement of one duty with another (eg sand for water in ritual ablution), one can deduce that it is generally the case that sand can replace water.[65]
10) The rules for replacement rules are transferred from the replaced rules. For example, in ablution with water one should wash the left hand first. From this one deduces that in ablution with sand, one should act similarly.

These ten means of transference are derived from reason or normal language (*al-lugha al-ʿurfiyya*). They involve no uncertainty as to the occasioning factor, and produce certain results when applied to specific cases, or when deriving general rules from specific rulings in revelation. They are clearly a means whereby the polemic against Sunni *qiyās* can be maintained, whilst incorporating elements of its operation. Without some sort of transference of rulings from case to case, the law would be impotent in the face of novel cases: analogy of some sort is necessary. When the Imams were present (and when the polemic against Sunni *qiyās* began), analogy was unnecessary, since the Imam could provide an answer. In his absence, the jurist must find a means of expanding the law, whilst remaining true to the words of the Imam.[66]

[64] The reasoning behind this argument can be found in *ibid.*, p. 149.
[65] Exactly why this is not a case of a general ruling (as in 5)) is unclear to me.
[66] On the Shīʿī polemic, see Calder, "Doubt and Prerogative", p. 57–60.

Ijtihād

As outlined in the opening chapter, *ijtihād* was a central area of dispute in the Akhbārī-Uṣūlī conflict:[67] it was perhaps the defining issue upon which a scholar was classified as an Akhbārī or Uṣūlī by later tradition. Baḥrānī wrote his *uṣūl* almost as if *ijtihād* had not been incorporated into Shiʿite legal discourse. His references to *ijtihād* are few, always pejorative and his aim is clearly to construct a legal theory in which *ijtihād* is unnecessary. He advocated *tawaqquf* when the texts of revelation were unclear, obscure or contradictory. *Tawaqquf* involved the suspension of the rule-making process. The obscurity of the texts meant that no rule could be made. Not even an informed guess as to a possible ruling was permitted. The lack of an indicated ruling, however, did not free the believer from legal responsibility. The Imams, he claimed, had advised caution (*iḥtiyāṭ*)—the believer is to follow the course of action which is most likely to ensure complete fulfilment of the law (*al-aḥwaṭ*).

In contrast to Baḥrānī's theory of *iḥtiyāṭ* and *tawaqquf* is Bihbahānī's recommendation to the jurist to perform *ijtihād*. For Bihbahānī, *ijtihād* involves a suitably qualified jurist (*mujtahid*) searching through all the possible interpretations of the texts, and deriving the ruling or assessment (*hukm*) most likely, in his opinion, to be the ruling of God in the case under discussion.[68] He cannot decree that his ruling is the Lawgiver's ruling: he can only say that his assessment is, after an extensive and comprehensive search (termed "the exhaustion of his effort"), his own opinion (*zann*). He is bound by this opinion, as are those who have elected him, vicariously, to carry out the search. This election also involves a submission (*taqlīd*) by the *mujtahid's* followers (*muqallidūn*) to the *mujtahid's* opinion. Other *mujtahids* are, theoretically, not bound by another *mujtahid's* opinion. Since they have the ability to perform their own *ijtihād*, they must not perform *taqlīd*, but carry out their own searches. Their *muqallids* are bound by their opinions, just as those of the first *mujtahid* are bound by his opinion.[69]

The techniques utilised by the *mujtahid* in his search for God's rule in a particular case can be divided into three categories. First, there

[67] See above, p. 6–8.
[68] On these qualifications within the Sunni tradition, see Hallaq, "Was the Gate" and Weiss, *God's Law*, p. 684–687.
[69] The implications of this for the structure of authority are tackled in Chapter Six, below, p. 237–245.

are procedural techniques, through which the *mujtahid* can determine the epistemological status of texts purporting to be a record of revelation. Included in this category are the means of determining that the Qur'ān, *akhbār* and *ijmāʿ* of the scholars are reflections of the law.[70] Second, there are exegetical techniques, which enable the *mujtahid* to overcome the limited nature of the texts in his search for universally applicable rules. These include procedures such as *al-qiyās al-manṣūṣ al-ʿilla* and *tanqīḥ al-manāṭ*, or the means of resolving contradictions between texts (*tarājīḥ*),[71] or delineating the linguistic implications of the revelatory text.[72] Third, there are legal presumptions, which are utilised if the first two sets of techniques fail to produce an answer. These include BA and *istiṣḥāb*.

It is only after exerting all possible effort (the literal meaning of the term *ijtihād*) in this search, that a *mujtahid* can give an assessment. This assessment is given on the basis of indicators (*adilla*) derived from the texts and interpreted according to the rules of exegesis. If these indicators contradict, he must select the strongest (*al-aqwā*), the clearest (*al-aẓhar*) or the most appropriate (*al-aḥwā*). The *mujtahid* is duty bound by such a final assessment, and is compelled to recommend it to his followers.[73]

Unfortunately, Bihbahānī does not spell out his theory of *ijtihād* in *FH* or *FJ*. He assumes the readership is familiar with the theory, as indeed it should be, considering that the adoption of *ijtihād* was a part of Shīʿī *uṣūl al-fiqh* from at least the time of al-ʿAllāma al-Ḥillī. However, that Bihbahānī's theory is as I have described it, is demonstrated by the following citations:

> You already know that *zann* has probative force, and that it is not permitted to act on it, except it be the *zann* of a *mujtahid*, after he has expended his effort in attaining what is the strongest, and by right, what is the most appropriate and what, to him, is most clearly, the ruling of God the Most High. [*FH*, 207]

Not all *zann*, then, is a proof. Only the *zann* of a *mujtahid* may be used as a basis for the *muqallid's* action:

[70] These have been described in Chapter Two, above, p. 60–85.
[71] See below, p. 136–144.
[72] See below, p. 164–181.
[73] That such an account of *ijtihād* was influenced by Sunni thinking is clear; see Calder, "Doubt and Prerogative", passim; Hallaq, *Legal Theories*, p. 117–123; Weiss, *God's Law*, p. 663–717; Chaumont, "Tout Chercheur"; Kamali, *Principles*, p. 366–394.

> You already know that the basic difference between the Akhbārī and the *mujtahid* is *ijtihād* itself—in other words, action on the basis of *zann*. Whoever acknowledges action on the basis of it is a *mujtahid*, and whoever claims it to be forbidden, and that his action is rather based on *ʿilm* and *yaqīn*, is an Akhbārī. [*FH*, 135]

The epistemological roots of the Akhbārī-*mujtahid* dispute are emphasised by Bihbahānī here. The Akhbārīs claim that action can only be valid (legal) if it is based on certain knowledge. The *mujtahids* argue that action can be valid if it is based on *zann*—providing it is the *zann* of the *mujtahid*. Finally:

> Know that it is only permitted for a *mujtahid* to adopt BA after he has expended effort, and exhausted his search for indicators (*adilla*) and obtained an assessment. If no indicator of legal responsibility (*dalīl ʿalā al-taklīf*) is found, then he adopts it [ie BA], for it will then not be in contradiction to any other indicator. [*FH*, 254]

BA, then, is the last resort, turned to only when no indicators can be found amongst the revelatory texts. Hence an assessment can always be given, even if it is ultimately based on BA. There are no circumstances, so it appears, where the *mujtahid* might be forced to suspend his judgement (*tawaqquf*). For every situation there is a ruling (as for Baḥrānī), even for those situations where there is no textual indicator.

Bihbahānī does not, then, consider *iḥtiyāṭ* to be of central importance in discovering the law.[74] He does, however, put forward *al-barāʾa al-yaqīniyya*, defined as "certainty that one has fulfilled the duties of the law, even though these duties were established by the opinion of the *mujtahid*".[75] Since *ijtihād* is necessary (as demonstrated by *ʿaql*, texts and *ijmāʿ*), one can discharge one's legal responsibility by following a *mujtahid*, even though a *mujtahid's* opinion is not certain (*qaṭʿī*). The commoner (*al-ʿāmmī*) is charged with following a *mujtahid*; he can be certain of having fulfilled the law if he does this, even though there is a possibility of the *mujtahid* being wrong. The *mujtahid* has discharged his responsibility as long as he has fulfilled the "conditions of *ijtihād*" (*sharāʾiṭ al-ijtihād*)[76] and "expended his

[74] He does, however, consider it permissible for the *mujtahid* to give a ruling based on *iḥtiyāṭ*, though only in certain circumstances. See above, p. 127.
[75] Bihbahānī, *FJ*, p. 433.
[76] These are normally seen as qualifications which the scholar must attain before he is considered a *mujtahid*. However, I consider Bihbahānī here to be referring to

effort" (*istifrāgh wusʿihi*) to find an assessment. Now, in his efforts the *mujtahid* may use *iḥtiyāṭ*, if he considers it appropriate. One example of the appropriate use of BA, previously delineated by Bihbahānī, is the case of limited (*maḥṣūr*) uncertainty (e.g. the case of the two receptacles). *Iḥtiyāṭ* is only one means of arriving at an assessment, and is, therefore, only recommended (*mustaḥabb*):

> There is a difference for the *mujtahids* between *iḥtiyāṭ* and obtaining *al-barāʾa al-yaqīniyya*. For them, *iḥtiyāṭ* is only recommended. It applies when there is a *zann ijtihādī* as to how to [fulfil a duty]. [*FJ*, 445]

For example, some say X and others say Y, and both groups use equally plausible legal reasoning in the mind of the *mujtahid*. It is recommended, Bihbahānī states, that the *mujtahid* makes his own assessment on the basis of *iḥtiyāṭ*, that is, that he establishes which, in his opinion, is more likely to fulfil the demands of the Lawgiver. *Iḥtiyāṭ*, therefore, becomes one procedure (amongst many) available to the *mujtahid* in his search; it only applies, however, when two opinions (*zannān*) seem equally plausible to him. The techniques outlined by Bihbahānī (as discussed in this chapter and the following chapter) aim to reduce the possibility of this happening but it is nonetheless possible. In sum, *iḥtiyāṭ* and *ijtihād* perform similar functions in the respective legal theories of Baḥrānī and Bihbahānī—they enable the scholar to make a decision in the face of unclear revelatory texts. They both indicate an acceptance that the texts are limited, and at times confusing and unclear as to God's law. The difference between them lies in their willingness to tolerate the possibility of error.

Contradictions in Revelation

Baḥrānī, the reader will recall, outlined a number of means whereby intra-revelatory conflicts might be resolved. Intra-Quranic conflicts could be resolved by abrogation (*naskh*), conditionality (*taqyīd*) or particularisation (*takhṣīṣ*). Qur'ān-*akhbār* conflicts could be solved by the latter two procedures. Intra-*akhbār* conflicts, however, could only be resolved by rejecting one report as historically accurate but legally irrelevant. To determine which reports fell under this category, it was necessary to use the tests for *taqiyya*. It is significant that Baḥrānī

the procedures essential to the correct fulfilment of a *mujtahid's* duty. See Newman, "Akhbārī-Uṣūlī Dispute, Part 2", p. 257.

does not consider it important to attempt a reconciliation (*jamʿ*) between the conflicting reports. Instead one is to be preferred and the other rejected (processes known as *tarjīḥ* and *ṭarḥ*).

The first two areas of *taʿāruḍ* identified by Baḥrānī (intra-Quranic and Qur'ān-*akhbār* contradiction) are not discussed by Bihbahānī in a separate section. He does not discuss *naskh* (abrogation) at all—it appears that this was not, for him, a controversial subject. The general acceptance of the rules concerning abrogation, and the limited nature of the Quranic text, led to a curtailment of dispute on this matter.[77] The nature of the relationship between Qur'ān and Sunna is only ever discussed in terms of *taqyīd* and *takhṣīṣ* by Bihbahānī. He does not appear to consider contradictions between Qur'ān and Sunna as ultimately possible, except in cases of *taqiyya*. It is the third area of contradiction (intra-*akhbār*) which dominates Bihbahānī's thinking, as it did for Baḥrānī. Even in FH33, entitled "*Taʿāruḍ al-adilla wa'l-nuṣūṣ*", there is no examination of either intra-Quranic or Qur'ān-Sunna contradictions. The term *naṣṣ* (text), though generic (meaning possibly Qur'ān, *sunna* or *ijmāʿ*), is taken to mean a "text of the Imams" throughout. Conflict between elements of the *sunna*—that is between the *akhbār* of the Imams (and occasionally those of the Prophet)—dominates.

Bihbahānī argues against a reliance on the *taqiyya* explanation of intra-*akhbār* conflicts. Some Akhbārīs (like Baḥrānī) argue that *taqiyya* was a frequent tactic of the Imams. At times, the Imams agreed with the Sunnis to reduce the risk of persecution, but, argue the Akhbārīs, they also gave contradictory answers in order to fragment the Shīʿa community, and thereby reduce the threat of the Shīʿa, in the eyes of the Sunnis.[78] For Bihbahānī, only the first explanation is plausible, for the reason outlined in the last chapter.[79]

Taqiyya, for Bihbahānī, is, then, not a useful tool for determining which of two conflicting reports from the Imams is preferred (*tarjīḥ*). Bihbahānī has an alternative procedure. First, the *mujtahid* must perform *ijtihād*, and after this, the opinion which is strongest in his mind becomes his opinion as to the ruling of God (*ḥukm allāh*). This is not to say that this opinion is identical with the wishes of the Lawgiver;

[77] Baḥrānī's section on intra-Qur'anic conflict is short and laconic. See above, p. 112–113 and Baḥrānī, *H*, 1, p. 87.
[78] For Baḥrānī's account of *taqiyya*, see above, p. 32–39.
[79] See above, p. 76–78.

instead, the *mujtahid* is obligated to follow that opinion. God has decreed a rule which is perhaps unknown from the sources (in micro), but he has also decreed a general rule (in macro) that a *mujtahid* (and hence his *muqallids* also) should follow what he considers to be the rule—the lack of certainty does not lead to a suspension of duty:

> The clear ruling of God is none other than the thing considered to be the actual ruling of God [by the jurist].
> *ḥukm allāh al-ẓāhir laysa illā maẓnūn ḥukm allāh al-wāqi'i.* [*FH*, 208]

God's ruling on a specific case may, or may not, agree with the conclusions of the jurist's endeavours—however, God has issued a more general ruling that the conclusions of the jurist's endeavours (ie the *ẓann* gained from his *ijtihād*) can be used as the basis for action:

> In sum, once one of the rulings has been overruled in the opinion of the jurist, then God's ruling is that it is not permitted for the jurist to issue a *fatwā* that [the overruled opinion] is the ruling of God. [*FH*, 208]

The preferred rulings (*al-rājiḥ*) remains the *mujtahid's* opinion, but he is charged with following what he considers to be God's law. He is not charged with following God's law itself (for that would require unobtainable knowledge—*'ilm*—of every element of the Sharī'a), but to follow the law as he humbly conceives it.

The first duty, then, is to embark on *ijtihād* in an effort to decide which ruling is preferred (*rājiḥ*) and which is to be rejected (*marjūḥ*). The tools available for this task are listed in FH21 and FH22, and are divided into "transmitted" and "non-transmitted". The first are provided in revelation, the latter are the result of human contemplation on the resolution of intra-*akhbār* conflict.

In FH21, Bihbahānī first lists the *akhbār* relating to the resolution of conflict. They are outlined in the table below. The differences (*ikhtilāf*) between the procedures advised by the Imams in these reports were solved by Baḥrānī through an assertion that the Imams were not giving a procedure to be followed, but merely listing the criteria that one might use to resolve the conflict. However, Baḥrānī does conclude that some criteria had priority over others (ie comparison with the Qur'ān and comparison with Sunni doctrine). Bihbahānī demonstrates the contradictory nature of the Akhbārī position by means of a three step argument:

1) Comparison with The Book of God is the most important of the criteria, as testified in many and widespread reports (*al-akhbār al-mutawātira*).

1) *Maqbūla* of Ibn Ḥanẓala (from Imam Ṣādiq)	2) From 'Abd al-Raḥmān (from Imam Ṣādiq)	3) From al-Ḥasan (from Imam Riḍā)	4) From 'Abd Allāh (from Imam Ṣādiq)	5) From Imam Kāẓim	6) From al-'Uyūn (from one of the Imams)	7) Reference to many *akhbār* relating to choice	8) Reference to unsourced *akhbār* relating that it is not permitted to act on one of the conflicting reports until one has performed *tarjīḥ*
a) *a'dal* (the most just) b) *afqah* (the most learned) c) *aṣdaq* (the most truthful) d) *awra'* (the most pious) e) *mujma' 'alayhi* (on which there is consensus) f) Agrees with *kitāb* (the Qur'ān) g) Agrees with Sunna (of the Prophet) h) What opposes the Sunnis i) That which opposes the Sunni judges j) *irjā'* (suspension of judgement)	a) *kitāb* b) Sunna	a) *kitāb* b) Our *ḥadīth* c) Choice	a) *kitāb* b) Sunna c) Your preference	a) *kitāb* b) Our *ḥadīth*	a) *kitāb* b) Sunna c) The Imams		

Table 2: Table representing the *akhbār* concerning the resolution of conflicts within revelation cited by Bihbahānī in FH21. Each report lists the criteria for distinguishing between two reports which indicate different assessments for the same action.

2) The Akhbārīs may not disagree with these statements, but they also argue that the Qur'ān cannot be understood without the exegesis of the Imams (*tafsīr thābit min ahl al-bayt*).
3) If the report collections are full of undetectable *taqiyya akhbār* (as the Akhbārīs claim) then it is impossible to know the meaning of the Qur'ān, since the report used to understand the Qur'ān could itself be *taqiyya*. Hence the Akhbārī position is contradictory and inevitably rejected.[80]

Bihbahānī lists the criteria used by the *mujtahids*:

> As for the *mujtahids*, they base their method upon [valid] investigation and acquiring what is closest [to God's ruling] in their opinion, by means of provenance (*sanad*), indicatory value (*dalāla*) and careful instruction (*tawjīh*). They find no difficulty in these [contradictory] reports. The command in all of them is to follow what is closest [to God's ruling] in [the *mujtahid's*] opinion. [*FH*, 221]

The reports described in the table give seemingly conflicting advice; ironically the reports concern the method of resolution when *akhbār* give conflicting advice. Bihbahānī solves these conflicts by examining those elements which are common to the different reports and pronouncing those elements *mutawātir*. This produces two criteria: comparison with the Book of God and comparison with Sunni doctrine. All the other criteria listed in the *akhbār* are isolated (*shādhdh*) and hence rejected. Earlier, Bihbahānī had listed *shuhra* (dissemination) as a means of determining which *akhbār* had probative force.[81] He is here using *shuhra* to determine which elements of a number of *akhbār* have probative force. In his exegetical methodology, a report is not taken as a unit, which is either rejected or accepted, but is instead composed of elements, some of which might be accepted and others rejected. Dissemination can then be used as a criterion to determine probative force, not just on a report by report basis, but also on an element by element basis. Bihbahānī intends not only the reports themselves, but the commands (*awāmir*) within each report to be tested one by one. Baḥrānī, it will be recalled, considered whole books of reports to be, *in toto*, sound or unsound.

In sum, the transmitted criteria whereby one report might be preferred over another are distilled to two in number—comparison with The Book and comparison with the Sunnis. The non-transmitted

[80] Baḥrānī anticipated such an objection, see above, p. 50.
[81] See above, p. 66.

criteria are not to be found in the texts and are much more numerous.

Bihbahānī's thinking here is closely linked with his proposals, analysed in the last chapter, concerning the probative force of the *akhbār*.[82] A *mutawātir* report has greater probative force than an isolated report (*khabar al-wāḥid*) and this is proven through reason. Isolated reports can, themselves, have varying levels of probative force depending on the signs (*amārāt*) upon which their probative force is established. These include standard techniques of *'ilm al-rijāl* and *al-jarḥ wa'l-ta'dīl*. One assumes that an isolated report, with a stronger collection of signs, overrules one with a weaker collection, though Bihbahānī is unclear about how such a judgement of strength is to be made. In FH22, before the list of signs, Bihbahānī lists the non-transmitted criteria to be used when two reports (*mutawātir* or *khabar al-wāḥid*) conflict. This he states is a summary of a more extensive discussion in the *Ta'liqāt*.[83] The criteria are as follows:

> [1] Amongst [the criteria] is: the greater number of transmitters of one of [the reports] and the greater accuracy of the transmitters
> [2] and amongst them is: the higher quality of the *isnād*
> [3] amongst them is: the transmission of the words of the Imam is to be preferred over the transmission of his meaning alone
> [4] amongst them is: the supporting indicatory value [of one of the reports] by means of an oath [by the transmitter] or some other means
> [5] some writers of *uṣūl al-fiqh* argue that if the ruling indicated in one of the reports is literal (*ḥaqīqī*) in meaning, and in the other is diverted (*majāzī*) [then the former is preferred] and similarly if one is a general statement which has not been particularised [it is to be preferred] over one which has been particularised—and likewise with conditionality
> [6] amongst them is: the [report with] the purer language [overrules the report with less pure language] . . .
> [7] amongst them is: that the *aṣl* [of one] is more appropriate[84]
> [8] amongst them is: agreement with the accepted doctrine of the early scholars
> [9] amongst them is: agreement with the accepted doctrine of the later scholars. [*FH*, 223–4]

These nine criteria include tests of dissemination (*shuhra* [1]), provenance (*isnād* [2]), analysis of content (*matn* [3–7]) and consensus

[82] See above, p. 66–79.
[83] See Bihbahānī, *Ta'līqāt*, p. 2–13.
[84] This presumably is an *'aqlī* test—does the command in one of the reports accord with what reason tells us about the nature of moral reality? See Chapter Five, p. 204–206.

([8–9]). The reader is not given any indication as to the relative strength of these criteria, though it is quite possible that they are in descending order of importance. What emerges though is a recommendation to the *mujtahid* to weigh the various criteria against one another and thereby determine the relative strength of the two conflicting reports. This process results in an opinion (*ẓann*) as to which is the strongest, or nearest, to God's own ruling. Bihbahānī expresses this final opinion as "*mā huwa al-aqrab ʿinda al-mujtahid*" or "*mā huwa al-aqrab ʿinda al-faqīh*". It is here, one assumes, that different *mujtahids* may arrive at different conclusions (*ikhtilāf*), though all are, in a sense, justified since they have expended their effort in discovering a ruling. They are not, however, all right in their assessment for, as Bihbahānī states, "truth is one for the Shīʿa" (*al-ḥaqq ʿinda al-shīʿa wāḥid*).[85]

All of the discussion to date has been based on the view that in cases of contradiction, one of the reports must be rejected. On this, Bihbahānī and Baḥrānī agree. Both consider contradictory reports to be, in many cases, irreconcilable, and hence one report must be rejected. However, the grounds on which a report is to be rejected differ. For Baḥrānī, all the *akhbār* are historically accurate accounts of the Imams' words and actions. A report can only be rejected if it is identified as *taqiyya* (which is not always possible, hence the need for *tawaqquf* and *iḥtiyāṭ*). Baḥrānī is, then, primarily interested in the probative force (*ḥujjiyya*) of the reports in question. For Bihbahānī, some reports are inaccurate historical accounts, and these can be identified and rejected through an evaluation of the level of dissemination (*shuhra*), validity of provenance (*isnād*) and appropriateness of content (*matn*). Bihbahānī is, therefore, interested in determining the historical accuracy of a report, and from this assessment, the probative force of the ruling flows. *Taqiyya* can only be used as a factor when a report explicitly contradicts the Qurʾān or agrees with the Sunnis.

Another area of agreement between Bihbahānī and Baḥrānī is that both are highly critical of attempts to join (*jamʿ*) conflicting *akhbār* together by implausible means. Baḥrānī had termed these implausible reconciliations *taʾwīlāt baʿīda*. In FH23, Bihbahānī discusses *al-jamʿ bayn al-khabarayn al-mutaʿāriḍayn*:

[85] See above, n. 73.

> Know that it has become common practice in times like ours that when they [the scholars] see two contradictory reports, they try to join them together by whatever means is acceptable, or by whatever conjunction they approve. They make this conjunction their *fatwā* and they base [their] action upon it. They make it God's ruling, arguing that "joining, whenever it is possible, is better than rejection". We have found no indicator or dispensation from the Lawgiver which justifies this. Rather the opposite is clear from the *akhbār*. [*FH*, 233]

Bihbahānī then deals with the difficult fact that al-Shaykh al-Ṭūsī appears to recommend *al-jamʿ* in the introduction to his *Istibṣār*. This was also discussed by Baḥrānī.[86] The Shaykh recommended *al-jamʿ* in order to re-convert a Shīʿa who had lost his faith. Baḥrānī explained this as a proselytising tactic. Bihbahānī, on the other hand, says that the Shaykh's use of the terms "probably" or "possibly" throughout the passage means that his recommendation was not definitive. It is possible that evidence (*qarāʾin*) which might effect a reconciliation has been lost "by accident" (*bi-sabab al-ḥawādith*). Hence, for Bihbahānī, the Shaykh was not advocating *al-jamʿ* in all circumstances. Both Baḥrānī and Bihbahānī are eager to show that their own rejection of *al-jamʿ* is not at variance with the views of al-Shaykh al-Ṭūsī, though they achieve this by different means.

Bihbahānī then makes the following, apparently contradictory, statement:

> Much of the law of the Shīʿa (*fiqh al-shīʿa*) is obtained from joining two indicators together, such that if [the law] was not based on *al-jamʿ*, then there would be no Shīʿī law at all. [*FH*, 233]

Hence, some processes of *al-jamʿ* are acceptable and others are not:

> We say: *al-jamʿ* is a proof when it has supporting evidence (*shāhid*) from the two contradictory reports themselves, or from one of them, or from another [third] report, or from *ijmāʿ*—widespread or constructed[87]—or from certain rational judgements, or, after investigating the contradictory reports, it is immediately clear in the mind what the Imam means—such as particularisation (*takhṣīṣ*) or conditionality (*taqyīd*). [*FH*, 235]

Attempting to reconcile two contradictory reports is a controlled process, operating under strict rules. These rules include the evaluation of evidence (*shāhid*, *qarīna*), the occurrence of consensus (*ijmāʿ*), the findings of human reason (*ʿaql*) and particularisation and conditionality

[86] See above, p. 114.
[87] For a definition of these types of consensus, see above, p. 81–82.

(*takhṣīṣ* and *taqyīd*).[88] Any other types of hermeneutic activity which attempt to reconcile contradictory reports are invalid. It will be recalled that Baḥrānī entertained none of these possibilities—*akhbār* cannot particularise *akhbār*, they can only particularise the Qurʾān. Some of Bihbahānī's legitimate means of reconciliation would understandably be considered *taʾwīl baʿīd* by Baḥrānī.

It is interesting that both writers participate in a polemic against *al-jamʿ*—both see much contemporary practice as excessive interpretation. For Baḥrānī, this is unsurprising since *al-jamʿ* was an *ijtihādī* process, and he was implacably opposed to *ijtihād*. For Bihbahānī, it is more surprising since he advocated *ijtihād*. It is possible that this is one area where Akhbārī polemic successfully moderated *mujtahid* views: the personal reasoning utilised in the indiscriminate elimination of contradictions in the *akhbār* was seen, eventually, by both Akhbārīs and *mujtahids*, as invalid. The Akhbārī school can be seen as a product of polemic with Uṣūlīs, but in certain areas the Uṣūlī school, post-Baḥrānī, can also be seen as influenced by Akhbārī assertions.

When Bihbahānī later discusses "contradictory indicators and texts" in FH33, he comes to a similar conclusion:

> There is no doubt that a contradictory text is not a proof, and that it is necessary to either reject [it] or to interpret (*taʾwīl*) [it]. [*FH*, 320]

Conclusion

The above analysis demonstrates that the power of human reason to prove certain principles of exegesis (such as BA and *istiṣḥāb*) was conceived of in quite different ways by Akhbārīs and *mujtahids*. This in turn led to the conclusion that the legal theory of an Akhbārī was of quite different character to that of a *mujtahid*. The rejection of *ijtihād* had ramifications for all areas of *uṣūl al-fiqh*. Whether or not this affected the authority of the jurist or *mujtahid* in the legal process is not clear.[89]

Dalīl al-ʿaql, as stated at the outset, was not restricted to matters of *al-taḥsīn wa'l-taqbīḥ*. It involved the demonstration of legal principles (discussed here) and linguistic interpretation (discussed in the

[88] The latter two processes are discussed below, p. 174–178.
[89] This is discussed below, p. 237–245.

next chapter). Though it did not include the means whereby contradictions between revelatory sources might be resolved, I have included an account of the two thinkers' discussions on this issue here because of Baḥrānī's assertion that revelatory obscurity and revelatory contradiction are basically similar. His reason for asserting this similarity is that the solutions to each are broadly the same—*tawaqquf* and *iḥtiyāṭ*. Bihbahānī's solutions are different. Revelatory silence implies licitness, whilst resolving obscurity and contradictions involves *ijtihād*. However, silence can only be established after *ijtihād*, so in a sense, this involves *ijtihād* also.

There are similarities between the legal theories of the two scholars. For both, God's law is uncertain in areas of silence and contradiction; this uncertainty is not debilitating—for both writers a ruling can be determined. This ruling is not the law "in reality" (*fī'l-wāqiʿ*), but a human attempt to establish the law. Baḥrānī and Bihbahānī differ, of course, in how this recommendation is formulated. For Baḥrānī, God, the Prophet and the Imams all recommended caution. For Bihbahānī, there is also a divine decree that when there is doubt, the qualified *mujtahid* must investigate the sources and discover the assessment which he considers most likely to be the ruling of God. Underlying the two positions is a fear and an acceptance of uncertainty respectively, and as I hope is now clear, differing views as to the possibility of human knowledge.

CHAPTER FOUR

LINGUISTIC INTERPRETATION

The preceding chapters have concerned, in the main, the status (or probative force) of texts, and their interpretation. I now turn to the use of language in these texts, or rather the theory of interpretation of language outlined in the works of Bihbahānī and Baḥrānī. In Western literary theory, the theory of interpretation is normally designated by the term hermeneutics; and for the overwhelming majority of Muslim scholars, their hermeneutic was based upon a specific understanding of the manner in which oral communication functioned: ie a theory of language that was primarily oral in character, not literary.

That language should form the basis of Muslim legal hermeneutics is not surprising. The texts which qualify as indicators of the divine law were first orally transmitted, and later committed to writing, in a particular language (Arabic). Thus before these texts can be understood, the linguistic system (of which the utterances of God, the Prophet and, for Shī'īs, the Imams also, are instances) must be understood. The importance of linguistic understanding to the process of interpretation is signalled in most works of Muslim legal theory by the presence of a number of chapters at the beginning of the work dealing with these issues. Bihbahānī's presentation is not at variance with this emphasis. He places proficiency in linguistic sciences (*al-'ulūm al-lughawiyya*) first in his list of the qualifications of a *mujtahid*:

> [Of the prerequisites of a *mujtahid*] first, there is knowledge of the linguistic sciences, for if [the *mujtahid*] does not know these sciences well, perhaps he will make mistakes, err and be led astray. His error is not like that of a qualified jurist . . . but is the mistake of a commoner, which is unforgivable [in a *mujtahid*]. [*FH*, 335]

Bihbahānī's point here is that a qualified jurist may proffer his opinion (*zann*) after he has investigated the sources in the proper manner, and his opinion may not, as I have explained previously, be identical with the divine decree. However, if a jurist gives his opinion having failed to investigate the sources properly, then this is an

inexcusable dereliction of duty on his part. For Bihbahānī, interpreting the texts without a sound knowledge of the linguistic basis of those texts will not only lead to mistakes in exegesis, but is in itself an error, for a person bereft of the skills of exegesis should not embark on the task of interpretation, but defer to one who possesses those skills.

The evident importance of linguistic understanding to legal theory may cause the reader to wonder why I have left a discussion of this until now. The answer lies in the location of these discussions in Baḥrānī's Prologues. Though part of M3 concerns linguistic interpretation, a large proportion of Baḥrānī's discussion is placed after his examination of the procedure for validating the probative force of texts, and the procedure to be followed when the texts are obscure or contradictory. As we have seen, establishing the texts to be silent, obscure or contradictory, in itself, requires interpretation of those texts. By placing his discussion of these (seemingly logically prior) matters, after the discussion of probative force, one gains the impression that he views linguistic interpretation as unproblematic, and that his hermeneutic is minimal. This is confirmed by an examination of the substance of his discussions.

Baḥrānī's Hermeneutics

Not only does Baḥrānī situate his discussion of linguistic interpretation after his discussion of sources and texts, but he also gives a presentation that is brief, densely worded and, in comparison with other works of *uṣūl al-fiqh*, less than comprehensive. Issues normally discussed by other writers of legal theory are either ignored (such as the origin of language) or mentioned only in passing (such as the logical relationship between commands and prohibitions).[1] This could mean either that he considers such discussion to be irrelevant to his legal theory, or that he is writing within an established school tradition and considers these issues to have been settled, and thus requiring no further qualification.

Having said that, much of Baḥrānī's exposition concerns topics

[1] Baḥrānī would seems to be committed to a position which rejects a logical relationship between commands and prohibitions, this being a consequence of his theory of *iḥtiyāṭ*. See above, p. 105–112.

familiar to anyone who has examined the issue of linguistic interpretation in other works of Muslim legal theory. His aim is to demonstrate how the hearer of an utterance might understand its meaning. The meaning is uncompromisingly identified with the intended meaning of the speaker (*murād*). This view of meaning (*maʿnā*) which Baḥrānī shares with other legal thinkers, has been described as intentionalist.[2] With regard to God, the Prophet and the Imams, the divine law can be discovered through obtaining the intended meaning of their utterances. These utterances are merely individual instances of the general method of linguistic communication, and hence some of his examples are drawn from the language used by less elevated individuals.[3]

Baḥrānī's discussion of linguistic hermeneutics is found in two sections of his Prologues: in the last section of M3,[4] and in a series of short prologues (M7–9).[5] Though he does not state it explicitly, it is clear that there is a difference in the methods of gaining meaning from utterances outlined in M3 and those in the later Prologues. The difference appears to lie in the methods' origins. In M3, the methods are described as part of *dalīl al-ʿaql*, that is, they can be derived by a rational individual examining a particular utterance, and using his reason to deduce their meaning. The methods in M7–9 are not described in this way, and it appears under closer examination, that they can be deduced, not from independent rational thought, but by an examination of the manner in which language users employ the tool of language. In technical terminology, one is sourced in *ʿaql*, whilst the other is sourced in *ʿurf*—reason and custom. For Baḥrānī, as for other legal theorists in the Shīʿī tradition, there is no question of reason (as a human faculty) being constructed, or controlled, by the established tradition of thought. What is reasonable or rational does not become rational through a process of the sanctification of reason in the context of a tradition.

Inevitably, the methods described by Baḥrānī are exceptions to the general means of communication. Muslim jurists, and as far as

[2] Weiss, *Spirit*, p. 52–65. See also Zysow, "Economy of Certainty", p. 85–90.

[3] Zysow expresses this well: "It cannot be too much emphasised that the rules of interpretation are presented as standing on their own. They emerge from the automatic understanding of language that we all have.", "Economy of Certainty", p. 86.

[4] Baḥrānī, *H*, 1, p. 55–65.

[5] *Ibid.*, 1, p. 112–125.

I can tell, Baḥrānī concurs with tradition here, view language, and the Arabic tongue in particular, as a system of arbitrary signs. Each sign was designated at some point (by God, or by the early human community) as pointing towards a particular thing (action, concept, item etc).[6] In cases other than those instances exemplified below, one is to assume that the ordinary, grammatical meaning is intended (and signified by the speaker). Baḥrānī is most concerned with those occasions when the language system seems to behave in a less than logical, but perfectly understandable, manner.

The means of deriving meaning through reason (*dalīl al-ʿaql*) are outlined in M3 and are subdivided into those meanings which are understood "at the point of articulation" (*fī maḥall al-nuṭq*), and those which are not. Baḥrānī is, I believe, trying to convey that even though a hearer of an utterance understands immediately the intention of the speaker (whoever he may be), this does not mean that reason is not being used: it is merely that the faculty of reason gains meaning with such speed that a rational human being may not even recognise the process occurring. This is when meaning is understood "at the point of articulation". The second category refers to occasions when a meaning can be derived, but a more obvious process of reasoning occurs.[7]

It is clear from the examples used by Baḥrānī that in both categories the meaning gained by the hearer is over and above that conveyed by the simple meaning of the words used—it is additional or surplus meaning, and it is perfectly valid (in Baḥrānī's view) to recognise and act upon these surplus meanings. In technical terms, the indicatory capacity of the utterance (*dalālat al-lafẓ*) exceeds the obvious meaning of the words used, and an additional meaning can be legitimately deduced. These categories become somewhat clearer in the context of examples.

Baḥrānī carefully categorises the ways in which a hearer should understand meanings which are not explicitly stated in the utterance.[8]

[6] For a general account of this, see Weiss, *God's Law*, p. 117–150, particularly p. 117–120. Baḥrānī seems to accept the fact of the linguistic system, and is unconcerned with the more theological question of its origin.

[7] Kamali (*Principles*, p. 121–122) has, I feel, failed to convey this underlying distinction between *dalālat al-manṭūq* and *dalālat al-mafhūm* by translating them as pronounced and implied meaning respectively.

[8] Baḥrānī's obsession with establishing schemes of categorisation is, as has been noted, a reflection of the more common assumption in Muslim theological and legal writings that knowledge is gained through defining and efficiently categorising a

The first category, that is those meanings which can be understood "at the point of articulation", is further divided into three subcategories:

1) those utterances in which the truth or theological validity is dependent upon the addition of an implied word. For example, God, in the Qur'ān, puts the words "Ask the village" [Q12.82] in the mouth of one of Joseph's brothers when he clearly means "Ask the people of the village". The words "the people" (*al-ahl*) form an implied addition (*taqdīr*). Additions such as this are added by the hearer at the time of hearing, and though he does it immediately, the process involves the hearer's rational capacity. This subcategory is termed *dalāla iqtiḍā'* (literally, "the indication of necessity")[9] by Baḥrānī (as it is by other legal theorists). In cases such as this the literal meaning is supplanted by the implied meaning.
2) those utterances in which an indication of causality can be legitimately derived. For example, when a bedouin told the Prophet that he (the bedouin) had had sexual intercourse with his (the bedouin's) wife during Ramadan, the Prophet replied, "Free a slave". Though not explicitly stated, it can be known with certainty, that the Prophet's utterance was a response to the bedouin's words, and the reason for the command to free a slave was the bedouin's transgression of the rules of the fast. Though the Prophet did not say, "If you have legitimate sexual intercourse during the daylight hours of Ramadan, free a slave as penance", one can deduce this in a valid manner from the utterance: the sexual intercourse is the cause (*'illa*) of the need for penance. This type of meaning derivation is described by Baḥrānī as a form of *tanqīḥ al-manāṭ*. In this context it is termed *dalālat al-tanbīh wa'l-īmā* (literally, "the indication of exhortation and reference").[10]
3) those utterances in which a meaning is not intended by the speaker at the time of speaking, but the meaning of which is a necessary result of the context of the utterance. The example used concerns the minimum period of time for a pregnancy. God may not have intended to convey the meaning that the minimum time is 6 months when he said, "and [a child's] bearing and weaning is thirty months". However, he did so, for he also said, "[a child's] weaning is in two years". 30 months less 24 months (ie two years) is 6 months. This type of meaning derivation is termed *dalāla ishāra* ("indication of allusion").[11]

complex corpus of information. To categorise something is, in effect, to know it. See Weiss, *God's Law*, p. 35–36.

[9] Weiss terms *dalāla iqtiḍā* "text-embedded implication" (*God's Law*, p. 483) whilst Kamali (*Principles*, p. 128–130) terms it "required meaning".

[10] Weiss terms this "textually engendered implication" (*God's Law*, p. 483).

Baḥrānī ends his description of the three types of indication by informing the reader that some scholars term these indications as implication (*mafāhīm*), a categorisation scheme he does not approve of since he separates those indications understood from articulation from implications understood only on reflection.

The second category is described as "*dalālat al-lafẓ lā fī maḥall al-nuṭq*" (literally, "the implication of the utterance, not at the point of articulation") and refers to a meaning the hearer may not obtain immediately, but only upon reflection. For the sake of terminology, I shall term such indications, "implications" (as a translation of *mafāhīm*). In these examples, the functioning of reason is more obvious. These are given the general title *dalālat al-mafhūm* (literally, "the indication of what is understood"), and, Baḥrānī tells us, they are divided into two types: *mafhūm al-muwāfaqa* and *mafhūm al-mukhālafa*.

The first of these types is identifiable in Western reasoning as the *a minori ad maius* and the *a maiori ad minus* arguments.[12] For example, when God says, "Do not say *uff* to your parents" [Q17.23] (where *uff* is an insult), the implied meaning, on reflection, is "Do not even say *uff* to your parents", that is, actions more serious than saying *uff* (the classic example is hitting) are also prohibited by this command. Similarly, when God says, "Whoever has done an atom's weight of good will see it, and whoever has done an atom's weight of evil will see it" [Q99.7–9] (ie see it rewarded or punished by God), he means "Whoever has done even an atom's weight of good (or evil) shall see it rewarded (or punished) in the final judgment". Actions of much greater good (or evil) than an atom's weight will therefore be remembered on judgment day.

These types of juridical reasoning were the subject of some debate in Muslim legal history, not because of their validity (though some, such as the Ẓāhirīs, famously did reject them).[13] The greater debate

[11] Weiss terms this "non-integral implication" (*ibid.*, p. 484) whilst Kamali (*Principles*, p. 126–127) terms it "alluded meaning".

[12] See Zysow, "Economy of Certainty", p. 157–162 and Weiss, *God's Law*, p. 486–490.

[13] See Ibn Ḥazm, *Iḥkām*, 2, p. 335–383; Zysow, "Economy of Certainty", p. 161–162; Hallaq, "Juridical *Qiyās*", p. 295, n. 28.

within the tradition was whether these arguments were better classified as analogy rather than implication. The Ḥanafīs generally argued that such implications were purely linguistic deductions, and hence not examples of analogy, whilst the Shāfiʿīs generally considered them to be examples of analogy (ie the *ʿilla* of "Do not say *uff*..." is the obligation to be respectful to one's parents).[14]

Since Baḥrānī rejects *qiyās*,[15] at least terminologically, he must reject the classification of *mafhūm al-muwāfaqa* as *qiyās* if he wishes to accept such arguments as valid:

> [*Mafhūm al-muwāfaqa*] is a proof, if it is certain—meaning that there is certainty as to the causality in the original case. For example [there is certainty that] more is implied in the prohibition to say *uff*... As for when it [the causality] is less than certain (*zannī*), then it is included under the heading of forbidden *qiyās*. [*H*, 1, 57]

Whilst the Ḥanafīs (and some Shāfiʿīs) argued that *mafhūm al-muwāfaqa* was a linguistic inference and not a type of analogy, Baḥrānī argues that it is a type of analogy, but one based on a "certainty of causality" in the original case. It is, in effect, a type of *tanqīḥ al-manāṭ* (as described in the previous chapter).[16] Whereas some Shāfiʿīs argued this was a type of *qiyās*, Baḥrānī argues that *qiyās* is based on a less-than-certain presumption of the *ʿilla*, and *mafhūm al-muwāfaqa* has a certain *ʿilla*; hence it is not a type of *qiyās*. The result is a position distinct from those of the other major legal traditions, but based squarely upon the epistemological considerations which have dominated his discussion to date.

The second type of *dalālat al-mafhūm* is termed *mafhūm al-mukhālafa*. Under this category a number of procedures are often included by Sunni jurists.[17] The basic form of the argument is that from any command, another contrary command can be deduced. Hence, when the Prophet said, "*zakāt* is owed on goats which graze", it can be deduced that *zakāt* is not owed on goats that do not graze. This type of reasoning is based upon a quality (*sifa*—goats which graze), but could be based on time (*zamān*), a place (*makān*) or numbers

[14] Hallaq, "Juridical *Qiyās*", p. 289–296; Weiss, *God's Law*, p. 486–490; Zysow, "Economy of Certainty", p. 159–161.
[15] See above, p. 103–105.
[16] See above, p. 104.
[17] For an account of this, see Zysow, "Economy of Certainty", p. 164–174 and Weiss, *God's Law*, p. 490–501.

(*ʿadad*) mentioned in the text. Baḥrānī advises great caution in its utilization. The only type of argumentation he accepts under this category is when God (or the Prophet or Imams) use a conditional sentence (*mafhūm al-sharṭ*).[18] The classic example of this type concerns God's statement "If they [divorced women] are pregnant, then provide them with maintenance until they deliver the child" [Q65.6]. The implied meaning being that if divorced women are not pregnant, the ex-husband need not provide for them. Though Baḥrānī does not use this example, it is clear he approves of its reasoning, though only because the Imams themselves sanctioned its use. He cites the following *khabar*:

> God said, "The Big One of them did it, so ask them, if they speak". He [Imam Ṣādiq] said, "By God, the Big One did not do it, and Abraham did not lie." It was said, "How?". He said, "This Big One of theirs did it, if they speak. If they did not speak, then this Big One of theirs did not do anything." [*H*, 1, 58]

In this case, Baḥrānī argues, the Imam clearly utilised *mafhūm al-sharṭ* (conditional implication). The Big One did it only if they spoke; they did not speak, therefore the Big One did not do it (Abraham did). This cunning solution resolves a theological problem (Abraham, a prophet, should not appear to have lied) and a juridical problem (how to justify *mafhūm al-sharṭ*).[19]

It is here one can discern Baḥrānī's views concerning the rational basis of the procedure of juristic reasoning. Such implications are rationally plausible, but are only valid if confirmed by revelatory material. Baḥrānī particularly criticises al-Ḥurr al-ʿĀmilī for his rejection of *mafhūm al-sharṭ*, when it is clear that the Imams sanctioned this sort of implication.

In similar vein, Baḥrānī rejects the principles used by other Shīʿī jurists, such as *muqaddimāt al-wājib* (ie if an act is obligatory, then the prerequisites to that act being valid are also obligatory) and *iltizām al-amr wa'l-nahy ʿan ḍiddihi* (a command to perform an action necessitates a prohibition to perform its opposite):

> As for what they say [about these two procedures] ... we have not found any trace [of their sanction] in the *akhbār*, even though the

[18] Weiss, *God's Law*, p. 491 and Kamali, *Principles*, p. 136.
[19] For a discussion of this verse in Sunni *tafsīr*, see Calder, "From Ṭabarī to Ibn Kathīr", p. 101–106.

> assessment of them [as prohibited procedures] leads to difficulty [in determining rulings from the texts]. [*H*, 1, 59]

Even though these procedures seem rationally plausible, without Imamic sanction, they cannot be considered valid.[20]

In sum, Baḥrānī's discussion of implication seems, to an extent, confused and unclear. At times he presents implications, such as those described above, as derived purely from reason, and sees no need for revelatory sanction (as with those in the first category of "indicated at the point of articulation"). At other points, he rejects procedures because, however plausible they may seem, they are unsanctioned by the Imams (such as the various types of *mafhūm al-mukhālafa*, except *mafhūm al-sharṭ*). Yet all of these discussions are situated under the heading of *dalīl al-ʿaql*. This ambivalence concerning reason's ability to deduce truths independent of revelatory sanction is a symptom of Baḥrānī's unease over the Muʿtazilī-Imāmī tradition in which he was writing. These matters are discussed further in the next chapter.[21]

What is of interest to the study of the history of Muslim legal theory is the schema utilised by Baḥrānī. Though the schema is clearly influenced by the Shāfiʿī tradition of *uṣūl al-fiqh* (the distinction between *dalālat al-manṭūq* and *dalālat al-mafhūm* is clearly lifted from Shafiʿī tradition),[22] the conclusions are not. *Mafhūm al-muwāfaqa* is, for Baḥrānī, not a type of *qiyās*, but it is analogical (termed *tanqīḥ al-manāṭ*).[23] Though he borrows the schema, he is not bound by its conclusions, and his exposition is, therefore, an interesting hybrid, which could be designated as a distinctive Imāmī style of presentation.

The implications described above are, for Baḥrānī, discoverable through reflection and the use of human reason, but are also (crucially it seems) sanctioned by the Imams. Revelation may come to confirm the validity of the procedure used to derive implied meaning, but a rational human being can, after considering the utterance, understand the intended meaning of the speaker. The hearer understands something in addition to the apparent meaning (as in the "Ask the village" example), but Baḥrānī clearly does not consider

[20] In this, Baḥrānī differs from the Shīʿī position generally. See Modarressi, "Rationalism and Traditionalism", p. 142.
[21] See below, p. 188–204.
[22] See Kamali, *Principles*, p. 130–132.
[23] See *ibid.*, p. 124–137.

this as a metaphor, but as an ellipsis. It is not that "the village" stands for the people of the village; it is that the words "the people" have been suppressed for some reason. Baḥrānī, then, considers such examples as cases of implication, not metaphor. This is in tune with his general view that non-literal meanings are problematic.

In M7–9, Baḥrānī deals with a different means whereby a meaning at variance from the literal meaning (ie the meaning assigned to it in the language system) might be acceptably obtained by the hearer. However, in these cases, the literal meaning is made redundant and a non-literal meaning is posited in the mind of the hearer. The discussion in these Prologues concerns the concepts of *ḥaqīqa* (literal) and *majāz* (diverted or non-literal) when applied to meaning. Though Baḥrānī deals with the issue of whether or not a command literally (*ḥaqīqatan*) designates an obligation in M7, I deal first with his discussion in M8, since it is in this section that he discusses the workings of the literal and non-literal more directly.

M8 is subtitled, "The legal theorists differ over how to demonstrate legal-literal meanings".[24] However, Baḥrānī's account presumes the reader's knowledge of how Muslim legal theorists have characterised the manner in which words gain meanings. Words, for Baḥrānī, as for most other thinkers in this area, have had meanings "placed" upon them by an agent. This, it appears, is how he views the origins of language.[25] A meaning, which has been placed upon a word, becomes its literal meaning:

> The truth of the matter is that if an utterance (*lafẓ*) is used in the manner designated to [or placed upon it], then it is literal (*ḥaqīqa*), and if not, then it is non-literal (*majāz*). [*H*, 1, 118]

If it is literal, then it can be "literal through revelation" or "literal through custom or usage". It is literal through revelation (*ḥaqīqa sharʿiyya*) if the person who designated the meaning was God or the Prophet. It is literal through custom (*ḥaqīqa ʿurfiyya*) if it was designated with a meaning by anyone else.

Baḥrānī appears to accept that the Arabic language existed before revelation, and that literal customary meanings were designated to terms in the pre-revelatory period. He also states that it is agreed

[24] Baḥrānī, *H*, 1, p. 118–121.
[25] For accounts of the dispute over the origins of language, see Weiss, "Muslim Discussions" and Weiss, *God's Law*, p. 117–150. For a brief account of *ḥaqīqa* and *majāz* in the Shīʿī tradition, see Calder, "Structure of Authority", p. 176–179.

(by the scholars of language?) that some words have meanings designated to them by the Lawgiver which are at variance with the pre-revelatory, customary meanings, and that the new meanings have passed into general usage such that most people now consider them to be the literal meanings. The example he provides is the word "*ṣalāt*", which originally meant prayer in general, but after revelation came to mean exclusively the five daily prayers which are obligatory for all Muslims.

The debate, for Baḥrānī, only concerns the (perhaps academic) question of whether, when the Lawgiver used a word (like *ṣalāt*) with a specific, new meaning, we can say he employed the word in a sense diverted from the customary meaning. The alternative is that we must say that his designation of meaning to a word is an innovative literal meaning. In technical terms, were *al-ḥaqā'iq al-shar'iyya* (and are they now) considered *majāz* usages of *al-ḥaqā'iq al-'urfiyya* (or *al-ḥaqā'iq al-lughawiyya*) or were they rather new literal meanings? The theological issue at stake here is whether God is constrained to communicate his will through pre-existent literal meanings (and the rules governing diversion from those meanings) or whether God can, in effect, invent a new set of literal meanings for pre-existent sounds (words), without reference, or connection, to the customary-literal meaning?[26]

Baḥrānī lists three positions held by various scholars on this issue. The first position, described as the orthodox and clearest opinion, is that the Lawgiver's words which already have customary-literal meanings, also have other legal-literal meanings. Hence words like *ṣalāt* have two literal meanings, one customary (*'urfī* or *lughawī*, I see no distinction in Baḥrānī's use of these terms) and one legal or revelatory (*shar'ī*).[27] They are, then, homonyms.

The second position is that the Lawgiver uses words with established meanings in a non-literal way (*majāz*). Hence they are not homonyms—one is a literal meaning and the other non-literal. The third position is that the manner in which the Lawgiver uses words is unknown (*ghayr ma'lūm*), and one should suspend judgment on this matter (*tawaqquf*).

[26] This issue seems to have been discussed by other legal theorists, but without the same urgency as Baḥrānī. See Weiss, *God's Law*, p. 142–143.

[27] Āmidī uses a slightly different terminology: *ḥaqīqa 'urfiyya* and *ḥaqīqa waḍ'iyya* (the latter term is absent from Baḥrānī's account) are considered together to be *ḥaqīqa lughawiyya*. See *ibid.*, p. 143.

Baḥrānī makes his own position clear:

> The clearest position, for me, is the first position. Of all the positions, it is the reliable one. We have, in support of it, the indicator of immediacy (*dalīl al-tabādur*). For them [the scholars of the language?], that is a sign of the literal. [*H*, 1, 119]

The "indicator of immediacy" is the phrase used to describe the empirical fact that when the Lawgiver uses a word like *zakāt* or *ṣalāt*, the technical, *shar'ī* meaning appears directly in the hearer's mind. This empirical evidence is used as proof that the meaning is literal. An objection to this proof, mentioned by Baḥrānī, is that one needs to understand the customary usage of language to understand the Lawgiver's usage. The only way to comprehend the Lawgiver's language is through our own language system. Without reference to the customary language system, the Lawgiver is, in effect, speaking a different (and incomprehensible) language. Since the Lawgiver takes words in customary language and injects them with new meanings, one must say that his use of these words is diverted (*majāz*) from the literal, customary usage.

Baḥrānī's reply to this objection is that the early Companions and Successors (*al-ṣaḥāba wa'l-tābi'īn wa jumla min al-salaf al-mutaqaddimīn*) understood words such as *ṣalāt*, when used by the Prophet, in a purely legal sense. When the Prophet spoke, they immediately knew that the legal meaning (*al-ma'nā al-shar'ī*) was intended. An example of this was when the Prophet was asked if *rukū'* and *sujūd* were revealed in the Qur'ān. These two terms refer to bowing and prostration, but in a legal sense, they mean the bowing and prostration performed during prayer. The Prophet's reply was in the affirmative, and as proof he recited the verse "Oh You who believe, bow and prostrate" [Q22.77]. Clearly the Prophet meant to imply that the terms *rukū'* and *sujūd* are present in the Qur'ān, not with their customary meanings, but in their technical, legal senses, and these are literal in character.

Baḥrānī's view is that there is a disjunction between the legal-literal meaning of a word and the customary-literal meaning. How then do we gain useful knowledge of the legal-literal meaning, when we are only adept in the customary system of language? Baḥrānī's answer is that we come to know legal-literal meaning through the Imams, who were, if you will, fluent in two language systems: the legal and the customary. The Imams knew the legal-literal and the customary-literal meanings of words, and hence were able to explain

the former by means of the latter to the people. Thus the Imams become crucial to understanding God's will. Without them, one might never discover the legal meanings of words found in revelation.

M7[28] deals with a specific use of language—the imperative (its positive and negative forms, ie command and prohibition).[29] What is the literal meaning of this grammatical form (termed *sīghat al-amr*)? The question that particularly concerns Baḥrānī is whether the command (*amr*) implies obligation literally or non-literally. For a word to signify a meaning other than the literal one, evidence is required to divert the assumed literal (be it legal or customary) meaning. This evidence is termed *qarīna* (pl. *qarā'in*), and can be derived from context, or from other clues which justify a diversion from the *ḥaqīqa* meaning to a *majāz* one. A non-literal interpretation is only justified if there are *qarā'in* to accompany it. To take the classic example, in the sentence "That man Zayd is a lion" one must take lion, not in its literal sense, but in its non-literal sense, for we are talking about a man and to take it literally would entail a contradiction (a man—Zayd—is a lion).[30]

The question of the imperative (both in the form of commands and prohibitions) is important because if such commands do not literally mean obligation or prohibition, but something else (say, recommendation or discouragement), then all such orders in revelation are to be understood in this non-obligatory manner until it is proven otherwise. To take another example, when God says, "Pray your daily prayers", it is clearly obligatory to do so; but when he says, "Marry as many women as seem good to you, two, three or four." [Q4.3], it is less clear. Does he mean all must marry; and furthermore, must all marry two, three or four wives? It would appear not; God here is recommending marriage, and permitting polygamy. However, the grammatical form used in each example is identical.

Baḥrānī considers the literal (*ḥaqīqa*) meaning of a command to be obligation.[31] The title of M7 expresses this conviction succinctly—*inna madlūl al-amr wa'l-nahy ḥaqīqatan, huwa al-wujūb wa'l-taḥrīm* (The thing indicated by a command and prohibition is obligation and pro-

[28] Baḥrānī, *H*, 1, p. 112–118.
[29] For an account of *amr* and *nahy* in Shī'ī legal theory, see Calder, "Structure of Authority", p. 182–184.
[30] For a fuller discussion of *qarīna*, see Hallaq, "Notes".
[31] Baḥrānī, then, holds a position similar to that of most Ḥanafīs, see Zysow, "Economy of Certainty", p. 116, and references cited therein.

hibition respectively). Baḥrānī's evidence for this consists of five Quranic quotes (including Q4.63 "obey God, obey his Prophet . . .") and eight *akhbār* (which all refer to the obligation to obey the Imams). These general exhortations to obey God, the Prophet and the Imams are taken by Baḥrānī to demonstrate that obedience to their commands implies that commands literally effect obligations.

There are, he says, "moderns", such as Ṣāḥib al-Ma'ālim, who view the commands of God and his Prophet as implying obligations, but due to the weakness of the *akhbār*, consider those of the Imams to be only recommendations. Baḥrānī's response is four-fold:

1) Orders are orders, and when contained in reports they are either accurate or inaccurate accounts of historical events. If they are inaccurate, they cease to be relevant to the law. "There is no difference, whether [the orders] were made by God the Most High, his Prophet or from them [the Imams]".[32]
2) An imperative can signify a recommendation, but for it to do so, evidence is required. Dubious provenance does not qualify as evidence of mere recommendation. It is evidence, possibly, of historical inaccuracy or fabrication.
3) Even if doubtful provenance is admitted as evidence of recommendation, caution (*iḥtiyāṭ*) would still dictate that one treat a command as an obligation, since it is possible that an obligation is intended. Without such caution, "There is no certainty of obedience to the Imams" (*lam yaḥṣil al-'ilm bi-ṭā'atihim wa lā al-yaqīn bi-mutāba'atihim*).[33]
4) The matter of whether or not an imperative means (literally) an obligation is, possibly, a matter of debate. As such it falls into the category of *shubha*, becoming one of the *mutashābihāt*. The rule in such cases is to proceed with caution, and this would require treating orders as obligations.

These four objections are basically two, as the first and second collapse into one, as do the third and fourth:

1) There is no justification for distinguishing between an Imam's order and those of the Prophet or God simply on the basis of possible historical inaccuracy.

[32] Baḥrānī, *H*, 1, p. 115.
[33] *Ibid.*, 1, p. 116.

2) Even if 1) is not accepted, to be certain of the law, one must adopt a cautious attitude and this entails assuming commands mean obligations.

M7 ends with a further criticism of a scholar (Abū Ḥasan)[34] who claimed that Shaykh al-Ṣadūq approved of treating the orders of the Imams as recommendations. Baḥrānī refutes this by claiming that Ṣadūq only did this when there was evidence (*qarā'in*) that an imperative was a recommendation; it did not form part of his *modus operandi*.

In M8, Baḥrānī establishes that the Imams are central to the process of interpretation, since without them, we are unable to fully comprehend the words of God or the Prophet. In M7, he establishes that when examining the Imam's words, one is to assume that an imperative (of which there are many in the *akhbār*) indicates an obligation, unless there is evidence that a recommendation is possible. Whether an imperative in the Qur'ān or in the Sunna entails an obligation is, it seems, dependent upon whether the Imams interpreted it as an obligation. The final topic selected by Baḥrānī for particular attention may seem to have little legal relevance at first. His concern in M9 is to examine literal and non-literal uses of descriptions with regard to their time-based accuracy. For example, when describing a person as beating someone or something (say, his wife), one is, in effect, saying that, at this moment, he is performing the act of beating. However, if one describes someone as a wife-beater, one is saying something more than this: one is saying that the person habitually beats his wife. In Arabic the word for the adjective "beating" (in the sentence "he is beating") and the word for "beater" (in the sentence "he is a beater") are the same: namely *ḍārib*. The sentence *huwa ḍāribun* has, then, two possible meanings: he is hitting (at this minute), or he is a beater (habitually). In English, this possible ambiguity is circumvented by having a different form for the adjective and the noun, but in Arabic this is not the case. Even if one expresses the meaning in a verbal sentence, such as "he beats", the ambiguity remains in Arabic (as it does, in fact, in

[34] That is, Abū Ḥasan al-Shaykh Sulaymān al-Baḥrānī (d. 1121/1709), who appears to have taught Baḥrānī's father (see Baḥrānī, *Lu'lu'a*, p. 8). In Abū Ḥasan's work, *al-'Ashara al-kāmila*, Baḥrānī states, that the author "supported *ijtihād*, but the implication from all of his later chapters in this book, is that he referred to what approximates to the Akhbārī method". (*ibid.*, p. 10). See also Bilādī, *Anwār*, p. 150–158.

English): does this mean he is beating or that he habitually beats? Of course, this ambiguity can be eradicated by context ("he beats the drum" usually implies a present action, whilst "he beats his wife" implies a habitual one), but this is not Baḥrānī's concern. He is keen to elucidate how the word *ḍārib* is used in such sentences: is the usage literal (*ḥaqīqa*) or non-literal (*majāz*) when describing a non-current action? The legal relevance of this issue becomes clear when one considers that if a person is termed, for example, an adulterer (*zānī*), then he is due certain punishment. Must he be committing adultery at the time to be literally described as an adulterer? And if not, is God using the term *zānī* in a *majāz* manner when he said, "The *zānī*, male and female, lash each one of them 100 times" [Q24.2]?

Debate surrounds the issue of whether or not there is a modal distinction between the adjectival and nominal use of the active (or indeed the passive) participle in an appellation. Baḥrānī expresses the issue in rather convoluted, technical language:

> Is it a condition [of an appellation being literal] that the reason for the description remains valid [at the time of designation] so that after the basis [of the appellation] has disappeared, then the [literal] usage disappears also, or is it not conditional, and it is literal without reference to a condition [of current performance]? [*H*, 1, 121]

This rather complex presentation of the issue owes much to the lexicographical tradition of Islamic scholarship, and the various positions outlined by Baḥrānī focus on whether or not the condition of current performance is necessary for a description to be classified as literal. It is important to recognise that none of the groups mentioned subsequently dispute that one can call someone who regularly beats his wife, a wife-beater, or someone who has committed adultery, an adulterer. They merely dispute the mode (*ḥaqīqa* or *majāz*) in which this designation occurs.

Baḥrānī outlines four main positions, and four additional refinements of these four positions. I will spare the reader the refinements, and concentrate on the four main views:

1) Most Imāmīs and many Muʿtazilīs argue that there is no condition of current performance for a *ḥaqīqa* appellation. To call someone who beats his wife a wife-beater is still a literal designation, whether or not he is currently performing the action.
2) Most Ashʿarīs, and, significantly, Muḥammad Amīn al-Astarābādī,

argue that there is a condition of current performance for an appellation to be *ḥaqīqa*.

3) Some unnamed scholars distinguish between descriptions of temporary validity (such as sitting or standing) and other descriptions (such as speaking and informing). For the former to be literal appellations there is a condition of current performance, but for the latter there are no conditions (an informant is an informant literally, even when he is not actually informing).
4) There are those who suspend judgment on the issue, since the indicators conflict. Amongst this group are supposedly, Āmidī (Sayf al-dīn (d. 630/1232)) and Ibn Ḥājib (d. 646/1249).

After presenting four highly technical refinements of these positions, Baḥrānī expresses his own preference. He argues that there are different types of appellation. Some require current performance as a condition of literal employment (such as cold or hot; or more legally relevant, menstruating or not); others do not require it (such as informant or speaker); and others are ambiguous (such as believer and unbeliever). It is, for Baḥrānī, unclear whether a believer has to be continuously confessing his belief for him to be literally termed *mu'min*. The result of this variety in appellation is confusion and dispute; Baḥrānī's response to such uncertainty is characteristic:

> The *akhbār* of the *ahl al-dhikr* [the Imams], indicate that it is obligatory to build legal rulings upon certainty and knowledge. When this is absent, [one] must rest upon the shore of caution (*iḥtiyāṭ*). [*H*, 1, 124]

Baḥrānī, for some reason, seems reticent when it comes to expressing his own opinion in the Prologues, and refers the reader to the *al-Durar al-najafiyya*. There one finds a more explicit statement:

> The truth, in my opinion, is that it is necessary for the literal linguistic truth of a meaning that . . . it remain in the state that is the reason for its current, truthful appellation.[35]

This rather prolix statement implies that Baḥrānī's position, notwithstanding his criticism of Astarābādī in the *Ḥadā'iq*, is the second of those outlined above. Caution (*iḥtiyāṭ*) dictates, it seems, that one presume that all appellations require a condition of current performance to be considered literal. Though a non-literal (*majāz*), habitual designation is not impossible, it requires justificatory evidence

[35] Baḥrānī, *Durar*, p. 19.

(*qarā'in*). This exegetical principle makes the interpretative task more difficult in one sense, for when the Imams decree a course of action (say, punishment) in response to a sin (say, adultery), it must be demonstrated that they are using the words which describe the agent in a non-literal manner. Baḥrānī clearly considers it to be possible in the majority of cases to discover the necessary evidence for such a demonstration.

Baḥrānī's exposition of linguistic hermeneutics is selective and incomplete when compared to that found in other works of legal theory. Though his coverage of implication is comprehensive, his discussion of *ḥaqīqa* and *majāz*, and of the functioning of language[36] generally, assumes a basic knowledge of both technical terminology and concepts on the reader's part. The style of these sections is laconic and the exposition dense and brief. The style differs significantly from that in the other Prologues, where Baḥrānī expresses himself in an expansive manner, explaining concepts and terms with which the reader may be unfamiliar. To be fair, some of the lacunae in his discussion are treated in M11, under the aegis of exegetical principles to be utilised by the interpreter, but even there, his discussion could hardly be considered comprehensive.[37]

Baḥrānī's discussion of implication in M3 is, as has been noted, dictated in structure, but not in its conclusions, by Shāfi'ī presentations of language. His reasoning in selecting the three topics of the literal nature of commands and prohibitions, the literal usage of words by the Lawgiver and the condition of current performance in M7, 8 and 9 respectively, is less clear. It is possible that these are the only areas of the linguistic sciences (*al-'ulūm al-lughawiyya*) which he considers worthy of comment, or that they are the only areas in which his position deviates from that of the established Imāmī view. What is clear is that his conclusions appear as logical extensions of his legal theory, as described in the other Prologues. In M1–6, the central role of the Imamic word (as distilled in the collections of *akhbār*) in understanding the Quranic text is stressed. Such emphasis is also found in Baḥrānī's account of linguistic hermeneutics. The epistemology of certainty, found particularly in his account of *iḥtiyāṭ*,

[36] The term *al-lugha* does not appear in the Prologues, though its adjectival form *lughawī* is found. The idea of a "primordial" linguistic system seems presumed throughout. On the *lugha*, see the references in note 6 above.

[37] For example, the issue of general and specific (*'āmm:khāṣṣ*) is discussed in the eleventh principle; for the functioning of these principles, see below, p. 232.

is employed also in Baḥrānī's attitude towards the non-literal interpretation of words. It is not the case that *majāz* meaning is impossible; it is merely that it must be established with certainty before it is permitted. Hence a command literally means an obligation and a negative command literally a prohibition until there is counter-evidence.

Finally, the procedure of caution (*iḥtiyāṭ*) to be used when certainty is not established, restricts the meaning of words to the literal, unless there is good reason to divert the meaning elsewhere. Hence descriptions (such as adulterer) are only designations of habitual states after *qarā'in* have been produced.

These discussions of language, though limited, only seem incongruous in the Prologues in terms of style. In content and conclusions, they show the same epistemological concern with establishing certainty in interpretation as previous Prologues have done concerning fulfilment of the law.

Bihbahānī's Hermeneutics

The assumption underlying much of Baḥrānī's exposition of language use was that the language of, say, the Qur'ān was difficult to understand without the explanation in ordinary language provided by the *akhbār* of the Imams. This, it appears, applied not just to those elements of God's word (and possibly that of the Prophet also) which are traditionally viewed as problematic (*mutashābihāt*), but to all sections of the Qur'ān (and Prophetic *sunna*) generally. Bihbahānī's position, as we shall see, is more sanguine with respect to the possibility of understanding God's word directly, and underlying this optimism is a general theory of the nature of everyday language and its relation to that of revelation.[38]

Bihbahānī's thoughts are, once again, scattered throughout *FH* and *FJ*, but the general thrust is laid down in FH5, the aim of which is to refute two commonly held misconceptions:

1) that the Lawgiver's use of language (*iṣṭilāḥ al-shāriʿ*) precedes that of ordinary people, but is comprehensible to them. Amongst the evidence for this position is that valid contracts of sale include elements of the Lawgiver's terminology. For a contract of sale to be valid, it must be fully understood by both parties. Hence the parties must understand the Lawgiver's terminology, and it precedes the language use of the parties, but is comprehensible to them.
2) that the Lawgiver's language use is in some way unique and incomprehensible to the ordinary person. It can only be understood after studying the *qarā'in* which indicate that God's intended meanings are different from those found in ordinary language.

[38] This view marries with Bihbahānī's views on the probative force of the Qur'ān. See above, p. 60–66.

These two positions represent extremes and are clearly mutually exclusive. The second seems close to that adopted by Baḥrānī, where the *qarā'in* for the Lawgiver's particular use of language are located in the *akhbār* of the Imams.[39] The proponents of this position, though not named, are held in particular contempt by Bihbahānī, as indicated by his rather disparaging description of them as "those with limited abilities in legal theory" (*al-qāṣirūn fī uṣūl al-fiqh*).

The first position is brusquely dismissed—the Lawgiver's terminology clearly does not precede that of ordinary people. It is merely the case that the parties in a contract identify the meaning of the Lawgiver's terminology accurately, and this identification (*taʿyīn*) is the same for both of them. The example, then, does not support the opponent's position.

The second position deserves a more expansive refutation. This position, which seems close to that of Baḥrānī, is incorrect because "the manner in which the Lawgiver uses expressions is the manner common amongst the people" (*ṭarīqa mukālamāt al-shāriʿ hiya al-ṭarīqa al-mutaʿārafa bayn al-nās*). The "manner common amongst the people" is, Bihbahānī claims, full of non-literal (*majāz*) usage. Bihbahānī concurs with the findings of an unnamed writer who "stresses that most of the language of the Arabs, and most of the language usages of the Lawgiver are non-literal ones (*majāzāt*)".[40]

From this (undemonstrated) assertion, it becomes clear that Bihbahānī is actually criticising Baḥrānī's position concerning legal-literal meaning (*al-ḥaqā'iq al-sharʿiyya*).[41] Bihbahānī rejects, it seems, the category

[39] It should be noted that Baḥrānī does not view the *akhbār* as containing *qarā'in* of *sharʿī* meaning, for *qarā'in* are used only for *majāz* meaning, and *al-ḥaqā'iq al-sharʿiyya* are, by definition, not *majāz*. See above, p. 155–158.
[40] Bihbahānī, *FH*, p. 114.
[41] See above, p. 155.

of legal-literal meanings which are distinct from customary (or linguistic) literal uses. His assertion is that the Lawgiver participates in the same linguistic system, with the same rules concerning literal and non-literal meaning, as ordinary language users. Hence, if one knows the rules for customary usage, one knows the rules for the language of the Lawgiver. This makes the task of interpretation somewhat easier for Bihbahānī, as there is no need to know two sets of literal meanings—one customary and one legal (revelatory), merely one set of literal meanings and a number of possible non-literal ones.

Baḥrānī's linguistic system admitted that there was a prevalence of homonymity (*ishtirāk*)—for many words had (at least) two literal meanings, one legal and one literal. For Bihbahānī, this is unacceptable, it seems, on purely practical grounds: a system with widespread homonymity is much more difficult to interpret and comprehend than one with literal and non-literal meanings. For Bihbahānī, "non-literal interpretation is better than homonymity" (*al-majāz khayr min al-ishtirāk*) because the latter hinders the exegetical process. If a word, such as *khamr*, has two meanings (one customary and one revelatory), and both are literal meanings, then it becomes impossible to formulate the ruling concerning the prohibition of *khamr* in any meaningful sense:

> From what we have said, it is clear that the Lawgiver, by simply using the word *kāfir* or *nāṣib* or *khamr* or others with a meaning other than their linguistic or common ones, [makes it] impossible for there to be a ruling, due to it being a new [and hence unknown] literal meaning. In the same way, it is not possible in any of the *aḥkām* to give a ruling if there is homonymity (*ishtirāk*). [*FH*, 115–6]

Baḥrānī, it will be recalled, was keen to separate revelatory language use from customary. Hence the word *ṣalāt* had two literal meanings—one was customary (ie prayer) and one legal (ie prayer in the legal sense of the five daily prayers). For Bihbahānī, it seems more practical (and practicality seems to be his only reason for arguing thus) to conceive of the word *ṣalāt* as having one literal meaning (the customary one) and a number of distinguishable non-literal meanings (one of which is the legal-literal meaning mentioned above). This leads him to conclude that there are a large number of *majāzāt* (non-literal usages) in the revelatory texts, and hence recognising and defining them becomes of great importance. The Lawgiver speaks our language, but he speaks it with all the possible ambiguities and non-literal meanings that we employ in our language usage.

The term Lawgiver in these discussions clearly means God and the Prophet, as evidenced by Bihbahānī's examples. The Imams are not considered Lawgivers as such, since theologically they were not permitted to provide new revelation, merely to explain previous revelations. They, too, spoke in ordinary language according to Bihbahānī, as he explains in FJ27, entitled "That the Imams used to speak in the manner of customary convention (*ʿalā ṭarīqat al-muḥāwarāt al-ʿurfiyya*)".

In this section he argues that the Imams, like God and the Prophet, did not use terminology in a strange and impenetrable manner. Rather they spoke in the manner of customary speech—at times this was literal and at other times non-literal. When they said that the blood of a woman's period is black, and that the blood of one about to start her period is yellow (as reported in the *akhbār*), they were clearly using black and yellow in a non-literal manner, referring to the special position held by menstrual blood in the laws of purity. In the same way, when the Imams said, "one who ignores prayer is an unbeliever", they did not mean this literally. They meant that ignoring prayer leads to unbelief, and hence should be treated as if it is unbelief. One (like Baḥrānī) who claims that in a statement such as this, unbeliever is being used in a special manner (ie a *ḥaqīqa sharʿiyya* manner), resigns himself to all sorts of exegetical problems as to how to discover this special meaning. The preferable course of action is to accept that the Imams, like God and the Prophet before them, used words in the common linguistic manner (including the *majāz* mode) so that the community might understand the Sharīʿa clearly.

The argument for this position appears entirely practical. To commit oneself to any other exegetical assumption would, inevitably, lead to obscurity and make interpretation more problematic. There are, however, limits to this practical identification of the language of the revelatory texts with customary usage. Bihbahānī recognises that, at times, it is undoubtedly difficult for the non-literal meaning of a word, as used by the Lawgiver or the Imams, to be known with precision, since the *qarā'in* which might pinpoint the meaning have been lost. This is particularly the case in matters of ritual worship, for in these matters, the meaning of the Lawgiver's words are not open to rational analysis (and hence, their possible *majāz* meanings cannot be assessed). "Purity" does not mean purity in its usual sense, and "impurity" similarly has a special meaning. Such terms cannot

be investigated in the usual (rational) manner. This bar on rational investigation into the meaning of terms concerning ritual worship (*ʿibāda*) makes these meanings "*tawqīfī*":

> Perhaps the intended meaning of what one of the Sinless Ones said is legal [and not ordinary]. This occurs through a designation of the Lawgiver alone . . . When the categorisation applies to matters of worship (*ʿibādāt*) they are *tawqīfī*. [*FJ*, 465]

I have more to say about the term *tawqīfī* in the next chapter,[42] but it suffices to say here that in the cases of *ʿibādāt*, Bihbahānī accepts that the Lawgiver's use of language is not identical with ordinary use. There were times when the Lawgiver utilised words in a technical way. But it is important to recognise that these usages were not literal, but non-literal. In such cases, which Bihbahānī restricts to matters of worship, the meanings of words are not gained through rational analysis, or through an examination of customary usage. In such cases, the meanings are "given" or "instructed" and in this sense are inescapably non-rational in their designation. In technical terminology, they are *tawqīfī*. In terms of Bihbahānī's linguistic analysis, *tawqīfī* words are those which have a non-literal meaning, the *qarā'in* of which cannot be discerned through rational investigation or examination of customary use—the meanings must merely be learned. This seems nearest to Baḥrānī's category of *al-ḥaqā'iq al-sharʿiyya* or revelatory-literal uses, except that unlike in Baḥrānī's analysis, the teaching of the meaning of such words does not seem restricted to the Imams. It can be effectively performed by the Prophet and even God himself. It is God, the Prophet and the Imams who define what they mean by words such as "purity" in the ritual context.

Since Bihbahānī has demonstrated to his satisfaction that God, the Prophet and the Imams use customary language, and that such customary language is full of understandable, but non-literal meanings (excepting those words associated with *ʿibādāt*), distinguishing between literal and non-literal meanings of words in the revelatory texts becomes essential to the exegetical task. In FH34, Bihbahānī outlines four means whereby literal and non-literal meanings might be distinguished. These are termed "signs of the literal and non-literal" (*ʿalamāt al-ḥaqīqa wa'l-majāz*). The importance for the *mujtahid* of using these rules is stressed:

[42] See below, p. 213–218. Bihbahānī's use of the term *ʿibādāt* is specific also.

> Whoever does not have knowledge of *uṣūl al-fiqh* will be unable to distinguish the literal from the non-literal. He will cause much havoc in the law, and perhaps be unable to distinguish one case from another . . . [*FJ*, 326]

The rules are as follows:

1) If the sentence in the revelatory text has an explanatory gloss, such as "the name of this is X", then it is clearly literal.
2) The meaning of a sentence or word which appears in the mind immediately is the literal. This does not imply that the literal meaning is necessarily the best interpretation, merely that this is one means of discovering the literal meaning. If such a literal meaning makes no sense, and this lack of sense also appears immediately in the mind, then a non-literal meaning must be found.[43]
3) If the statement cannot be negated without the statement becoming untrue, then it is literal; if not, it is non-literal. If one says "That man is a lion", one could negate the statement ("That man is not a lion"), and it would be a true statement. From this one knows that the meaning of lion is non-literal here, if this statement is to be considered true.
4) The literal meaning has "continuity" (*iṭṭirād*) whilst the non-literal meaning does not. By this, I take Bihbahānī to mean that a non-literal meaning makes the hearer stop and think, whilst the literal meaning does not (ie for the literal meaning the conversation continues uninterrupted). For example, the sentences "Ask the village" and "Ask the carpet" differ. The first has continuity, whilst the latter does not. This might be considered an unfortunate example since one may wish to argue that "Ask the village" is non-literal (the village standing for the people). However, Bihbahānī (like Baḥrānī) considers this to be a case of implication (*mafhūm*). This is ellipsis, not metaphor. "Ask the village" does not prevent understanding, whilst "Ask the carpet" does. The latter can only be understood if a non-literal meaning is discovered (one could conjure up the idea that the carpet stands for a group of people, rather like "Ask the throne" might mean "Ask the king", rather than "Ask the king's chair").

These rules, basic as they are, are those recommended by Bihbahānī. Once a non-literal use has been identified (and there will inevitably

[43] This is also a sign of the literal meaning for Baḥrānī. See above, p. 157.

be many of these), *qarā'in* will come into play to determine which non-literal meaning is intended. Unfortunately, Bihbahānī does not outline the means whereby one non-literal meaning might be determined in preference to another. This task, it appears, is left to the *mujtahid's* own investigation. The preferred meaning of such texts will then be subject to the *mujtahid's* exegetical powers; he will produce his opinion as to their most likely meaning. Hence the intended meaning, in the majority of such cases, will be less than certain, resulting from the *mujtahid's* efforts (ie they will be *zannī*).

Before leaving the topic of the literal and non-literal meanings of words, it is worth considering Bihbahānī's views on concurrent appellation. Baḥrānī argued that due to the conflicting indicators in this area, one cannot be sure that an appellation (eg wife-beater) applies to one who is not performing the action at a particular moment. This lack of certainty leads one to exercise *tawaqquf* and *iḥtiyāṭ*, and stipulate the need for *qarā'in* in appellation—hence one assumes that the appellation is *majāz*.

Bihbahānī, like Baḥrānī, considers there to be no dispute that an appellation applied to someone or something whilst in a particular state is a literal use of the word. As for when the person or item is not in that state, there are five positions:

1) that the non-concurrent appellation is *majāz*;
2) that there is no difference between the concurrent and non-concurrent appellations: both are *ḥaqīqa*;
3) that the appellation is such that, if its opposite does not arise after the appellation has been used, then it is literal. If not, it is non-literal;
4) that if the appellation is one with temporal extension (such as "he is speaking"), then it is non-literal to say he is a speaker when he is not;
5) that if the appellation is one which has legal consequences (such as the appellation "murderer"), then the non-concurrent appellation is literal.

Bihbahānī appears not to take a position on the issue, as he ends FH35 with the sentence "on [this matter] there is dispute, so consider (*fa-ta'ammal*)", but an earlier statement expresses his opinion more decisively:

> So know that an appellation, whenever it wavers between the concurrent or the non-concurrent, such as a fruit-bearing [tree] which bears fruit only after it has been called such, then the second [ie non-concurrent appellation] is agreed to be non-literal. It is different from the literal meaning, and does not come into existence except through evidence (*qarīna*). [*FH*, 332]

Hence, practically, Baḥrānī's and Bihbahānī's positions are not dissimilar, though they reach them via different routes. Baḥrānī considers non-concurrent appellations to be non-literal, because that is the most cautious course of action, whilst Bihbahānī considers them to be non-literal in principle (though he offers no clear argumentation for this position, and seems unwilling to claim it explicitly).

The remaining sections of *FH* and *FJ* devoted to linguistic understanding fall into three main categories:

1) commands (*awāmir:nawāhī*)
2) general and specific expressions (*'āmm:khāṣṣ*)
3) implications (*mafāhīm*).

The first two of these occupy the most space, implications being discussed in a single *fā'ida*.

Commands

Baḥrānī, the reader will recall, included only a brief section on commands (*amr* and *nahy*), confining his discussion to whether or not an order implied an obligation (and prohibition, a proscription) in a literal manner. Bihbahānī's account, though less than comprehensive, certainly encompasses more than Baḥrānī's rather selective presentation.

Bihbahānī's aim in FH13 is to refute the position that the imperative means, in a literal manner, a request (*al-ṭalab*), and that when scholars interpret an imperative as an obligation, they are using a (possibly unjustified) non-literal meaning.[44] This position, held by an unnamed scholar, is at the other extreme to that of Baḥrānī. The unnamed scholar proposes that the meaning of an imperative is indeterminate in terms of legal classification. He argues that the immediate impression gained in a hearer's mind (ie *al-mutabādir*), when an imperative is heard, is a request (rather than an obligation), and this is an indication of its literal meaning.

Bihbahānī considers this depiction of the imperative to be inaccurate. He agrees that the immediate impression made on the mind

[44] For the secondary literature on this topic, see above, notes 29 and 31.

(*al-mutabādir ilā al-dhihn*) is of a request and not an obligation *per se*. However, the immediate impression on a hearer's mind is more than this—it is a "request in terms of a lack of satisfaction" (*al-ṭalab bi-ʿanwān ʿadam al-riḍā*) produced from the non-performance of the act (or in the case of a negative imperative, from the performance of the act). This does not mean that an obligation is necessarily a non-literal meaning of the imperative form. Rather an obligation is a particular possible implication (*mafhūm*) of the imperative form. The use of the term *mafhūm* here is, the reader is left to presume, linked to the implications (*mafāhīm*) discussed below.

To illustrate how the imperative contains an implication of obligation, Bihbahānī uses an analogy. The word "horse" immediately conjures up in the mind a single image (*ṣūra wāḥida basīṭa*). Reason (*ʿaql*) then divides this image up into its constituent parts (colour, size, form etc), but the constituent parts are not what is immediately understood by the word "horse"; they are merely a confirmation of a particular implication of the word "horse" (*miṣdāqu mafhūmin*). Hence a brown horse, for example, is not a non-literal understanding of the word "horse", but is a particular, possible implication of the word "horse". In the same way, an obligation is not the immediate meaning of an imperative, but, on reflection, obligation makes up a particular, possible, implied meaning of an imperative. To interpret an imperative as an obligation is not a diversion from its literal meaning, but a confirmation of a particular, possible, implied meaning. This view of the imperative form differs from that of Baḥrānī, since for him an imperative form either literally means an obligation, or caution dictates that it be treated as such. For Bihbahānī, one of the possible implications of the imperative is obligation. Both Baḥrānī and Bihbahānī, however, would refute the view of the unnamed scholar that obligation is somehow a non-literal meaning of the imperative. Unfortunately, exactly how one is to recognise the obligation-implication over the recommended-implication is unclear in *FH* and *FJ*. It appears to be the task of the *mujtahid* to deduce which possible implied meaning of the imperative form (be it obligation, recommendation or permission) is meant on a particular occasion—and hence one is forced to conclude that such a deduction would be the *mujtahid's* own opinion.

Bihbahānī next turns his attention to the views of Ṣāḥib al-Maʿālim (Ḥasan b. Shahīd II), who the reader will recall, was heavily criticised by Baḥrānī. Ṣāḥib al-Maʿālim's view, according to Bihbahānī, is that most of the imperatives used by the Imams are not obligations, but must be treated as recommendations, since a higher degree of confidence in the soundness of the *isnāds* (*wuthūq*) is needed to interpret them as obligations.[45] This view is criticised by Bihbahānī on slightly different grounds to those evident in Baḥrānī's criticism. Bihbahānī argues that merely because in some (perhaps many) cases a recommendation is a justified interpretation of an imperative in the *akhbār*, this does not establish a general presumption (*aṣl*) that the Imams' imperatives are only recommendations. Each imperative must be examined and assessed on its own merits.

Ṣāḥib al-Dhakhīra (Muḥammad Bāqir al-Sabzawārī (d. 1090/1679)) argues in a similar vein to Ṣāḥib al-Maʿālim, except that he allows an obligation to be derived from an imperative only if the community accepts it to be so. This view is also unacceptable to Bihbahānī, who maintains his position that although some of the imperatives in the *akhbār* might be seen as mere recommendations due to defective *isnāds*, this cannot be the general presumption.

In the final section, Bihbahānī briefly considers the two principles also discussed by Baḥrānī: *muqaddimāt al-wājib* and *iltizām*.[46] His view is surprisingly conservative on these matters, stating that the proofs for them are less than complete (*ghayr tāmm*). He does not seem to reject them completely though; their application leads to (possibly acceptable) *zannī* conclusions.

In these conclusions, in his criticism of those who reduce imperatives to recommendations, and in his rejection of the view that an obligation is a non-literal interpretation, one sees, perhaps, the impact of the Akhbārī (and specifically Baḥrānī's) critique on Bihbahānī. For both Baḥrānī and Bihbahānī, Ṣāḥib al-Maʿālim's position is open to dispute, though in Baḥrānī's account, the criticism is more vehement.

On other matters relating to commands, Bihbahānī's discussion is brief. In FJ22 he states (rather than proves) that an imperative does not necessarily indicate immediate performance (*ʿalā al-fawr*), but it needs evidence (*qarīna*) before immediate performance can be deduced. In FJ3, he states that a limit indicated in a command is not assumed to be included as part of the command (ie "Fast until night" [Q2.178]

[45] Whether or not Ṣāḥib al-Maʿālim's views correspond to Bihbahānī's portrayal here is, of course, irrelevant. It seems clear to me that Bihbahānī is presenting Ṣāḥib al-Maʿālim's position in a manner which will enhance his own argument. See Ḥasan b. Shahīd II, *Maʿālim*, p. 65–74, especially p. 74.

[46] See above, p. 153–154.

means fast until nightfall and not after that time), however, it is possible for the limit to be included, if there are *qarīna* to support such an interpretation. This makes the latter interpretation *majāz*. Conclusions such as these indicate how Bihbahānī's views on the meanings of such orders are less cautious than those of Baḥrānī. Though Baḥrānī does not state it explicitly, his theory of *iḥtiyāṭ* would seem to commit him to the view that an imperative implies immediate performance (and *qarā'in* are required for it to mean anything else) and that a limit is included in the command (unless there are *qarā'in* to prove otherwise). In this way the law can be fulfilled with certainty.

General and Unqualified Expressions

Amongst the means of reconciling contradictory elements of revelation mentioned by both Baḥrānī and Bihbahānī were the processes of *takhṣīṣ* and *taqyīd*—that is, treating one text as general and the other as specific (or one unqualified and the other qualified).[47] The manner in which this might effectively eliminate a contradiction is part of a more comprehensive understanding of the relationships between rules and exceptions to those rules. Neither Baḥrānī nor Bihbahānī give definitions of the terms associated with these topics (*'āmm:khaṣṣ*, *muṭlaq:muqayyad*), presuming the reader has prior knowledge of their importance. A general expression (*'āmm*) is one that refers to all members of a specified class. A specific expression (*khāṣṣ*) limits the applicability of the general expression.[48] For example, the expression "divorced women" in the verse, "Divorced women must observe three courses upon themselves" [Q2.228] is interpreted as general in intention, ie all divorced women are subject to this ruling. If there was no other relevant revelatory text, this ruling would stand and all divorced women would have to observe a waiting period of three menstrual cycles. However, in Q33.49 it states, "Oh believers, if you marry believing women and divorce them before you have touched them, then you should not count a period". This second verse shows that there is a restriction on the applicability of

[47] See above, p. 113–114 and p. 136–137.

[48] For a general account of *'āmm:khāṣṣ* and the related topic of *muṭlaq:muqayyad*, see Zysow, "Economy of Certainty", p. 126–152; Kamali, *Principles*, p. 104–113. For a full exposition of Āmidī's view (which is representative generally of Shāfi'ī thought), see Weiss, *God's Law*, p. 389–446; for Shī'ī legal theory, see Calder, "Structure of Authority", p. 179–182.

the first ruling. Divorced women who have not had a consummated marriage need not observe the three cycles. The second verse performs the act of specialisation (*takhṣīṣ*) upon the first.

The unqualified expression refers to an expression which is not limited in any manner. The phrase, "Bring two witnesses amongst your men" [Q2.282] refers to the witnesses to a contract. The term witness is unqualified in that any two witnesses (it seems) will suffice. However, Q65.2 states that one should bring "two just witnesses" for a contract (in this case one of divorce). This second verse performs the act of qualification (*taqyīd*) on the first verse, meaning that the unqualified sense (*muṭlaq*) has been restricted by the qualified sense of the second verse (*muqayyad*). From this brief description one can see that, generally, *takhṣīṣ* refers to exceptions to orders and *taqyīd* applies to adjectival qualifications.

That the processes of *takhṣīṣ* and *taqyīd* were problematic is evidenced by the debate mentioned in Chapter Three, over whether a *khabar al-wāḥid* report could perform *takhṣīṣ* on a Quranic dictum: Bihbahānī, with his view on the range of permitted probative force accorded to texts, had faced the particular problem of whether equal authenticity was needed to perform *takhṣīṣ* and *taqyīd*. For Baḥrānī, of course, this was unproblematic since *khabar al-wāḥid* were of equal probative force to the Qur'ān itself.[49] The issue here was the relative probative force of the two elements of the processes of *takhṣīṣ* and *taqyīd*.

Two other issues emerge as important for Bihbahānī:

a) What are the linguistic indicators of the general expression?
b) How does one know that *takhṣīṣ* has taken place?

The first of these is addressed in FH18 and FJ5; the second in FH19 and FJ12. Like most legal theorists, much of Bihbahānī's discussion is dedicated to the general expression, but much of what is said also applies to the unqualified expression.[50]

First, Bihbahānī simply lists words which an exegete should recognise as designating the general expression:

[49] See above, p. 113–114.

[50] For a discussion of *muṭlaq* and *muqayyad*, see Kamali, *Principles*, p. 113–116. The concentration on the general:specific distinction rather than the qualified:unqualified distinction seems a feature of Āmidī's presentation also, see Weiss, *God's Law*, p. 390.

> There is no dispute amongst [the scholars] that the plural [of a word], adorned with the definite article, signifies the general expression, just as is the case with an indefinite word in the context of negation, and the rest of the words [which indicate] the general such as "all", "whoever", "when", "whenever" and the like. [*FH*, 189]

When an exegete sees such words in a revelatory text, he is justified in presuming the ruling contained within them is general. The case of "an indefinite word in the context of negation" refers to the grammatical point, in Arabic, such that a general negation (such as "No man may enter my house") is intended, which is formed by the negative particle (*lā*) and the noun, in the singular without the definite article (*lā rajul*).

There is, Bihbahānī claims, no debate about the words in this list bar one: the general designation of a singular definite noun, such as the word, "thief" in the phrase, "The thief, male and female, cut off their hands" [Q5.38]. How does one recognise that "the thief" here is general, whilst, for example, the word "King" in "the King said" [Q12.54] is clearly specific, referring to a particular king? The grammatical forms in each example are identical. Bihbahānī accepts that in many cases, context will make the meaning clear. However, both the specific and general understandings of a definite singular noun are possible. The issue for Bihbahānī is, which is a literal and which is a non-literal designation? In other words, which should one presume the definite singular to mean when there is no contextual evidence to support one or other interpretation?[51]

> The truth is that [the definite singular noun] was originally designated to distinguish the generic kind, because the utterance of the singular designates the kind, and the definite article is designed to distinguish and show [the kind in general]. The literal meaning is the individual generic kind. [*FH*, 190]

The more specific use of the definite singular (such as "the King" in the above example) is in need of *qarā'in* to be understood. These can be elements of context (*siyāq*), such as time and place, which serve to situate the sentence, and make the specific referent of the

[51] This question—whether a singular definite article signifies the general form—can be seen as a specific application of the debate over whether the linguistic forms of the general signify generality in a literal sense. See Weiss, *God's Law*, p. 401–406. For a discussion of the *ḥaqīqa:majāz* distinction after specialisation has occurred, see Zysow, "Economy of Certainty", p. 147–159.

definite singular explicit. However, these *qarā'in* serve to justify a non-literal meaning of this grammatical form; its assumed meaning in the absence of such *qarā'in* is general.

Having established, however briefly, the linguistic forms which designate the general, Bihbahānī, in FH19, explains the working of *takhṣīṣ*. He begins by explaining that it is not permitted to act on the basis of a general expression until a search has been completed for a specific expression, which might restrict the general one. This search (*faḥṣ*) can only be carried out by a *mujtahid*, and he has a number of issues to bear in mind. Bihbahānī lists them to remind the reader that *takhṣīṣ* is far from simple and the end result must be considered uncertain. The list includes:

a) Is the specifying element of the same certainty as the general element?
b) Are all the *rāwīs* (transmitters of the *khabar* in question) just in either the general or the specifying element?
c) Is the *matn* of the report the *rāwī*'s own words, or the Imams'?
d) Is it possible that the specifying element is subject to *taqiyya*?[52]
e) Is it possible that there are two contradictory specifying elements?

Takhṣīṣ, then, is a *zannī* procedure, and can only be attempted by the adept, and even then the conclusion will be *zannī* in a large number of cases.[53]

The process of *taqyīd* is as problematic as that of *takhṣīṣ*. In FJ12, entitled "The obligation to interpret the *muṭlaq* according to the *muqayyad*", Bihbahānī criticises those who argue that a later revelation always qualifies an earlier one. For example, in Q58.3, the penance for making a futile oath is to free a slave. In Q4.92, the penance for erroneous killing is to free a Muslim slave. Some "mistaken" jurists have interpreted this latter verse as a sign that the slave in Q58.3 must be an unbelieving slave, otherwise the Lawgiver would have said "a believing or unbelieving slave."

Bihbahānī argues that such a conclusion is clearly fallacious because the two commands have no exegetical relationship (and hence no *taqyīd*). They refer to different areas of the law. In the first, either a believing or unbelieving slave can be freed as penance, in the latter,

[52] See Bihbahānī, *FH*, p. 203–205.
[53] For a more detailed discussion of *takhṣīṣ*, see Zysow, "Economy of Certainty", p. 142–149.

only a Muslim slave will suffice. For *taqyīd* to function, the two rulings must have some legal connection.

Bihbahānī takes another example, but this time of effective *taqyīd*. If at one point a ruling is given "If you perform *zihār* (a discouraged type of divorce), then free a slave", and later a ruling is given "If you perform *zihār*, free a Muslim slave" one can deduce that:

a) One does not have to free two slaves, one of any kind and one Muslim. The second is clearly a *muqayyad* of the first.
b) One must free only one slave, who must be a Muslim.

How does one know this? Because there is an obvious legal connection between the rulings; the *taklīf* is the same. Legal connection is, then, a condition of effective *taqyīd* occurring. In such cases, the *muqayyad* is, Bihbahānī says, stronger than the *muṭlaq*, since it contains the total data needed to formulate a ruling, whilst the *muṭlaq* is incomplete. However, if there is any doubt as to whether or not the *taklīf* is the same, one must treat the two injunctions as separate commands, without an exegetical relationship. Unfortunately, Bihbahānī does not provide a list of the means of establishing a legal connection.

Bihbahānī's coverage of the *ʿāmm:khāṣṣ/muṭlaq:muqayyad* topic is hardly comprehensive, and in the absence of a section on this topic in Baḥrānī's Prologues, one is unable to determine with precision whether Baḥrānī's position differs significantly.[54] Considering the importance of the topic, particularly in the resolution of conflicting *akhbār*, it is surprising that it does not receive greater coverage. This lack of coverage is, perhaps, an indication that this topic was not one of disagreement between Akhbārīs and Uṣūlīs, and in the polemic texts of Baḥrānī and Bihbahānī, areas of agreement are always marginalised.

Implications

Bihbahānī's thoughts on implication are limited to what Weiss has termed "construed implication" (*dalālat al-mafhūm*).[55] Bihbahānī does not discuss the *dalālat al-manṭūq* (as Baḥrānī did), suggesting that they are either unimportant for the law or uncontroversial. The definition of construed implication found in FH17 is:

[54] See above, note 37, for a brief mention of this topic.
[55] See above, Weiss, *God's Law*, p. 482.

> The meaning of *mafhūm* being a proof is that what is said has an indicatory function and ruling, whilst what is construed (*mafhūm*) has another indicatory function and another ruling. [*FH*, 185]

By this, Bihbahānī means that what is understood from the text is not always explicit in the text, but must be drawn out of it through a process of reasoning. The proponent of implication is, then, vulnerable to the accusation of "deviation from that indicated in the text", also termed *al-qiyās al-fāsid* (illegitimate *qiyās*) in FH17.[56] This is a criticism Bihbahānī is anxious to avoid, whilst maintaining the validity of some types of *mafhūm*.

He attempts to escape such a condemnation by a discrete examination of each type of implication, considering some valid, some debatable and others weak. By using this discriminating approach to implication, Bihbahānī hopes to present himself as carefully testing each type of implication before accepting its validity.

First, we should note that *mafhūm al-muwāfaqa* is accepted as fully valid and operational: "There is no doubt as to its probative force", says Bihbahānī.[57] The other valid counter-implications are listed and include those types of counter-implication (*mafhūm al-mukhālafa*) which delimit extent (*ghāya*), number (*ʿadad*) and cause (*ʿilla*).

Three other types of implications are afforded greater comment. These are:

a) *mafhūm al-sharṭ* (conditional counter-implication)
b) *mafhūm al-ṣifa* (adjectival counter-implication)
c) *mafhūm al-laqab* (nominal counter-implication)

Counter-implications, as these are, work in such a manner that the implied meaning is congruent with the explicit meaning, but concerns what is excluded from the original statement. Hence, if one accepts counter implication, one accepts that one is able to say something about what is not explicitly mentioned in the text.

Mafhūm al-sharṭ, it will be recalled, was the only type of counter-implication accepted by Baḥrānī.[58] His evidence for this was its explicit use by the Imams. For Bihbahānī, however, more explanation is needed: he proceeds first by defining a conditional sentence

[56] See Bihbahānī, *FH*, p. 185.
[57] *Ibid.*, p. 186. This type of implication is, however, treated in the concluding paragraphs of Bihbahānī's chapter.
[58] See above, p. 153.

as "that which, when the condition (*sharṭ*) is negated, the conditioned item (*mashrūṭ*) is also negated". Hence the sentence "Give Zayd a dirham if he is kind to you" can be divided into:

1) if Zayd is kind to you (*sharṭ*)
2) give him a dirham (*mashrūṭ*)

The counter-implication is "If Zayd is not kind to you, do not give him a dirham", and appears to be valid. However, for a counter-implication to be valid, the *sharṭ* must be the only condition of the *mashrūṭ*. The counter-implication in the following example is invalid:

1) if the water is found in a large amount (known as *kurr*, equivalent to 5 ass loads) (*sharṭ*)
2) then it is prevented from being ritually defiled (*mashrūṭ*)

The counter-implication is "If the water is not found in a large amount, it is not prevented from being ritually defiled". This is invalid because water can be prevented from being ritually defiled by a number of means (such as it being running water), of which being found in the amount known as *kurr* is only one. The condition is valid, but the counter-implication is not because the *sharṭ* is not the only means of achieving the *mashrūṭ*. The crucial point is whether the speaker (in the case of the Sharīʿa, this is the Lawgiver) wishes to convey that the *sharṭ* is the only means whereby the *mashrūṭ* might be effected. If this is the case, then the condition becomes general (*ʿumūm*). If it is not the case, and there are a number of possible conditions (*shurūṭ*), the counter-implication is invalid.

Unfortunately, Bihbahānī does not explain how one might discover whether the speaker intends the condition to be solitary (termed *fā'ida* by Bihbahānī), and hence the means of ensuring that *mafhūm al-sharṭ* is accurately employed are unclear.

Bihbahānī is particularly circumspect about the use of counter-implication on the basis of an adjective (adjectival counter-implication or *mafhūm al-ṣifa*). The classic example, used by Bihbahānī (as by those before him), concerns the Prophetic statement "*Zakāt* is due on free-roaming sheep" (found in a number of variants). If one accepts *mafhūm al-ṣifa*, one could argue that *zakāt* is not, therefore, due on domesticated sheep (*al-ghanam al-maʿlūfa*). One must be certain that the Prophet's intention was to convey the idea that *zakāt* was only due on free-roaming sheep for the counter-implication to be valid. This certainty can only be gained by finding a report in

which the Lawgiver said that *zakāt* was not due on domesticated sheep. In the event of such a report being unforthcoming, one has to content oneself with the lack of such a report, and whether this is sufficient seems a moot point. Bihbahānī appears more optimistic about the potential of this counter-implication than Baḥrānī, because the original state of anything (*al-aṣl*) is that it is not subject to classification, in accordance with the principle of *al-barāʿa al-aṣliyya*.[59] Since *al-barā'a* produces *ẓannī* results, one is left to presume that *mafhūm al-ṣifa*, for Bihbahānī, is acceptable if used to produce a *mujtahid's* opinion, but that it does not produce certainty.

The counter implication, *mafhūm al-laqab*, is based on a name given in the text. For example, "Give this to Zayd" means, do not give it to anyone else. This, Bihbahānī states, is even weaker (*aḍʿaf*) than *mafhūm al-ṣifa*: "that a thing is proven does not [necessarily] negate that which differs from it".[60] A comment which could be applied to counter-implication generally.

From the above it is clear that Bihbahānī's account of linguistic exegesis, though fuller than Baḥrānī's, is also less than comprehensive. As in Baḥrānī's Prologues, topics found in other works of legal theory are either marginalised or ignored. The tendency appears to be to discuss debatable or controversial elements only. The result is a rather patchy description which the reader can only understand after a knowledge of the tradition in which Bihbahānī is writing has been obtained.

Conclusion

A comparison of the conclusions reached by both scholars elicits the general view that Bihbahānī is much more sanguine about the possibility of these interpretative principles producing results which may be of use to the jurist. Furthermore, the texts available for exegesis are expanded in one sense by his acceptance of the possibility of interpreting the Qur'ān and the Sunna directly. For Baḥrānī, a distinction is clearly made between these two sources and the *akhbār*. Only the latter can be understood, the meaning of the former sources is, essentially, unobtainable without the *akhbār*.

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[59] See above, p. 121–123.
[60] Bihbahānī, *FH*, p. 185.

By admitting that it is possible for someone with knowledge of the "speech of the Arabs" to understand the Qur'ān, Bihbahānī is, in effect, rejecting the category of *al-ḥaqā'iq al-sharʿiyya* proposed by Baḥrānī. What is clear, is that the techniques of linguistic exegesis for both scholars are entirely congruent with their conclusions elsewhere. For Baḥrānī, the *akhbār* have a central exegetical role in the interpretation of the Qur'ān and Sunna, and this is reinforced by a distinction between the language of the former and the latter. When the language of the *akhbār* proves too difficult to comprehend with certainty, he recommends caution (*iḥtiyāṭ*). Bihbahānī places no such emphasis on the *akhbār*, and hence has no use for the *sharʿī/ʿurfī* (or *sharʿī/lughawī*) distinction. However, this does not mean that any person can approach the sources: it is a prerequisite that the would-be exegete have a thorough knowledge of the Arabic language (*ʿurfī* and *lughawī*). That at times such exegesis does not bring certainty as to the meaning of a text is problematic for Baḥrānī, whilst the inevitability of uncertainty over the texts' meaning causes Bihbahānī little concern, since, from an epistemological perspective, opinion which is less than certain is acceptable.

CHAPTER FIVE

RATIONALIST MORALITY

The manner in which the Shiʿites adopted and modified Muʿtazilī ideas has been the subject of a number of recent studies. A full description of the dynamics of this process is beyond the scope of this work.[1] However, the disagreements within Muʿtazilism often led to debates as vigorous as those that arose between Muʿtazilīs and partisans of other early Muslim theological trends, and an understanding of the different, and often contradictory, ideas encompassed under the term Muʿtazilī is pertinent to my analysis here.

I am principally concerned with the implications for jurisprudence of the Shīʿī adoption of Muʿtazilī ideas. The doctrine that both revelation and reason can lead to knowledge (*ʿilm*) was central to Muʿtazilism, and was also accepted in modified form by later Muslim orthodoxy.[2] What was disputed was the manner in which reason and revelation interacted and the kinds of knowledge each could bring independent of the other. Such disputes are also found in Imāmī theological writing.

In juristic terms, the doctrine of the epistemological efficacy of independent reason was incorporated into Shīʿī works of *uṣūl al-fiqh*, haltingly at first, and wholeheartedly later. As in Muʿtazilism, the issue at the centre of Shīʿī discussions was the ability of *ʿaql* (a term not devoid of ambiguity, but usually translated as reason or intellect),[3] not only to reach knowledge, but to reach legally relevant

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[1] See Madelung, "Imamism and Muʿtazilite Theology"; McDermott, *al-Shaykh al-Mufīd* and Schmidtke, *Hillī*.

[2] See Tritton, "Reason and Revelation"; Peters, *God's Created Speech*, p. 82–84 and p. 91–93; Hourani, *Islamic Rationalism*, p. 57–67 and passim and Martin and Woodward, *Defenders of Reason*.

[3] Reinhart argues against the translation of *ʿaql* as "reason" since it fails to convey the flavour of the term as human faculty, system of knowledge and, at times also, common sense. See Reinhart, *Before Revelation*, p. xi, 188, 220–221. Peters settles for "intuition", see Peters, *God's Created Speech*, p. 82, n. 237. Baḥrānī and Bihbahānī, and the Shīʿī tradition in general, use the term in a variety of different but related ways, and if there is ambiguity in the translation of *ʿaql* as "reason", and *dalīl ʿaqlī* as "rational indicator", then, I feel it matches the ambiguity of the terms in the texts studied here. That *ʿaql* may also be seen as a verbal noun (the

knowledge, such as the moral qualities of acts. In technical vocabulary, was *ʿaql* able to perform *al-taḥsīn wa'l-taqbīḥ* (recognising something—usually an action—as good or evil)? An affirmative answer to this question, as that given by the Shīʿa, was intimately linked to a number of related issues. Discussions included the meaning of good and evil, the ontology of these properties (do the characteristics inhere in the action, independent of recognition, or are they linked to a subjective assessment?) and the relation between *al-taḥsīn wa'l-taqbīḥ* and the consequences of performance or non-performance (that is, reward or punishment) of an act. There was (and continues to be) a popular conception that Akhbārīs and Uṣūlīs adopted differing approaches to *ʿaql*;[4] though, as I demonstrate below, it was not a matter of one school rejecting and the other accepting *ʿaql* as a source of moral knowledge. Further evidence that their positions were more complex than simple acceptance or rejection can be found in the lucid summary provided by the twentieth century Uṣūlī writer, Muẓaffar Riḍā. For Riḍā, any discussion of independent reason comprises solely of the issue of *al-taḥsīn wa'l-taqbīḥ*. He lists four questions concerning *al-taḥsīn wa'l-taqbīḥ*:

> (1) Are actions good or evil by virtue of their essences, having essential qualities recognisable by the *ʿaql* before the Lawgiver gives a ruling concerning them, or is this not the case, and good is what the Lawgiver deems good and evil is what he deems evil? . . . This is the basic difference between Ashʿarites and the *ʿadliyya*.[5] This is the question of *al-taḥsīn wa'l-taqbīḥ* which is well known in the discipline of *kalām*.
> (2) Given that actions are essentially good and evil, is the *ʿaql*, which comprehends good and evil, capable (*tamakkana*) independent of the Lawgiver's instruction and explanation or not? Also, on the matter of its construction, is the *mukallaf* [the morally responsible agent, charged with the performance of certain duties] able to obtain [this understanding] without the Lawgiver's instruction or not? . . . This issue was a point of dispute between the Uṣūlīs and some Akhbārīs . . .

activity of "reasoning") is also recognised, though, with Smith, I consider this usage to be most prevalent amongst non-Muʿtazilī authors, see Smith, "The Concept of Sharīʿa", p. 39.

[4] See Madelung, "Akhbāriyya", p. 56; Kohlberg, "Aḵbārīya", p. 716, where the opponents of the early Akhbārīs are termed Muʿtazila (signifying a distinctive position of *ʿaql*). See also Newman, "The Akhbārī-Uṣūlī Dispute, Part 2", p. 254.

[5] The term *ʿadliyya* is used to describe those who assert that God must act in a just manner, ie the Muʿtazila and the Shiʿites. For an examination of the Sunni argument over the obligation of God to "create the best" for his creatures, see Brunschvig, "Muʿtazilism et Optimum" and Ormsby, *Theodicy*, passim.

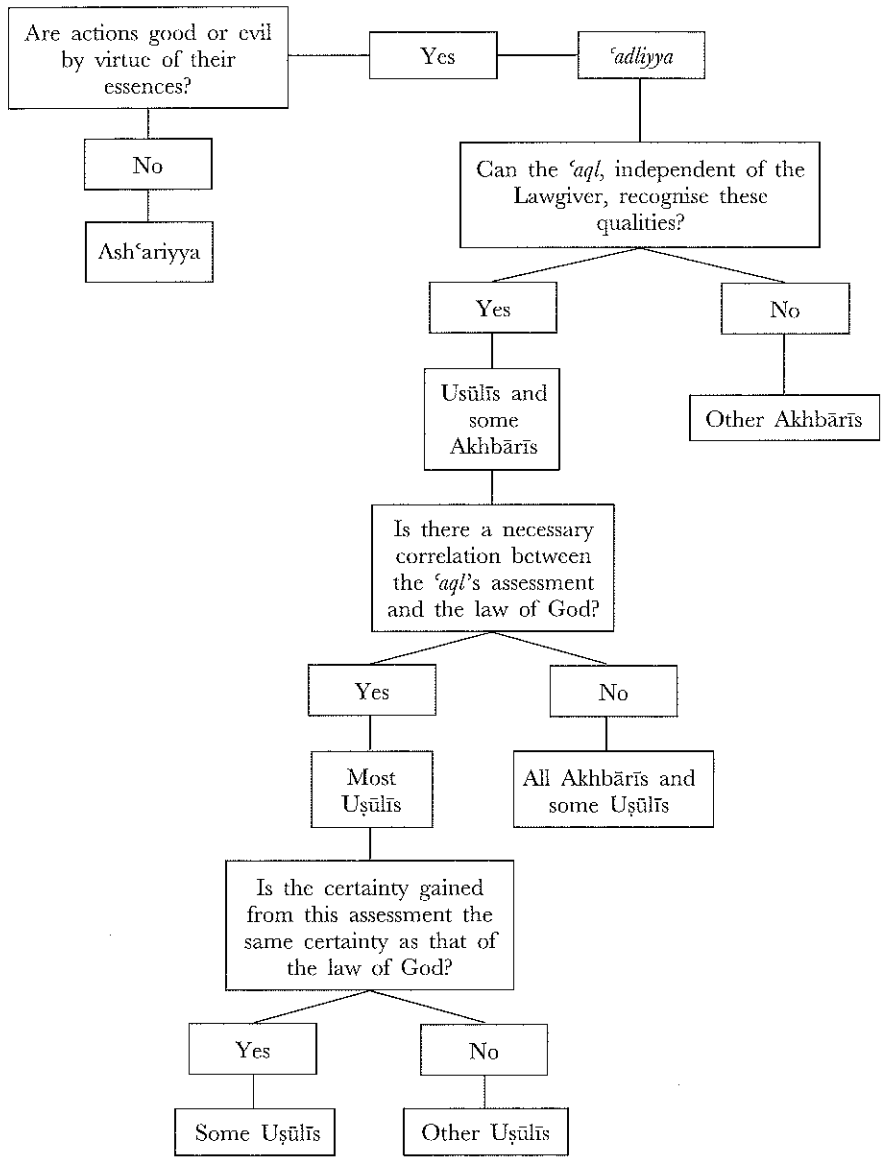


Figure 1: Diagram explaining the positions of different sects over the relationship of reason and revelation as depicted by Muẓaffar Riḍā.

> (3) After accepting that good and bad are essential to actions, and that the *ʿaql* can comprehend good and evil [without instruction from the Lawgiver], we must ask: when the *ʿaql* judges [an action], is there a necessary correlation between its judgement and the judgement of the law?, meaning when *ʿaql* judges a thing to be good or bad, is it a rationally necessary consequence that the Lawgiver must also judge in a like manner? This is the issue of jurisprudence (*al-masʾalat al-uṣūliyya*), termed *al-mulāzama*, on which there is dispute. All the Akhbārīs, and some Uṣūlīs, like the author of *al-Fuṣūl*,[6] deny this necessary correlation.
> (4) After *mulāzama* has been proven, and certainty has been attained concerning the fact that the Lawgiver must order in agreement with *ʿaql's* judgement, then [there is the question] is this certainty legal (*sharʿan*)?[7]

From this account, it is clear that Riḍā considers these four questions to have given rise to a number of positions on the role of reason in discovering knowledge.

First, there are the Ashʿarites who consider actions to be good or evil only by God's decree. The moral qualities of actions are not essential characteristics of these actions, that is, they do not inhere in the actions themselves. The action of lying is not in itself evil, but only evil because (and after) the divine Lawgiver has decreed it as such. This position has been termed "theistic subjectivism",[8] for it is the subjective judgement of God which makes an action good or evil. Reason, unaided by revelation, is unable to deduce the moral designations of acts.

Second, there are the *ʿadliyya*, amongst whom are both the Muʿtazilīs and the Imāmīs. They consider actions to be good or evil by virtue of essential properties which inhere in acts; God plays no part in their designation as good or evil. For the *ʿadliyya*, lying and murder are inherently evil actions. Human reason can recognise these assessments without referring to the formal sources of revelation.

I use the term "formal sources of revelation" because amongst the Imāmīs are those who take the view that God has constructed the *ʿaql* in such a way that it can recognise moral properties. Furthermore,

[6] al-Sayyid Muḥammad Ḥusayn al-Iṣfahānī (d. 1250/1833–34). The reference is to his *al-Fuṣūl al-gharawiyya fīʾl-uṣūl al-fiqhiyya*; the discussion on *al-taḥsīn waʾl-taqbīḥ* is found in Iṣfahānī's *Fuṣūl*, p. 316–351.

[7] Riḍā, *Uṣūl al-fiqh*, I, 2, p. 213–224.

[8] See Hourani, *Reason and Tradition*, p. 59 and Reinhart, *Before Revelation*, p. 70–75 (on Ghazālī).

he tutors and instructs the *ʿaql* in its response to acts, directing it in the moral (that is, legal) classification of these acts. The classification is not entirely the product of unaided human effort, and *ʿaql* works under the controlling activity of God. Riḍā says that "some Akhbārīs" take this view. Uṣūlīs (and presumably other Akhbārīs) consider *ʿaql* to be independent of God's control.

All Akhbārīs (and a few Uṣūlīs also) agree, however, that even after *ʿaql* has discovered the moral properties of an action, God is not compelled to rule in revelation in accordance with these findings. This does not mean that he does rule, or has ruled, contrary to reason, but that there is no compelling reason why God, who is a free agent, must rule in this manner. He is free to demand irrational actions from his servants, even if he never does demand such irrationality. The majority of Uṣūlīs, however, contend that God must act in accordance with reason, since he is the supremely rational being. To allow even the possibility of God acting irrationally is to propose a defect in his nature. Reason and revelation are, for Uṣūlīs, entirely congruent, not merely by accident (in the philosophical sense of the word), but as a logical necessity. This doctrine is called *mulāzama*.[9]

Finally, there is the question of whether or not the findings of *ʿaql* are logically related to the classification of acts in the Sharīʿa (from obligatory through to forbidden). Does the fact that *ʿaql* finds that lying is evil mean that lying is *ḥarām* (forbidden)? This, I presume, is what Riḍā means when he asks if the moral classification of the *ʿaql* is *sharʿī* in nature. The Akhbārīs wish to reduce the compulsion on God to act in a particular manner, and hence they say that he may draw a distinction between an action that is evil and an action that is forbidden (entailing the punishment of the offender). The Uṣūlīs, keen to demonstrate the ultimately rational character of God, claim that it is not in his nature to make such a distinction, and that an evil act is a forbidden act. Performance of such an act (in the absence of revelation) leads not only to disapproval, but also to punishment.

The position of the various groups, as laid out by Riḍā, is depicted in the diagram below. Riḍā's intention, however, is not merely to describe the dispute. He wishes to criticise the Ashʿarī and Akhbārī

[9] See Modarressi, "Rationalism and Traditionalism", p. 142.

perspectives; for this reason his account may not tally with Ashʿarī or Akhbārī writings on the subject. However, his depiction is useful as an introduction to the issues surrounding *ʿaql* and helps us to locate Baḥrānī and Bihbahānī in the dispute.

Baḥrānī's Discussion of ʿAql

In Chapter Three, I examined those elements of Baḥrānī's legal theory which he describes as *dalīl al-ʿaql* (*al-barā'a al-aṣliyya, istiṣḥāb al-ḥāl* and the various linguistic inferences).[10] That *dalīl al-ʿaql* or *al-dalīl al-ʿaqlī* (I detect no distinction between his use of these locutions) comprised of these interpretative devices was a matter of some disagreement amongst Shīʿī writers. *Dalīl al-ʿaql* was a pliant term, moulded and transformed by successive generations of Shīʿī scholarship.[11] The glaring omission from Baḥrānī's treatment of *dalīl al-ʿaql* in M3 of the *Ḥadā'iq* is, of course, *al-taḥsīn wa'l-taqbīḥ*. There is no discussion of the ability of *ʿaql* to attain moral or legally relevant knowledge independent of revelation (whether in areas of revelatory silence or in matters before the coming of revelation). The issues that are discussed in M3 are better characterised as interpretative devices (operating under principles derived from revelation) which provide indicators (*adilla*) for cases not explicitly covered in the texts of revelation. They are the means of expanding the relevance of revelation to new areas; they are not new sources of knowledge in the sense that *ʿaql* is discussed here.[12]

Having said this, *al-barā'a al-aṣliyya* (and in a restricted way, *istiṣḥāb al-ḥāl* also) does have obvious conceptual links with the idea that *ʿaql* can be a source of knowledge independent of revelation. A less important link is that some jurists (Bihbahānī amongst them) claimed that the operation of this device could be legitimised by pure reason, as well as from the revelatory texts.[13] More importantly, however, the

[10] See above, p. 90–112.
[11] See Riḍā, *Uṣūl al-fiqh*, I, 3, p. 121–125; Modarressi, "Rationalism and Traditionalism", p. 141–143.
[12] Modarressi characterises the distinction between the conception of reason as a separate source of knowledge and devices like *istiṣḥāb al-ḥāl* and *al-barā'a al-aṣliyya* as the difference between pure and practical reason (*ibid.*, p. 142).
[13] See Bihbahānī, *FH*, p. 240 and above, p. 123. Hallaq implies that *al-barā'a al-aṣliyya* and *istiṣḥāb al-ḥāl* are identical principles (Hallaq, *Legal Theories*, p. 113); this is clearly not the case in Shīʿī *uṣūl*.

presumption that an action not specifically legislated for in revelation is permitted (*al-barā'a al-aṣliyya*) is based upon the premise that reason can discover that actions which cause no obvious harm are permitted. *Al-barā'a al-aṣliyya* can be seen as a specific application of the efficiency of independent reason.

Whatever the explanation for the omission of *al-taḥsīn wa'l-taqbīḥ* from M3, the issue is not ignored completely in the Prologues. It is tackled, though without extensive use of the established terminology, in M10. One should not necessarily see its appearance here as a demotion in importance as far as Baḥrānī is concerned, but it is interesting to note that in Bihbahānī's work, *al-Fawā'id al-ḥā'iriyya*, issues of *al-taḥsīn wa'l-taqbīḥ* occupy the first four chapters, and appear repeatedly throughout the work in relation to other issues.

If Baḥrānī has a sophisticated psychology of *ʿaql*, he does not express it in his Prologues. He states explicitly that *ʿaql*, in its purest form, is considered "one of the proofs of God".[14] The phrase "one of the proofs of God" is ambiguous, and an examination of its context does not provide immediate clarification. It could imply that pure *ʿaql* is a system of reasoning that can reach conclusions concerning God (his existence or nature, for example). Alternatively, it might be read in a possessive sense in that God controls the functioning of reason, over which he is lord, and to which he is not subject. The reader is faced with the problem of the meaning of the genitive *ḥujaj allāh*.

I propose that Baḥrānī means the latter of these two possible interpretations. My evidence for this is the metaphor he uses in conjunction with *ḥujaj allāh* to characterise *ʿaql*: *ʿaql* is a light shining from his direction (*min jihatihi*);[15] that is, the light originates in God and illuminates our understanding. God is the source of the light rather than being illuminated by it. Baḥrānī also says that *ʿaql* is a law (*sharʿ*) from inside a person (*min dākhil*). It is, therefore, not imposed (upon the person, or upon God) from outside, but is a law that God (since he is the Creator of all things) has placed within human beings, which they can naturally access, and through which they can comprehend the correct response to him. This does not mean, however, that *ʿaql* is infallible. As discussed below, this "law from inside" can be corrupted by the individual, and hence can

[14] For a discussion of the meaning of this phrase, see below, p. 193–194.
[15] Baḥrānī, *H*, 1, p. 131.

cease to be a means of understanding God. This is what I take Baḥrānī to mean by *ʿaql*.

Baḥrānī's treatment of the role of *dalīl al-ʿaql* in determining *al-aḥkām al-sharʿiyya* is short (eight pages in the printed edition, around half of which is made up of citations from other sources). He does not utilise the terminology of *ḥasan/qabīḥ* or *taḥsīn/taqbīḥ*. It is clear that the importance of this issue to previous authors does not impress itself on Baḥrānī and he does not consider *ʿaql* to be a particularly useful source of legal knowledge. His opening statement sets the tone:

> The Ninth Prologue on explaining the probative force, or lack of it, of *al-dalīl al-ʿaqlī*.
>
> Relying on rational indicators (*al-adilla al-ʿaqliyya*) in *uṣūl* and *furūʿ*, and giving preference to them over transmitted indicators (*al-adilla al-naqlīyya*), has become common practice amongst most of our co–religionists (*akthar min aṣḥābinā*), may God be pleased with them. Because of this, you see them in the two *uṣūl*—*uṣūl al-dīn* and *uṣūl al-fiqh*—giving preference to and relying upon rational proofs when they and the transmitted proofs contradict. They interpret the latter so that they accord with the former, or [if such an interpretation is not possible], they reject the latter completely. [*H*, 1, 125]

He goes on to add that these scholars always list the rational indicators first: "most of them" give preference to "action on the basis of *al-barāʾa al-aṣliyya*, *istiṣḥāb* and other such rational indicators over a *khabar* which they consider weak, or even one they consider trusted (*muwaththaq*)."[16]

Baḥrānī gives an example of the privileging of *ʿaql*. Al-Sayyid al-Murtaḍā stated that one may choose any pure liquid with which to eliminate impurity (*khabath*), saying that this permission of choice was the *ijmāʿ* of the Shiʿites. Muḥaqqiq, in his comment on this statement, replies that Murtaḍā claimed this "because action based upon an indicator of *ʿaql* is one of our principles, as long as there is no [contradictory] transmitted indicator". In other words, Murtaḍā asserted this *ijmāʿ*, not because the Shīʿa agreed upon the permission to choose, but because they agreed on the probative force of *ʿaql* in cases of revelational silence. *ʿAql*, he claimed, here clearly indicates that any liquid, as long as it is not itself impure, is efficacious in the removal of impurity. For example, vinegar (*al-khall*) can be used in such circumstances because it is as effective as water ("perhaps it is more effective", he suggests). Muḥaqqiq disagrees, saying that *ʿaql*

[16] *Ibid.*, p. 125.

does in fact have the ability to distinguish between water and vinegar and obviously the former is more appropriate.

The disagreement here is not just about what *ʿaql* actually concludes (species), but the types of knowledge it can conclude (genus). Muḥaqqiq says its scope is more extensive than Murtaḍā presumes, since it can distinuish between vinegar and water as purifying agents with different degrees of efficiency. In Baḥrānī's view, however, there is little to distinguish between the two scholars:

> Notice that he [al-Muḥaqqiq] agrees with ʿAlam al-Hudā [al-Murtaḍā] in what he relates concerning the principle of action on the basis of a rational indicator in matters of *furūʿ*. He only disagrees with him in detail (*fīʾl-juzʾī*) . . . in sum, [most scholars'] position, explicitly in some places and implicitly in others, accords with how we have described it. [*H*, 1, 126]

Baḥrānī is clearly uninterested in the conclusion concerning the ability of some liquids to purify more efficiently than others. He is concerned with the principle on which both scholars (and other Shīʿī jurists also) agree—that *ʿaql* can be used to supplement *naql*.

This opening example is followed by two quotations from previous authors: Niʿmat Allāh al-Jazāʾirī and one Imām Rāzī (the latter being the Sunni, Fakhr al-dīn al-Rāzī (d. 606/1209)). Both citations are attacks on the idea that *ʿaql* can lead to knowledge. Citations from previous authors perform a number of functions in texts such as Baḥrānī's *Ḥadāʾiq*. Above all, they establish the writer as part of a tradition of learning, tracing ideas back through a network of previous thinkers. The first citation from Jazāʾirī establishes a precedent for Baḥrānī's position and (partially) defuses any accusation of innovation on his part. For Baḥrānī, this is particularly important since he is developing an Akhbārī *uṣūl* with a distinctive character, separate from the main tradition of Uṣūlī legal thought. The citation from Imām Rāzī is actually a direct quotation of a citation found in Jazāʾirī's *al-Anwār al-nuʿmānīyya*.[17]

The quotations themselves do not contain particularly sophisticated arguments. Jazāʾirī's quotation can be divided into three parts: an invective against those who promote *ʿaql*, and two examinations of possible definitions of *ʿaql* (both of which are rejected). It is important

[17] Jazāʾirī, *Anwār*, 3, p. 127–128. That this writer is indeed Fakhr al-dīn al-Rāzī is confirmed by Jazāʾirī's reference to him elsewhere in the *Anwār* (*ibid.*, 1, p. 38–40). The editor expresses surprise that a Sunni author of philosophical bent should be cited to support a Shīʿī author's position (*ibid.*, 3, p. 127, n. 1).

to bear in mind that Baḥrānī offers no modification of Jazā'irī's views; he even expresses his unreserved approval of them (*niʿma mā qāla*). The first section lists those who prioritise reason over revelation. This list includes the "people of *raʾy* and *qiyās*", natural philosophers (*ahl al-ṭabīʿa*) and philosophers in general. Al-Jazā'irī illustrates their heresy by citing a parable in which Plato is made to say to Jesus that "Jesus is a prophet to those who are weak of mind. As for myself and those like me, we have no need to know of the messages of prophets".[18] An example of their faulty reasoning is, Jazā'irī argues, their refusal to accept that the Prophet made inadvertent errors (*al-sahw*), since, they suppose, allowing him this would lead to the possibility of mistakes in the *aḥkām*. Jazā'irī refers to, but does not cite, numerous *akhbār* which permit such mistakes as a *raḥma* (mercy) for the community.[19]

He continues:

> We ask them, "What is the meaning of *dalīl al-ʿaql*?" . . . if they mean "that which is acceptable to most reasonable minds", then it is not proven. [*H*, 1, 127]

It is not proven because people differ in their rational capacities, and what seems reasonable to one is not to another.

> If the meaning [of *dalīl al-ʿaql*] is "that which is acceptable to the one seeking to prove something by it", then it would not be possible for us to call the illuminationists and the atheists unbelievers, and not to show that the Ashʿarites and the Muʿtazilīites have gone astray". [*H*, 1, 128]

The reason being that if such *ʿaql* is a source of knowledge, then the various groups which are clearly outside the bounds of Islam cannot be condemned because they are all asserting "what seems reasonable to the individual". Both of these definitions are rejected because of the inherent subjectivism in recourse to *ʿaql*; this subjectivism leads to an epistemological pluralism in which the certain knowledge (*ʿilm*) advocated by Jazā'irī (and also by Baḥrānī) is eroded. As I have already demonstrated, there is no room for pluralism, compromise and uncertainty in Baḥrānī's Akhbārī system.

[18] Baḥrānī, *H*, 1, p. 126.

[19] It is considered a *raḥma* (mercy) for the community since through the Prophet's minor errors, the believers discover the correct penance when they commit minor errors. See Madelung, "Iṣma", p. 182–184.

The citation from Imām Rāzī is similar in its message (which rather begs the question of why it is included):

> These [rational] proofs, if they really were proofs, then all who heard them and studied them would be obligated to accept them. [*H*, 1, 128]

Of course, Imām Rāzī comments that this is not the case, as one sees the *ʿuqalāʾ* arguing consistently; they cannot all be right since "this would necessitate the truth of two opposites, which is clearly false".

The final section of M10 is the most interesting, in that Baḥrānī, having disposed of those who favour *ʿaql* over *naql* (through the arguments in the citations), expresses his own position on its role. It takes the form of an extended conditional sentence stretching over four pages.[20] The conditional is in the familiar "if you say . . . then I say . . ." (*in qulta . . . fa-qultu . . .*) format. The apodosis consists of a number of Qur'anic and *akhbār* references which recommend reason and contemplation to the Muslims, and may be summarised as "if you say that these indicators (*adilla*) approve the use of reason":

> Then I say: there is no doubt that sound natural reason (*al-ʿaql al-ṣaḥīḥ al-fiṭrī*) is one of God's proofs, may he be praised, and a light shining from him, may he be exalted. It agrees with the law (*al-sharʿ*), rather it is a law from the inside [of a person], just as [*al-sharʿ*] is a law from outside [of a person], but only as long as it is not affected by the influence of evil imagination or changed by disobedience [to God] or the love of status or other stagnant prejudices. Perhaps it proves things before the law comes (*qabl wurūd al-sharʿ*), and the law comes to confirm it. Perhaps it comes before it, and the aspect (*al-wajh*) in them [the things] is hidden from it [*ʿaql*]. The law acts as an uncoverer (*kāshif*) and elucidator (*mubīn* [or possibly *mubayyin*]) of it. The most that these [*adilla*] prove is that pure sound natural reason is approved of, so long as it is free from the wanderings of the whim and purified of the filth of disobedience. In this way, it is indeed a divine proof which attains, by the purity of its illumination and the essential character of its nature, some of the matters [with which human beings are] charged (*baʿḍ al-umūr al-taklīfiyya*). [*H*, 1, 131]

This passage has all the hallmarks of an *ad hominem* argument—there are those who credit their *ʿaql* with more than is pious or appropriate; they have been led astray by their own imagination. Despite its flowery language, this passage repays close inspection.

ʿAql, as long as it is sound and natural, is one of God's proofs

[20] Baḥrānī, *H*, 1, p. 129–133.

(*ḥujja min ḥujaj allāh*). The use of the term *fiṭrī* gives the impression that it is a natural faculty in human beings, created as a means of understanding God, and through it, humans make the appropriate response. The total harmony between this *ʿaql* and the revealed law is asserted. It can reach conclusions which are then confirmed by the law; on other occasions it reaches conclusions but the aspect (*wajh*) of them is hidden from it. Now, this use of the term *wajh* is never explained by Baḥrānī, and is replete with (perhaps intentional) ambiguity. The most likely meaning of *wajh* here, in my view, is not the moral quality of an act (ie whether it deserves praise or blame), but the eternal consequences of its performance or omission (ie the reward or punishment to be meted out by the Creator).[21] The limitation of the *ʿaql's* competence to recognise an act's moral quality, but not its consequences, was not universally accepted by all Imāmī theologians, and it is the Akhbārīs who deny *ʿaql's* ability to do this in Riḍā's fourth question.[22]

The caveat in all this is that this reason must be "sound" and "natural", "free from the filth of disobedience" and the like, and in this proviso, discussed below,[23] Baḥrānī imposes narrow constraints on the power of *ʿaql*.

He continues:

> There is, then, no doubt that the rulings of *fiqh* (*al-aḥkām al-fiqhiyya*) concerning cultic practices (*ʿibādāt*) and others, all of them are *tawqīfī* (learned, acquired) [from God]; they need the *samāʿ* (revelation) from the Preserver of the Sharīʿa. For this reason there are many *akhbār* which demonstrate this, already related to you in *muqaddima* three[24]—they
> [i] prohibit deducing the *aḥkām sharʿiyya* without a *samāʿ* from them [ie a *khabar* from the Imams], upon whom be peace, or an item of knowledge which has proceeded from them, may the blessing of God be upon them and
> [ii] they [the *akhbār*] make it obligatory to perform *tawaqquf* and *iḥtiyāṭ* when there is no easy road to knowledge (*ʿilm*) and [they]
> [iii] make it obligatory to refer to them [the Imams] in all [matters]. The *ʿaql*, as it has been described, is unable to give knowledge concerning their [the *aḥkām*'s] profundity and scope... rather, if the *ʿaql* could do this, then the sending of prophets and the revelation of books would be pointless. For this reason, the *akhbār* denounce the *aṣḥāb al-qiyās*. [*H*, 1, 131][25]

This passage is immediately followed by five *akhbār* which demonstrate these three assertions. Baḥrānī then adds:

> And there are other *akhbār*, *mutawātir* ones, which prove that the nature of the law (*kawn al-sharīʿa*) is *tawqīfī*, and there is no place for *ʿaql* in elucidating a single one of its *aḥkām* whatsoever. It is agreed that acceptance, obedience and submission (*al-qabūl wa'l-inqiyād wa'l-taslīm*), when they are required, are based upon it [*ʿaql*]. This is indeed one of the things the *adilla* [the citations from the Qur'ān and *akhbār* in the apodosis], which the opponents produced, prove; except that it [*ʿaql*] leaves [unresolved] those things which are *tawqīfī*. [*H*, 1, 131]

In these two citations, one has Baḥrānī's clearest indication yet of what *ʿaql* can and cannot prove. It has no role in the discovery of legal norms (*lā madkhal lil-ʿaql fī istinbāṭ shay'in min aḥkāmihā*) because such norms are not based on reason but on revelation (*al-samāʿ*). When revelation is found wanting, still there is no recourse to *ʿaql* since *tawaqquf* and *iḥtiyāṭ* are obligatory. If reason could reach the *aḥkām*, then the sending of prophets with books would be pointless. Sound natural *ʿaql* can bring a person to know that they should accept (*qabūl*) and obey (*inqiyād*) God's commands and submit (*taslīm*) to his will. Baḥrānī does not mention whether or not the *ʿaql* can perform further acts of *al-taḥsīn wa'l-taqbīḥ*, though it seems clear that even if it can, these have no relation to the legal classification (that is, the *aḥkām*), since he has asserted that *ʿaql* plays no role in the *aḥkām sharʿiyya*.

The most important term in this passage is *tawqīfī*. This can be translated as "instructed" or "taught" and has the connotation of something that is unable to be obtained through contemplation or rational thought. *Tawqīfī* rulings are essentially non-rational. They have no relationship with the findings of reason. Baḥrānī's position is a stronger version of that of a previous Akhbārī thinker, the infamous, Muḥammad Amīn al-Astarābādī:

> Let it not be said that his [the Imam's] word, "All things are unrestricted (*ṭilq*) until a prohibition refers to them" nullifies [the proposition

[21] For a summary of the debate about *ʿaql's* ability to recognise not only good and evil, but also reward and punishment (for performance of such actions), see (prior to Baḥrānī) Tūnī, *Wāfiyya*, p. 172–177 and in the nineteenth century Qummī, *Qawānīn*, 2, *al-maqṣid al-rābiʿ* (pages not numbered).

[22] See above, p. 186–187.

[23] See below, p. 198.

[24] Baḥrānī, *H*, 1, p. 28–30, analysed above, p. 96–102.

[25] This argument is usually termed *ʿabath*, though Baḥrānī does not use this term here. For a classical Ashʿarī discussion, see Bāqillānī, *Bayān*, p. 37–49.

> that] things are good or evil by their nature, because there are two matters here. One is the essential nature of good and evil and the other is the essential nature of obligation and prohibition. This [word from the Imam] means that the second is nullified, not the first. Between them is a great distance, for you see that most things which are evil according to reason are not forbidden in the Sharīʿa, and similarly with respect to obligatory things.[26]

Astarābādī's point being that although reason can recognise good and evil, it cannot recognise *sharʿī* classifications such as obligatory or forbidden. Only the latter lead to reward or punishment and these are not essential to an act, but imposed upon it by the Lawgiver. Baḥrānī gives a weaker role to reason than his Akhbārī predecessor; he implies that reason can only gain knowledge of the most basic human responses to God (*qabūl, inqiyād* and *taslīm*).[27]

Now here we seem to have a contradiction. At one point Baḥrānī says *ʿaql* agrees with the *sharʿ*, and at another he says *ʿaql* must play no role in the formulation of *aḥkām*. Baḥrānī's position, then, is that *ʿaql*, in its pure natural state, does agree with the *sharʿ*, but that does not mean that it should be used as an indicator (*dalīl*) of the legal status of certain actions; the implication is that although pure *ʿaql* does lead to moral knowledge, one can never be sure that one is utilising pure *ʿaql* (one may be affected by the "filth of disobedence") and hence, in the derivation of the *aḥkām*, one must only rely on revelatory proofs. *ʿAql* can be trusted, it seems, to establish broad general duties (like obedience to God and submission to his will), but it cannot, with any certainty, bring detailed knowledge of God's law.

The final section of Baḥrānī's analysis of *dalīl al-ʿaql* is an account of the procedure to be followed when a rational indicator (*dalīl al-ʿaql*) conflicts with another indicator (be it rational or transmitted). It may at this point be useful to examine how Baḥrānī conceives a *dalīl* (transmitted or rational) functioning. As mentioned earlier, he views *ʿaql* as a faculty of comprehension, naturally occurring in human beings, and placed in them by their creator. A *dalīl ʿaqlī* is a piece of evidence that is recognised by the *ʿaql* as pointing towards a truth, hence my translation of it (following Weiss)[28] as an indicator. An

[26] Astarābādī, *al-Fawā'id al-madaniyya*, p. 161.

[27] Baḥrānī's position has much in common with Ghazālī's suspicious recognition of *ʿaql*'s power, see Ghazālī, *Mustasfa*, p. 63 and p. 67 and Reinhart, *Before Revelation*, p. 75. It appears that Āmidī utilised the same argument, see Weiss, *God's Law*, p. 92.

[28] See Weiss, *God's Law*, p. 42–46.

indicator's function is to point towards a destination and in Baḥrānī's case that destination is knowledge (*ʿilm*). A rational indicator (*dalīl al-ʿaql*) is one which points towards *ʿilm* through the use of reason. A transmitted indicator (*dalīl al-naql*) is of the same genus, but it points towards *ʿilm* by means of a revelatory source. Since, for Baḥrānī, an indicator is only useful if it points towards knowledge and not opinion, indicators which are thought by Uṣūlī jurists to point towards opinion (*khabar al-wāḥid,* for example) are either upgraded in Baḥrānī's system, or rejected completely. Furthermore, since the indicators point towards knowledge and certainty, a single piece of evidence is sufficient to establish that knowledge. When two *dalīls* conflict, one must be in accordance with God's will, and the other must be rejected. The rejected one only exists in the revelatory text because of the Imams' need to dissimulate (*taqiyya*). The problem is discovering which is the *taqiyya* generated indicator. However, the *dalīls* cannot be interpreted (*taʾwīl*) or brought together (*jamʿ*); such attempts to harmonise the *dalīls* are, for Baḥrānī, attempts to change the meaning of the Imams' words, whether the indicator is transmitted (*naqlī*) or rational (*ʿaqlī*). The only difference between them is that rational indicators are not subject to *taqiyya*.

Reason, then (or more specifically, a rational indicator (*al-dalīl al-ʿaqlī*)), can contradict revelation (or more specifically, a transmitted indicator (*al-dalīl al-naqlī*)), though when such a conflict occurs, the rational indicator cannot have arisen from pure natural reason:

> We say: There is no doubt that reason characterised in this way, which is clearly immediate [in the mind], like their assertion "half of two is one" is a sound basis for action. If it is not [immediate], then, if there is no other indicator, rational (*ʿaqlī*) or transmitted (*naqlī*), which contradicts it, then similarly [it is a sound base for action].
>
> If, however, two rational indicators conflict, and one of them is also supported by a transmitted indicator, then preference is given to the one with transmitted support.
>
> If [there is no transmitted indicator supporting one of them] then there is ambiguity (*ishkāl*).
>
> If a transmitted indicator conflicts with it [the rational indicator], then if the rational indicator is also supported by a transmitted indicator then the rational indicator is given preference, except that this is, in reality, a case of *taʿāruḍ fī l-naqlīyyat* (conflict within transmitted indicators).
>
> If there is no supporting transmitted indicator [for the rational indicator which clashes with the *dalīl naqlī*], then preference is given to the transmitted indicator . . .
>
> This refers to *ʿaqlī* in an unrestricted sense (*bi-qawlin muṭlaqin*). As

> for when I intend by [the word *ʿaql*] the specialist meaning, which is natural and free from the wanderings of the whim and which is one of the proofs of God, and this [sort of *ʿaql*] is rarely found amongst the people, then there is ambiguity in giving preference to a transmitted [proof] over it. [*H*, 1, 132–3][29]

This passage is as complicated in the Arabic as it appears in my translation, but a detailed inspection further clarifies Baḥrānī's position. It is represented in the diagram below. It is clear that here Baḥrānī is using *ʿaql* and *dalīl al-ʿaql* in a number of ways. First, he refers to sound natural reason, which leads to knowledge of God (*qabūl, inqiyād, taslīm*). Second, he refers to *al-dalīl al-ʿaqlī badīhiyyan*, transmitted indicators which occur immediately (in the mind): the example being mathematical proofs. Third, he talks of other, non-immediate types of rational indicator. The second and third categories are termed "'*aql* in an unrestricted sense", the first having a restricted, specialist meaning. Fourth, and finally, by implication one has deductions which are called reason, but which are in fact corrupt.

Now the types of knowledge that such indicators yield are not elucidated by Baḥrānī. However, it seems that the Muʿtazilī (and later the Sunni also) epistemology can be partially applied here. The first and third types of reason would approximate to acquired knowledge (*ʿilm iktisābī*)—knowledge acquired through reflection—like the existence of God and the duty to obey him. The second type of rational indicator, it seems clear, points to necessary knowledge (*ʿilm ḍarūrī*).[30] The final type of rational indicator is corrupt and rejected (presumably because of its *zannī* quality).

Having already explained what he means by *al-ʿaql al-ṣaḥīḥ al-fiṭrī*, Baḥrānī moves onto the second and third types listed above. Briefly, if an immediate rational indicator is found, it is a sound base for action. Baḥrānī does not consider that there is any possibility of a clash between such indicators, or a clash between them and a transmitted indicator. On the matter of non-immediate rational indicators (unfortunately Baḥrānī gives no examples of what he means by "rational indicators that are not immediate [in the mind]"), if there

[29] This is one point of divergence between Baḥrānī and (positions attributed to) Ghazālī, see Abrahamov, "Ibn Taymiyya". Baḥrānī takes a position not dissimilar to Ibn Taymiyya here.

[30] For a description of this epistemology, see Weiss, *God's Law*, p. 37–41; Hallaq, *Legal Theories*, p. 38; Reinhart, *Before Revelation*, p. 220–221, n. 49. Reinhart says that *ʿilm badahī* is "probably" equivalent to "'*ilm ḍarūrī*".

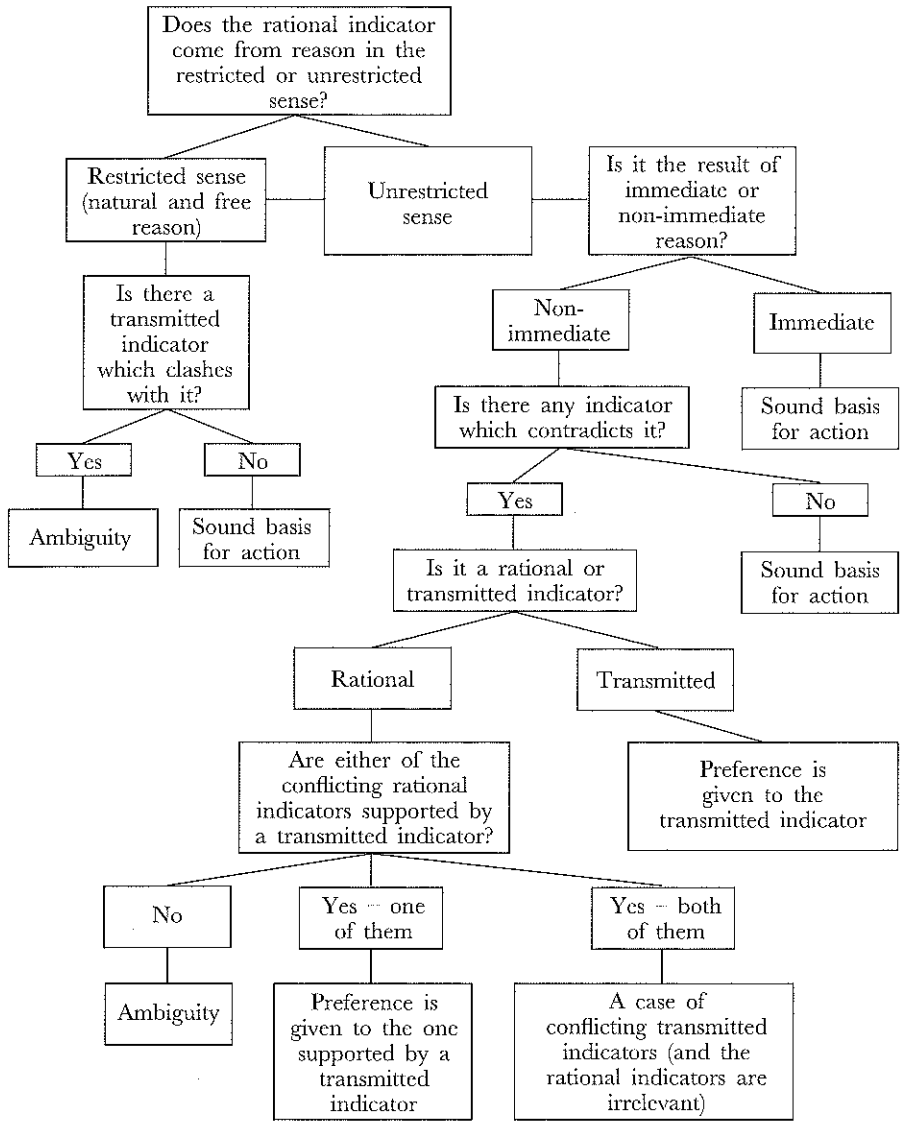


Figure 2: Diagram examining the relationship between reason and revelation in Baḥrānī's M10.

are no contradictory indicators (of any sort), then they are also considered sound. If there is a rational indicator opposing the first rational indicator, then one is to look for a transmitted indicator to support one of the two. The one with the support is preferred. If there are no such supporting indicators, then there is ambiguity (*ishkāl*).[31] If a rational indicator and a transmitted indicator conflict, then one looks for a transmitted indicator to support the first. If one is found, then it is preferred. The crucial point being that in these circumstances, we are not talking about a *naqlī-ʿaqlī* contradiction as such, but a *naqlī-naqlī* contradiction which is decided by the tie-breaker of a *dalīl ʿaqlī*. If no transmitted indicator can be found to support the rational indicator, then the rational indicator is to be rejected.

As can be seen, rational indicators are allowed to have probative force as long as they do not contradict any transmitted indicator. As soon as they do this, the transmitted indicator is to be preferred. The most that *dalīl al-ʿaql* can do is act as the deciding factor between two transmitted indicators which are in conflict. Now here we have a genuine inconsistency in Baḥrānī's theory. In M4 he lists the means by which conflicting elements of revelation (ie conflicting transmitted indicators) are to be understood.[32] He does not mention the ability of a rational indicator to decide between two conflicting transmitted indicators.

Finally, there is sound natural reason, which gives rise to indubitable indicators. This type of reason "is rare amongst the people" (*shadhdh wujūduhu fī'l-ānām*). It is a precious commodity, obtained by only a few; the rest have reason, but it is corrupt; corrupt to varying degrees perhaps, but nonetheless this type of reason is unable to produce true knowledge. This conception of sound reason is, perhaps, an indication of the authority theory inherent in Baḥrānī's epistemology. This is examined at greater length in the next chapter.[33] However, if this sound reason clashes with a transmitted indicator (a possibility that is unlikely in Baḥrānī's view, since the *ʿaql* agrees with the *sharʿ*), there is ambiguity (*ishkāl*) once again.

From this one can clearly see that reason, or rational indicators, can lead to knowledge, for Baḥrānī, but it is knowledge of a specific

[31] For an analysis of this term, see below, p. 201–202.
[32] Baḥrānī, *H*, 1, p. 87–111, see above, p. 112–121.
[33] See below, p. 222–237.

sort, and it operates in a severely restricted arena. It cannot operate in the area most important for jurisprudence—the discovery of legal rulings. It has no role (*lā madkhal*) in that process. The most that rational indicators can do is to act as the deciding factor between two contradictory transmitted indicators.

A note also needs to be made about the term *ishkāl*, which I have translated as ambiguity. I consider this to be an accurate translation since *ishkāl* occurs when there are two mutually exclusive options which have equal probative force, that is, when two rational indicators (neither of which is supported by a transmitted indicator) contradict, and in the other circumstance, when a rational indicator derived from sound natural reason and a transmitted indicator contradict. In these cases the probative force of the two elements is equal (unlike in the cases where transmitted and rational indicators conflict). Now we have seen how Baḥrānī's juristic methodology is based upon a polarisation of, and radical disjuncture between, binary opposites (truth: falsehood, knowledge: ignorance, obligatory: forbidden).[34] *Ishkāl* occurs on those occasions when his binary system breaks down irretrievably. Since the normal processes of harmonisation (*taʾwīl* and *jamʿ*) are explicitly rejected by Baḥrānī, one is left with irreconcilable contradictions. Baḥrānī does not seem unduly worried by such circumstances, since presumably they happen so rarely as to pose no threat to his overall system. In the case of sound natural reason, even if it does occur, it will be recognised by a small proportion of the community, since sound natural reason is only obtained by them. However, what these examples of *ishkāl* do demonstrate is that there are limits to human knowledge of God's will. This is not quite the same as those cases which necessitated *tawaqquf* and *iḥtiyāṭ*; there one had the possibility of choosing the more cautious option, of maximising one's chances of fulfilling the law as a result of one ruling being more extensive in scope than the other. In the cases of *ishkāl*, one ruling cannot be preferred over the other since they are equal in their epistemic status; they are unresolvable contradictions for human agents.[35] Since, for Baḥrānī, jurisprudence is a science of

[34] See above, p. 60.
[35] It may be that Baḥrānī has missed a trick here. It seems quite obvious that in cases such as the clash of a transmitted indicator with an indicator of sound natural reasoning, the most prudent course of action is to follow the transmitted indicator because one can never be sure that one's reasoning is entirely free from prejudice and corruption.

knowledge, not opinion, the failure of the sources (reason or revelation) leads him to a conclusion which could be (and was) considered heretical by his opponents. Here, in these short passages on *ishkāl*, he admits the possibility that God, through revelation and his gift of reason, has failed to give sufficient guidance to humanity to solve a problem. He has left us in ignorance on such occasions, not only of his will, but also of any means of discovering his will.

We are now perhaps in a position to predict Baḥrānī's responses to the fundamental questions of *dalīl al-ʿaql* as outlined by Muẓaffar Riḍā, and cited at the beginning of this chapter.[36] On the question of *ʿaql's* ability to perform *al-taḥsīn wa'l-taqbīḥ*, though he does not use the terms, he would come down on the side of the *ʿadliyya*. Reason can reach conclusions concerning the moral status of certain acts (if not, how could the possibility of it clashing with *dalīl al-naql* be entertained?). Specifically, reason can find that acceptance, submission and obedience (*qabūl, taslīm* and *inqiyād*) directed at God are obligatory. But this sort of reason is so rarely found amongst believers that the *aḥkām* should be considered as *tawqīfī*, that is taught, instructed, even imposed by God. On the second question as to whether or not reason renders such judgements independent from God's instruction (*taʿlīm*), Baḥrānī is clearly an Akhbārī (according to Riḍā's schema), since this *ʿaql* was placed in human beings by God himself. Furthermore, if my interpretation of the metaphor of *ʿaql* being "a light shining from him" is correct, then God controls the *ʿaql*, prompting it in the correct direction.[37] On the third question, "must God judge the same as the *ʿaql*?", Baḥrānī would probably answer that it is inconceivable that he would not, since the *ʿaql* is a means, controlled by him, whereby humans might come to know him. This is quite different, however, from the Uṣūlī assertion that God must rule in conformity with the *ʿaql* because his nature as the supremely rational being forces him to do so. On the final question, concerning the relationship between *ḥasan/qubḥ* and the *sharʿī* classifications, Baḥrānī's reference to *wajh*, and his assertion that *ʿaql* cannot bring knowledge of God's *aḥkām*, is evidence that he does not consider *ʿaql* to be able to deduce that an evil act is to be punished by God. However, his lack of precision in these matters, and

[36] See above, p. 184–186.
[37] Once again Baḥrānī does not use the terminology of *taʿlīm* (instruction) found in Riḍā, see above, p. 186–187.

his refusal to use established terminology, make a definitive statement of his position on these issues difficult. The fact that Baḥrānī does not provide equivocal answers to Riḍā's four questions is evidence that Riḍā's depiction is a reflection of what Uṣūlīs considered important in these matters; it is not a neutral description of the various positions on *ʿaql*.

Baḥrānī's version of *dalīl al-ʿaql* did not, however, gain much support amongst his successors. In the most influential work of *uṣūl al-fiqh* of the thirteenth century AH/nineteenth century CE (which continues to be a set text in theological seminaries), the *Farāʾid al-uṣūl* of al-Shaykh Murtaḍā al-Anṣārī (d. 1281/1864), there is a passage which specifically condemns Baḥrānī's account of *dalīl al-ʿaql*.[38] After citing the final paragraph of the Prologue, analysed above, Anṣārī says he does not understand how Baḥrānī could prefer *dalīl al-naql* over immediate rational proofs (like "half of two is one"). This is not how I read Baḥrānī here; rational indicators of this sort (ie the immediate kind) do not, by design, conflict with transmitted proofs; it is other non-immediate rational proofs which might conflict with transmitted indicators. Anṣārī also asserts:

> The incomprehensible thing which he [Baḥrānī] states is that there is a means, in cases of conflict between *ʿaql* and *naql*, of making a preference between these two certainties.[39]

Baḥrānī does not designate the findings of *ʿaql*, in its general sense (*bi-qawlin muṭlaqin*), as certain (*qaṭʿī*); transmitted indicators, however, are certain. Hence there is not a clash between two certainties, but a clash between a certainty (transmitted indicator) and a proposition, the certainty of which is unknown (not even probable). The difference between Anṣārī and Baḥrānī concerns the probative force of *ʿaql* in its non-immediate form—the former claiming that it produces certainty (indistinguishable from *ʿaql* in its immediate form) and the latter claiming that it is of epistemological value only when it is not contradicted by a transmitted indicator. The citations of Baḥrānī by Anṣārī (and others) are not designed to present an unbiased account of his position, but are part of a polemic exercise through which the supremacy of one intellectual system (Usulism) over another (Akhbarism) can be demonstrated. Anṣārī's citation

[38] Anṣārī, *Farāʾid*, I, p. 18.
[39] *Ibid.*, p. 18–19.

does, however, demonstrate that Baḥrānī's account of *al-dalīl al-ʿaqlī* was considered to be in need of refutation well into the nineteenth century.[40]

Bihbahānī's Discussion of ʿAql

In chapter 24 of *al-Fawā'id al-ḥā'iriyya*, Bihbahānī argues for the legitimacy of *al-barā'a al-aṣliyya* as an interpretative device by which the limited nature of the texts (and hence the limited nature of the *dalīls* one might be able to draw from the texts) can be overcome. His arguments for the validity of *al-barā'a* are labelled "the proofs of the *mujtahids*":

> The *dalīl* of the *mujtahids* [concerning the validity of *al-barā'a*] is that *ʿaql* judges *taklīf*[41] and *mu'ākhadha* (moral blame) to be repugnant (*qubḥ* [ie unnacceptable]) when there is no elucidation [ie no explicit text establishing the command or blame]. Many verses in the Qur'ān and widely accepted *akhbār* also include [the proposition] that *taklīf* and *mu'ākhudha* are prohibited when [either] there is no knowledge and elucidation, and [ie or] when there is no Imam to teach the people what is and is not in their interests. A group of scholars also claim *ijmāʿ* on this matter. [*FH*, 240–1]

Baḥrānī would have recognised this as a case of *dalīl al-ʿaql* being placed before *dalīl al-naql* (both literally and epistemologically); the very practice he criticised in M10 analysed above. The *ʿaqlī* proof is mentioned first, the *naqlī* is recorded as supporting it.

The most significant thing about this passage is the issues Bihbahānī ommitted:

1) It is clear to the reader that, for Bihbahānī, *taklīf* and *mu'ākhudha* in the absence of elucidation are evil. He does not, however, produce the *ʿaqlī* reasoning to explain why this is so.
2) *Taklīf* and *mu'ākhudha* are to be classified as evil by the *ʿaql*; they are objectively evil. Bihbahānī entertains no possibility that the *ʿaql* may be mistaken, or its judgement subjective.
3) Because such impositions are objectively evil, they cannot be attributed to God, for God is, by his nature, just.

[40] In the twentieth century also: Riḍā, *Uṣūl al-fiqh*, II, 3, p. 124–125.
[41] For a definition of this term, see above, p. 23–24.

Now these issues are crucial to Bihbahānī's argument. Without a recognition of these premises, it would be difficult for a reader to grasp his point. As I have argued already,[42] the intended audience for the *Fawā'id* is probably Akhbārī contemporaries or students tempted to adopt Akhbarism. These points, all accepted elements of Imāmī-Muʿtazilī theology, are presumed to be common ground with the reader. There is no need to demonstrate them. This gives a further indication that it was not whether, but how *ʿaql* gains knowledge independent of revelation, that was the issue under discussion. These assumptions are, however, justified in *al-Fawā'id al-jadīda*, Bihbahānī's later work.[43] The main opponents there are the Ashʿarites.[44]

Bihbahānī states at the outset that all the various sects (except the Ashʿarites) accept that *ʿaql* can recognise good and evil. Their denial is, however, a point of dogma, and if one examines their works (the *Iḥyā* of al-Ghazālī (Abū Ḥamīd (d. 505/1111)), the *Futūḥāt* of Ibn ʿArabī (Muḥy al-dīn (d. 638/1240)) and the *Mathnawī* of Rūmī (Jalāl al-dīn (d. 672/1273)) are specifically mentioned) one finds that the Ashʿarites utilise the idea of *ʿaql* having this power in many places but formally reject the doctrine. Whether this is an accurate portrayal of these scholars is not important for Bihbahānī's argument.

ʿAql, he says, can perform *al-taḥsīn wa'l-taqbīḥ*, just as the auditory sense can recognise the difference between noise and singing:

> We find that we have a natural ability, a passionate ability, an evil ability and an angelic holy ability, which are called [collectively] *al-quwwa al-ʿāqila* (the rational faculty) and we find that each of these has preferences and aversions, [an ability to recognise] necessities of existence and non-existence, and [when to] act and [when to] refrain from acting . . . the function of the rational faculty is to command what is wise and beneficial and all things that are good, and to avoid those things contrary to these, that is, all evil. [*FJ*, 363]

Though the Ashʿarites deny the existence of such a faculty, or like Ghazālī, consider its findings legally unimportant,[45] they refer to it in their works. Bihbahānī states explicitly that *istiḥsān* and *qiyās* are

[42] See above, p. 13–15.
[43] Bihbahānī, *FJ*, p. 363–374.
[44] The selection of the Ashʿarites as opponents here might indicate that Bihbahānī is not only concerned to refute Akhbarism, but also Sunni thought. It is possible that he sees an ideological linkage between the two.
[45] See Ghazālī, *Mustaṣfā*, p. 56–59; Hourani, *Reason and Tradition*, p. 135–167; Reinhart, *Before Revelation*, p. 70–75.

dependent upon the existence and reliability of a faculty like the one conceived here: *istiḥsān* because it assumes that the jurist can select the most appropriate course of action, and *qiyās* because the recognition of the *ʿilla* is an act of the *ʿaql* itself. The purpose of these examples is to show that the Sunnis in general, and the Ashʿarites in particular, denounce *ʿaql* with their tongue (*fī'l-lisān*), but in fact the presumption in their *fiqh* is that *ʿaql* has cognitive ability.

Bihbahānī then asks us to imagine a man of unspeakable evil who sodomises his children and demands that his parents and grandparents sodomise him both in public and in private:

> The rational faculty when it hears of such evil, or [even just] the most evil of these acts, it will be adverse to it; it will feel disgust and prohibit them. [*FJ*, 365]

The same would be true, but in reverse, of someone who did good works. Of course, Freud would be interested in the choice of example here. Bihbahānī is, however, using exaggeration (*tafrīṭ*) to demonstrate his point; his point being that for the Ashʿarites such evil could only be labelled as evil after God has described it as such. The acts are not evil in themselves. Bihbahānī's conception of *ʿaql* as a faculty indicates that he does not differ from Baḥrānī on this point.[46]

The Ashʿarite reply to this is that to allow these things to be evil on account of real qualities attached to these acts is to open the door to the possibility that, for example, neglecting prayer or pilgrimage is permitted, because reason cannot recognise any benefit in them:

> [They claim that] *ʿaql* has no aversion to things such as neglecting prayer or pilgrimage, things which are evil on account of the immediate truths of religion (*badahiyyāt al-dīn*). Our rational powers cannot attain [knowledge] of their improbity . . . we accept this but the aversion of reason [to these things] is due to their being examples of disobedience to the Lord Most High in legal matters (*sharʿiyyāt*). This is the nub of the issue: *ʿaql* can distinguish good from evil and there is no doubt that it can recognise the evil in any slave going against what his master orders or prohibits. For the order and the prohibition of the master are not good or bad in themselves. Obedience and disobedience are the reason for calling such things good and bad. [*FJ*, 366]

This argument establishes two types of moral property and hence two moral ontologies. First, there are those properties that exist independent of human or divine designation. Actions such as sodomy of one's children are evil essentially, that is, they have properties which either include improbity or necessarily give rise to a description of improbity. Second, there are actions whose improbity is not recognisable to reason except through the general command, deduced through reason, to obey one's master. Actions such as neglect of prayer and pilgrimage are not evil in themselves, but become evil when the Lawgiver so designates them as part of his unquestionable will:

> Reason's judgement that neglecting pilgrimage and matters of *taʿabbud* (worship) like this are only evil after knowing that the *shāriʿ* has made them so . . . without this, the *ʿaql* cannot distinguish between these and other permitted or forbidden actions. [*FJ*, 367]

These two moral ontologies are termed *mā uḍīfu ilayhā* (primary) and *iḍāfiyya* (secondary) respectively. One cannot understand the latter without the former. The Ashʿarites consider only the second to exist. However, the reason for a person living by secondary moral properties is not because of some rationally-established rule concerning obedience to one's master, but simply because the Lawgiver is God. The secondary moral ontology is therefore described as undisputed (*al-ḥasan wa'l-qubḥ bi'l-maʿnā al-ladhī lā nizāʿ fīhi*). The former is a matter of dispute (*al-ḥasan wa'l-qubḥ bi'l-maʿnā al-mutanāzaʿ fīhi*) between the Ashʿarites and the Shiʿites. The Ashʿarite position is fallacious, Bihbahānī argues, because, if one needs the Lawgiver's decree to call an action good or evil, one would need two decrees for every action—one to say it is good and one to say neglecting it is evil. If the Ashʿarite position is accepted, then when there is only one command (*amr*) in revelation concerning a particular action, the prohibition on ignoring that command becomes morally untenable, for it would need an additional indication from the Lawgiver.[47] This is obviously false. If, however, one accepts the two-tier system of moral ontologies, then one can say that reason designates obedience to one's master as good, and disobedience as bad, and the problem of such lacunae is avoided.

What, then, is the relationship between the moral knowledge gained through *ʿaql* (primary) and the moral knowledge gained through revelation (secondary)? God, it seems, sends prophets to inform the people

[46] See above, p. 194.

[47] See Hallaq, *Legal Theories*, p. 47–58; Weiss, *God's Law*, p. 368–381; and above, p. 171–174 for a *nahy* from an *amr* and *vice versa*.

of these secondary moral qualities, which are not inherent in the actions, but arise from the Lawgiver's designation of them as obligatory or forbidden. This is the reason for sending prophets; rational beings already have an understanding that they should obey a prophet, but they cannot know through reason alone what God orders:

> If the *ʿaql* could not [judge primary moral properties, like the duty of a slave to obey his master], the Prophets would be pointless and there would be no point in their mission or the *aḥkām sharʿiyya* . . . The Prophet did not talk to madmen and children who heard his words, understood his meaning, but did not learn that one should obey his command. [For them] the Prophet was like a foreigner who says, "you must do this and you must not do that". We hear his words and understand his meaning, but we do not see why we should obey him or follow his orders and prohibitions. [*FJ*, 368]

Bihbahānī means here that only a rational person can become subject to God's law (ie become a *mukallaf*), because an immature or insane person may hear the Prophet, and understand his words, but have no recognition that a person should obey his master. He does not have this recognition because he does not have the potential to reach the independent rational deduction that a slave should obey his master, and, therefore, a human being should obey his creator. A rational person can reach these conclusions, and can, therefore, be considered a *mukallaf*. If, as the Ashʿarites claim, reason cannot establish these basic moral duties, and revelation must precede moral categorisation, then a prophet would be pointless. People would understand his words, they may even understand that he comes from the Creator, but they would not understand why they should obey him or God. The Prophet would be like a foreigner (*ajnabī*) to them.

These arguments hold an established place in *kalām* discussions. Some Ashʿarites concede a certain ability to reason; they accept that reason can establish that an individual should be aware that God will send a messenger to the world, and hence reason can also establish that a would-be prophet's claims must be investigated and considered, for there is a possibility that he is a prophet.[48] Bihbahānī does not deal with this argument for it compromises the anti-rationalist straw man of Ashʿarism that he has constructed.

[48] This is in fact the position of Ashʿarites such as Ghazālī (see *Mustaṣfā*, 1, p. 10–12 and Reinhart, *Before Revelation*, p. 88–93) and, according to Weiss, Āmidī also (Weiss, *God's Law*, p. 88–93).

The other Ashʿarite response is that the individual is compelled to take heed of the Prophet because of his miracle (*wujūb al-nazar fī muʿajizāt al-nabī*). The principal miracle referred to here is the Qur'ān, which contains the imperative to contemplate (*anzar*). Because of this miraculous divine intervention, the individual is compelled to contemplate the Prophet's message and eventually adopt his moral system.

Bihbahānī's reply is that such a counter-argument is ineffective (*fāsid*). The mere imperative to contemplate is insufficient to establish an obligation to contemplate unless one accepts that reason comes prior to revelation:

> When [a prophet] says to a *mukallaf*, "The one who created you, and created the world, has sent me to you. He created you for a purpose, so listen to me, contemplate my miracle and hear from me the purpose", then there is no doubt that the *ʿaql*, at that time, judges that it is obligatory to contemplate [his message] and after the message has been proven to be true, it is obligatory to follow him. [*FJ*, 369]

The putative Ashʿarite claim that it is the miracle of the Qur'ān which establishes the duty to contemplate the truthfulness of a prophet is ineffective because one needs a general obligation, proven by independent reason, that pretenders to prophethood should be investigated. Without such a general obligation, "The *mukallaf* hears only an utterance; he understands only the meaning of that utterance. Nothing more than this."[49] No obligation to contemplate is established merely by hearing the command from a pretender to prophethood, "Contemplate!". That this argument has been proposed by Ashʿarites in the past is, again, unimportant for Bihbahānī. He wishes to demolish the Ashʿarī arguments as he portrays them, not as they may have been developed by individual thinkers.

Bihbahānī ends his rejection of the Ashʿarī moral ontology with a *reductio ad absurdum* argument. The Ashʿarites claim that a miracle establishes a would-be prophet as an emissary from God. The Qur'ān is the miracle *par excellence*. However, a miracle is, by definition, a deviation (*khāriq*) from God's customary way of acting (*ʿādat allāh*). How does a *mukallaf* know what God's customary ways are? It can only be through a process of (inductive) reasoning. This reasoning can only be carried out by the rational person's *quwwa ʿāqila*, therefore, reason must come before revelation. The Ashʿarī response that

[49] Bihbahānī, *FJ*, p. 369.

moral reasoning, not reasoning in general, cannot occur until after recognition, is absent from Bihbahānī's discussion.

Having dismissed the Ashʿarī ontology, Bihbahānī considers alternatives. These comprise of three Muʿtazilī ontologies. First, there are those Muʿtazila who claim that good and evil are attributable to the essence of an action (*dhāt al-fiʿl*). An action is evil because it has, as part of its essence, the property of evil. It is evil because "that is what it is like" (*min haythu hiya hiya*), just as it may have other properties. The action of speaking a lie may be performed in a loud voice or in a particular language. These properties are of the same genus, according to this first ontology, as improbity. Second, there are those Muʿtazila who claim that an action is not evil in essence, but that it has properties that necessarily cause the *ʿaql* to label it as evil (properties such as "it is an untruth" or "it causes harm"). The character of the act necessitates its description as evil (*wasfuhu lāzim*). Finally, there are those who argue that the action of lying, in itself, is not evil, but it becomes evil when performed in certain circumstances, or as Bihbahānī puts it, "on account of aspects and perspectives (*biʾl-wujūh waʾl-iʿtibārāt*)" which pertain to the act. The combination of the action and the circumstances make it an evil act; these Muʿtazila are, then, situationists. Though Bihbahānī does not name them as such, it is possible to identify these positions as those of the Baghdādī, the early Basran and the later Basran schools respectively.[50]

As will become clear, Bihbahānī's position seems to have much in common with the first of these positions, though he does not claim it as his own. The first is not examined at all, but the third is examined because "some of our modern [scholars]" (*baʿḍ al-mutaʾakhkhirīn minnā*) have adopted it. He refutes their position first.

According to Bihbahānī, these mistaken Shīʿa colleagues consider the other two positions to be unacceptable because they make *naskh* (abrogation) impossible. If an action is evil because of its essence (or because of properties inherent in its essence which give rise to a necessary description of the action as evil), then abrogation on the part of God is impossible. An action is good; God must rule that this action is obligatory. If later, he abrogates an obligatory action,

[50] See Frank, "Fundamental Assumptions"; Peters, *God's Created Speech*, p. 3–6 and p. 16–19; McDermott, *al-Shaykh al-Mufid*, passim; Reinhart, *Before Revelation*, p. 138–160.

he is ruling that a good action should not be performed. He is contradicting himself, and this is unthinkable in relation to God. If, however, one is a situationist, then an action is only obligatory in certain circumstances. God abrogates a ruling because of the need to adjust his law to take into account changing circumstances. The proponents of this position also reject the other two positions which turn the telling of lies to protect the Prophet into an evil act, because lying is essentially evil: "for this reason", Bihbahānī states, "they forgive someone who performs an evil action and do not forgive someone who tells the truth when it is necessary to do otherwise."[51] The legal consequences of such a position, according to Bihbahānī, include the idea that a person who is ignorant of the *aḥkām* is forgiven (a position taken by Baḥrānī) because of the circumstances of his ignorance. The identity of these mistaken Shīʿa is not given, but it seems clear that Akhbārīs would be amongst them, since the doctrine of the "forgiveness of the *jāhil*" was a doctrine of Akhbarism.[52]

Bihbahānī attempts to devise a moral ontology which circumvents this position. He first ridicules their position, once again by exaggeration, saying that they cannot bring themselves to say that sexual impropriety, killing women and children or eating the flesh of dead children is wrong. They can only say it is wrong in certain circumstances. For Bihbahānī, this contravenes moral common sense.

He then states that although these actions are evil in essence, or more accurately, possess characteristics which give rise to a necessary judgement of them as being evil, that does not always mean that they are a prohibited course of action:

> The reply to the examples of lying, killing or harming is that the essences of these actions, which are essentially [good or bad], are outweighed (*marjūḥa*) by the *ʿaql*, but this only comes about due to necessity (*fiʾl-ḍarūrī*). For example, protecting the Prophet is to be preferred in most cases, but the one that is outweighed is not obliterated. [*FJ*, 371–2]

Killing and lying are evil, but at times they are necessary evils to prevent a greater evil occurring. The circumstances do not, however, make them good actions. Legally speaking, just as the *jāhil* was liable for *kaffāra* for his transgressions of the law, the person who commits a necessary evil cannot be considered to have done an

[51] Bihbahānī, *FJ*, p. 371.
[52] See above, p. 15–23, for Baḥrānī's defence of this doctrine.

absolute good if he lies to protect the Prophet. It may be a sin which is forgiven, but nonetheless it is a sin.

The objection to Bihbahānī's position is that it entails a "combining of opposites" (*ijtimāʿ al-nāqiḍayn*).[53] Something is both obligatory and forbidden at the same time. Bihbahānī's reply here is most interesting:

> Not performing [an evil] may be good in essence (*bi'l-dhāt*) but evil by some non-essential characteristic (*bi'l-ʿaraḍ*). For it is described as evil from the point of view of its concomitant (*bi-iʿtibār lāzimihi*), and that is that it is a lie. There is, in truth, no combining of opposites here—just as one can describe someone as both sitting in a boat and moving simultaneously. [*FJ*, 373]

Bihbahānī here moves into metaphysics. Actions have essential characteristics and non-essential characteristics. The former are what give rise to judgements of evil; the latter cause evil actions to be permitted in specific circumstances. Though a man sitting in a boat is essentially stationary, it would not be wrong to describe him as also moving; though this latter description is non-essential or contingent (*ʿaraḍī*). Similarly, an action may be essentially evil, though it would not be wrong to describe it as permitted, or even obligatory, in certain circumstances. It would be convenient if Bihbahānī stated clearly that essential properties (*ḥasan* and *qabīḥ*) are moral judgements, but legal categories (*wājib, mandūb* etc.) are contingent. Unfortunately, he is not so explicit, and one must settle for the view that this is one amongst other possible positions that Bihbahānī would have taken. His metaphysics is not particularly sophisticated, but it does demonstrate that he is willing to use the language of the philosophers to bolster his theory.

The chapter ends with a return to the subject of Ashʿarism. The Ashʿarites produced the verse "We [God] do not punish [a people] until we send a prophet" [Q17.15]. If God does not punish until he sends a prophet, how can *taklīf* be established before revelation. Surely, they argue, this negates *al-taḥsīn wa'l-taqbīḥ*. Bihbahānī responds:

> The intended meaning of the verse is that there will be no worldly punishment (*al-ʿadhāb al-dunyawī*) for what has passed. How is there no evil [before revelation] on account of punishment being only deserved after the sending [of the Prophet]? Rather before that one deserves praise or blame (*al-lawm wa'l-tawbīkh*) and forgiveness is possible after that; this is the opinion of the Shīʿa, though some Shīʿa agree with the first part [ie some say one deserves praise and blame before the sending of a prophet and forgiveness will not be given after revelation]. [*FJ*, 373]

[53] Bihbahānī, *FJ*, p. 373.

Bihbahānī appears to be taking the line that before revelation there is no worldly punishment for wrong-doing. Presumably he is drawing on the Qur'anic idea that before the Prophet Muḥammad there were nations who were called to follow God, disobeyed and hence were destroyed (ie given a worldly punishment). Most Shīʿa, he claims, believe that although punishment is due for immoral actions before revelation, there is a possibility (*jawāz*) of forgiveness from God after revelation comes. Hence *ʿaql* can recognise punishment for the performance of evil actions, but that does not mean that the punishment will necessarily be carried out by God. This position is a more sophisticated version of the Uṣūlī position on the fourth of Riḍā's questions.[54]

We are now in a position to make a judgement concerning Bihbahānī's views on two of the issues of dispute identified by Riḍā. The first issue concerned the debate about the ontology of moral values (objectivism versus theistic subjectivism). Bihbahānī clearly sees good and evil as objective properties, independent of the *ʿaql's* recognition of God's designation of an action as good or evil. The second issue concerned whether or not God tutored or controlled the *ʿaql's* recognition of good and evil. An underlying assumption of Bihbahānī's argument is that human beings are able to recognise good and evil, as free and responsible agents. In FJ5, he argues strongly against Ashʿarī conceptions of predetermination.[55] To discover his position on the third and fourth issues, one must turn to an analysis of the term *tawqīfī* in the early sections of *FH*.

FH2 is entitled: "On the refutation of two misconceptions". In this section Bihbahānī aims to refute, first, the misconception that "all things [meaning rulings] must be taken from the Lawgiver, and his dictat is *tawqīfī*, dependent upon a text"; and second, that "some of the *aḥkām sharʿiyya* can have their source in *ʿurf* (common practice)". The identities of the proponents of these two views are unclear, and no names are mentioned, though it could be postulated that the Akhbārīs, particularly Baḥrānī, constitute the first group, and the

[54] See above, p. 186–187.
[55] Bihbahānī, *FJ*, p. 375–385.

qāḍīs, who rule in the courts according to *ʿurf*, are the second. Bihbahānī's refutation begins:

> For both the *mujtahids* and the Akhbārīs, the *aḥkām sharʿiyya* are, as a whole, (*bi-aṣrihā*) *tawqīfī*, and depend upon a text, be they *ʿibādāt* or *muʿamalāt*,[56] in the five categories or in the *aḥkām waḍʿiyya* . . . be they understood by *ʿaql* or not. This is because *ʿaql's* understanding on its own does not make a thing a *ḥukm sharʿī*, as long as there is no proof that the Lawgiver has ordered it. The Shīʿī scholars and the Muʿtazila, when they say that there is a necessary correlation (*mulāzama*) between the rulings of the *ʿaql* and the *sharʿ*, and that the second uncovers the first and *vice versa*, they make the rulings of the *ʿaql* one of the indicators of the law's ruling, not [a ruling] in its own right (*lā nafsahu*). [*FH*, 95]

Bihbahānī appears to contradict himself here, as he claims that all the *aḥkām* are *tawqīfī*, but some of them are proven by *ʿaql*. Baḥrānī used the term *tawqīfī* in contrast to *ʿaqlī*, and claimed that all the *aḥkām* were the former, not the latter. By this he meant that they were non-rational and proven only by means of transmitted indicators.[57] Now Bihbahānī uses *tawqīfī* in a slightly different manner. For him, a ruling being *tawqīfī* does not exclude it from being *ʿaqlī*. All the *aḥkām* are *tawqīfī* in that there is a text (*naṣṣ*) which proves their validity. Some *aḥkām* may also be attained through a different route, that of rational contemplation. This does not mean that they cease to be *tawqīfī*: they are both *tawqīfī* and *ʿaqlī*.

Bihbahānī here states explicitly that he affirms the doctrine of *mulāzama*—the necessary correlation between the findings of *ʿaql* and the rulings of the *sharʿ*. Because the *ʿaql* and the *sharʿ* are in total agreement, one may use either in deriving a *ḥukm*, though it is important to recognise that *ʿaql* is not a source in its own right, but a source because of the dogma that its findings necessarily agree with the *sharʿ*:

> Every place in which the *ʿaql*, by its understanding, or by something else, independently [attains knowledge] in the form of a decision (*jazm*), it is clear from another revelatory indicator that this is so. However, that which the *ʿaql* supports is certain (*yaqīnī*). [*FH*, 96]

For every *dalīl ʿaqlī*, there is a *dalīl sharʿī*. The reverse, however, is not the case because some *aḥkām sharʿiyya* are proven by transmitted (or revelatory) indicators alone. On the other hand, a *ḥukm* which has both types of indicator to support it is certain—*yaqīnī*. The meaning of this term is not explained by Bihbahānī. However, it is clear that a *ḥukm* with both (transmitted and rational) indicators reaches a higher level of epistemological provenance than that supported by a transmitted indicator alone.

In short, every *ḥukm ʿaqlī* is also a *ḥukm sharʿī* because there is always a revelatory indicator to support it. Bihbahānī implies, by his assertion that *ḥukm al-ʿaql* becomes "one of the indicators of the ruling of the law (*min adilla ḥukm al-sharʿ*)", that *ʿaql* can be used as a substitute for searching for transmitted indicators because, *de jure*, all *ʿaql's* conclusions will agree with the *aḥkām sharʿiyya*. It is also the case that one does not need *ʿaql* to prove the *aḥkām sharʿiyya* because all of its findings are concurrently evidenced by revelation.

Baḥrānī and Bihbahānī agree with respect to the assertion that all the *aḥkām* are *tawqīfī*. They disagree on the relationship between *ʿaql* and these *aḥkām*. For Baḥrānī, *ʿaql* and *naql*, and *dalīl ʿaqlī* and *dalīl naqlī*, can conflict and, in such circumstances, one should always prefer the latter over the former. For Bihbahānī, it is a logical impossibility that *ʿaql* and *naql* could conflict. If they could, that would imply that God gives orders in conflict with the *ʿaql*, which would compromise his status as the supreme rational being.

Returning now to Riḍā's characterisation of the different positions of the role and abilities of *ʿaql* in the law, one can now locate Bihbahānī in relation to the third and fourth areas of dispute. The third concerned the doctrine of *mulāzama*—the necessary correlation of reason and revelation. Bihbahānī explicitly supports this doctrine, whereas Baḥrānī envisages circumstances in which a *dalīl ʿaqlī* and a *dalīl naqlī* could conflict. Bihbahānī takes an Uṣūlī line here. On the final question of the relationship between the findings of reason and the *sharʿī* categorisations, Bihbahānī states that *ʿaql* can be considered "one of the *adilla ḥukm al-sharʿ*"—meaning that it can bring, not just moral knowledge (*al-ḥasan* and *al-qabīḥ*), but also legal (*sharʿī*) knowledge. He, therefore, takes an Uṣūlī position here. Riḍā's characterisation of the differences between Akhbārīs and Uṣūlīs on the question of *ʿaql* is , once more, shown to be accurate.

Before departing from Bihbahānī's discussion of *ʿaql*, it is necessary to note that he also considers the rational faculty to be a means of gaining knowledge, not just of general moral commands, but also the specifics of certain duties. These duties are those termed *ʿibādāt*, and it is normally considered the case that independent *ʿaql* is unable to aid the *mukallaf* in understanding their nature. These duties are

[56] For Bihbahānī's rather eccentric use of these terms, see below, p. 216–218.
[57] See above, p. 195–196.

tawqīfī in the sense that revelatory texts are required to establish them as obligatory. However, reason (*ʿaql*), language (*lugha*) and common custom (*ʿurf*) are useful in understanding the specific duties of the act. For example, the Qur'ān establishes the duty of Friday prayer:

> Oh you who believe, when the call to prayer is made on the day of *jumʿa*, hasten to the remembrance of God and cease trading. [Q69.9]

Bihbahānī comments:

> As for the words "when", "day" and "*al-jumʿa*", "trade" and the form of "cease" and things like this, they are not *tawqīfī* and the Lawgiver is not responsible for explaining them. Rather [their meaning] is found in *lugha* or *ʿurf* or one of the other things we have mentioned [like *ʿaql*]. As for the words "prayer" and "call"—if the *adhān* is meant here—and the remembrance of God—if prayer is meant by this—then they are *tawqīfī*. It is not possible for *ʿurf*, or *lugha*, or *ʿaql* or anything else to understand the essence of prayer and call as long as the *shar*ʿ has provided no explanation. [*FH*, 97]

Any command is made up of words. For the command to make sense, and for the *mukallaf* to be able to follow the command correctly, he must know the meaning of these words. Bihbahānī terms the meaning of these words *mawḍūʿāt*. The command itself is *tawqīfī*—ie a text of revelation (in this case a Qur'anic verse) establishes it as a duty. The meaning of some words contained within a command also need an explanatory text before a *mukallaf* can understand them. For example the term "prayer" in the above command refers to the specific actions (prostration, recitation etc) encompassed in the Muslim act of worship. By referring to this verse alone, the *mukallaf* will acheive knowledge of these actions. He is in need of other texts of revelation to explain what prayer entails. These meanings (*mawḍūʿāt*) are *tawqīfī*. God was not obliged to command these particular actions as constituting prayer. However, not all the words in the command are of this sort. The word "trade", for example, is not used in a specific sense. The usual meaning of trade will suffice. To understand the command the *mukallaf* need not turn to other texts of revelation to discover what it is that he must cease doing. The meanings of these words are not *tawqīfī*, that is, they do not stand in need of an explanation from the Lawgiver. One can discover their meaning from *ʿurf, lugha* or *ʿaql*. *ʿAql*, then, can aid in understanding the details of a command.

Another example used by Bihbahānī is a comparison of two prerequisites for prayer: to wash clothes that have been soiled with an impure substance (*ghusl al-thawb al-nājis*), and to purify oneself, by washing, from a major impurity infraction (*ghusl al-janāba*). Both commands are supported by revelatory texts: they are, then, both *tawqīfī*. The same word, *ghusl* (wash), is used in both commands, but its meaning differs. When washing one's clothes, it is used in a non-*tawqīfī* sense—the usual activities associated with washing will suffice. When purifying oneself from a major purity infraction (*janāba*), however, *ghusl* is used in a specific sense—certain actions will make the purification valid and others will not. *ʿAql* aids the discovery of the first sense of *ghusl*, but not the second. Furthermore, purification from a major ritual impurity requires an intention—it is a duty in itself. Washing one's clothes requires no intention as such—it is a duty which is to be performed as a prerequisite for the valid perfomance of a higher duty (ie prayer).[58]

Bihbahānī, rather confusingly, refers to these two sorts of duty as *ʿibādāt* and *muʿāmalāt* respectively. He is not using these terms in the usual sense, though his meaning is linked to the distinction between cultic practices (*ʿibādāt*) and social regulations (*muʿāmalāt*). In brief, every obligatory duty of a *mukallaf* is an *ʿibāda*. Every *ʿibāda* is *tawqīfī* in that it has a textual indicator establishing it as obligatory. Every *ʿibāda* comprises of a series of actions which will ensure its valid performance. These actions are also duties which the *mukallaf* must perform. The commands to perform these actions, however, must be set in a language that a *mukallaf* can understand. The commands of God are set in technical language and must be reformulated in a manner such that the community can carry them out without errors of commission or omission. These detailed commands, which establish how the *ʿibāda* is to be carried out, must be provided by the Lawgiver elsewhere in revelation. To leave them unexplained would mean that God was asking his servants to perform an action, the details of which they do not understand; this would imply injustice on God's part. These detailed commands are then expressed in a manner which the *ʿaql* can understand; they are not *tawqīfī* for no further elaboration of their meaning is incumbent upon the Lawgiver. They are *muʿāmalāt*. Every *ʿibāda* is made up of *muʿāmalāt* which

[58] His discussion is found in Bihbahānī, *FH*, p. 96–98.

ensure its correct performance, and the *ʿaql*, through its knowledge of *lugha* and *ʿurf*, can understand these *muʿāmalāt*. *ʿAql* acts as a bridge between the technical language of revelation and the understanding of the community. Sometimes the conditions of an *ʿibāda* are themselves *ʿibāda* (as in the case of *ghusl al-janāba* as a prerequisite for prayer). These must also be reduced to *muʿāmalāt* before people can perform them; the Lawgiver must explain what it is he means by *ghusl al-janāba*; there must be no "frustration in action" (*iḥbāt fi'l-ʿamal*, the doctrine criticised by Jazā'irī in Baḥrānī's citation, mentioned above).[59] Those who confuse the technical language of *ʿibādāt* with the ordinary language of *muʿāmalāt* (Bāqillānī (Abū Bakr (d. 403/1013)) is mentioned as an offender) are bound to err in their jurisprudence:

> It is clear that the difference between the means of proving (*ṭarīqaṭ al-istidlāl*) for *ʿibādat* is different from the means of proving *muʿāmalāt*. Whoever does not know the difference between these two, and does not distinguish between them, will corrupt *fiqh* from beginning to end. [*FH*, 100]

ʿAql, for Bihbahānī, plays a pivotal role in understanding what it is God requires of humanity. It can be used before revelation to establish certain truths, which are essential if the individual is to accept the message of the Prophet. These truths are also found in God's revelation, and hence after revelation *ʿaql*, strictly speaking, is unnecessary. However, since *ʿaql* and revelation agree on all matters, *ʿaql* can be a short-cut to knowledge of God's law, dispensing with the need to search for a transmitted indicator. Those elements of the law which have no rational foundation (which is different from saying that they are irrational) must be broken down into discrete units which can be understood by a *mukallaf*. The *ʿaql* comes into action again, since these discrete units are comprehensible by and through the *ʿaql*.

Conclusion

Perhaps the best way to understand the difference between Bihbahānī and Baḥrānī is not to say that one accepts reason and the other rejects it, but that one is optimistic and the other pessimistic con-

[59] See above, p. 191–192.

cerning the ability of reason to discover knowledge. They both differ from the Ashʿarite tradition, which even in its most rationalist expressions, portrays reason's discovery of moral facts as irrelevant to the divine decree. For both Bihbahānī and Baḥrānī, moral facts are real qualities in the world and are not merely expressions of egotism (*pace* Ghazālī) or subjective opinions. Values truly exist in the world, waiting to be perceived by human beings. Both Bihbahānī and Baḥrānī subscribe to an objective ontology of moral values.

This fundamental agreement on matters of ontology should not mask the difference in emphasis between the two thinkers, and between Akhbārīs and Uṣūlīs in general. Baḥrānī restricts the use of reason to such an extent that it becomes useless in the derivation of legal norms. He ascribes to basic Muʿtazilī ideas, because he wishes to establish his link with Shīʿī tradition. Yet he adjusts their impact upon his jurisprudence such that the flavour of his account of *ʿaql* is rigidly traditionalist. We have witnessed this technique of argumentation in other areas of his juristic theory. Bihbahānī, in response to the Akhbārī challenge, devised a more sophisticated account of *ʿaql's* ability and role in deriving the *aḥkām*, where reason and revelation were seen not as competing sources of knowledge, but as mutually supportive structures, aiding the believer in his search for God's law.

CHAPTER SIX

THE AUTHORITY OF THE JURIST

Ijtihād, the name given to a jurist's efforts to find a ruling, utilising the available exegetical techniques and presumptions laid out in Bihbahānī's theory, was undoubtedly linked to a theory of juristic authority.[1] By specifying that only a jurist, trained in a particular manner and possessing certain qualities could interpret the sources of God's law, and that others must bind themselves to following the jurist's opinion, those that proposed the theory of *ijtihād* had acquired an ideological tool with which to promote juristic authority within the Shīʿī community over rival claims (such as those of Sufi shaykhs, tribal chiefs and would-be political leaders). The extent of the jurist class's success in this endeavour was dependent upon historical circumstances, and the varying degrees of courage that scholars showed, at different points in time, in advancing their claims.[2] Developments in the theory of *ijtihād*, from its introduction into Shīʿī legal theory until the time of Baḥrānī and Bihbahānī, display an ever increasing tendency to base claims to community leadership in the absence of the Imam upon a firm ideological footing.[3] After Bihbahānī and Baḥrānī, this movement culminated in a loose, but recognisable, hierarchy within the scholarly class with the most learned scholar at the apex of a triangle, the base of which was occupied by the majority of students: lower levels deferring to higher ones. In theoretical terms, this was expressed in a theory of *aʿlamiyya* (the leadership of the most learned) and the proposition that one scholar should hold a pre-eminent position within the community; that is, he should be the source of imitation (*marjaʿ al-taqlīd*) for all Twelver Shiʿites. Though, in practice, selecting a single leader and maintaining his authority ran into problems, the ideal of Shīʿī community leadership was expounded by most nineteenth century writers of Shīʿī legal theory.[4]

[1] For Sunni theory and its link with juristic authority, see Calder, "*Ikhtilāf* and *Ijmāʿ*"; Stewart, *Islamic Legal Orthodoxy*, p. 35–60 and p. 210–217; Weiss, *Spirit*, p. 113–144 and Kamali, *Principles*, p. 366–394.

[2] Accounts of the Shīʿī *ʿulamāʾ*'s attempts at gaining increased community influence in the pre-modern period include Algar, *Religion and State*; Hairi, *Shīʿīsm and Constitutionalism*; Arjomand, *Shadow of God*; Litvak, *Shiʿi Scholars*; Momen, *Shiʿi Islam*, p. 86–146; Cole, *Roots*.

[3] See Calder, "Structure of Authority", p. 171–243 and "Doubt and Prerogative". Other references for theoretical aspects of Shīʿī juristic authority include Eliash, "Ithnāʿasharī-Shīʿī Juristic Theory"; Madelung, "Authority"; Sachedina, *The Just Ruler*, passim.

The close link between juristic authority and the theory of *ijtihād* has led some commentators to argue that Akhbārīs, who rejected *ijtihād*, also rejected scholastic authority, in favour of a more populist expression of Shiʿism.[5] Akhbārīs rejected the division of the community into *mujtahid* and *muqallid*, and it would therefore seem plausible to argue that, in so doing, they weakened the intellectual hegemony of the scholarly elite.

A number of factors cause me to doubt this line of argument. The biographies of a number of Akhbārīs demonstrate that they were as eager (and at times as reluctant) as Uṣūlīs to adopt a position of community leadership (*shaykh al-islām, pishnamāz* etc).[6] Second, the Akhbārī position on matters such as the leadership of Friday prayer, the collection of community taxes and the administration of justice was not inimical to juristic authority (as some have argued).[7] Third, the rejection of *ijtihād* may have implied a rejection of a certain ideological justification for juristic authority, but it did not mean a rejection of authority *per se*. Of course, Akhbārīs did reject the *mujtahid/muqallid* division, but this did not lead to an automatic rejection of the scholar/layperson distinction. Finally, the rejection of the *mujtahid's zann* as a legal proof did remove one of the epistemological elements of the theory of juristic authority, but this merely meant that Akhbārīs had to find other epistemological props (and this, as we shall see, was Baḥrānī's tactic through his emphasis on legal certainty).

[4] For the practicality of the *marjaʿiyya* doctrine after Bihbahānī, see Litvak, *Shiʿi Scholars*, p. 21–63 and Amanat, "Madrasa and Marketplace". For the development of the theory of *marjaʿiyya* and *aʿlamiyya*, see Lambton, "A Reconsideration"; Hairi, *Shīʿīsm and Constitutionalism*, p. 62–65; Moussavi, "Establishment of Marjaʿiyyat" and Moussavi, *Religious Authority*, p. 185–216.

[5] See Algar, *Religion and State*, p. 35 (The Akhbārī school's "whole tendency was . . . to restrict the role of the ulama"); Newman, "Rationalist and Traditionalist Schools", introduction; Newman, "Akhbārī-Uṣūlī Dispute, Part 2", p. 258–260; Momen, *Shiʿi Islam*, p. 225: "The Akhbārī position severly restricted the prerogatives of the ulama".

[6] For example, al-Ḥurr al-ʿĀmilī was *shaykh al-islām* of Isfahan; Muhsin Fayḍ al-Kāshānī (d. 1091/1680) had close relations with the Safavid state; Baḥrānī himself sought the protection of political leaders. See above, p. 10.

[7] See, for example, my analysis of Baḥrānī's views; Gleave, "Akhbārī Shīʿī Jurisprudence", ch. 7 and 8.

In this chapter, I demonstrate that Baḥrānī's theory is not only thoroughly Akhbārī, but is also rooted in a presumption that only a person with training in certain exegetical techniques can deliver certainty of the law to the individual believer. Underlying his theory is an inescapable division of labour between the scholar, who provides the law (and also follows it), and the believer who follows the scholar's ruling. The idea that the Akhbārīs were essentially "egalitarian" or "anti-hierarchical" is, it is my contention, in need of reassessment. Supporting such a conclusion is the fact that none of Bihbahānī's criticisms of Akhbārī thought concern juristic authority.[8] The criticisms relate to errors in Akhbārī legal theory.

Baḥrānī's Theory of Juristic Authority

The procedures set out by Baḥrānī in M1–10 are designed to ensure that any legal question, whether addressed explicitly in the revelatory texts or not, is answered. As discussed previously, these answers (unlike those of a *mujtahid*) are not intended to be reflections of the law in reality; at times an answer may stipulate a course of action which may not constitute simple obedience to the letter of the law. Instead, due to uncertainty as to what constitutes the law, a course of action which will ensure obedience, but may include supererogatory (or even superfluous) actions, is made obligatory.[9] At other times, when there is total ignorance of any indicator in the texts which might assess an action, it is permitted to act on the assumption that an action is permitted.[10] Baḥrānī's concern in the instances when the texts are perceived to be silent or unclear is that the *mukallaf* is justified in his actions, even if they do not accord with the law in reality.

One question not addressed in M1–10 is the means whereby these rulings are made known to the community. In Muslim legal theories which incorporate the theory of *ijtihād*, the educational qualifications of a person entitle him to give an opinion as to the Lawgiver's assessment of an action. This qualified person (the *mujtahid*) acts as an

[8] See below, p. 244–245.
[9] See above, p. 105–112.
[10] See above, p. 91–96.

interpreter of the law for the community.[11] For Baḥrānī, and Akhbārīs generally, this avenue of justification was, of course, closed.

It is the case that Baḥrānī, in M1–10, does not explicitly address the issue of who is to carry out the necessary interpretative process to discover the most cautious course of action. However, there is, it appears to me, an underlying assumption that the interpreter is a scholar, who is trained in the exegetical procedures outlined by Baḥrānī, and who provides the community, on demand, with rulings which might enable them to follow the law with confidence of total fulfilment, or at least the knowledge that they are justified before God in their actions. In this section, I outline the evidence for this assumption.

Baḥrānī's concentration on the status of the ordinary believer should not lead us to conclude that the intended readership of M1–10 is the community at large. His intended audience is undoubtedly the scholarly elite. It is true that Baḥrānī, unlike Bihbahānī, upholds the doctrine that the *mukallaf*, ignorant of the existence of an indicator, is excused if he transgresses the law due to his ignorance.[12] Such a doctrine could be used to justify the, at best, incomplete adherence to the law exhibited amongst the general populace, and thereby obviate the need to know the revelatory texts. The ignorant *mukallaf* is excused and forgiven for his transgressions, but there is no indication that this ignorance is a desirable state. A pardon for ignorance does not mean that scholarship and study of the texts are obsolete. Rather, it is the task of scholars to eradicate this ignorance. On more than one occasion, Baḥrānī cites the following *khabar* from Imam Ṣādiq, who read in "the book of Imam ʿAlī":

> God did not take away a duty to search for knowledge (*talab al-ʿilm*) so that he might [also] take away [a duty to] spread knowledge to the ignorant from the scholars (*ʿulamāʾ*). [*H*, 1, 161][13]

The ignorant are excused from the search for knowledge, but the *ʿulamāʾ* have a duty to pass on that knowledge to the ignorant. Baḥrānī, of course, concentrates on the term *ʿilm* in this report, and as we

[11] For accounts of *ijtihād* in Sunni theory, see Hallaq, "Was the Gate"; Hallaq, *Legal Theories*, p. 117–124 and p. 199–205; Weiss, *God's Law*, p. 681–716; Zysow, "Economy of Certainty", p. 459–592.
[12] See above, p. 15–23.
[13] See also Baḥrānī, *H*, 1, p. 81.

have seen *ʿilm*, in Baḥrānī's theory, is certain indubitable knowledge.[14] The scholars pass on their knowledge, gained from the texts, to the ignorant community. It could be argued that the authority of the scholarly elite is enhanced by such a system, since the scholars deal, not in their personal opinion (*zann*, as in *ijtihād*-based theories), but in knowledge. They are not dissimilar to the Prophet or the Imams, who, though they do not participate in the formulation of the divine law, gain prestige and charisma from being the mouthpieces of God's will.[15]

That this conception of juristic authority is assumed in M1–10 is also evidenced by the slogan used in connection with the theory of *iḥtiyāṭ*:

> *al-tawaqquf fi'l-fatwā wa'l-iḥtiyāṭ fi'l-ʿamal.*
> Suspension of judgment in offering a ruling and caution in action.[16]

Such a procedure is recommended when the revelatory texts are unclear. By implication, then, when the revelatory texts are clear, one need not suspend one's *fatwā*, but one can declare it with certainty. Baḥrānī's use of the term *fatwā* assumes the presence of a *muftī* who is in a position to advise the community on request as to the correct course of action. This *fatwā*, which Baḥrānī elsewhere calls an order (*amr*), is not mere scholastic opinion as to the content of the divine law, but a declaration as to the law in reality.[17] In cases where the law is unclear, the *muftī* cannot give such a definitive *fatwā*, but he can give advice as to the most cautious (*aḥwaṭ*) course of action, which will ensure legal compliance. Such a second-tier *fatwā* also brings certainty, not of the law itself, but of obedience to the law. It does not appear that the scholar's role or prestige is diminished in such a procedure.

It might be argued that Baḥrānī's use of the term *nazar al-faqīh* in M4, and his proposal that the "opinion of the jurist" can be ignored (though it is not obligatory to do so) in cases of uncertainty, may mitigate these conclusions.[18] However, this is only the case if

[14] See for example, above, p. 55–66.
[15] This observation (with reference to Sunni theories of judicial authority) has been made by Baber Johansen in an unpublished paper presented at the Second Joseph Schacht Conference on the Theory and Practice of Islamic Law, Granada, December 1997.
[16] See above, p. 119 and Baḥrānī, *H*, 1, p. 65–88.
[17] Gleave, "Marrying Fatimid Women", p. 42.
[18] See above, p. 109–111.

one interprets the rather vague term *nazar al-faqīh* as referring solely to a current jurist. Unfortunately Baḥrānī does not (to my knowledge) elucidate what he means by *nazar al-faqīh*, but it is perfectly possible that he means by this juristic opinion in the broader sense of the established legal norm. Such an interpretation would imply that it is permitted for a scholar, when searching for the most cautious course of action to recommend, to follow the established answer to the question at hand. However, it is recommended (though not obligatory) that he follow what he discovers to be *al-aḥwaṭ*. Outside of the Prologues, Baḥrānī goes to great lengths to prove that it is permitted to contradict the opinion of past jurists, if they are shown to have been mistaken.[19]

The matter of whether Baḥrānī, as an Akhbārī, has a theory of juristic authority is, in my opinion, settled by an examination of his work *ʿAqd al-jawāhir al-nūrāniyya*.[20] This work is a series of answers to questions posed to him by his father's teacher, Shaykh Ḥasan. The first set of questions deals with matters of *uṣūl al-fiqh*. The fifth of these questions relates to the issue discussed in Chapter One concerning the ignorant *mukallaf*. If a *mukallaf* is in an area where there are no (Shīʿī) scholars, is he permitted to follow the established school doctrine (*al-mashhūr*), or must he follow *iḥtiyāṭ*? Baḥrānī's answer is expansive, but in sum, he states that the *mukallaf* must search for a scholar, but whilst he is searching he must act on *iḥtiyāṭ*. If he transgresses the law during this search, then he is forgiven, but he is not excused the task of searching for a scholar (*ʿālim*). Just as was mentioned in Chapter One, the scholar is essential to the ideal operation of the law.[21] The *mukallaf* may consult works of *fiqh* in such circumstances (ie he may follow the *mashhūr*), but these works must be by authors who give direct and clear answers and not by those whose answers are clouded in extensive discussion. The implication is, then, that he must consult Akhbārī works of *fiqh* (like Baḥrānī's own *al-Ḥadā'iq al-nāḍira*) and not those of the *mujtahids*.

Question 7 refers to whether a *mukallaf* may, after following one scholar, abandon him and follow another. Baḥrānī's answer is that it depends upon the second scholar's credentials:

[19] See Gleave, "Marrying Fatimid Women", p. 48–49.
[20] Majlis Library, MS#633, Tabataba'i Collection. Hāʿirī, *Fihrist*, 22, p. 335–340.
[21] See above, p. 22.

> If the second scholar is one whom it is permitted to follow (*taqlīd*), like the first scholar was, then there is no point in distinguishing between following him and the *fatwā* of the first.[22]

A scholar "whom it is possible to follow" (*yajūzu taqlīduhu*) is one who is worthy of *taqlīd* and who uses the correct methods of expressing a preference between contradictory *akhbār* (*murajjaḥāt*):

> If he does not have this rank (*al-martaba*), then it is not permitted to follow him at all (*bi'l-kulliyya*).[23]

Question 8 refers to the issue of whether it is obligatory to follow the most learned scholar (*al-aʿlam*) when there are many scholars (*ʿulamā'*) present. Baḥrānī's answer is instructive:

> There is no doubt that [when they are in agreement], one can choose whichever *fatwā* one wishes. When [they disagree], then it can be deduced from the Maqbūla [of Ibn Ḥanẓala] concerning this issue, that one should prefer the [*fatwā*] of the one who has more of the qualities [mentioned in the Maqbūla] to one who has less.[24]

The qualities mentioned by Baḥrānī are justice (*ʿadāla*), learnedness (*faqāha*), truthfulness (*ṣidq*) and piety (*waraʿ*). These qualities are present in one who has "the right of delegation (*niyāba*) from the Imams".[25] If two scholars excel in one of these qualities then one has a problem (*ishkāl*).[26] Some say *ʿadāla* takes precedence over all other qualities, but Baḥrānī argues that *faqāha* is included in *ʿadāla*, and the most learned (*afqah*) must, therefore, be the most just also (*aʿdal*). The privileged position given to learning in this hierarchy of qualities does, of course, emphasise that a scholarly education is essential to the mechanism of expounding the law. Finally, the issue of whether one is permitted to follow the *fatwā* of a dead scholar is addressed in question 4. The answer, for Baḥrānī, is that one must follow the rulings of the Imams, which are transmitted to us by the early generations, and they are all scholars who are dead. He lists

[22] Baḥrānī, *ʿAqd al-jawāhir*, folio 65b, ln18–20.
[23] *Ibid.*, folio 65b, ln21.
[24] *Ibid.*, folio 64a, ln4–10.
[25] The doctrine of *niyāba* is discussed extensively in Calder, "Structure of Authority", p. 66–170. See also, Calder, "Sabzavārī"; Sachedina, *The Just Ruler*, p. 119–173; Momen, *Shi'i Islam*, p. 189–199 and Moussavi, *Religious Authority*, p. 47–183.
[26] See the use of this term in the context of revelation/reason conflicts, above p. 201–202. Baḥrānī does not, to my knowledge, explain the theoretical significance of the term *ishkāl*. It seems to function like *ikhtilāf* in *ijtihād*-based theories, but with a determination that the correct solution is obtainable.

akhbār (including the Maqbūla) which emphasise that one must take into account the *fatwās* of the early generation.

Baḥrānī, in these answers, adopts some of the terminology of the *mujtahids* (eg *taqlīd*, *al-aʿlam*), but does not base the jurist's authority on *ijtihād*, but on the (possibly more vague) concepts of "learning" and "justice" or moral probity. These qualities are an indication that the scholar utlises (or utilised, in the case of a dead scholar) the correct procedures for deriving *fatwās* from the sources. In Uṣūlī theory, the person of the *mujtahid* justifies the authority of his ruling; the ruling itself is only authoritative because he has issued it. Hence the *fatwā* of a dead *mujtahid* dies with him; it had authority because it was his ruling and not because it was, necessarily, the correct one. For Baḥrānī, one needs to identify the scholar who will produce the correct ruling, and his ruling will have authority because it is the correct one.[27] One does not, in a sense, follow the scholar; one follows the ruling, because it is a correct declaration of the law. The Imams delegated this role (*niyāba*) to the *ʿulamā'* during the *ghayba*, as is indicated by the Maqbūla, and hence although the scholars do not have the same kind of authority as those in *mujtahid* theory, it would seem clear that they are an essential element of an Akhbārī legal theory such as Baḥrānī's.

These are the only passages known to me in which Baḥrānī explicitly addresses the issue of juristic authority in a manner recognisable from a reading of Uṣūlī theory. The correct procedures for deducing rulings, on which the scholars theoretically rely, are summarised in M11, entitled "Concerning the legal principles and the complied-with precepts upon which all juristic rulings are based".[28] There follows a list of twenty-one (or twenty, depending on where section breaks are inserted) principles (*qawā'id*, *uṣūl*). The purpose of these principles is not entirely clear, but it appears that they perform both a descriptive and advisory function. They describe the rationale behind the law, as it has been presented (by God, the Prophet and possibly the Imams also); and they advise the manner in which the law might be interpreted and elaborated. That the latter function is included, is demonstrated by two, very similar reports from Imams Ṣādiq and Riḍā:

[27] See below, p. 236–237.
[28] Baḥrānī, *H*, 1, p. 133.

> Imam Ṣādiq said, "We are only obligated to announce to you the principles (*al-uṣūl*). You are obligated to deduce (*tafarriʿū*)".
>
> Imam Riḍā said, "We must announce the principles, you must deduce (*tafrīʿ*)". [*H*, 1, 133]

These principles, then, function as exegetical guides in the exposition of the law. That an exegete is permitted to use them is proven by the Imamic sanction that accompanies them. Having stated a principle, Baḥrānī then produces *akhbār* which prove its validity. Before listing the principles, Baḥrānī makes it quite clear that the principles of exegesis, as they are presented here, are the only valid principles upon which to base legal rulings. In a conclusion to M11 (analysed below), Baḥrānī lists twelve principles of exegesis which his colleagues (*aṣḥāb*) claim to be valid, but which he considers to be invalid. I begin by listing the acceptable principles in paraphrase:

1) All things, which are not known to be impure, are pure until their impurity is known.
2) Anything which is not known to be forbidden is permitted.
3) Certainty is not dispelled by doubt.
4) Every agent is responsible for his actions, as long as the opposite is not proven.
5) One should rule that anything that appears to pollute, or appears to be forbidden, is actually pure and permitted (respectively), as long as it is not specified as such.
6) After having left something, there is doubt that it has remained in the same state.
7) An aim of the law is to eliminate hardship.
8) When *akhbār* conflict, use the recorded methods of preference (*murajjahāt*).
9) Forgiveness is requisite in that which "God is greater than".[29]
10) Caution (*iḥtiyāṭ*) is obligatory at the appropriate times.
11) The ignorant *mukallaf* is forgiven his transgressions.

[29] The implications of this principle are not immediately obvious in translation. The principle refers to occassions when a *mukallaf* could not have acted otherwise. The justificatory *khabar* concerns the one who faints during prayer. Since sleeping invalidates ritual purity, there is an issue over whether or not the one who faints (*al-mughmiy ʿalayhi*) has violated his ritual purity. The *akhbār* seem to indicate that his ritual state is unaltered, his fainting being an "act of God", as it were. This is surprising since *iḥtiyāṭ* would seem to indicate the need for a renewal of ritual purification. Baḥrānī, *H*, 1, p. 152.

12) The general rulings of the author of the Sharīʿa are certain and secure.
13) Rules concerning food laws: eat eggs which are not round before those that are; eat birds which flap their wings before those that glide in the sky; eat fish with fins before those without fins.
14) God has eliminated the blame for forgetfulness, ignorance and inability to perform actions.
15) Dissimulation is obligatory when it is necessary.
16) One can act on the basis of *al-barāʾa al-aṣliyya* at the appropriate points in time.
17) If there is doubt over whether two or four prostrations are required for the noon prayer on Friday, the extra two should be performed.
18) Accept ambiguity in what God has made ambiguous and remain silent about that which God has remained silent.
19) What increases and decreases the created state of a thing is proven to be a defect.
20) All animals which chew the cud, their saliva and the food remaining after they have eaten is lawful.
21) Accept the opinion of one who cannot be contradicted.

These principles are a puzzling collection. Many of them only become clear after examining examples of their operation. Some appear as mere reformulations of others and the list generally lacks organisation. It is quite possible that the list is a hastily constructed effort to cover those areas of legal theory which were not sufficiently described in M1–10. In order to aid analysis of these principles, they can be divided into two initial categories:

a) those that are described and justified elsewhere in M1–10
b) those that are introduced for the first time in M11

Those in the first category (nos 9, 10, 11 and 16) are accompanied, not by a justification, but by a note from Baḥrānī, directing the reader to the appropriate Prologue. Since I have discussed these previously, I concentrate here on the second category.

The second category (ie those principles not explicitly discussed in M1–10) can be subdivided into three:

a) Principles relating to the problems of epistemology (nos 2, 3, 5, 6 and 18)

b) General principles (nos 7, 8, 12, 14, 15 and 21)
c) Principles relating to specific areas of positive law (nos 1, 4, 13, 17, 19 and 20)

The manner in which a particular principle is justified follows a predictable pattern:

1) Quranic verses relating to the principle
2) *Akhbār* explaining the meaning of the Quranic verses which also justify the principle
3) Exegesis of the material in 1) and 2)

The third section often consists of one line, or is missed out altogether, indicating that Baḥrānī considers the revelatory material in 1) and 2) to be self-explanatory. In what follows I analyse each category in turn.

Principles Relating to Epistemology

In Chapter Three, I discussed principles 1 and 2.[30] These relate to the acceptable method of proceeding when there is no (perceived) text which provides an indicator for a particular case. The conclusion was that in such circumstances one may legitimately presume an action to be permitted, or an item to be ritually pure. Principle 3 is pithily expressed as "certainty is not overturned by doubt" and refers to the *mujtahid* practice of modifying assessments established by a certain textual indicator with a *mujtahid's* opinion. Baḥrānī does, it appears, permit the modification of a certain assessment, but only through a textual indicator. Once a textual indicator is established as existent, then it is certain that the ruling in the text is modified. If the modifying textual indicator is unclear in some way, then, and only then, does *iḥtiyāṭ* come into force as a legal principle. The most obvious application of this principle concerns the assumption that a command effects an obligation.[31] For Baḥrānī, a textual indicator (other than the command itself) must be established (with certainty) to modify the command from indicating an obligation to indicating permission or recommendation. The crucial point here is that mere opinion (*zann*) that a ruling indicated by a text is modified is insufficient.

[30] See above, p. 92–96.
[31] See above, p. 158–160.

There must be certainty that it is modified. However, Baḥrānī goes on to say, certainty of the fact of modification does not necessarily entail certainty as to the nature of the modification. When there is doubt as to the latter, then *iḥtiyāṭ* is applied. The certainty of the original ruling cannot be overturned by the certainty of modification alone; it must be certainty as to the nature of the modification.

Principle 5 concerns the problem of pure items mixed with impure items in such a manner that they are indistinguishable and inseparable. Baḥrānī distinguishes here between limited (*maḥṣūr*) and unlimited (*ghayr maḥṣūr*) mixing. For example, if the *mukallaf* knows that one of two identical cups has been ritually defiled, but does not know which, then this is an example of limited mixing. In such cases, *iḥtiyāṭ* is necessary (and, in this example, neither cup should be used). However, when the mixing is unlimited, there is an assumption of purity, and *iḥtiyāṭ* is unnecessary. For example, there is some debate about the permitted nature of cheese, since it is made with rennet, and there is no certainty that the animal was slaughtered in the correct way. Hence cheese, a generally available commodity, represents a case of unlimited mixing. Although, one knows that some cheese is possibly unfit for consumption, one does not know which falls into this category. In such cases, there is an assumption of purity, until one knows (ie one has *ʿilm*) that a particular piece of cheese is impure.

Finally, principle 18 commands the exegete to accept God's ambiguity and silence. This is a general exhortation, justified by three *akhbār* with no exegetical comment. It appears as a general criticism of those who attempt to deduce rulings on matters which God himself has remained silent (Baḥrānī means those who practice *ijtihād*). In such cases the silence and ambiguity in God's word should be accepted. The means of sanctioning actions in such circumstances have already been examined.[32]

These principles can be seen as an elaboration of Baḥrānī's thoughts on BA. They restrain the principle of *iḥtiyāṭ*, limiting it to specific circumstances (ie when there is knowledge of the existence of a ruling, but uncertainty as to its content). Baḥrānī realises, it seems, that *iḥtiyāṭ*, if taken to its extreme, could lead to a paralysis in religious life and Muslim society more generally. One would be unable to attain certainty over ritual purity unless one personally cleaned the

[32] See above, p. 91–102.

mosque and washed one's clothes, using water which one had personally obtained in a matter which secured its ritual status. Even then, one might be racked by doubt that one had performed the ritual purification in the correct way. Though he places great emphasis on certainty, Baḥrānī recognises a number of situations when certainty can be assumed rather than proven, and naturally, the Imams, through the *akhbār*, have sanctioned every such provision.

General Principles

The general principles do not form a coherent category, but they have in common the generality of their application. For example, principle 7 declares that God intends the law "to reduce hardship" (*raf' al-ḥarj*). Two Quranic quotes are cited as proof of this principle. The *akhbār* cited next are direct interpretations of one of the Quranic verses. This, of course, is compatible with the prohibition on direct interpretation of the Quranic text:[33]

> 'Abd al-a'alā said to Imam Ṣādiq, "I stumbled and my fingernail was torn. I made a bandage for my finger. How can I perform *wuḍū'* (the ritual washing required before prayer)? He said, "[The answer] is known. Its reference is found in the Book of God, when he says, 'He has not made for you hardship in religion'. [Q22.78] So wipe [the bandage when you do *wuḍū'*]". [*H*, 1, 151]

For this principle to be consistent with Baḥrānī's theory of *iḥtiyāṭ*, the case of the bandaged finger must be a case which is unmentioned in the sources, or at least perceived to be so. Reducing hardship is consonant with principles 1 and 2 (the assumption of purity), but these only apply to cases where there is no perceived relevant indicator. Principle 7 must also apply to such cases, for if there is an indicator, albeit an unclear one, then *iḥtiyāṭ* is effective. *Iḥtiyāṭ* certainly does not reduce hardship—it imposes a greater burden upon the *mukallaf*.

Principle 12 (the general rulings of the author of the Sharī'a are certain and secure) is similarly general in its application.[34] Principle 14, where ignorance and forgetfulness and the inability to perform impossible demands are all forgiven, is clearly consistent with Baḥrānī's

[33] See above, p. 48–55.

[34] For an account of general expressions in Bihbahānī's writings, see above, p. 174–178.

views on the *mukallaf's* knowledge as essential to the Lawgiver's apportionment of blame. Principle 15 establishes *taqiyya* when it is necessary, not just for the Imams, but also for the community. The final principle (no 21) establishes that the word of one who cannot be contradicted (such as the woman who says she is menstruating) is of certain validity. This is broadly in line with the principle of eliminating hardship. Though rationally it would seem acceptable to doubt a woman's word (she may be lying), for the purposes of the law, it would be impractical to practise *iḥtiyāṭ* on such occasions. Her word is accepted. There are five convenient *akhbār* which support such a view.

Principles Relating to Specific Areas of Positive Law

Some principles listed in M11 are so specific in nature that they seem out of place. Whilst principles of the above two types could be applied to any area of law, these are restricted in their remit. For example, principle 13 is comprised of three linked rules:

> Eat eggs which are not round before those that are.
> Eat birds which flap their wings before those that glide in the sky.
> Eat fish with fins before those without fins.

Each of these food laws is justified by reference to an Imamic report. Their placement in a general account of the law is perplexing.

Principle 19 enlightens us as to the reasoning behind such specific principles:

> Whatever is more or less than the original state (*aṣl*) of a created being, is proven to be a defect. [*H*, 1, 157]

The accompanying report concerns a slave girl who has no pubic-hair growth. This is counted as a defect, and hence should be declared at the time of sale. The underlying reasoning here is that there is a created norm, and anything which deviates from that norm is a defect. Transferring this reasoning to principle 13, the created norm is for eggs not to be round, for birds to flap their wings and for fish to have fins. Hence these foodstuffs are preferable to those which deviate from this norm. However, this reasoning is not spelled out by Baḥrānī.

Principle 17 appears as a specific application of the principle of *iḥtiyāṭ* to a particular problem of law: that of the content of the noon

prayer on Friday when the congregational prayer is also obligatory. The answer, unsurprisingly, is to perform the two doubtful prostrations.

Epistemologically speaking, these principles are certain (*yaqīn*) since they were explicitly spelled out by the Imams, therefore applying them to novel (unregulated) circumstances will, in itself, bring certain results. This reduces the exegete's role to a minimum, and might be said to thereby reduce his authority. However, the exegete must know these principles (that is, he must be trained) and must be able to recognise when and how a case falls under one of these principles. The exegete's opinion does not formally enter into the correct application of these principles, but the figure of the exegete, who passes on certain rulings to the community seems, to me, implicit in Baḥrānī's exposition.

The principles generally serve to reduce the areas of the law which are subject to *iḥtiyāṭ*. By developing principles to cover novel circumstances, Baḥrānī has ensured that certain rulings can be found in a large number of cases not covered by the revelatory texts. As was the case at other points in his theory, he withdraws from a full-blown scepticism which would lead to an impractical level of caution, and instead introduces elements which, though not invalidating *iḥtiyāṭ*, certainly reduce its operation.

Baḥrānī also discusses principles which are used by the scholars but which he rejects. The implicit assumption of an exegete or scholar is confirmed at the start of the appendix to M11:

> Other principles have become well known in the discussions of the Shi'ite scholars (may God be pleased with them), upon which they base rulings (*aḥkām*). [*H*, 1, 160]

It is, then, the scholars who have the responsibility of basing rulings on principles. The scholars mentioned in the above quote have not deviated because they have issued rulings *per se*, but because they have based them on unjustified principles—that is, principles that are not established by the *akhbār*.

The twelve principles listed by Baḥrānī are:

1) It is not permitted to delay the explanation beyond the time of need.
2) Words in the *akhbār* should be interpreted according to their *ḥaqīqa shar'iyya* meaning; and if not, then their specific customary meaning; and if not, then their linguistic meaning; and if not, then their general customary meaning.

3) Not finding evidence of a legal ruling is in itself evidence of a legal ruling of permittedness.
4) Two conflicting indicators should be harmonised rather than one rejected.
5) When *akhbār* conflict, and it is not certain that an action is obligatory or recommended, then BA dictates that we treat it as recommended.
6) For an order to be obligatory, *qarā'in* are required, otherwise a command is merely a recommendation.
7) If a report is weak according to the classification system of *akhbār*, then it can only produce a recommendation.
8) A request of an essential nature from the Lawgiver is assumed to include every action which falls under this category, because it is assumed that a request is unrestricted.
9) Of all the means of combining the *akhbār*, interpreting a command as a recommendation is the clearest.
10) It is not a condition of a current description of a subject that he be performing the action at the moment of description.
11) If a contract contains an invalid precondition, then this nullifies the contract altogether.
12) A command to perform an action necessitates a prohibition on doing its opposite.

These rejected principles are also a strange collection. Most of them have been refuted by Baḥrānī elsewhere in the Prologues, and he refers the reader to the relevant sections. The only new material introduced here is the refutations of principles 1, 8 and 11, and only the first and last receive any real comment or discussion.

Rejected principle 1 refers to the issue of *ta'akhīr al-bayān* (the delay in explanation) which is mentioned by Samāhijī as an issue of dispute between the Akhbārīs and *mujtahids*.[35] The issue at hand is, must the Lawgiver always explain all the details of a ruling, for to give a ruling but not its details, would be asking the impossible from the *mukallaf*?

Baḥrānī states that this is a Sunni doctrine, adopted by some Shī'a.[36] It is invalid not just because it is a Sunni doctrine, but

[35] See Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 35 and p. 50, where the rejection of *ta'khīr al-bayān* is associated with stricter Akhbārīs such as Astarābādī. See also Weiss, *God's Law*, p. 463–467.

[36] The criticism of Uṣūlī thought as being Sunni in origin, was certainly an element

because of the issue of *taqiyya* (an issue not relevant to Sunni law). *Taqiyya* can prevent a full explanation of the law. It might be argued that delaying an explanation causes hardship to the *mukallaf* since he cannot fulfil the law (and hence be in contradiction to principle 7 in the accepted list). However, Baḥrānī argues that this is not the case because:

> A wonderful principle has been decided upon, by [the Imams] for cases such as this: following the way of *iḥtiyāṭ*. [*H*, 1, 160]

Hence, for Baḥrānī, it is permitted for the Imams to delay an explanation because they have provided a solution to this legal lacuna in the form of *iḥtiyāṭ*. To deny this is "pure *ijtihād*" (*ijtihād ṣirf*—note the pejorative use of the term here).

Rejected principle 11 concerns contract law. Some scholars have argued that an illegitimate condition in a contract nullifies the contract completely. Baḥrānī adheres to an alternative opinion: the condition alone is invalid but the contract generally is valid. The *akhbār*, he admits, are unclear on this point, and hence it is necessary to perform *iḥtiyāṭ*. *Iḥtiyāṭ* in this case requires treating the contract as valid. The reason for this is that whether or not a contract with an illegitimate condition is valid is uncertain (*shubha*). Treating it as invalid would expose the parties to a risk of non-fulfilment of the contract. To treat it as valid may also be a risk, but only to the extent of performing superfluous actions which are not contractually necessary. Elsewhere I have demonstrated how this principle is, rather inexactly, utilised in Baḥrānī's positive law.[37]

These principles are rejected, then, because they are unjustified by Imamic sanction; but more importantly, they are rejected because their application gives rise to doubt as to the law's fulfilment, not certainty. They are then *ẓannī* rather than *ʿilmī*. Unlike the accepted principles, they fail the rigid epistemological criteria demanded by Baḥrānī's legal theory.

Since the scholar transmits this *ʿilm* to the ordinary *mukallaf*, there

in Akhbārī polemic, and this point is well expressed by Stewart, *Islamic Legal Orthodoxy*, p. 185. He overstates the case by saying it was a major feature. Accusing one's opponents within Shiʿism of taking doctrine from the Sunnis was a common feature of classical Shīʿī jurisprudence. Akhbārīs were accused of this by Uṣūlīs (see, for example, Khwānsārī, *Rawdāt*, 1, p. 142 and p. 144–145, where Astarābādī is accused of being a closet Ashʿarī).

[37] Gleave, "Marrying Fatimid Women", p. 52–53.

should, ideally, be no variety of opinion (*ikhtilāf*) amongst the scholars. Their rulings should be identical, and both they and the commoners should be subject to them. It is in this sense that Akhbārīs such as Baḥrānī understood the dictum "We are all *muqallids* to the Imam", not in the sense that there was no role differentiation between scholars and commoners.[38]

Bihbahānī's Theory of Juristic Authority

It is important to note from the outset that Bihbahānī recognises two modes in which the *ʿulamāʾ* generally, and jurists (*fuqahāʾ*) in particular, have authority within the community: authority based on delegation from the Imam and authority based on learning. Educational qualifications in themselves provide authority, but they also allow entry into the class of people delegated by the Imam to carry out certain community functions during the occultation. That these two modes are, therefore, linked is clear, but the manner in which they operate is quite distinct in Bihbahānī's theory.

In FJ33, Bihbahānī presents the various duties a scholar might undertake in the community:

> The *mujtahid*, jurist (*faqīh*), jurisconsult (*muftī*), judge (*qāḍī*) and the designated trustee (*ḥākim al-sharʿ*) are, at this point, encompassed in one person.
>
> With respect to the actual rulings, he is a *mujtahid* [ie one who attempts to discover the actual rulings of the law], since the door to knowledge has been closed.
>
> With respect to the clear rulings, he is called a *faqīh*, for you know that he has acquired knowledge of the clear rulings in a prescribed manner.
>
> With respect to when he offers his opinion, he is called a *muftī*.
>
> With respect to when two litigants bring a case before him, he is called a *qāḍī*.
>
> And irrespective of whether a case is brought before him or not, he is called *ḥākim al-sharʿ* in [matters] such as the care of orphans and those absent and in other countless matters in the law.
>
> And with respect to the conditions of *ijtihād*, he is called an expert in traditions, theology, legal theory, transmission and other disciplines. [*FJ*, 499–500]

[38] For this dictum, see Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 26 and p. 41.

These various tasks, it seems, can only be performed by a member of the scholarly elite, more specifically a *mujtahid*. Bihbahānī notes though that the *mujtahid's* status changes dependent upon which of these roles he is performing. He is always a *mujtahid*, but he acts as a *qāḍī*, *muftī* or *ḥākim al-sharʿ* in particular circumstances.

The major distinction is between the roles *faqīh* and *muftī* on the one hand and *qāḍī* and *ḥākim al-sharʿ* on the other. In the first two roles, the *mujtahid* presents his opinion in areas where "the door of knowledge (*bāb al-ʿilm*) has been closed". He presents both his reasoning and his conclusions, and the non-*mujtahid* (*al-ʿāmmī*) is to follow the latter without necessarily understanding the former. The *mujtahid* is not permitted to follow the opinion of another *mujtahid*, though he may look towards another's opinion for confirmation (*taʾyīd*), just as he may look towards the findings of those who have written works in linguistics or the science of transmission. His use of this material does not represent *taqlīd*, but the legitimate use, by a *mujtahid*, of the resources available in the formulation of a ruling. Finally, the *mujtahid* is not permitted to follow the rulings of a dead *mujtahid*. The reason for this is that when the *muqallid* follows the *mujtahid's* opinion he is investing authority not in the ruling directly, but in the person who issued it. The authority of the ruling is dependent upon the scholar, and if the scholar is dead, then the *muqallid* is not in touch with the *mujtahid*, and the ruling loses its authority. The *muqallid* must turn towards another *mujtahid*. Bihbahānī ends his account of the *mujtahid* acting as *faqīh* or *muftī* by saying:

> These are the characteristics of the *mujtahid* which he has because he is a *mujtahid*. They are not restricted to what has been said, indeed, perhaps, others could be found. Hence one should obey his opinions, and find amongst them that his word is a proof for the *muqallid*. It is obligatory for the *muqallid* to act on his word alone, forsaking all other *mujtahids* to whom he is not bound, or has not followed. When the most learned and most knowledgeable (*al-aʿlam waʾl-afqah*) is found, following him is an individual duty, and if they are all equal, then one must choose. [*FJ*, 500–501]

The *mujtahid* commands this authority because he is a *mujtahid*—that is, because of his learning. The *muqallid* attaches himself to the *mujtahid* ("he binds himself to him") and for that *muqallid*, the *mujtahid's* word is a proof. If the *muqallid* perceives there to be a more learned *mujtahid*, he should change his allegiance: the ultimate decision as to who is the most learned seems to rest with the *muqallid*, though how he is able to recognise the most learned is unclear.

This rationale for juristic authority is not in operation with respect to the *qāḍī* or *ḥākim al-sharʿ*. In these roles, the *mujtahid* has authority, not because he is learned, but because it has been delegated to him by the Imam. As a *qāḍī* and as a *ḥākim al-sharʿ*, the *mujtahid's* ruling outlives his death. His ruling is the final ruling permitted (in theory) upon the matter in hand. It is authoritative for both other *mujtahids* and *muqallids*:

> After he has given his ruling, the *qāḍī's* judgment lasts forever, even if he dies. Its status after his death is the same as when he was alive. His ruling does not die with him. [*FJ*, 501]

The reason for the more definitive stature of the *qāḍī's* ruling (and that of the *ḥākim al-sharʿ* also) is that, whilst the *muftī's* opinion is authoritative because the scholar is a *mujtahid*, the *qāḍī's* opinion is final because he is "the representative of the Imam" (*nāʾib al-imām*) or "delegated by the Imam" (*manṣūb min al-imām*).[39]

This distinction reveals the two means whereby, according to Bihbahānī, the scholarly elite, and jurists in particular, have authority over the community in the absence of the Imam: through their learning and through delegation by the Imam. Both means are present in one individual (the *mujtahid*), but the status of his decisions differs according to the role he is performing. As a *muftī* he has authority because of who he is; as a *qāḍī*, he has authority because the Imams have given it to him. Since the *qāḍī* is acting for the Imam, and not, in a sense, in his own right, his decision is, in effect, that of the Imam. Like the Imam's decision, it has a permanent quality. The *muftī* merely speaks for himself, whilst the *qāḍī* speaks for the Imam. The added responsibility of being a judge made Shīʿī scholars, in theory, reluctant to accept the role of *qāḍī*, since it was an additional burden (with the potential of additional punishment).[40] Interestingly, Bihbahānī states, in one of his few references to contemporary times, that, "In these times, a *qāḍī* who will arbitrate (*qāḍī al-taḥkīm*) cannot be found",[41] though it is unclear whether this is a lament for the unwillingness of the *'ulamā'* to accept their responsibilities, or a comment on the paucity of qualified individuals.

Having made this distinction between authority through learning and authority through delegation, Bihbahānī concentrates entirely on

[39] See above, note 3 for the secondary literature on this topic.
[40] I analyse these issues in Gleave, "Two Shīʿī Theories of Judicial Authority".
[41] Bihbahānī, *FJ*, p. 501.

the former in the other sections of *FH* and *FJ*. His purpose is to outline how the theory of *ijtihād*, analysed briefly in Chapter Three, establishes the authority of the jurists. It is clear, then, that the community is divided into *mujtahid* and *muqallid*; the latter need not understand the former's reasons for giving a ruling, they are commanded merely to follow it. The *muqallid's* opinion, from a legal perspective, is worthless:

> You have learned that action on the basis of opinion is forbidden, except that it be the opinion of the *mujtahid* after he has expended effort in respect of all [the sources] which seem pertinent to him. [*FH*, 201]

How one becomes a *mujtahid* and, therefore, how one's decisions become authoritative was a matter of debate within the Uṣūlī tradition.[42] Bihbahānī presents his own assessment of the "qualifications of *ijtihād*" (*sharā'iṭ al-ijtihād*) in FH36. The prospective *mujtahid* must have attained proficiency or "knowledge in" (*al-ʿilm bi, al-maʿrafa bi*) a number of disciplines:

1) linguistic sciences (*al-ʿulūm al-lughawiyya*)
2) the customs (of an area) in their general and specific aspects (*al-ʿurf al-ʿāmm wa'l-khāṣṣ*)
3) theology (*kalām*)
4) logic (*manṭiq*)
5) legal theory (*uṣūl al-fiqh*)
6) *ḥadīth* (but only those necessary for understanding the law—*maʿrafat al-ʿilm bi'l-ḥadīth al-mutaʿallaqa bi'l-fiqh*)
7) exegesis (*tafsīr*)
8) the legal thought of the jurists (*maʿrafa fiqh al-fuqahā'*)
9) the science of transmission (*maʿrafat al-rijāl*).

Finally, he must have the quality termed "holy strength" (*al-quwwa al-qudsiyya*).

The last of these, "holy strength", consists of a number of characteristics, some of which appear to be objective (eg the *mujtahid* should have sound sensory faculties), whilst others are more subjective (eg he should not be stubborn, impetuous or argumentative).

At the end of FH36, Bihbahānī lists additional qualities which are entitled "*muḥammalāt al-ijtihād*". These, it seems, are not conditions

[42] This was the case in Sunni tradition. See Hallaq, "Was the Gate".

of a *mujtahid* as far as Bihbahānī is concerned (though he mentions that some scholars have counted them as such), but additional "burdens" to the core ten qualities listed above. These supplementary skills consist of proficiency in areas such as medicine, astronomy and mathematics so far as they are useful to the study of the law.

These qualities may seem quite vague to the reader. Bihbahānī does not explain what is meant by proficiency in each of these areas, and many of the qualities associated with "holy strength" are decidedly subjective. However, Bihbahānī's view is clearly that the rank of *ijtihād* is not attained easily. He appears more concerned to justify the inclusion of certain disciplines in the list, than to explain what is required in each of them. The qualifications are each accompanied by a justificatory passage of varying length. For example, knowledge of *uṣūl al-fiqh* is justified in the following manner:

> Amongst the conditions [of *ijtihād*] is *uṣūl al-fiqh*. The requirement of it is obvious, as scholars have explained in the past, and each of the sections which we have written [in this book] declare, in the highest voice, that [*uṣūl al-fiqh*] is needed in a number of ways. They [the sections] declare also that it is needed to protect one from ignorance and the error of neglect. [*FH*, 336]

Bihbahānī goes on to explain that *uṣūl al-fiqh* is the most important of the qualifications (*aʿẓam al-sharā'iṭ wa ahammuhā*).

Translating the term *sharā'iṭ* as "qualifications" (as I have done up to this point) requires some explanation. Strictly speaking, *sharā'iṭ* are "conditions"; that is, conditions which must be fulfilled before the title of *mujtahid* can be conferred upon a scholar. They are, if you like, a checklist which a non-*mujtahid* (or another member of the scholarly elite) might use to verify that a particular scholar is a potential *mujtahid*. As has been mentioned by other commentators, the means whereby a scholar becomes a *mujtahid*, in both Sunni and Shīʿī legal thought, are quite informal.[43] A scholar gains this status, it appears, through a general acceptance of his authority by the scholarly community, and later by the community at large. Bihbahānī does not explicitly state his support for such a process; in his *al-Risāla fī'l-ijtihād wa'l-akhbār* it appears that the means whereby a scholar gains the status of *mujtahid* (*ithbāt al-ijtihād*) is through internal recognition by the scholar himself that he has fulfilled the requisite

[43] See Makdisi, *Rise of the Colleges*, p. 270–276; Litvak, *Shi'i Scholars*, p. 21–44.

criteria, as they have been laid out by the *ʿulamā'*.[44] If he is correct and honest in this internal recognition, the community, it appears, will naturally accept his authority as *mujtahid*. It is, however, the scholar's task to put himself forward as a *mujtahid* before the community can consider his claim. What is perhaps surprising about this account is the lack of reference to what we know about the mechanism of promotion in the Shrine Cities at the time: that is, the mechanism of *ijāzat al-ijtihād* given by a *mujtahid* to his pupil.[45] There is clearly a disjuncture between the theory of attainment of *ijtihād* and the actual operation of the educational system.

Bihbahānī's list of "the conditions of *ijtihād*" is, then, a reflection of his own view of the essential elements of a *mujtahid's* training, and the curriculum is quite broad, including all the major elements of Islamic scholarship, except *taṣawwuf* and *falsafa*. The breadth of learning required leads to a qualification with wide-ranging powers of interpretation. Elsewhere, Bihbahānī argues against the view that *ijtihād* can be segmented.[46] A *mujtahid* must be an expert in all areas of legal knowledge; partial *ijtihād* does not qualify as *ijtihād*. The interconnectedness of the Sharīʿa, he argues, means that knowledge limited to the areas which appear relevant to, say, inheritance law, is insufficient to give authority to rulings in that area. The partial *mujtahid* (*al-mujtahid al-mutajazzī*) can never gain knowledge (*ʿilm*) that he has exhausted all possible human effort in his search for a ruling. His *ijtihād*, if it is allowed to be called such, can never be equal to that of a total *mujtahid* (*al-mujtahid al-muṭlaq*).

Bihbahānī, like Baḥrānī, recognises that the duty of *taqlīd* is only placed upon the *ʿāmmī* in matters pertaining to legal obligations (*al-umūr al-taklīfiyya*).[47] The reason for this is that in matters relating to religion (*uṣūl al-dīn*), there is knowledge (*ʿilm*) as to what constitutes correct belief:

> As for *uṣūl al-dīn*, there is no doubt that the door of knowledge is not closed in relation to such matters. [*FJ*, 494]

[44] See Bihbahānī, *Rasā'il*, p. 23–28.
[45] See Litvak, *Shi'i Scholars*, p. 1–19.
[46] Bihbahānī, *Rasā'il*, p. 66–86.
[47] Baḥrānī's position can be seen, from a terminological point of view, as the reverse of that of Bihbahānī. Baḥrānī allows *ijtihād* with respect to matters of religious belief. In *ʿAqd al-jawāhir al-nūrāniyya*, he states that it is the duty of each *mukallaf* to discover religious truths, but he disallows *ijtihād* in matters of law. This terminological reversal, however, does not alter the fact that the positions of the two authors are substantially the same. See *ʿAqd al-jawāhir*, folio 114.16–120.2.

There is no *taqlīd* in *usūl al-dīn*, because there is no *ijtihād* of the *mujtahids*.

Bihbahānī mentions another area where there is no *ijtihād* or *taqlīd*; that of the "placement of rulings" (*mawḍūʿāt al-aḥkām*).[48] If a *mujtahid* rules that substance of type X purifies objects of type Y, the *muqallid* should follow this rule. However, whether a specific substance X1 has purified a specific object Y1 is a matter of the "placement" of the *mujtahid's* opinion, and in such matters the *mukallaf* himself (whether he is a *mujtahid* or a *muqallid*) must make the decision. The *mujtahid*, it seems, only has opinions on the rulings themselves, not on their discrete application to specific circumstances.

In other matters, such as the testimony of two witnesses in a contract, the rule is known with certainty (ie it is known, from the Qur'ān, that the testimony of two witnesses validates a contract), but its application to a specific case is yet to be determined. In such cases it is the *qāḍī* who makes the decision. There is no *taqlīd* as such, because the *qāḍī* (though he must be a *mujtahid*) is not acting as a *mujtahid* in such matters, but as a representative of the Imam. Hence the *mukallaf* must obey the *qāḍī's* decision, but he is not performing *taqlīd* in so doing. The *qāḍī* represents the Imam, and thus if the *mukallaf* is following anyone here, it is the Imam himself.

This, then, appears to be Bihbahānī's view in sum: a *mujtahid* must meet certain conditions of education and personality, and once he has done this, he may perform certain functions in society. These functions fall into categories: those which have been specifically delegated to him by the Imam (such as *qaḍā'*) and those which he undertakes as a *mujtahid* (such as *iftā'*). In the former case, he is representing the Imam, and his decrees are, in effect, the Imam's decrees, and survive his death. This is not to say that he is sinless (as the Imams were), merely that sin is an inappropriate category to use for any errors that he might make in such activity (unless, of course, he takes bribes and is corrupt).[49] The *qāḍī's* decision has the force of the Imam's decision.

As a *muftī*, however, he acts in a personal capacity as a learned person, attempting to discover the content of the law. His activity in such matters is his own opinion, and the need for such an opinion

[48] This corresponds to Baḥrānī's second type of ignorance (or knowledge): when a ruling is known, but its application is neglected or ignored. See above, p. 20.
[49] Ulrich Reibstock has explored the epistemological status of the *qāḍī's* error in "A Qāḍī's Error".

comes from one of his followers (*muqallidūn*). They follow his opinions as a matter of choice, unlike in the case of a *qāḍī*, where they have no choice. By choosing to follow the *mujtahid*, they bind themselves to him personally. His decisions are authoritative, not because they are necessarily right, but because he has made them. If at any point the *muqallid* discerns there to be a more learned *mujtahid* (*aʿlam*), he must change his allegiance. Because the commitment is to the person and not the opinion, when the person dies, the *muqallid* must find another *mujtahid*.

However, the *muqallid* is not to follow the *mujtahid* in two specific areas. These are areas in which *ijtihād* does not operate: ie matters of religious belief and the application of rules to circumstances. The former are known through texts, and the latter are known as soon as the original rule is known. In either case it is inappropriate to talk of *ijtihād* and *taqlīd*.

The remaining sections on *ijtihād* and *taqlīd* in *FH* and *FJ* are rebuttals of incorrect opinions. In FH7, Bihbahānī corrects a misconception of the Akhbārīs concerning *ijtihād*. The Akhbārīs have failed to understand that the *mujtahids* do not consider *zann* to be correct; it is what appears to the *mujtahid* to be correct. *Ẓann* is also not unbridled opinion making—it is the result of a procedure which is based upon the texts of revelation. Furthermore, the procedure itself is of certain validity, though the results are less than certain. Finally, to claim as some conciliatory Akhbārīs do, that their *ʿilm* is equivalent to a *mujtahid's zann* (and the dispute is, therefore, linguistic rather than substantial) ignores the important difference between *ʿilm* and *zann*, both in language and in *uṣūl al-fiqh*.

In FH8, Bihbahānī refutes the Akhbārī rejection of *taqlīd*. The Akhbārīs say they are *muqallids* to the Imams but:

> In truth, this is a denial of *taqlīd*, for *taqlīd* to the Sinless Ones is not *taqlīd* at all. The basis of this ruling is that regarding the *uṣūl al-dīn*, since they are known, it is not permitted to perform *ijtihād* or *taqlīd*. [*FH*, 131]

Furthermore, *taqlīd* has a long pedigree in Shīʿa history. The *akhbār* prove that *ijtihād* and *iftāʾ* are permitted, and that the early Shīʿa followed the *fatwās* of the learned scholars. Women and non-scholars have always had to rely upon the *taqlīd* to the learned classes. *Ijmāʿ* also demonstrates the permitted nature of *taqlīd*. The truth of the matter is that Akhbārī denials of *taqlīd* are disingenuous, because

"the Akhbārī only denies [*taqlīd*] with his tongue",[50] and follows the decisions of past scholars as slavishly as a *muqallid* follows the *mujtahid's* opinion. Some Akhbārīs even deny that one need be proficient in the linguistic sciences to understand the texts, though Bihbahānī accepts that this is not all Akhbārīs.[51] The need for knowledge of the linguistic sciences to gain an adequate understanding of the texts seems axiomatic to Bihbahānī.

These refutations are, bearing in mind Bihbahānī's legal theory, unsurprising. They follow a predictable pattern with predictable themes. What is of interest is that although Akhbārī views on *ijtihād* and *taqlīd* are refuted, there is little or no explicit engagement with the issue of juristic authority. The Akhbārī position is refuted on epistemological grounds (ie that they have misunderstood the nature of *zann*), not because their theory threatens the authority of the jurist. It might be argued that the epistemological discussion is a foil for the threat to *mujtahid* authority, but for this to be the case, one would be forced to interpret Bihbahānī's discussion as something other than what he presents. This is possible, but speculative. Bihbahānī did wish to repel the Akhbārī threat, but not because it undermined the idea of the scholarly elite. We have already seen how Akhbārī principles could be married with an elitism in Baḥrānī's theory. Bihbahānī rejects Akhbārī *uṣūl al-fiqh* because he considers it to be intellectually untenable. The certainty of knowledge which they claimed to have obtained, is, in many areas of the law, unobtainable. Bihbahānī proposed a more credible theory; that of *zann*—the result of *ijtihād*. If there was a hidden agenda in these discussions, it was not the authority of the elite as such, but the type of authority the elite could claim. For Bihbahānī, authority came through the person of the *mujtahid*, and hence was restricted to the upper echelons of the scholarly community. For Akhbārīs, it seems, it was more diffusive, spread throughout the scholars, stemming from their role as protectors of the religious texts and the knowledge contained within them.[52]

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[50] Bihbahānī, *FH*, p. 133.

[51] This is confirmed by Samāhijī's text, see Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 27 and p. 42.

[52] Though Baḥrānī, at times too, indicates his preference for the most learned, see above p. 226–227.

Conclusion

The major difference between Baḥrānī and Bihbahānī on the matter of juristic authority is not whether the scholars have authority, but how they gain this authority. The debate between them (and by transference, the debate between Akhbārīs and Uṣūlīs) concerns the intellectual coherency of the justification for juristic authority. Baḥrānī was eager to place supreme authority in the law itself—that is, the scholars have authority because they are the section of the community who will (or are most likely to) produce a correct formulation of the law. Their rulings demand obedience because they are the correct formulation of the law, and the more learned the scholar, the more likely his ruling is to be correct. Baḥrānī does not discuss the possibility of juristic difference (*ikhtilāf*), and seems to consider it an impossibility if his legal theory is followed. Indeed Baḥrānī claims that the scholars have been delegated the task of transmitting the law to the community, not of interpreting it.

Bihbahānī, on the other hand, invests the jurists with authority, first, because they are the people who are qualified to give opinions on the law and, second (for certain functions only, it seems), because they are the people to whom authority has been delegated by the Imam. The opinions are authoritative because the scholars have made them, not because they are necessarily right. Even though the *mukallaf* may act in accordance with the law, if he has not followed a *mujtahid* in such matters, his performance is invalid. Juristic difference is inevitable, since all *mujtahids* are attempting to discover the law in actuality, but are limited (on account of their human nature) in this search. The mechanism of following the most learned scholar could be seen as an attempt to reduce juristic difference, but the means whereby such a scholar might be recognised are so vague that, in practice, the emergence of a single scholar of recognised stature was rarely achieved.

CONCLUDING REMARKS

I have titled this book "Inevitable Doubt" because in both the legal theories analysed in the preceding chapters, the major preoccupation of the writers has been the means whereby doubt (*shakk* or *shubha*) as to the content of the law might be overcome. As indicated in the introductory chapter, the response to uncertainty drove the legal thought of both Bihbahānī and Baḥrānī. They based their theories on quite different assessments of the probative force of rulings which were less than certain.[1] Their differences were, at root, over epistemology. Though the details of the law might be uncertain, Baḥrānī presented the mechanism of caution (*iḥtiyāṭ*) as a means whereby certainty as to the fulfilment of the law might be gained, despite this uncertainty over its content. Through adopting a more charitable attitude *vis-à-vis* the validity of the reports of the Imams, and through devising a series of principles on which action could be based, and fulfilment guaranteed, Baḥrānī ensured that caution was restricted, but nonetheless effective. Bihbahānī also accepted uncertainty as to the details of the law, but proposed a mechanism whereby this only became important for the qualified scholar (*mujtahid*). The ordinary believer need only follow the *mujtahid's* rulings to fulfil the law. The scholar must produce an opinion as to the content of the law and this opinion is less than certain (*zann*). It is what the law appears to be to the scholar that is decisive, and this may, or may not, accord with the law "in reality" (the Sharīʿa).

Accepting uncertainty in the law was not an easy process for Shiʿite scholars. Early Shiʿite legal theory was written with the assumption that certainty (*yaqīn*, *ʿilm*, *qaṭʿ*) was not only possible to obtain, but had been attained with respect to most of the law.[2] The reasons for the erosion of this adherence to certainty can be traced to practical necessity arising from juristic difference,[3] or the need to enhance scholarly authority,[4] or an emerging feeling that the adherence was

[1] See above, p. 85–86 and p. 144–145.
[2] See Calder, "Doubt and Prerogative", p. 57–65; Zysow, "Economy of Certainty", p. 497–501.
[3] Zysow ("Ejtehād", p. 282) speaks of the "inevitability of *ejtehād*".
[4] See Calder, "Doubt and Prerogative".

intellectually untenable or the influence of Sunni legal theory upon Shiʿism.[5] Whatever the reason, once uncertainty had been accepted, it became a permanent feature of the Shīʿī legal tradition, and this, it seems, was the case for both Akhbārīs and Uṣūlīs, though they reacted to this situation differently. Of course, both groups attempted to trace the origins of their legal system to the earliest writers, though we should not be entirely taken in by their accounts. The post-Astarābādī Akhbārīs shared some common ground with the earlier Shīʿī traditionalists. Both had a concern for the preservation of certainty. However, whilst the earlier traditionalists were concerned with certain knowledge of the law, the later Akhbārīs, if Baḥrānī's thought is found to be replicated elsewhere within the Akhbārī tradition, were concerned with certainty as to the fulfilment of the law, accepting that some details might be in doubt. It is this distinction which leads me to the initial judgment that the post-Astarābādī Akhbārī writers based their legal theory on different grounds to the earlier expressions of traditionalism. A more definitive description of the differences between traditionalists and later Akhbārīs awaits a more comprehensive survey than that offered here.

The distinction between Uṣūlīs and Akhbārīs over epistemological concerns lies at the root of the dispute; the edifices of legal theory analysed in this book were based upon these differing theories of knowledge. However, the dispute was rarely described in these terms—instead, it was presented as a dispute over *ijtihād*. The acceptance of doubt had come hand in hand with the theory of *ijtihād*. The Akhbārīs, or at least Baḥrānī, accepted the doubt, but rejected *ijtihād*. This rejection, as is clear from the later Shīʿī texts of legal theory, became the hall-mark of the Akhbārīs. They wore this badge with pride, and the *mujtahids* scolded them for it with venom. It is for this reason that the dispute is perhaps best characterised as an Akhbārī-*mujtahid*, rather than an Akhbārī-Uṣūlī dispute; *mujtahid* here meaning one who supports a theory of *ijtihād*, rather than one who has necessarily gained the rank of *ijtihād*.

Bearing these thoughts in mind, it is perhaps surprising that Baḥrānī, in M12[6] (on the differences between Akhbārīs and *mujtahids*), lists three differences between the Akhbārī and *mujtahid*, but does not mention *ijtihād*, or epistemology. His three differences are:

[5] See Stewart, *Islamic Legal Orthodoxy*, p. 15–17 and p. 226–229.
[6] Baḥrānī, *H*, 1, p. 167–170.

1) The *mujtahids* divide the sources of law into four: Qur'ān, Sunna, *ijmāʿ* and *dalīl al-ʿaql*. The Akhbārīs only allow the first two.[7]
2) Akhbārīs divide "things" into three: *ḥalāl*, *ḥarām* and *shubha*, whilst *mujtahids* affirm only the first two.[8]
3) Akhbārīs do not consider it possible to interpret the Qur'ān or Sunna directly; they allow interpretation only after considering the *tafsīr* of the Imams. The *mujtahids* consider direct interpretation of the Qur'ān and Sunna to be possible.[9]

Baḥrānī mentions a difference of opinion amongst the Akhbārīs on the third point, which corresponds to the different views analysed in Chapter Two (and mentioned in M3).[10] There are those, like Astarābādī, who deny the legitimacy of direct interpretation absolutely; there are those who restrict direct interpretation to clear verses (*muḥkamāt*); and there are those who consider themselves to be like the Imams, as they can interpret the sources directly without the need for the *akhbār*.[11]

The absence of *ijtihād* in this list might be taken as evidence that *ijtihād* was not considered by Baḥrānī to be an element in the dispute. This, in my opinion, would be a hasty conclusion for two reasons. First, Baḥrānī mentions *ijtihād* infrequently in his Prologues, and only ever pejoratively.[12] It appears to me that Baḥrānī is trying to outline a legal theory without reference to *ijtihād* and the *mujtahids*. He is, then, attempting to demonstrate that Akhbārī legal theory need not be purely reactive, but can define itself without constant recourse to polemic. He is, however, only partially successful in this project. He makes scant reference to *ijtihād*, but he is forced to make regular reference to *ẓann* in a manner which makes it clear that he is referring to the results of the *mujtahid's* effort. That his aim was to withdraw from overt polemic is further supported by his assertion

[7] This point is mentioned by Samāhijī also, see Newman, "Akhbārī-Uṣūlī Dispute, Part 1", p. 24 and p. 39.
[8] Though not phrased in exactly the same manner, the substantive of this point is also found in Samāhijī's list, *ibid*, p. 30 and p. 46.
[9] *Ibid.*, p. 29 and p. 44.
[10] See above, p. 48–49.
[11] Moussavi (*Religious Authority*, p. 102) mentions a positive assessment of *ijtihād* in Baḥrānī's work on *furūʿ al-fiqh* (Baḥrānī, *H*, 6, p. 301), but this is not in the context of *uṣūl al-fiqh* and appears isolated. I consider his assessment of Baḥrānī as pro-*ijtihād* (*Religious Authority*, p. 36) as particularly suspect.
[12] Baḥrānī, *H*, 1, p. 126 (*ijtihād ṣirf wa taʿaṣṣub baḥt*) and *ibid*, 1, p. 62 (*ijtihād fī muqābil al-nuṣūṣ*).

in M12 that the early period of Shi'ism was "full" of Akhbārīs and *mujtahids* and yet, "the voice of dispute was not raised between them; one did not insult the other by describing them in these [insulting] terms".[13] In time, however, the argument between them grew heated and unpleasant. Astarābādī, in particular, is blamed for causing this bitterness:

> The voice of dispute was not raised . . . except from the time of the author of the *al-Fawā'id al-madaniyya*. He started to insult fellow Shi'ites. [*H*, 1, 180]

Baḥrānī, it seems, was trying to reduce the tension between Akhbārīs and Uṣūlīs, and hence, it can be argued, that for this reason he does not mention the most controversial element of the dispute—*ijtihād*. Alternatively, one might argue, that Baḥrānī's criticism of those who accept *ẓann* as sufficient proof, rarely mentioning *ijtihād* and *mujtahids*, is due to his perceptiveness that the root of the dispute was epistemological. *Ijtihād* is, therefore, a consequence of the more fundamental error of accepting anything less than certainty as a basis for action. Whatever his reason for not mentioning *ijtihād*, it should not lead us to the immediate conclusion that he did not view it as an issue. He would not have called the disputing parties Akhbārī and *mujtahid* if this was the case; whenever he mentions *ijtihād* it is with a clear pejorative tone; whenever he mentions the views of the *mujtahids*, he rejects them.[14]

The second reason why we should not conclude that Baḥrānī is unconcerned with *ijtihād*, is that the three differences are, in my view, linked to the structure of the Prologues. In the first three Prologues, Baḥrānī describes the sources of law, providing his position on his first issue of difference between Akhbārīs and Uṣūlīs. In M4–6, he discusses possible causes of *shubha*, including revelatory silence, contradiction and ambiguity in the meanings of words. He also provides a procedure which accommodates this *shubha*—that of *iḥtiyāṭ*—and, therefore, provides his view on the second difference. In M7–9, he discusses language and how to interpret the language in the texts of revelation. He makes it quite clear that such an interpretation is only possible through the prism of the Imams' words. The latter

[13] *Ibid.*, 1, p. 169.

[14] In the *Durar*, he lists eight points of difference, all relating to *ijtihād*. See *Durar*, p. 253–256.

provide the *qarā'in*, the justifications for the meanings of words. Hence, in these sections, he provides his answer to the third of the differences. Undoubtedly these three issues are discussed elsewhere in the Prologues, outside of the three sections, but the main themes marry well enough for me to be convinced that Baḥrānī intends M1–9 to be an account of his position on the three issues. Since, for the reasons suggested above, he does not deal with *ijtihād* explicitly in the Prologues, *ijtihād* does not figure in the differences.[15]

Many commentators have characterised Baḥrānī as a "moderate" Akhbārī.[16] Part of the reason for this assessment is Baḥrānī's own statement:

> I was, at first, one of those who supported the school of the Akhbārīs (*madhhab al-akhbāriyyin*). I argued continuously with some of the *mujtahids* amongst our contemporary scholars . . . However, it became clear to me, after giving thought to the truth of the matter that [I should] close the discussion on this matter and draw back the curtain and veil which surrounded it. [*H*, 1, 167]

This statement, his views on the peaceful co-existence of *mujtahids* and Akhbārīs in the early period and his criticisms of Astarābādī are used, in conjunction with positive biographical accounts of his life and work,[17] to categorise him as a moderate Akhbārī, or even as an ex-Akhbārī, who took a "middle way". A careful reading of M12, however, reveals the following points:

First, Baḥrānī does criticise the tone in which the dispute has been conducted, but he does not say that he has ceased to be an Akhbārī, or that he has adopted a middle path.

Second, though he criticises Astarābādī for his vituperative attack on *mujtahids* (especially 'Allāma), he also adds the caveat that Astarābādī was "correct in all of the issues he mentioned in that book".[18] This indicates Baḥrānī's underlying sympathy with the Akhbārī tradition of thought.

Third, Baḥrānī's position (as found in M1–9) on the three areas

[15] Gleave, "Akhbārī *uṣūl al-fiqh*", p. 26–28.

[16] Madelung, "Akhbāriyya", p. 57; Moussavi, *Religious Authority*, p. 36; Kohlberg, "Aḵbārīya", p. 718. Newman ("Akhbārī-Uṣūlī Dispute, Part 2", p. 261, n. 35) argues that "al-Baḥrānī's status as 'moderate' is also suggested by his position on *al-khums* and Friday Prayer". Of course, this is only evidence for moderation if one accepts that issues of both *uṣūl* and *furū'* were implicated in the dispute, a view which, in my assessment, has not yet been proven. See above, p. 5–7.

[17] Analysed in Gleave, "Akhbārī-Uṣūlī Dispute".

[18] Baḥrānī, *H*, 1, p. 180.

of dispute listed in M12 is decidedly Akhbārī. On the matter of the four sources, he generally rejects *ijmāʿ* and *dalīl al-ʿaql* (whether it is defined as *al-barāʾa al-aṣliyya*, *istiṣḥāb al-ḥāl* or *al-taḥsīn wa'l-taqbīḥ*). When he does allow these sources, it is only in restricted circumstances. On the matter of the category of *shubha*, he states clearly that he accepts its existence. On the interpretation of the Qurʾān (and possibly the Prophetic Sunna also, though he is unclear on this point), he does accept there to be some elements of the sources which can be interpreted directly, but these do not relate to legal matters. As I have indicated elsewhere, Baḥrānī's legal theory appears well within the mainstream of the Akhbārī tradition.[19] He may wish, for reasons of expediency, to present himself as putting an end to the Akhbārī-*mujtahid* dispute, but this can be explained as his attempt to persuade his *mujtahid* readers that Akhbārī *uṣūl al-fiqh* is a viable, indeed the only viable, legal doctrine, in order to convert them.[20]

Bihbahānī's respect for Baḥrānī, as recorded in the biographical sources, did not, it seems, extend to the latter's jurisprudence. The preceding chapters have, I hope, shown that his legal theory is entirely incompatible with that of Baḥrānī, in particular, and Akhbarism more generally. For Bihbahānī, the difference between the two camps is quite simple:

> You know that the cause of the difference (*manāṭ al-farq*) between the Akhbārī and the *mujtahid* is *ijtihād* itself—that is acting on the basis of *ẓann*. Whoever acts on its basis is a *mujtahid*, and whoever claims not to, but rather [claims] to be acting on the basis of *ʿilm* and *yaqīn*, is an Akhbārī. [*FH*, 131]

This unambiguous statement in FH8, from which he goes on to berate Akhbārīs for denouncing *taqlīd*, can be compared to Baḥrānī's more cautious list of the three differences, where *ijtihād* is not mentioned. Baḥrānī's text is undoubtedly less polemical, but is no less Akhbārī for that fact. He rejects *ẓann* as epistemologically unfounded, and therefore can be seen as an Akhbārī, both on the basis of his own three-fold definition and that of Bihbahānī.

The above quote also highlights that the *ʿilm/ẓann* distinction lay

[19] See Gleave, "Akhbārī *uṣūl al-fiqh*", p. 42–43.

[20] This presentation gave the biographical writers a positive impression of Baḥrānī. The continued popularity of *al-Ḥadāʾiq al-nāḍira* may also have contributed to their portrayals of Baḥrānī. See Gleave, "Akhbārī-Uṣūlī Dispute".

at the root of the dispute.[21] *Ijtihād* is even glossed as *al-ʿamal bi'l-ẓann*. From this distinction flowed two different legal theories, though whether significant differences in applied legal theory (such as juristic authority during the *ghayba*) can also be traced to this, is as yet, unclear. However, the issues surrounding the sources of the law, the status of isolated traditions, the validity of consensus, the ability of reason to discover legal/moral truths and linguistic theory were all provided with different and contradictory answers by Bihbahānī and Baḥrānī, and their positions on these major elements of legal theory arose from the *ʿilm/ẓann* distinction. What the two theorists agreed upon, perhaps resigned themselves to, was that human limitations prevented a full understanding of the law in reality. Uncertainty over some (perhaps most) of the orders God had given to humankind, was inevitable.

[21] Zysow ("Economy of Certainty", p. 497–508) and Kohlberg ("Aspects") are the only commentators to fully grasp the importance of epistemology in the Akhbārī-Uṣūlī dispute. Zysow consciously ignores aspects of *taqiyya* which were, as we have seen, of the greatest importance. He also links the dispute, rather obviously, with the dispute over the probative force of isolated traditions (*akhbār al-āḥād*). Though the isolated tradition was part of the dispute, it can be seen as a result, not a cause of, the modified epistemology adopted by Shīʿī writers of *uṣūl al-fiqh*. He repeats this analysis in his article "Ejtehād", p. 281. Kohlberg ("Aspects") in his accurate analysis of Astarābādī, Kāshānī and Baḥrānī, concentrates on the *ʿilm/ẓann* distinction.

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