



From norm evaluation to norm construction: The Metaethical origin of al-Ghazālī's radical infallibilism

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Themed section

Towards New Perspectives on

Ethics in Islam

Casuistry, Contingency, and Ambiguity

Guest editor

Feriel Bouhafa



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From Norm Evaluation to Norm Construction: The Metaethical Origin of al-Ghazālī's Radical Infallibilism

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Abstract

This study examines the issue of norm construction in al-Ghazālī's thought focusing on the grounds advanced to support his radical infallibilist position. To fulfill such end, al-Ghazālī, I explain, relies on two types of arguments, the first one relates to the presumptive nature of legal texts in order to highlight their fundamental indeterminacy and the second links to the interpreter to show the impossibility to fall into error. To buttress these arguments, al-Ghazālī both draws on epistemological principles and metaethical ones. As it will be shown in the study, al-Ghazālī ultimately explains the divergence in interpretation of norms using the concept of *ṭab'* (nature, disposition or appetitive self) drawing on his well-known relativist ethical theory concerning norm evaluation and therefore brings in a unique way this typical feature of Ash'arism within his own radical infallibilist theory of norm construction. The concept of *ṭab'* allows to bridge the gap between the ambiguity in the revealed text and the *mujtahid*'s interpretation in the norm construction process, and ultimately serves to justify *ex post* the choices made by the *mujtahid*. In doing so, al-Ghazālī assigns to theology a critical role in revealing the origin of the illusion of the jurists who naively think that licit and illicit are qualities of things themselves.

Keywords: al-Ghazālī, *Uṣūl al-fiqh*, Metaethics, *Ijtihād*, *Ṭab'*

Introduction

This study examines the issue of norm construction in al-Ghazālī's thought, based on the chapter on *ijtihād* of his last *summa* of legal theory, *al-Mustaṣfā min 'ilm al-uṣūl*. The very concept of *ijtihād*, containing the idea of "effort" (*juhd*), usually translated by "interpretative effort", refers to the process and conditions of norm construction accomplished by the *mujtahid*. This process is defined in legal theory as the extraction of norms (*aḥkām*) from ambiguous texts. Islamic legal theorists thoroughly investigated this process and were divided about its outcome whether, when carried out properly, it leads to one single good solution or to diverging solutions that are equally good. For al-Ghazālī, who defends the latter position, when the meaning of a text is presumptive (*ẓannī*) and not clear and categorical

(*qatʿ*), there is no logical or semantic necessity linking this text to the produced norm. Hence, the norm is a product of a non-necessary and presumptive sign (*ʿalāma*) which can lead to two opposite solutions that are equally true. However, this does not mean that the *mujtahid* during this process chooses randomly and for no good reason one solution over the other or that he can change his mind whenever he wants. In fact, the absence of a determinate norm in ambiguous propositions is not contradictory with the highly formalized character of the process of *ijtihād*. The jurist examines the whole proofs in order to choose the one he considers to be the best solution according to the prevalent presumption that “tips the scales” in his mind.

In a seminal article devoted to *ijtihād*, Baber Johansen addresses this issue and his reflection constitutes the starting point of the present study (JOHANSEN 2013). He presents the position of three jurists (al-Ghazālī, Ibn ʿAqīl and al-Sarakhsī) and shows how they legitimize the diversity of conclusions in the *ijtihād* process. According to Johansen, it is the notion of *taʾammul* (contemplation) that “allows jurists not to rely solely on rational thought in human interpretation and construction of norms.” Therefore, he highlights the non-cognitive factors underlying such a concept, which as he admits evidently carries “psychological undertones” (JOHANSEN 2013: 132).

Building up on that idea, with which I fully agree, I intend to show in what follows the central role played by the notion of *ṭabʿ* within al-Ghazālī’s system. I start by outlining the radical infallibilism of al-Ghazālī and its difference with other *uṣūlī* positions regarding *ijtihād*, and then, I deal with the justification he gives of such a controverted position. As I shall demonstrate his justification relies on two types of arguments, while the first one relates to the presumptive nature of legal texts in order to highlight their fundamental indeterminacy, the second one links to the interpreter through underlining the impossibility to fall into error. These arguments involve some epistemological principles but also metaethical ones that lead us to the last part of the study where I discuss the concept of *ṭabʿ* (nature, disposition or appetitive self). This concept gives us a fuller picture of the whole process. I show that al-Ghazālī ultimately explains the divergence in interpretation using a concept that stems from his well-known relativist ethical theory concerning norm evaluation, connecting in a unique way this typical feature of Ashʿarism with his own theory of norm construction. The concept of *ṭabʿ* allows to bridge the gap between a revealed ambiguous text and its use by the *mujtahid* in the norm construction process, and ultimately serves to justify the choices made by the *mujtahid*.

The radical infallibilism of al-Ghazālī

In legal treatises, the sections devoted to the concept of *ijtihād* deal with the epistemic, ethical and institutional conditions stipulated for an individual to become a *mujtahid*, such as the extension of norm construction (which texts does it concern) and the famous issue pertaining to the possibility of error in the process of norm construction: can a *mujtahid* commit an error when deploying his interpretative effort and would this error have any juridical/eschatological consequences on him? This last issue is often referenced by using the following

dictum, *hal kull mujtahid muṣīb* “Is every *mujtahid* right?” or “does every *mujtahid* hit the true answer?”, which generally constitutes the core of the sections devoted to *ijtihād*.¹

Those who embrace the saying “*kull mujtahid muṣīb*” are called, accordingly, *muṣawwiba*, and their opponents, who refuse it, are the *mukhaṭṭi’a* or *muḥaqqiqā* (BERNAND 1990). However, behind this allegedly clear opposition between what we shall call “infallibilists” and “faillibilists” lies a profound ambiguity. In fact, *kull mujtahid muṣīb* is an ambiguous proposition that can be understood in two different ways. The first one admits the possibility to hit the truth but denies any accusation of error in case one misses it: every *mujtahid* is right means that no one will be blamed, punished or accused of sin if he commits error, since error is human. This position is best illustrated by a well-known prophetic tradition: “If the judge makes an interpretative effort and hits the truth, he will have a double reward; and if he misses it, he will have a single reward.” This tradition identifies two levels of error. On the one hand, the scientific or alethic level, that of error in itself (*khaṭa’*), and on the other hand, the juridical level, that of sin (*ithm*) or accusation of error (*takḥī’a*). This tradition establishes the existence of a right and a wrong solution distinguished by the amount of the reward promised to the jurist (a double or a single one), and on a juridical level, it denies the existence of any sin or accusation of error for those who miss the truth, since they exerted all their effort in interpreting the text. One can sense here the importance of the notion of effort (*juhd*) in the lexical meaning of *ijtihād* and the particular role it plays in this endeavor: it justifies the existence of a reward regardless of the result and makes the epistemic process in itself an individual enterprise that should be rewarded. This divide between process and result is illustrated by the distinctions made sometimes in the juristic literature between being right “according to the jurists” / “according to God” (ZARKASHI 1992: IV, 251) or “according to the act of *ijtihād*” / “according to the ruling itself” (al-BAṢRĪ 1965: II, 949-952).

The second construal of *kull mujtahid muṣīb* is that of al-Ghazālī in the *Mustasfā*. If every *mujtahid* is right, it is because, when it comes to presumptive juridical questions, there is no pre-established truth to be found laying in the mind of the Legislator. Whatever the *mujtahid* decides or chooses becomes the true answer. In this case, the very possibility of error is excluded from the beginning, and *a fortiori*, any possible accusation of error, provided that the interpretative process meets all the required conditions. Unlike the first understanding, which requires from the *mujtahid* to find or extract the right solution, the latter entrusts the *mujtahid* with the authority to assign a certain norm to a given act. Needless to say, even in this latter case, *ijtihād* is not a spontaneous mental action and is not within everybody’s reach: it is a highly formalized process consisting in the exploration of all available proofs before reaching any solution, and is mostly restricted to professional *mujtahids* who meet the required conditions. Moreover, the reached solution is binding for the *mujtahid* and cannot be easily replaced by its opposite (al-GHAZĀLĪ 1997: II, 454).

To sum up, we have two different ways to embrace the saying *kull mujtahid muṣīb* and therefore two very different kinds of *muṣawwiba*: the first kind endorses what might be called

¹ For the general and historical approach of the concept of *ijtihād*, see HALLAQ 2001, esp. chapters 1 and 2. For a thorough study of this question in particular, see ZYSOW 2013: 259-78. See also BOU AKL 2019, where I discuss the whole debate, which also inspires this first section. For a full review of the literature dealing with this issue and an outline of its main issues from a shāfi’ite perspective, see EIṢSA 2017: chapter 5.

legal determinacy (for they posit a pre-determined ruling for the *mujtahid* even if he is not compelled to hit it) and the second one legal indeterminacy.² This ambiguity blurs the aforementioned frontier between infallibilists and fallibilists, because the first kind of infallibilism is very close to fallibilism, since they both espouse legal determinacy. By opposition to these two, the second kind of infallibilism, called sometimes total infallibilists (*al-mu‘ammima fī l-taṣwīb*)³, is distinguished by an utter negation of any pre-existing ruling for the *mujtahid* to hit. Al-Ghazālī calls them *muḥaqqiqū al-muṣawwiba* (true infallibilists) and presents their position as follows:

[text 1] According to the true infallibilists, there is no determined ruling (*lā ḥukma mu‘ayyan*) to which presumption can lead concerning questions devoid of a clear text. The ruling follows the presumption. For God, the ruling is what prevails in the opinion of each *mujtahid*. This is our position. Al-Qāḍī [al-Bāqillānī] has embraced it⁴. (al-GHAZĀLĪ 1997: II, 409.3-5)

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This total absence of determinate truth applies only to presumptive juridical matters (*al-ẓanniyyāt*), which constitute the domain of *ijtihād* (*al-mujtahad fīhi*) delineated by al-Ghazālī. In contrast, juridical matters explicitly stated by the Legislator in unequivocal sentences and producing certainty contain a determined ruling that can and should be reached. Likewise, matters of legal theory itself, which are juridical principles (the validity of consensus, the validity of analogy, and solitary reports, etc.), can also be reached and established with certainty from the texts. *A fortiori*, matters of rational theology (existence of God, creation of the world, and divine attributes, etc.) are predicated upon certainty through the use of rational arguments, which leads to a determinate truth. In fact, the objectivity of rational norms (*ahkām ‘aqliyya*) is attested by everyone except the sophists. These three classes of categorical matters, i.e., *qaṭ‘iyyāt* (clear juridical texts, legal theory, and rational theology) are clearly distinguished by al-Ghazālī (al-GHAZĀLĪ 1997: II, 399-400). They all contain a determinate ruling to reach. Within their realm, error is possible and leads, when committed, to an accusation of error. The gravity of the accusation (*takfīr* or simple *tabdīl*) depends on the gravity of the matter involved (*Idem*).

On this account, only radical infallibilism can be linked to legal indeterminacy, in opposition to legal determinacy. As we mentioned, this latter position is embraced, with various degrees, by both moderate infallibilists and fallibilists. Although al-Ghazālī explicitly speaks of the absence of a “determined ruling” (*ḥukm mu‘ayyan*) for presumptive matters, he never makes it a concept or a label in itself, instead he adheres to the fallibilism/infallibilism

2 On this subject, see for instance the special issue of *Droit et philosophie: Annuaire de l’Institut Michel Villey*, 2017, vol. 9-1 [Droit et Indétermination] dedicated to the issue in modern western systems of law, with articles in French and English.

3 Coined by Ibn Taymiyya: 37, cited in ZYSOW 2013: 261.

4 All translations are mine, unless specified otherwise. Al-Ghazālī first embraced a moderate version of infallibilism, that of his teacher al-Juwaynī. Thus he says in the *Mankhūl*: “Our position is that every *mujtahid* is categorically correct in his practice [emphasis mine], and this is made necessary by a divine obligation (*fa-innahu wajaba bi-ijābi llāh*). However, it does not make any sense to hold infallibilism (*iṣābat kull wāḥid*) in the sense of a negation of a determined *quaesitum* in the knowledge of God concerning illicit and licit.” See al-GHAZĀLĪ 1970: 455.

dichotomy that shapes the debate in Islamic legal literature. In that sense, this couple of concepts cannot be totally reduced to that of legal determinacy/indeterminacy, which does not appear as such in the texts.⁵

Al-Ghazālī's position does not seem to go without perils. At the end of the chapter on *ijtihād* he adds a whole section to clarify further his position:

The chapter in which we unveil this enigmatic question, added after the completion of the book and the spread of its copies.⁶ (al-GHAZĀLĪ 1997: II, 437.2-3)

According to al-Ashqar, this appendix has been added after the spread of the objections against al-Ghazālī's chapter on infallibilism (al-GHAZĀLĪ 1997: II 437 note 1). This polemical reception of Abū Ḥāmid's theory and his need to clarify his position to his readers shows its originality. This position cannot be in anyway confused with the traditional moderate infallibilism that states the existence, in the Legislator's mind, of one solution to every juridical problem.

After clarifying his position, al-Ghazālī specifies in this addendum the types of textual ambiguities that hide a real indetermination (like general terms or extraction of nexus) and those that hint to an objective and determined truth (like the verification of nexus or the extraction of the intended meaning).⁷ He then summarizes his main ideas in ten points translated in an appendix to this paper. I will not dwell here on the different types of ambiguities that constitute the object of *ijtihād* and will rather limit myself to al-Ghazālī's justification of legal indeterminacy. But what one can keep in mind from these pages that give us the final position of the author is that within the general realm of *ẓanniyyāt* that constitutes the object of *ijtihād*, some exegetical criteria allow us to distinguish between ambiguities masking a determined answer that can be unveiled by the *mujtahid* and others that are genuinely indetermined, i. e. without any correspondence in the Legislator's mind.

⁵ Eissa, who devotes a whole chapter to that issue in his monography (see note 3, supra), seems to be confusing the two concepts. In fact, the debate in Islamic legal theory is always, ultimately, mujtahid-oriented, even if one can clearly distinguish between determinist and indeterminist positions. For that reason, Aron Zysow's rendering of *taḥṭī'a* and *taswīb* by "fallibilism" and "infallibilism", despite all the misunderstandings that it can generate (reported in EISSA 2017: 246-247), captures well the idea of error (and lack thereof) that constantly sticks to the debate.

⁶ This addendum is composed of eight folios. It is absent from the first Būlāq edition of 1325 H [1907]. Al-Ashqar includes it in his edition on the base of manuscript Chester Beatty 3879, and Hafiz in his later 2010 edition following two Cairote manuscripts.

⁷ This restriction of indeterminacy to only some kind of ambiguities is considered by al-Ashqar as a retraction on the 9 out of 10 of the questions. One should note that al-Ashqar disagrees with al-Ghazālī's radical infallibilism and criticizes it in the notes of his edition. For him, there is always a good answer, even in presumptive matter, that the mujtahid can hit and might miss. See for instance the long footnote on p. 408-409 in which he cites the Ḥanbalī position that he seems to embrace. On Ḥanbalī fallibilism, see BERNAND 1990.

The justification: determinacy vs indeterminacy

In order to argue in favor of radical infallibilism or legal indeterminacy, al-Ghazālī uses two kinds of arguments: one pertains to the texts (why are they indeterminate, why proofs do not always lead to the same solution) and another to the interpreter (can he be obliged to hit a given solution or miss it without being accused or can he be charged of something impossible). One can say that while the first type of arguments is directly commanded by the dichotomy determinate/indeterminate, the second one fits more with that of fallibilism/infallibilism. Nonetheless, both arguments pursue the same objective, that is establishing radical infallibilism.

Let us begin with the first type of arguments, covered by the propositions 1 to 5 of the appendix. Prop. 1 and 2 establish the relative contingency of legal signs and *rationes legis* and oppose them to rational proofs. Prop. 3 negates the existence of any implicit ruling in God's mind. Prop. 4 pertains to metaethics and is based on the conclusions of the first section of the *Mustasfā*. Prop. 5 establishes the instituted character of legal ruling—which derives from prop. 4—and adds an important principle already established in the section on unit-tradition (*āḥād*) and legal analogy (*qiyās*), that of the “displacement of certainty” according to which only the master rule establishing the obligation to act has to be certain, while the material itself can be presumptive. With this rupture between the presumption and the final categorical ruling, al-Ghazālī secures the possibility of always hitting the right answer. Let us unfold this reasoning by using other texts from the *Mustasfā*.

Prop. 1: The presumptive (*ẓanniyya*) proofs, by opposition to the rational ones, are relative (*iḍāfiyya*) and not essential (*ḥaqīqiyya*).

Al-Ghazālī opposes presumptive proofs to rational ones (prop. 1) by drawing on a broad epistemic hierarchy between *dalīl* (proof) and *amāra* (sign or indication, sometimes referred to as *alāma*). While the former leads inevitably to a determined solution, the latter, epistemically weaker, works differently:

[Text 2 a] Calling the signs proofs is a metaphor, for signs do not entail presumption *per se* but vary according to [contingent] relations. When it does not provide presumption to Zayd, it can provide it to Amr, and what provides a ruling to Zayd can provide its opposite to Amr. Its effect on Zayd could vary in two different situations, so it is not a path to knowledge. If it were a way, he would be disobedient not to hit it. (al-GHAZĀLĪ 1997: II, 432.4-7)

The difference between proofs and signs is no longer that of an epistemic strength, with proofs being stronger indicators than signs. Their whole structure is different: while *dalīl* functions like a classical sign, pointing itself to its object, the object of *amāra* is not essentially linked to it and varies according to contingent relations. Unlike *dalīl* which constantly points to the same object, *amāra* has different effects on different people (or on the same person in two different situations), and its final object varies accordingly. Therefore, *amāra per se* is incomplete without an interpreter who ultimately gives it its object, through the mediation of the effect it will have on him. We can say that while *dalīl* has a dyadic

structure and functions like natural signs, *amāra* has a triadic structure that necessarily includes the interpreter.

Prop. 2: The ratio legis is a relative sign (*‘alāma*). Measuring can be a sign (*‘alāma*) erected by God for Abū Ḥanīfa and edibility [another] sign erected for al-Shāfi‘ī.

Applied to *uṣūl al-fiqh*, this relativity of presumptive proofs coincides with that of *rationes legis* (prop. 2), the fundamental element of legal analogy, which constitutes an important part of *ijtihād*. The main consequence of the relativity of signs and *rationes legis*, by opposition to the “reality” (*ḥaqīqa*) or essentiality of proofs, is the variability of the solutions to which they lead, illustrated by the canonical example of usury.

The same idea is thoroughly developed in the following passage:

[Text 3] If one objects: what is the *ratio legis* behind the illicitness of usury according to God: is it edibility, measurability or the fact of being basic commodities? We say: each one of the two, edibility or measurability is not apt in itself to be a *ratio legis*. Saying it is a *ratio legis* means it is a sign (*‘alāma*). For he who has the presumption that measurability is a sign for illicitness, it is a sign, but not for he who has the presumption that its sign is edibility. The *ratio legis* is not an essential qualification, like eternity and createdness of the world, so that the knowledge of God should correspond inevitably to one of the two qualifications. Rather, it is something instituted, and institutions vary according to [contingent] relations. (al-GHAZĀLĪ 1997: II 435.6-11)

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The whole hermeneutical vision of al-Ghazālī is embedded in this passage. While Abū Ḥanīfa deems measurability to be the real *ratio legis*, al-Shāfi‘ī admits edibility to be the one. For al-Ghazālī both are correct. The qualifications of edibility and measurability cannot function *per se* as *rationes legis* (*lā yaṣluḥu an yakūna ‘illatan li-dhātihī*). Unlike essential qualifications, relative ones are instituted (*amrun waq‘ī*) and hence, one can add, they need an institutor, which is in this case the interpreter. This presence of the interpreter, which is necessary to ascribe to signs their ultimate objects, is couched in a theological fashion at the end of the paragraph. More specifically, al-Ghazālī underlined the absence of *rationes legis* from God’s knowledge, which only contains essential qualifications. In sum, theological truths are attainable by objective proofs, while juridical presumptive truths are subjective and dependent upon the *mujtahid*’s choice.

Prop. 4: The licit and illicit are not qualities of things themselves (*awṣāf a‘yān*). Hence, it is not impossible that the same thing can be at the same time licit and illicit for two different persons.

The instituted nature of *ratio legis* and its opposition to the essential nature of rational proofs is based on a more general principle stated in prop. 4: licit and illicit, *in general*, are not qualities of things themselves (*awṣāf a‘yān*). This feature allows for variation and diversity, i. e.: the same thing bearing two different qualities for two different persons.

In adopting the general principle of the instituted character of licit and illicit, al-Ghazālī provides the ultimate founding principle for his radical infallibilism. Unlike the other propositions, prop. 4 is not directly a hermeneutical principle but rather a metaethical one.

For that reason, al-Ghazālī addresses it in the beginning of the *Mustasfā*, in the section where he outlines his ethical relativism.

The first part (*qutb*) of the book is dedicated to rulings (*ḥukm*, *aḥkām*). It begins with a theoretical discussion that corresponds to the theological chapters on the rational value of good and bad (*al-taḥsīn wa-al-taqbīḥ*). A similar discussion can be found in al-Ghazālī's theological treatise *al-Iqtiṣād fī l-ʿItiqād*. However, the section of the *Mustasfā* proceeds differently and is more directly *ḥukm*-oriented. Al-Ghazālī begins by questioning the nature of rulings: are they essential qualifications of the acts that can be defined without any legal discourse or do they fully depend upon the legal discourse? For Mu'tazilis, the revealed legal rulings are in part the expression of rational ethical rulings attached essentially to acts ascribing a moral value to them before Revelation. For al-Ghazālī and Ash'arīs, there is no such rational ethical rulings preexisting to the revealed law, which is fully dependent upon God's Will.⁸ He then draws the following consequence:

[Text 4] On this account, if Revelation had not come down no act would have been distinguished from another other than by accord [with one's objectives] or contrariness [to them], which varies according to [contingent] relations. But these usages [do not refer to] an attribute of essence. (al-GHAZĀLĪ 1997: I, 112.2-4)⁹

Before Revelation, the ethical value of acts is solely defined by mundane ethics, following a fundamental utilitarian principle anchored in human nature, that of seeking pleasure and the aversion to pain: an action is deemed good when it complies with one's objectives, and bad when it opposes them. No other ethical principle interferes in guiding human actions. Therefore, since human objectives are not the same for everybody, these values vary accordingly and cannot be considered as fixed attributes of essence. As in text 2a, al-Ghazālī opposes here attributes of essence (*ṣifa li-l-dhāt, li-dhātiha*) to what is *bi-al-idāfa* or *bi-al-idāfāt*, in a peculiar use of this expression, without any complement, to qualify what is relative and non-essential.

For Mu'tazilis, ethical values are essential attributes of acts (*awṣāf a'yān*, cf. prop. 4). Therefore, licit and illicit are, in a large part, also essential attributes. For al-Ghazālī, on the contrary, both ethical (pre-revelational) and legal (post-revelational) rulings lack the feature of essentiality: before Revelation, ethical values vary according to contingent relations, i. e. our objectives, and after Revelation, legal rulings are instituted by God's discourse. Therefore, if the clear and categorical rulings of God's discourse are fixed and do not vary, it is not because they have essential relations with the acts they qualify, but because they have been instituted by a clear and fixed discourse. Ontologically speaking, we may say that although they are "eternal" or at least stable, they still lack the modality of necessity and are only possible or contingent, which means that they could have been different.

⁸ The metaethical problem in Islamic theology has been well explored. For an introduction to the whole question, see SHIHADDEH 2016. For Ash'arism and al-Ghazālī in particular, see HOURANI 1976 and VASALOU 2016. There is an English translation of this chapter of the *Mustasfā* in REINHART 1995: 87-104. For an English translation of the metaethical section of the *Iqtiṣād*, see ALADDIN 2013: 157 sq.

⁹ Translation by Kevin REINHART, with some modifications.

Prop. 3: The distinction between what is a ruling *in potentia* and a ruling *in actu*.

The instituted character of all rulings is specifically visible when it comes to presumptive ones. Unlike the non-essential nature of clear and categorical rulings, which do not have any hermeneutical consequences, presumptive rulings allow diversity and variation. Also, while the categorical rulings have been already instituted by God's discourse, the presumptive ones have not yet been. *Prop. 3* establishes this specific point by dissociating rulings *in potentia* from rulings *in actu*. The formulation of *prop. 3* may be misleading, and should be supplemented with another passage where al-Ghazālī explicitly denies any existence for potential rulings (al-GHAZĀLĪ 1997: II, 430.3-15 and 433.8-11). The objective of such a denial is to dismiss all determinate or quasi-determinate arguments drawing on the preexistence in God's mind of certain implicit rulings, as stated by the doctrine of verisimilitude (*ashbah*) held by some Mu'tazilī infallibilists (BERNAND 1990: 151-172). Only categorical rulings *in actu* exist and are known through God's discourse. All others, premised on presumptive texts, do not exist before their institution by the *mujtahid*. One of al-Ghazālī's constant strategy in this whole section is to draw a sharp line between categorical and easily reached clear discourse (*in actu*) and everything else (*in potentia* = inexistent) without allowing any degree or intermediate posture between those two extremes. One can find here a strict parallel with the Ash'arī denial of capacities and intrinsic *dunamis* in nature, reducing reality, in a Megarian fashion, to what plainly exists (BOU AKL 2016).

Prop. 5: A ruling is conventional and relative, not essential, and it can follow presumption (*ẓann*) and be based on it. It does not precede presumption. Thus, a presumptive [proposition] may be subject to doubt while the ruling based on it is categorical, like when the Prophet judges that the testimony of two witnesses providing a strong presumption (*ghalabat al-ẓann*) is sincere, because in this case, he doubts their sincerity while being categorical about the judgment and about hitting the point in the judgment. The same applies to the *mujtahid* concerning the testimony of the source to the derived ruling.

The epistemic consequence of the inexistence of rulings *in potentia* is that they follow both chronologically and ontologically the *mujtahid*'s presumption instead of preceding it. In *prop. 5*, al-Ghazālī reformulates the principle of "displacement of certainty" (ZYSOW 2013: 23) generally used to establish the validity (*ḥujjiya*) of *qiyās* and solitary reports, and more generally, to allow the extraction of rulings from presumptive material: by adding an external ruling or a master rule according to which presumption is a categorical sign of the necessity of action, this principle resolves the problem of the lack of certainty in juridical material. Al-Ghazālī illustrates it by the example of testimony, a fundamentally presumptive and hence necessary proof in trial (and in *uṣūl*, when it comes to unit-tradition): while the testimony of two witnesses only leads to a strong presumption (and not to certitude), the judgment concerning their sincerity is categorical, because it draws its certitude from an exterior legal principle. This allows him to establish the existence of two different and equally true categorical rulings.

Therefore, *prop. 5* allows to complete the process and to give it what it needs to work in a legal context: signs are contingent relations, so are *rationes legis*; all God's legal discourse

is instituted and is not preceded by any essential ethical quality of acts; so is the case for the *mujtahid*'s solutions for new rulings. This fully instituted character allows several contradictory new rulings to follow presumption and nevertheless be all equally categorical and true.

The concept of harm: fallibilism vs infallibilism

The last set of propositions, from 6 to 10, pertains to the *mujtahid* and falls within the bounds of the aforementioned fallibilism/infallibilism dichotomy. The core of these arguments is to consider norm construction as a legal charge (prop. 6). The last four propositions raise all the problems related to this issue. Two important theological principles are generally used in this kind of argument. The first one is that of optimum, used by Mu'tazilis and absent from al-Ghazālī's propositions. According to that principle, since God is obliged to seek the optimum of his creature, he cannot but reward all his jurists. The second principle is that of the charge of impossible, stated in prop. 10.¹⁰

In what follows, I will only focus on prop. 9, which is related to metaethical issues and may help us connect the two topics in al-Ghazālī's thought.

Prop. 9: One cannot be summoned to hit the point and not be accused of error if he leaves it.

For all parties, except a minority, no interpreter should be incriminated (*ta'thīm*) for his error when dealing with presumptive issues in law. This unanimous principle is scripturally based on a consensus of the Companions. In the debates, it constitutes a shared premise between all parties, used by each to prove one's point. For the proponents of legal determinacy, if the interpretation is not incriminated, this does not mean that error does not exist. As Averroes states, in his *Abridgement of the Mustasfā* and in the *Decisive Treatise*, this kind of error, coming from an expert dealing with difficult issues, is forgiven. The concept of forgiveness allows Averroes to untie the link between error and accusation of error. The *mujtahid* has the obligation of hitting the right answer. However, he will be forgiven if he misses it (BOU AKL 2019).

Al-Ghazālī uses the same shared argument of non-accusation of error to prove the exact opposite position. For him, the fact that the Companions were unanimous in avoiding any accusation of error is a proof that the very possibility of error does not exist, i. e. that there is

¹⁰ For optimum and infallibilism, see ZYSOW 2013: 265, and for the charge of impossible, 269. Mu'tazili optimism can be also used to defend fallibilism, as it is clear from the following objection raised by al-Ghazālī: "Maybe God knows that the advantage (*ṣalāh*) of humankind resides in Him not positing rulings to cases, and making its ruling following the presumptions of *mujtahids*" (al-GHAZĀLĪ 1997: II, 433.15-17). One should note that infallibilism, in its radical version, is also the doctrine of some Baṣrī Mu'tazilī, a piece of information completely absent in al-Ghazālī's discussion for obvious strategic reasons. Hence, the link he establishes between ethical relativism and indeterminacy gives the impression that Mu'tazilis cannot be but proponents of legal determinacy, since they consider that values are essential attributes of acts. But al-Ghazālī chooses his opponents carefully: be it in the first metaethical section or in the last one, he seems to argue only against Baghdadi Mu'tazilis, known for their fallibilism and their strict moral realism.

no single right answer to a juridical issue. While this position may seem sophisticated, it corresponds to an important Ash'arī meta-ethical principle defended by al-Ghazālī: the concept of obligation (*wājib*) entails or contains in its very definition that of sanction (*'iqāb*) or more broadly that of harm (*darar*). Therefore, since an obligation without a sanction is inconceivable, the absence of any sanction or harm towards an action is a necessary sign of the absence of any obligation to perform that action.

The concept of harm is fundamental in the Ash'arī definition of obligation. Things can be described as follow: before Revelation, reason is not a source of ethical obligations to human beings. Human actions are solely guided by the aforementioned fundamental utilitarian principle, that of seeking benefit and avoiding harm. From this principle stems the only conceivable obligation: avoiding any harm to oneself. Reason in this scenario is a mere instrument that helps us fulfill this obligation, which is anchored in the non-cognitive part of our soul. For instance, a starving man has the obligation to eat in order to stay alive and repel the harm of death. Without any harm to repel, no obligation can be conceived. In the same vein, the very act of adhering to the law by accomplishing the “first obligation” (*al-wājib al-awwal*) that moves us from the pre-revelational state to the post-revelational one follows the same and only mechanism that motivates human being: repelling harm, which is, in this case, the great harm in the afterlife described by the Revelation. Therefore, the obligation to adhere to the law does not rest on an ethical reasoning, indicating to the individual the goodness of the prophetic message, but from the human nature and its desire to repel a future harm in the afterlife.¹¹ From this perspective, harm forms a bridge between Ash'arī mundane or pre-revelational ethics and the religious or post-revelational one, solely based on the discourse of the law.

Juridically speaking, obligation as a legal category is also defined as an action the omission of which entails a sanction:

[Text 5] In sum, hitting the point is either something impossible or something possible. But [on the one hand], to the impossible no one is bound [,therefore, it cannot be impossible]. And [on the other hand], omitting to reach what is possible is a disobedience and a sin. And one cannot say: “One [indeed] received an order [which fulfilment is possible] but if one leaves it, one will neither be disobedient nor sinful, but forgiven.” Such [a claim] contradicts the very definition of order and obligation, for obligation is [an action] which omission entails sanction and blame. (al-GHAZĀLĪ 1997: II, 414.20-23)

Sanction is therefore a necessary sign for the existence of an obligation and its absence implies the absence of any obligation to hit the point. Like any human being who will never reflect on the law if there is no fear of a greater harm in the afterlife, the *mujtahid* cannot be obliged to hit the point without the fear of being sanctioned if he misses it. Consequently, since the obligation of hitting a determined ruling cannot stand, it should be replaced by another one, that of ruling according to his own presumption.

¹¹ The link between harm and obligation is more explicit in the *Iqtisād* section than in the *Mustasfā*. See VASALOU 2016: 107-19, especially 117 for the “first obligation”.

From a strict legal perspective, al-Ghazālī has so far fully established his legal indeterminacy or radical infallibilism, using epistemic as well as legal arguments. In the aforementioned ten propositions, there are no allusions whatsoever to the reasons explaining the divergence between *mujtahids*.

After all, this divergence may come from the different paths contemplation (*ta'ammul*) can lead into, as stated by Johansen in his study cited above. Dissent and different opinions are grounded and justified, in the eyes of the jurist, in the non-cognitive concept of *ta'ammul*. However, al-Ghazālī goes a step further in explaining the reasons of that divergence, anchoring it in a entirely non-cognitive faculty of the soul that he examined in his meta-ethical question, that of *ṭabʿ*, to which we dedicate the last part of the study.

It is important to note at this stage that the two concepts of *ta'ammul* and *ṭabʿ* are not situated at the same level. Each one of them addresses a particular audience. Contemplation is a prescriptive concept addressed to the jurist. It instructs the jurist on how to experience and lead the process of *ijtihād*, and allows him, following Baber Johansen, to have a greater margin of action. It is a theoretical concept oriented towards practice and meant to guide this practice. On the contrary, *ṭabʿ* is a more critical and reflexive concept. It justifies *ex post* the process without playing any role in its elaboration. Its aim is not to guide the practice of *ijtihād* and in that sense, it is not addressed to the jurist *qua* jurist, who does not need to know (or even who should not know) that his decision is ultimately guided by his *ṭabʿ*. As I will briefly show in the conclusion, *ṭabʿ* and the whole idea of legal indeterminacy belong less to law than to rational theology, a critical and reflexive discipline that unveils juridical illusions and to which al-Ghazālī gives preeminence over *fiqh*.

***Ṭabʿ*, from “appetitive self” to “disposition”**

It has been established that reason is not a source of obligation and that ethical values are not themselves qualifications of actions which reason can grasp. Therefore, our evaluation of good and bad does not stem from any rational faculty. As we have seen, al-Ghazālī shows that this evaluation is grounded, before the revealed law, in our self-interested purposes guided by a utilitarian principle. One should note a very important feature of this principle in its Ashʿarī version: it is founded in our desire, contrary to Muʿtazilīs who linked it to intuitive knowledge (VASALOU 2016: 118-119).

Therefore, while reason is not a source of ethical or legal obligation, *ṭabʿ* is the ultimate explanation of our norm evaluation process before the law:

[Text 6] Applying [the terms] good and bad to acts is like applying them to pictures: one whose disposition (*ṭabʿ*) is attracted to a picture or to an individual's voice judges him to be good; one whose disposition is averse to a person deems it bad. Many a person is repulsed by one disposition (*ṭabʿ*) and attracted to another: he is therefore

good for one disposition and bad for the other. For example, one group may approve of brown-skinned and another detest them. (al-GHAZĀLĪ 1997: I, 113.12-16)¹²

Likewise, in the very continuation of text 2a, one can read:

[Text 2b] The origin of that error is applying the term proof metaphorically to signs. It leads to the presumption that signs are real proofs, whereas presumption is the inclination of the soul to something. Appreciating benefits is like appreciating pictures. For those whose disposition (*tabʿ*) agrees with a picture are inclined to it (*māla ilayhā*) and call it good. This very thing can contradict another disposition, which will call it detestable since it is repulsed by it (*yanfuru ʿanhu*). Being brown-skinned is beautiful for one group, detestable for another. For those are relational predicates (*umūr idāfiyya*) without any truth in themselves. (al-GHAZĀLĪ 1997: II, 432.7-13)

The process of norm evaluation in the metaethical section and of norm construction in the last section are compared to subjective aesthetic evaluation ruled by the inclination and repulsion of the *tabʿ* and not by objective rational standards. The explicit parallelism established by al-Ghazālī, who takes the same example of the beauty of brown-skinned people, is meant to convince the reader in the last section on the basis of what had been already established in the beginning. In both cases, and by opposition to a cognitive evaluation model which constantly leads to the same solution, the aesthetic model and the concept of *tabʿ* allow us to explain the diversity of norm evaluations before the law and its diversity in a legal hermeneutical context of norm construction. Therefore, in the case of *mujtahid-s*, *tabʿ* is the ultimate explanation of the variety of effects of presumptive signs on them:

[Text 2 c] If someone says: brown-skinned are beautiful or ugly according to God, we answer: there is no reality in its being good or bad for people except its being accorded to some people's disposition (*tabāʾiʿ*) or being contrary to it. And it is for God as it is for the people. For God, it is good according to Zayd and bad according to ʿAmr, since there is no sense in its being good except its accordance with Zayd's disposition, and no sense in its being bad except its contrariety with Amr's disposition. (al-GHAZĀLĪ 1997: II, 432.13-16)

Since beauty and ugliness are not rational attributes, they vary according to the judgment of individuals and therefore are absent from God's mind. The same logic for proofs and signs applies here: the presence of the former in God's mind is a guarantee of their universality and of the possibility to grasp them by reason, and the absence of the latter (as well as of aesthetic judgment and, we may add, pre-revelational ethical judgment) confirms and legitimizes their contingency. To push it a step further, signs are not totally absent from God's mind according to al-Ghazālī: as he states it in the text, they seem to be present in their diversity or as they relate diversely to individuals, since the only definition one can give of good and bad is

¹² Translation of Kevin REINHART, with some modifications. For *tabʿ* in norm evaluation, see VASALOU 2016: 107-19.

relational (accordance and contrariety) and thus depends on their effect on the *mujtahid*'s *ṭabʿ*.

Al-Ghazālī illustrates his idea with a historical example, that of the divergence between Abū Bakr and ʿUmar on the issue of *ʿaṭāʾ*, the war pension of Muslims in the early days of Islam: while the former leaned towards equal pensions for everyone, the latter grounded it on merit.¹³ This is due, according to al-Ghazālī, to a difference in their temper and innate character (*khilqa* and *sajjyya*), two non-cognitive concepts that may be related to *ṭabʿ*.

[Text 2d] Likewise, giving the desire to pursue virtues by disproportional gifts (*ʿaṭāʾ*) is good for ʿUmar [Ibn al-Khaṭṭāb] and in accordance with his point of view, while the same thing is not in accordance with Abū Bakr [al-Ṣiddīq]. On the contrary, for him, the world is only a mean and one should not pay any regard to it. (al-GHAZĀLĪ 1997: II 432.17-433.1)

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In displaying variance in norm constructions between two equally eminent figures of early Islam, al-Ghazālī validates the diversity in legal solutions. In this context, *ṭabʿ* is no more an affective concept that explains egotistic attitudes by opposition to altruistic ethical behavior. Its use in this last section is more neutral as is shown by the following text where it plays a direct role in the jurist's hermeneutical process:

[Text 7] The difference of characters, situations and practices entails a difference in presumptions. One who practices rational theology possesses a disposition (*ṭabʿuhu*) corresponding to a specific type of proofs that guides his presumption (*yataharraku bihā ḡannuhu*), which does not correspond to the one who practices *fiqh*. Likewise, someone who practices predication is inclined to that specific type of speech. [Presumptions] also differ according to characters: those in which anger predominates have their soul inclined to audacity and revenge; on the other hand, those with a sensible nature (*man lāna ṭabʿuhu*) and a gentle heart have an aversion for it and are inclined to gentleness and conciliation. (al-GHAZĀLĪ 1997: II, 413.8-13)

This paragraph explains more precisely the relation between *ṭabʿ* and norm construction, since it concerns scholars and intellectuals rather than political figures. The cognitive process of pursuing the truth through different kinds of proofs is anchored in the different dispositions of the scholars. These dispositions are tied to their practice (*mumārasa*): theologians and jurists are not guided by the same presumptions because of their different practice and background, which may explain their two different ways of doing legal theory. To this divergence according to practice, al-Ghazālī adds that depending upon the different characters of the individuals: anger and kindness as natural dispositions can also have an influence on the presumptions leading to the solutions. However, one should note that these two last dispositions, being related to emotions, seem irrelevant in a strictly intellectual or exegetical context, that of *uṣūl al-fiqh* for instance, and fit more in a political or judicial context: that of *siyāsa* (cf. the pension issue) or that of a judge driven by his character in his search for a conflict resolution.

¹³ On the issue of *ʿaṭāʾ*, see Cl. CAHEN, “*ʿaṭāʾ*”, in *IEP*. This difference between Abū Bakr and ʿUmar is related by Abū Yūsuf in *Kitāb al-Kharāj*. See ABŪ YŪSUF 1979: 42-43.

In this new post-revelational context, *ṭabʿ* is given the positive connotation lacking in the former metaethical section, where it is exclusively presented as a negative concept. There, *ṭabʿ* as a disposition is perfectly rendered by the “appetitive self”, since it explains human actions and desires without resorting to reason, and in accordance with the Ashʿarī intuition of a human being driven by the irrational part of his soul (VASALOU 2016: 27). However, this same disposition works differently within the boundaries of Revelation. This transformation between a pre- and a post-revelational context is mainly due to the objectives pursued by al-Ghazālī in each section: his metaethical section is above all critical and solely aims to destroy the Muʿtazili pretension of a universal ethical reason and subsequently, any intrinsic moral value to acts. Against this pretension, al-Ghazālī draws a dark anthropological portrait of human beings driven by their egotistic desires in order to pave the way to the Revelation as the only valid source of ethico-legal rulings. However, after Revelation, and within its boundaries, the same human faculty of *ṭabʿ* is invested with a positive role, that of norm construction: rather than pursuing self-oriented purposes, it can now let itself be guided and affected by revealed presumptive signs in order to fill the gap of the Legislator’s intention. In a way, Revelation redeems this human faculty by giving it a positive function that legitimates diversity within the boundaries of Revelation. This positive function blurs the sharp opposition between human nature and God’s command, or, to put it differently, between human natural ethics and Divine revealed law. Humans do need a prophet to inform them of God’s command, since they cannot rely on their own natural ethics to seek salvation. However, within the boundaries of divine discourse, human nature appears to be a fundamental and reliable tool to achieve such a goal.

Conclusion: Theology as a critical discipline

As mentioned earlier, this position of radical infallibilism raised a number of objections that led al-Ghazālī to reformulate his thought and explain it in an addendum. From an ethical point of view, declaring a total indeterminacy in God’s presumptive texts and giving explicitly to the *mujtahid* the full power to assign from scratch a ruling without any possibility of committing an error can be seen as puzzling and even as scandalous. The objection refuted in prop. 7 (how can one posit a *quaesitum* without any possibility of error in case he misses it) is a technical formulation of a broader question: can we still talk about an explanation of God’s words or even of a hermeneutical process if nothing in the text itself may help the *mujtahid* tip the scales in favor of what constitute, in one way or the other, God’s intention? As al-Isfarāyīnī puts it, radical infallibilism is at best sophistical and at worst heretical (*awwaluhu safsaṭa wa-ākhiruhu zandaqa*), a statement carefully anonymized by al-Ghazālī who cites it as one of his opponents objection.¹⁴ If this statement shows anything, it is that unlike other juridical issues, this one carries an ideological weight and cannot be dealt with regardless of its social consequences. This may explain the public’s reactions that prompted al-Ghazālī to write his addendum.

¹⁴ This statement is cited in al-Juwaynī’s *Burhān*, in a last added section on *ijtihād* (absent from the edition of Beirut). See al-JUWAYNĪ 1979, II: 1319, §1426. Al-Ghazālī cites it in al-GHAZĀLĪ 1997, II: 415.14.

In a way, al-Ghazālī himself was aware of the importance of such a belief in legal determinacy from the perspective of the jurist involved in the process. At the end of our long-quoted paragraph (text 2a to d), he says:

[Text 2e] This is the truth concerning presumptions that should be understood in order to uncover the question. Jurists have erred in it since they thought that illicit and licit are qualities of the things themselves, like other people thought that good and bad are qualities of essences. (al-GHAZĀLĪ 1997: II, 433.2-4)

Al Ghazālī draws an analogy between Mu‘tazilis and jurists: like the former thought that good and bad are qualities of essences, missing thus their relative and instituted nature, the latter thought that illicit and licit are qualities of things themselves. However, both are not treated in the same manner. While Mu‘tazilism is challenged in order to be replaced by Ash‘arism, jurists and their discipline only occupy a lesser rank than theology in the hierarchy of sciences.¹⁵ When al-Ghazālī cites anonymously al-Isfarāyīnī’s condemnation of radical infallibilism, he considers it as stemming from a good-hearted jurist (*faqīh salīm al-qalb*) ignorant of *uṣūl* (legal theory or may be more broadly principles of science), of the definition of contraries and of the true nature of ruling, naively thinking that licit and illicit are qualities of things themselves. Al-Ghazālī’s opposition to jurists in this section looks more like an “epistemological division of labor” between two disciplines framed in a mass/elite dichotomy, as if the illusion of rational proofs leading to determined solutions was a necessary fiction that allows jurists to fulfill their role when accomplishing the hermeneutical process : the objection raised in prop. 7 (the impossibility of a quest when the *quaesitum* is absent), may hold, not as an absolute truth, but as a relative one for those who are engaged in practical reasoning. Instead, al-Ghazālī assigns to theology the role of describing this process and revealing the origin of that illusion, in a theoretical moment that is not directly meant to guide action but to describe it *ex post* in a reflexive or critical way. This critical function assigned to theology is not new in Abū Hāmid’s career and it has already proven its worth, since it helped him some fourteen years ago to unveil the philosopher’s greater illusion of a natural causality in his *Tahāfut al-falāsifa*.¹⁶

¹⁵ This competition between jurists and theologians is a recurrent theme in legal theory. According to Aron Zysow, infallibilism, which was mainly a position of theologians as opposed to jurists, was a way to deny to *fiqh* and *jadāl* any scientific nature and to downgrade it in comparison with *kalām*, which is based on rational proofs leading every time to one true solution (ZYSOW 2013: 275-76.). This aspect is heavily present in our text, especially when al-Ghazālī criticizes *‘ilm al-jadal* and its claim to really resolve juridical problems instead of confining itself in its gymnastic function (al-GHAZĀLĪ 1997, II: 422-423).

¹⁶ On this whole issue of natural causality in al-Ghazālī’s *Tahāfut*, see GRIFFEL 2009: chap. 6.

Appendix (al-GHAZĀLĪ 1997, II: 446.3-447.2)

- Prop. 1: The presumptive (*ẓanniyya*) proofs, by opposition to the rational ones, are relative (*idāfiyya*) and not essential (*ḥaqīqiyya*).
- Prop. 2: The *ratio legis* is a relative sign (*‘alāma*). Measuring can be a sign (*‘alāma*) erected by God for Abū Ḥanīfa and edibility [another] sign erected for al-Shāfi‘ī.
- Prop. 3: The distinction between what is a ruling *in potentia* and a ruling *in actu*.
- Prop. 4: The licit and illicit are not qualities of things themselves. Hence, it is not impossible that the same thing can be at the same time licit and illicit for two different persons.
- Prop. 5: A ruling is conventional and relative, not essential, and it can follow presumption (*ẓann*) and be based on it. It does not precede presumption. Thus, a presumptive [proposition] may be subject to doubt while the ruling based on it be categorical, like when the Prophet judges that the testimony of two witnesses providing a strong presumption (*ghalabat al-ẓann*) is sincere, because in this case, he doubts their sincerity while being categorical about the judgment and about hitting the point in the judgment. The same applies to the *mujtahid* concerning the testimony of the source to the derived ruling.
- Prop. 6: The ruling is a legal charge, and one of the conditions of the legal charge is to reach the person responsible of carrying it. There is no legal charge according to God, and thus no ruling according to him, before it reaches the concerned person.
- Prop. 7: A quest despite the absence [reading *intifā’*] of any ruling for God is possible. It is possible that the legal case contains a determined ruling but it is also possible that it does not contain one.
- Prop. 8: Error is a noun, that can be said relatively to what is necessary (which is its true meaning), or to the object of the quest, which is a metaphorical use.
- Prop. 9: One cannot be summoned to hit the point and not be accused of error if he leaves it.
- Prop. 10: One cannot be summoned to hit that on which there is not a categorical proof, because it would be a charge of the impossible.

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