

Logic, Argumentation & Reasoning

Interdisciplinary Perspectives from the Humanities
and Social Sciences

Volume 9

Series editor
Shahid Rahman

Logic, Argumentation & Reasoning (LAR) explores links between the Humanities and Social Sciences, with theories (including decision and action theory) drawn from the cognitive sciences, economics, sociology, law, logic, and the philosophy of science. Its main ambitions are to develop a theoretical framework that will encourage and enable interaction between disciplines, and to integrate the Humanities and Social Sciences around their main contributions to public life, using informed debate, lucid decision-making, and action based on reflection.

The series welcomes research from the analytic and continental traditions, placing emphasis on four main focal areas:

- Argumentation models and studies
- Communication, language and techniques of argumentation
- Reception of arguments, persuasion and the impact of power
- Diachronic transformations of argumentative practices

LAR is developed in partnership with the Maison Européenne des Sciences de l'Homme et de la Société (MESHS) at Nord - Pas de Calais and the UMR-STL: 8163 (CNRS).

Proposals should include :

- A short synopsis of the work, or the introduction chapter
- The proposed Table of Contents
- The CV of the lead author(s)
- If available: one sample chapter

We aim to make a first decision within 1 month of submission. In case of a positive first decision, the work will be provisionally contracted—the final decision about publication will depend upon the result of an anonymous peer review of the complete manuscript. The complete work is usually peer-reviewed within 3 months of submission.

LAR discourages the submission of manuscripts containing reprints of previously published material, and/or manuscripts that are less than 150 pages / 85,000 words.

For inquiries and proposal submissions, authors may contact the editor-in-chief Shahid Rahman at: shahid.rahman@univ-lille3.fr, or the managing editor, Laurent Keiff, at: laurent.keiff@gmail.com.

More information about this series may be found at <http://www.springer.com/series/11547>

Walter Edward Young

The Dialectical Forge

Juridical Disputation and the Evolution
of Islamic Law

 Springer

Walter Edward Young
Alexander von Humboldt Kolleg
for Islamic Intellectual History
Universität Bonn
Bonn, Nordrhein-Westfalen
Germany

ISSN 2214-9120 ISSN 2214-9139 (electronic)
Logic, Argumentation & Reasoning
ISBN 978-3-319-25520-0 ISBN 978-3-319-25522-4 (eBook)
DOI 10.1007/978-3-319-25522-4

Library of Congress Control Number: 2016958574

© Springer International Publishing AG 2017

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To My Mother and Father
Nancy Louise Bird Young and Courtney Denton Young, Jr.
with loving gratitude for their
inspiration, encouragement,
and ceaseless giving

Acknowledgments

The present monograph would never have seen completion without the generous and patient support of mentors, family, and friends. My heartfelt thanks go to all who have provided me the space, the means, and the motivation to see this project through. Professor Robert Wisnovsky has been a constant, kind, and unstinting pillar of encouragement and support; and Professor Wael Hallaq has been an unflagging source of inspiration, strength, and bounteous good cheer. Both of these friends and mentors deserve more gratitude than I can properly express. A special word of thanks is owed to Professor Stephen Menn of McGill University and Professor Joseph Lowry of the University of Pennsylvania for their sound counsel and suggestions on numerous issues. It goes without saying that such faults as persist in the following pages are a measure of my falling away from the sound advice of all these benevolent teachers.

I would also thank my alma mater, the Institute of Islamic Studies at McGill University: its brilliant faculty, friendly staff, and kind-hearted librarians, with particular thanks to Professor Jamil Ragep and Professor Rula Abisaab. The greater part of my research was undertaken at this venerable institution, and I am grateful to all who have made it, and continue to make it, a congenial stronghold of pure scholarship. I also owe much to the generous support of the Islamic Legal Studies Program at Harvard University; a portion of this project was researched during my very beneficial time there as a Visiting Fellow in 2013, and I am particularly grateful to Dr. S. Nazim Ali and Ceallaigh Reddy. My special gratitude goes also to Professor Shahab Ahmed of Harvard for his warmhearted friendship, advocacy, and scholarly example. Your untimely passing is an unfathomable loss to us all. The latter stages of editing this volume were undertaken during my time on the IMPACT project at the Oriental Institute, University of Oxford, under the profitable tutelage of Prof. Dr. Judith Pfeiffer; partial funding for this book was thus made available by the European Research Council under the *European Union's Seventh Framework Programme (FP7/2007–2013)*/ERC Starting Grant 263557 IMPACT. Finally, I would express my appreciation to Professor Shahid Rahman for his kindness and subsequent encouragement in nominating this work for

publication, and to all the helpful editors and staff at Springer, who rendered the process not only painless but enjoyable.

No project of this kind can be realized without a great deal of assistance and advice from family and friends. I would like to express my love and indebtedness to the Young Family and to the Mandjee Family, to the invincible Leonard Wood and the indomitable Hasher Majoka, and, above all, to the eternally smiling and supportive light of my heart, Saïs Mandjee.

Contents

1	The Current Project	1
1.1	Starting Points, Objectives, Procedure	1
	Project Title	1
	Starting Points.....	2
	Questions and Objectives.....	5
	Procedure and Presentation	6
1.2	Summary of Findings, Arguments, and Theories	10
1.3	Recurrent Terms and Definitions.....	13
	References	17
2	Evolutionary Narratives	19
2.1	Current Narratives for the Evolution of Juridical Dialectical Theory in Islam	19
	On the Dialectical World of Early Islam	19
	Evolutionary Narratives for Juridical Dialectic.....	21
	Wael Hallaq on the History of Juridical <i>Jadal</i>	24
	Larry Miller on the History of Juridical <i>Jadal</i>	27
	Miller’s “Early Period” of Juridical Dialectic	28
	Miller’s “Middle Period” of Juridical Dialectic	29
2.2	Dialectical Qualities of the Subject-Text and its Jurists.....	32
	Al-Shāfi‘ī and the <i>Kitāb al-Umm</i>	32
	Jurist Dialecticians and the Truth Seeking Ethic	36
2.3	Towards a New Narrative	42
	References	43
3	The Subject-Text and Its Genre	47
3.1	Introducing the Subject-Text	47
	On the Layers of <i>Ikhtilāf</i> in the Subject-Text	48
3.2	Authenticity and Transmission of the Subject-Text.....	52
	General Approach	52
	The “Traditional Status Quo” for the Shaybānī Version	52

	The “Traditional Status Quo” for the <i>Umm</i> Version.....	53
	The “Traditional Status Quo” for the <i>Kitāb al-Umm</i>	54
	Scholars Questioning the Authorship and Transmission of the <i>Kitāb al-Umm</i>	58
3.3	The Genres of Juridical Disagreement and Their Relationship to <i>Uṣūl al-Fiqh</i> and <i>Jadal</i> -Theory	65
	The <i>‘Ilm al-Khilāf</i> : Definition and Introduction.....	66
	On the Relationship between the <i>‘Ilm al-Khilāf</i> , <i>Jadal</i> , and <i>Uṣūl al-Fiqh</i>	67
	On the Historical Development of <i>Ikhtilāf</i> Literature.....	69
3.4	A Key Text of the <i>‘Ilm al-Khilāf</i> : The <i>Ta’sīs al-Nazar</i>	73
3.5	Premise-Principles of Legal Theory and Dialectic: The <i>Uṣūl al-Karkhī</i>	79
	“ <i>Uṣūl</i> ” as <i>Qawā’id Fiqhiyya</i>	79
	Relevant Premise-Principles from the <i>Uṣūl al-Karkhī</i>	80
	References	83
4	The Full-System <i>Jadal</i> Theory of the Lens-Texts	85
4.1	Selecting the Lens-Texts: A Brief Justification.....	85
4.2	Categories of Epistemic Justification: Drawing Indication (<i>Istidlāl</i>)	88
	Al-Shirāzī’s Hierarchy of Modes for Drawing Indication (<i>Istidlāl</i>)	89
	Al-Bājī’s Hierarchy of Modes for Drawing Indication (<i>Istidlāl</i>)	97
4.3	Representative Typologies of <i>Qiyās</i>	108
	Al-Baṣrī’s Typology of <i>Qiyās</i>	109
	Al-Shirāzī’s Typology of <i>Qiyās</i>	110
	Summary of al-Shirāzī’s <i>Qiyās al-‘Illa</i>	114
4.4	Categories of Dialectical Inquiry: Question (<i>Su’āl</i>) and Response (<i>Jawāb</i>)	129
	On the Prescribed Ordering of Questions and Objections.....	135
4.5	Categories of Critique: Demand (<i>Muṭālabā</i>), Objection (<i>I’tirād</i>), and Counter-Indication (<i>Mu’ārada</i>)	137
	On the Higher Order Categories of Objection	137
	A Brief Outline of the <i>K. al-Qiyās al-Shar’ī</i>	147
	The Focal Point of Dialectic: Hallaq on al-Baṣrī’s <i>Qiyās</i>	148
	Higher Categories of al-Baṣrī’s <i>Qiyās</i> -Oriented Objections	150
	Further on al-Baṣrī’s <i>K. al-Qiyās al-Shar’ī</i>	150
	On “Denial” (<i>Man’/Mumāna’a</i>).....	152
	On “Professing the Compelling Agency of the Occasioning Factor” (<i>al-Qawl bi-Mūjib al-‘Illa</i>).....	155
	On Objection to “Justifying the Occasioning Factor by way of the Name” (<i>al-Ta’līl bi’l-Ism</i>).....	157
	On “Divergence of Occasioned Status” (<i>Ikhtilāf al-Waḍ’</i>), or “Invalidity of Occasioned Status” (<i>Fasād al-Waḍ’</i>), and “Invalid Compatibility-Comparison ” (<i>Fasād al-I’tibār</i>).....	158

On “Lack of Efficiency” (<i>‘Adam al-Ta’t’hīr</i>).....	160
On “Reversal” (<i>Qalb</i>)	165
On “Inconsistency” (<i>Naqđ</i>)	169
On “Inconsistency” (<i>Naqđ</i>) and “Particularization of the Occasioning Factor” (<i>Takhṣīs al-‘Illa</i>).....	172
On “Breaking Apart” (<i>Kasr</i>)	173
On <i>Qiyās</i> -Oriented “Counter-Indication” (<i>Mu‘ārađa</i>) and “Invalidating Distinction” (<i>Farq</i>)	176
4.6 Procedural Norms: Inexorable Concession (<i>Ilzām</i>), Termination of the <i>Jadal</i> Session (<i>Inqītā’</i>), and Proper Comportment in Dialectic (<i>Ādāb al-Jadal</i>).....	183
On Inexorable Concession (<i>Ilzām</i>)	183
On Termination of the <i>Jadal</i> Session (<i>Inqītā’</i>).....	183
On Proper Comportment in Dialectic (<i>Ādāb al-Jadal</i>)	188
4.7 Aristotle’s Dialectic and Full-System <i>Jadal</i> Theory: Parallels and Divergences.....	188
Developmental Schemas for Dialectical Traditions in Islam	190
On Aristotelian Dialectic and Early Juridical <i>Jadal</i> -Theory	192
Reduction <i>ad impossibile</i> (εἰς τὸ ἀδύνατον; “[argument] to the impossible”); and Proof <i>per impossibile</i> (διὰ τοῦ ἀδυνάτου; “[argument] by means of the impossible”).....	193
Objection (Ἐνστάσις), or <i>Instantia</i> , or Instance.....	195
Aristotle’s <i>Topics</i>	196
Location (τόπος) or <i>Mawđi’</i> , and the Dialectician’s Method	197
Aristotle’s <i>Sophistical Elenchi</i>	204
Refutations “By seeking the contradictions between the views of your opponent and the school to which he belongs”	213
Concluding Statement.....	213
References	214
5 Extended Dialectical Sequences	217
5.1 Notes on Translation and Analysis	217
Materials for the Arabic Text.....	217
Translation Approach	218
Presentation Categories and Procedure.....	219
5.2 <i>Masā’il</i> -Sets with Extended Dialectical Sequences.....	222
Prefatory Notes	222
<i>Masā’il</i> -Set #1.....	223
<i>Masā’il</i> -Set #2.....	234
<i>Masā’il</i> -Set #3.....	265
<i>Masā’il</i> -Set #4.....	283
<i>Masā’il</i> -Set #5.....	306
<i>Masā’il</i> -Set #6.....	318
<i>Masā’il</i> -Set #7.....	328

Masā'il-Set #8.....	335
Masā'il-Set #9.....	343
Masā'il-Set #10.....	348
Masā'il-Set #11.....	356
Masā'il-Set #12.....	366
References	375
6 Short Dialectical Sequences and Independent Dialectical Formulae.....	379
6.1 Short Dialectical Sequences	379
Prefatory Notes	379
Short Sequence 1	380
Short Sequence 2	382
Short Sequence 3	387
Short Sequence 4	392
Short Sequence 5	396
Short Sequence 6	398
Short Sequence 7	400
Short Sequence 8	405
Short Sequence 9	409
Short Sequence 10	413
6.2 Independent Dialectical Formulae	417
Prefatory Notes	417
The <i>Ra'ā</i> Formulae: Have You Considered (<i>A-ra'ayta</i>)?	
Don't You See/Opine (<i>A-lā tarā</i>)?.....	418
Other Formulae Indicative of Past or Recurrent Dialectic	429
6.3 A Note on Argumentative Material Which Is Not Overtly Dialectical.....	431
References	432
7 A Picture of Proto-System <i>Jadal</i>	435
7.1 What is Common: Elements More Consonant with Full-System Theory	435
Introduction	435
Proto-System Dialectical Questions Within the Categories of the Lens-Texts.....	437
Proto-System <i>Istidlālāt</i> and <i>I'tirāḍāt</i> Within the <i>Adilla</i> Domains of the Lens-Texts.....	439
<i>Laḥn al-Khiṭāb</i> (the Unspoken Implication of the Instruction), <i>Faḥwā al-Khiṭāb</i> (the <i>A Fortiori</i> Signification of the Instruction), <i>Dalīl al-Khiṭāb</i> (the [Restrictive] Indicant of the Instruction), and <i>al-Ḥaṣr</i> (Restriction)	450
<i>Istiṣhāb al-Ḥāl</i> (Presumption of Continuity of the Legal <i>Status Quo Ante</i>)	455

	Proto-System <i>Istidlālāt</i> and <i>I'tirādāt</i> Expanded to Other Domains.....	457
7.2	What is Distinct: Elements More Unique to Proto-System Teaching and Practice.....	459
	Proto-System Question Strategies Outside the Categories of the Lens-Texts.....	459
	Proto-System <i>Istidlālāt</i> and <i>I'tirādāt</i> Outside the <i>Adilla</i> Domains of the Lens-Texts.....	462
	Modes of “Consistent Generalizing of the ‘ <i>illa</i> ”	465
	Objections to Objections	467
	Arguments of a More Ancient Tenor	468
	Arguments to the <i>Ma'qūl</i> , Appeals to Legal Theory, and Caliphal Imposition.....	470
	Formulae of Subsumption, Extension, and Objection.....	472
7.3	Additional Elements from Non-Sequence Arguments.....	474
7.4	Elements of Wider Historical Interest	484
	Elements of Additional Interest	484
7.5	Remarks on the Character of Proto-System Juridical <i>Jadal</i>	487
	References	489
8	<i>Uṣūl al-Fiqh</i> and <i>Jadal</i>-Theory in the Dialectical Forge	491
8.1	Introducing the Dialectical Forge Model	491
8.2	Proto-System <i>Jadal</i> and the Development of <i>Uṣūl</i> -Theory	492
	Differences Between Proto-System Legal Theory and Full-System <i>Uṣūl al-Fiqh</i>	492
	Legal Theory in the Dialectical Forge.....	498
8.3	The Dialectical Forge and Current Paradigms for the Evolution of <i>Uṣūl al-Fiqh</i>	500
	Wael Hallaq.....	501
	Muḥammad Abū Zahra	512
	Norman Calder	522
	Khalil al-Mays	527
	References to <i>Jadal</i> in Secondary Works on Islamic Legal Theory	529
8.4	<i>Uṣūl</i> -Theory Components of the Dialectical Forge Model.....	530
	On the Three-Stage Cycle, the Bequeathing of Dialectical Axioms, and Dynamic Symbiosis and Co-Evolution.....	530
	On the Three-Stage Cycle and <i>Ijtihādīc</i> Anticipation	533
	On the First Principles Parallel: “Scientific” Premises and Aristotelian Dialectic	534
8.5	Proto-System <i>Jadal</i> and the Development of <i>Jadal</i> -Theory	535
	Differences Between Proto-System <i>Jadal</i> Teaching and Practice and Full-System <i>Jadal</i> -Theory	535
	Arguments to <i>Tanāquḍ</i> and the Meaning of <i>Mutanāqiḍ</i>	537

8.6	<i>Jadal</i> -Theory Components of the Dialectical Forge Model.....	543
	On <i>Jadal</i> Practice Shaping <i>Jadal</i> -Theory.....	543
	On Dialectic Defining What is <i>Endoxon</i>	546
	On the Transmission, Study, and Analysis of Past <i>Jadal</i> by <i>Jadal</i> Theorists.....	548
8.7	The Dialectical Forge Model in its Current Form	550
	References	551
9	Supplementary Paradigms and Open Doors	555
9.1	Towards a Background Narrative for the Early Evolution of Juridical Dialectic and Legal Theory	555
	The Confluence of Argumentation Epistemes and the Early Development of Epistemic Justification and Objection in Islamic Law	556
9.2	Towards a Motive Model for the Bequeathing of Dialectical Axioms.....	559
9.3	Open Doors.....	562
	Appendices	565
	Appendix I: al-Baṣrī’s Modes of <i>Qiyās</i> -Oriented Dialectic	565
	Appendix II: al-Shīrāzī’s Modes of <i>I’tirād</i>	573
	[Disputing the Authoritative Source-Case (<i>Aṣl</i>)]	573
	[Disputing What Is Rationally Understood from the Authoritative Source-Case (<i>Ma’qūl al-Aṣl</i>)]	578
	[Disputing Presumption of Continuity (<i>Istiṣhāb Ḥāl</i>)].....	584
	[Modes of Preponderance].....	585
	Appendix III: al-Bājī’s Modes of <i>I’tirād</i>	589
	[Disputing the Authoritative Source-Case (<i>Aṣl</i>)]	589
	[Disputing What Is Rationally Understood from the Authoritative Source-Case (<i>Ma’qūl al-Aṣl</i>)]	596
	[Disputing Presumption of Continuity (<i>Istiṣhāb Ḥāl</i>)].....	603
	[Modes of Preponderance].....	604
	References for the Appendices.....	608
	Glossary: Select Technical Terms of Islamic Legal Theory and Dialectic	609
	Index	615