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Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence

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Identity and Difference in Islamic Jurisprudence

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In Loving Memory of My Father

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Introduction

There is an essential relation between identity and religion in human societies. Among the pre-Islamic Arabs, this connection found expression in the identification established between the Arab tribes, their mythical progenitors and their respective gods. Each tribe had its own privileged god(s), and the great grandfather of the tribe — a half-human, half-divine figure — was conceived as responsible for the introduction of the worship of that specific god. These aspects of group identity point to a tripartite structure comprising kinship, religion and identity in intricate combination. It would be a fascinating course of inquiry to trace the incidence of monotheism in the complex identity structure of pre-Islamic Arab communities. In this paper I examine the repercussions of monotheistic Islam on a specific cultural product, viz., legal discourse, investigating the issue of the unitary identity of Islamic law as this identity transpires in both the legal philosophy and the practice of Islamic law during its formative period in the second century of Islam.

To better understand the philosophy animating the early Muslim jurists, it is natural to inquire into the determinate circumstances and conceptions that presided over its forma-

tion in the second Islamic century. In particular: What is the relationship between the jurists' religious understanding of law and the concrete methods they followed in their practice? Was there a single paradigm or systematic conception of legal method which guided the jurists' activity, or rather a multiplicity of such methods? Such a question acquires a particular significance in the context of the last and most monotheistic of the three Middle Eastern faiths. A cursory examination of the writings of Muslim legists of the formative period would reveal that the idea of the uniqueness of the law was intimately connected to the fundamental tenet of Islamic faith: the Oneness of Allah (*al-tawhid*). If "there is but one Lawgiver, *Allah al-ahad*," it follows that there is no law but God's law, the essential duty of the *fuqaha'* residing in the disclosure of the unique, unchanging and self-identical Divine *jus*. Yet this unitary, monotheistic spirit of *fiqh* contrasts with another more pluralistic understanding of Islamic law which derives from actual practice and from reflection on that practice by leading legal theoreticians, so that a more accurate judgment of the issue of uniformity and difference in Muslim jurisprudence should take into account both dimensions, the unitary-theological and the pluralistic-practical.

In the following pages I attempt to integrate both dimensions within a dialectical view of the relationship between substantive law and religion in Islamic culture. I underline the

dynamic interaction between two levels in Islamic law: its formal self-image as rooted in and justified by Divine and Prophetic utterance, and its functional historical reality as a pluralistic legal system. The strongest claim in support of the unitary nature of Islamic law appears from the quarters of the founding Muslim legists themselves who — whether religiously oriented or practically minded, conservative or innovative — proclaim in unison the primacy of precedent (*sunna*) over human reasoning and opinion (*ra'y*). While this feature — unitary, justificatory, theological — of Muslim jurisprudence is highlighted in both traditional Muslim and modern Western accounts of *fiqh*, the other aspect of Muslim legal philosophy — pluralistic, critical — has received little scholarly attention. Given the centrality of such considerations for the nature of Islamic law, it is important to subject them to closer scrutiny.

Chapter 1

Legal Pluralism in Early Islam

I don't say that humanity doesn't progress. I say that it is a bad method to pose the problem as: "How is it that we have progressed?" The problem is: How do things happen? And what happens now is not necessarily better or more advanced, or better understood, than what happened in the past.

Michel Foucault[1]

The theme of this chapter is the pluralistic dimension of Islamic law. While pluralism will appear in the following pages to be a salient feature of Islamic jurisprudence in its formative period, legal pluralism is not an exclusive property of *fiqh*, setting it apart from other legal systems. Law touches a very deep level of human existence: the crucial protection of life and property, the organization of sexuality and marriage, inheritance rights and financial transactions. The possibility of more than one system regulating these fundamental relations is demonstrated by the multiplicity of legal structures on the present-day world scene. Within a single juridical system, pluralism manifests itself in the bringing to bear of more than one legal principle on the resolution of a particular problem, a circumstance that permits divergent rulings on the same problem.[2]

Considering that conflict and litigation are part and parcel of the intricate texture of social life, it is only natural that the resolution of conflict by adjudication should involve differences of appreciation in many cases and result in different rulings. Given the complexity of considerations that determine the domain of law, a measure of flexibility allowing for some disagreement in evaluation and judgment among jurists would seem to be a healthy feature of any legal system. Islamic law and jurisprudence exemplify this feature on a grand scale.

In its most comprehensive meaning, Islamic jurisprudence, *fiqh*, signifies two domains of Islamic law: legal methodology, or the science of the foundations of law, *'ilm usul al-fiqh*; and the substantive rulings or branches, *furu'*, that constitute the legal content. By the end of the third Islamic century, Muslim jurists had before them an impressive written corpus of substantive law, created by the great Muslim legal minds of the second century and cast in its definitive form by their illustrious disciples. The major legal treatises of the Hanafis, the Malikis and the Shafi'is, and the Hadith collections of Ibn Hanbal, Muslim and al-Bukhari were in circulation, preparing the ground for the generations of classical legists of succeeding centuries. Two aspects of this development of Islamic jurisprudence merit special attention: its prodigious pace and its striking pluralism. If the death of Abu Hanifa in 150 A.H. marks the completion of the first phase of systematic

legal thought in Islam, the intervening ninety years that conclude with the death of Ibn Hanbal in 241 A.H. witness the rise of the voluminous constituted corpuses of the four orthodox Sunni schools, or *madhahib* (sing. *madhhab*). Rules of worship (*'ibadat*); marriage and divorce (*nikah, talaq*); inheritance (*fara'id*); contracts and commercial transactions (*'uqud, mu'amalat*); and criminal law (*'uqubat*) appear full-fledged in their final form, as if by design, at the close of this decisive third century. In both tempo and completeness, the rise of Islamic law constitutes a unique event in the cultural history of Islam, for in no other period — apart from that of the modernist legislation of the nineteenth and twentieth centuries — was the will as determined, the effort as concentrated and the purpose as clear on the part of those whose names are securely preserved in the folds of the primary corpus juris. Their achievement is compounded when it is further realized that detailed substantive law surfaces not just in one version but in a multiplicity of variants, each coupled with indications of the methods employed in its derivation.

One of the major sources of legal pluralism in Islam lies within the contrast between Shari'a as God's ideal Law and Fiqh as human endeavor to discover that Law. An essential tension exists at the heart of Islamic law, between its Divine and, consequently, absolutely objective character on the one hand, and, on the other hand, the large measure of autonomy

accorded to the individual jurist in the elaboration of its precepts. The sacred Law, *shari'a*, *shar'*, is the sum total of Divine instructions to individual Muslims whereby the properly legal domain — family, contract, and penal law — is subsumed under the notion of religious duty. Worship regulations such as prayer, fasting and pilgrimage are therefore prominent in Shari'a, and worship should indeed be viewed as the source and purpose of Law. The conviction that God's single, unique Law is an objectively existing structure detailing the model behavior of the believer belongs to the deepest level of Muslim consciousness. It constitutes the driving force behind the practice of *fiqh* (literally, "thorough understanding"), and Islamic jurisprudence is the science and study of Shari'a. As a lure for religious feeling, the belief in the objectivity and accessibility of the Law impels, incites and justifies Muslim jurists (*fuqahā'*) in their quest for knowledge (*'ilm*).

The fact that legal knowledge, derivation and elaboration — in short, the making of the law — was conceived and practiced under the guise of religious duty gave *fiqh* a strong subjective tinge. It is the personal responsibility of the jurist toward God, the Prophet and the Muslim Community (*al-umma*) to see to it that his juridical pronouncements approximate God's and the Prophet's dicta as much as possible; as he is to personally assume this responsibility before God, he also assumes it personally before men. Islamic law was the product of individual

legal scholars working as independent minds, bound by no authority except the Qur'anic text and Prophetic precedent (*al-sunna*). The pioneering work of al-Shafi'i (d. 204) on the foundations of jurisprudence was not alien to the panoply of methods practiced by the legists of his time, underscoring both the objective limits and the essential subjective dimension of Muslim juridical reflection. "No one," he declares, "is ever to claim that something is legally permissible (*halla*) or prohibited (*haruma*) except (when the claim is) based on knowledge (*'ilm*). And knowledge is information (present) in the Book, or the Sunna, or consensus, or analogy." Concurrently al-Shafi'i criticizes the one who does not care to justify his position by proof and argument, "condescending to other people's imitation of his position, and to their unquestioning disregard for proof (*hujjatih*)... And imitation (*taqlid*) fosters their ignorance, God absolve us and (absolve) them."[3] On a similar note, al-Muzani (d. 264), a prominent disciple of al-Shafi'i, describes the latter's valuation of autonomous investigation in *fiqh* in the introduction to his *Digest (Al-Mukhtasar)*of his master's jurisprudence:

> I have summarized this book from the science of Muhammad b. Idris al-Shafi'i, God have mercy on him, seeking the essence of his doctrine in order to make it accessible to the one desiring it. And this, knowing that al-Shafi'i forbids anyone to imitate him or to imitate anyone else, so that one may investigate the subject for (the sake of) his religion, and assume responsibility for himself.[4]

The Historical Scene

Apart from the legal and governmental practices of the Prophet and the four right-guided caliphs (*al-khulafa' al-rashidun*) — the Muslim state that came to be incorporated under the Sunna[5] could claim no right of control or supervision over the elaboration of legal doctrine. During the second century, private groups of jurists developed the law, working independently of any state intervention in different geographical parts of the Islamic state, primarily in the Hijaz and Iraq. While the law was being made and practiced, to a greater or lesser degree, among the Muslim communities of Syria, Egypt, Iraq and the Hijaz, the state authorities, through a hybrid of conviction and *real politik*, saw to the appointment of official judges (*qudat*; sing. *qadi*) to implement "God's limits" (*hudud Allah*). Apart from administrative and governmental procedures of Byzantine and Sasanid inspiration, the Umayyad and especially the 'Abbasid states toed the line.[6] To be sure, the rulers were not averse to the system of duties and obligations that was being developed in minute detail by the private legal specialists. In addition to political expediency, the Umayyad and 'Abbasid caliphs, as Muslim believers, had a real interest in the implementation of a system which they had every reason to think

reflected Qur'anic and Prophetic strictures.

Indeed, the religious character of the legal practice of these autonomous jurists carried with it so much social authority and prestige that it made any large-scale judicial change practically impossible. Any attempt to unify the substantive rulings of the different schools and regions in a single code was bound to come up against the authority of the living traditions of established religio-legal practice. The following quotation from Ibn al-Muqaffa', a state secretary under the 'Abbasid Caliph al-Mansur (d. 158), presents a vivid image of the unhappy coexistence between the state administrator's desire for judicial uniformity throughout the territories of the state, and the real plurality of legal practice in the various regions:

> The Commander of believers might wish — concerning these two regions (Basra and Kufa) and other regions and localities — to look into the disagreement between these contradictory rulings: in criminal, marriage, and property laws. What is allowed in marriage and criminal law in Hira is forbidden in Kufa. A similar disagreement obtains inside Kufa: what is permitted in one district is prohibited in another district. Despite its plurality (*ta'addud*), the law is binding on Muslims in their blood and honor: it is implemented by judges (*qudat*) whose ruling and verdict are recognized as valid. Every party (of legists), whether from Iraq or the Hijaz, is infatuated with its (own) doctrine, and slights the doctrines of others.[7]

Yet apart from the single serious attempt by the early ‘Abbasid Caliph al-Mansur, no measures were taken by the state to impose uniformity of law over the extended domains of Muslim rule. The autonomy of the juridical class vis-à-vis the state is evidenced by, among other things, the fact that when the ‘Abbasid state, in its effort to centralize the administration of justice, created the office of chief judge (*qadi al-qudat*), it turned to the legists of the authoritative schools. The Caliph Harun al-Rashid (d. 193) appointed Abu Yusuf, the leading Hanafi doctor of the period;[8] al-Shaybani, Abu Hanifa's other prominent companion, then succeeded Abu Yusuf in the office of chief justice.

In Muslim legal thought, such flexibility and diversity in the law as depicted by Ibn al-Muqaffa‘ was recognized, at an early stage in its history, as both necessary and salutary. By the end of the second century, leading Muslim jurists such as Malik (d. 179) and al-Shafi‘i (d. 204) were employing the term *ikhtilaf* (disagreement), not only to designate an existing state of affairs among legists, but also to confer legitimacy on the *de facto* differences of opinion and judgment in matters juridical. Manifestations of pluralism abound in *fiqh*. Diversity in legal norms and rulings appears in its formative period during the first three centuries of the Hijra; this pluralism arises among the four major schools — Hanafi, Maliki, Shafi‘i and Hanbali — of what later came to be mainstream (Sunni) jurisprudence, and within each school.[9] Thus the three prominent pupils of Abu Hanifa,

Abu Yusuf (d. 182), al-Shaybani (d. 189), and Zufar (d. 158), whose rulings constitute the Hanafi primary corpus, disagree on a number of legal solutions, both among themselves and with the position of the master. Similarly, the jurisprudence of al-Shafi'i is rent by a chronological division: his new doctrine (*al-madhhab al-jadid*), formulated after he settled in Egypt, does not conform to his old doctrine (*al-qadim*). Still later, the followers of Ibn Hanbal distinguish between various accounts (*riwayat*) of the rulings of their master.

In the expanse of the second century, the following broad contrasts present themselves: The Iraqi jurists of Kufa and Basra (later to constitute the Hanafi school) refer to the individual's measured opinion (*ra'y*) and better judgment (*istihsan*) in applying a Qur'anic or Hadith rule.[10] On the other hand, the Madinans (later known as the Maliki school) take the historical precedent of the people of Madina (*'amal ahl al-Madina*) to be their guide in legal interpretation and application.[11] Furthermore, al-Shafi'i himself institutes a new school of law by admitting isolated reports of Prophetic utterance (*hadith al-'ahad*) as legally binding.[12] The third century witnesses further manifestations of legal pluralism in mainstream Sunni Islam. The traditionist (*muhaddith*) Ibn Hanbal develops attachment to the letter of the Hadith and the Qur'an into a universal principle, thus allowing a very limited range for juridical discretion. Dawud b. Khalaf al-Zahiri (d. 270) pushes the literalism and formalism

of Ibn Hanbal even further by confining legal judgments solely to the apparent meaning (*al-zahir*) of the sacred texts and rejecting any form of independent human reasoning. Given the inaccessibility of the Arabic sources to the general Western reader, and considering the vividness of "first hand" historical accounts in comparison to commentary, I will present here, *à la lettre*, some of the most influential testimonies on the meaning, place, and *raison d'être* of legal pluralism as they transpire in the formative period of *fiqh*.

Ibn Qutayba's (d. 264) account, taken from the field of *belles lettres* (*'adab*), and written with the freshness of an outsider of sorts, is as good a record as any. He did not practice jurisprudence, yet he had his own sympathies and he wrote as a committed advocate of the conservative legists of the Hadith party (*ahl al-hadith*). Ibn Qutayba enumerates

> ...those leading scholars and recent jurists, active minds which are unequalled: the likes of Sufyan al-Thawri, Malik b. Anas, al-Awza'i, Shu'ba, al-Layth ibn Sa'd, and the scholars of the parts: the likes of Ibrahim b. Adham, Muslim al-Khawwas, al-Fadil ibn 'Ayad, Dawud al-Ta'i, Muhammad b. Nadr al-Harithy, Ahmad b. Hanbal, Bishr al-Hafi, and others like them who are closer to our times.[13]

Of those enumerated, only two — Malik and Ibn Hanbal — were to have the stature and following sufficient to institute a lasting tradition of jurisprudence. But others named, particularly al-Awza'i (Syrian, d. 157), Sufyan al-Thawri (Kufan, d.

161), and al-Layth ibn Sa'd (Egyptian, d. 175), were also to leave their imprint on the youth of *fiqh*. The eclectic listing and the marked absence of al-Shafi'i's name — yet rather close in time, if not in spirit, to the doctors honored by Ibn Qutayba's reference — point to the still fresh and uncertain future awaiting many a legal doctrine in the mid-third century.

Another listing from an earlier period covers similar ground, with the added advantage of underlining the competitive atmosphere and the varied geographical locations of these thriving movements of jurisprudence. It so happens that the cities newly created by the Muslim fighters, Basra and Kufa, and the historical urban centers of the new faith, Mecca and Madina, were the theaters of legal reflection, argument and counter-argument. Thus al-Shafi'i relates:

> We knew that some of the people of Mecca followed the doctrine of 'Ata' [bin Abi Rabah, d. 115] and that others chose differently. Then al-Zunji ibn Khalid issued rulings in Mecca, and some preferred him in jurisprudence, while others were inclined to the teaching of Sa'id b. Salim... I knew that the people of Madina preferred to follow Sa'id ibn al-Musayyib [d. 94], while rejecting some of his teaching. Then in our time Malik [bin Anas, d. 179] appeared amidst them, and many of them followed him, while others exaggerated in attacking his doctrines; I saw Ibn Abi al-Zinad exaggerate in attacking him. And I saw al-Mughira and Ibn Abi Hazim and al-Darawardi [d. 189] support his doctrines, and others attacked them. In Kufa

> I saw some who, inclined to the teaching of Ibn Abi Layla [d. 148], were attacking the doctrines of Abu Yusuf [d. 182]. There were others who, inclined to the teaching of Abu Yusuf, were attacking the doctrines of Ibn Abi Layla and what contravenes (the ruling of) Abu Yusuf. Others followed the teaching of [Sufyan] al-Thawri, and still others that of al-Hasan b. Saleh. And what I gathered about other cities not mentioned here is similar to what I saw and described of the disagreement among the people of cities.[14]

These tangible signs of the ambience of heated controversy and passionate commitment that inspired the early Muslim legists, and which prepared the terrain for the recognition of disagreement as a normal feature of legal thought, set the tone of early Islamic jurisprudence as an intellectual and practical activity punctuated by a variety of sources and methods. Pluralism in *fiqh* manifests itself at both the methodological and the substantive, positive levels;[15] the theoretical and the practical. In terms of methodology, the classical theory of Islamic law, since al-Shafi'i formulated its epistemology at the close of the second century, adheres to the theory of the four sources of law: the Qur'an, the Sunna, consensus (*ijma'*) and analogy (*qiyas*). Recent researchers, however, seem to draw skeptical conclusions about the presence of any such uniform methodology well into the fourth century.[16] A closer look at the history of juristic science in the first and second centuries reveals a multiplicity of ways of legal derivation that were applied by jurists in the various parts of the Islamic empire. What

were the commanding visions of these jurists? What sources and methods did they employ in their activity? Whence did they derive authority in law? What was the nature of their substantive rulings? The scarce source material from the first century allows only limited insight into these questions. Later Muslim authors have preserved a number of documents in the form of epistles, letters, and eye-witness reports which depict significant aspects of first-into-second century Islamic jurisprudence. In some cases, the authenticity of these documents may be disputed, but judging by their content and circumstances, a number of them seem to be authentic and there is no specific reason to doubt their authenticity.[17]

The common ideological canopy under which the distinct legal traditions found their *raison d'être* was their exemplification of the Sunna, i.e., the Precedent of the Prophet and his Companions. The concept of Prophetic and Companion Precedent, or Sunna, played a singular function in the derivation of the law. Given the partly circumscribed and partly vague scope of Qur'anic legislation, the symbolic religious aura of the Sunna as emanating from the person of the Prophet, his Companions (*al-sahaba*), and their Successors (*al-tabi'un*) surrounded a majority of the substantive rules and precepts of Islamic law. In this regard, the letter of the Egyptian legist al-Layth ibn Sa'd to Malik ibn Anas,[18] his illustrious colleague of Madina, acquires special significance as it reveals aspects of

the more complex historical sequence of juristic development in the first century of the Hijra:

> Many of the first generation of Emigrants (*al-muhajirin*) and Supporters (*al-ansar*) went on Holy War, mounted campaigns, and the people accepted their leadership: they were implementing the Book of God, and the Sunna of His Prophet; in what is not explained by the Qur'an and the Sunna, they exercised their opinion. In their lead were Abu Bakr and 'Umar and 'Uthman... who watched over the Muslim encampments, instructing them in writing to apply the religion, and to avoid disagreement about the Book of God and the Sunna of His Prophet: they advised them in all the matters explained by the Qur'an, or practiced by the Prophet, p.b.u.h., or which they implemented after him. But if a matter arose which the Companions of the Messenger of God (*ashab rasul Allah*), p.b.u.h., had consistently adhered to until their death, in Egypt, Syria and Iraq, during the reigns of Abu Bakr, 'Umar and 'Uthman, the latter ordered the Muslim encampments to abide by it... And yet, the Companions of the Messenger of God, p.b.u.h., disagreed in legal judgment on many issues after him (*ikhtalafu ba'd fi al-futya fi ashya'in kathira*)... Then the Successors (*al-tabi'un*) disagreed very strongly on issues after the Companions... Sa'id ibn al-Musayyib [d. 94] and others of similar standing. Then those who came after them disagreed, and I witnessed them in Madina: at their head were Ibn Shihab [al-Zuhri, d. 124] and Rabi'a b. Abi 'Abd al-Rahman.[19]

What transpires from al-Layth's account is that the Sunna is thoroughly imbued with the phenomenon of *ikhtilaf*, differ-

ence in the sense of disagreement. Both the ideal-monistic and the functional-pluralistic notions of Prophetic and Companion Precedent are evident in the Egyptian jurist's letter to Malik. Al-Layth describes the confluence of political and legal authority in the persons of the three successor caliphs governing the newly conquered realms; yet in the same breath he underscores the contributions of the Prophet's Companions to legal practices in the various parts of the empire. He stresses the fact that the central political-legal authority of Abu Bakr, 'Umar and 'Uthman insured that the rulings of the Prophet's Companions were implemented in the regions where the individual Companions resided, and this despite their disagreement on many a legal judgment. Among the most prominent were the Companion ('Abdallah) Ibn 'Umar (d. 74), son of the second caliph, who became the major juristic source for the Madinans; ('Abdallah) Ibn 'Abbas (d. 68), the Companion who transmitted the Prophet's rulings and became a legal authority for the Meccans; and Ibn Mas'ud (d. 33), an older Companion of the Prophet, who became the authority for the Kufans and the Iraqis in general, his doctrine having been transmitted through Ibrahim al-Nakha'i (Kufan, d. 96).

Al-Layth amply illustrates his historical account by citing rulings on prayer, witnesses and dowry on which there is disagreement between Madinan practice and that of other localities. Malik, following Madinan custom, favors combining the

two prayers of *maghrib* and '*isha*' in a single prayer on the rainy night,[20] whereas al-Layth retorts: "The rain of Syria far exceeds the rain of Madina, and yet none of the Companions there grouped the two prayers together on the rainy night; among them were Abu 'Ubayda b. al-Jarrah, Khalid b. al-Walid, Yazid ibn Abi Sufyan, 'Amr b. al-'As and Ma'adh b. Jabal."[21] On the issuing of a verdict on the basis of the testimony of one witness and the oath of the plaintiff, Malik and the Madinan jurists[22] "still practice it, whereas the Companions of the Prophet did not rule by it, neither in Syria, nor in Homs, nor in Egypt, nor in Iraq."[23] Again,

> The Madinans rule that a woman could stipulate that the later portion of her dowry (*mu'akhkhar sadaqiha*) be paid to her immediately upon marriage; and the Iraqis have agreed with the Madinans on this... yet none of the Companions of the Prophet allowed immediate payment to a woman of the later portion of her dowry; only if she were separated from her husband by death or divorce did she have the right to that payment.[24]

Images of the Law

The concept of imago or self-image, as applied to cultural products such as political institutions, law and art, retains a useful ambiguity. It simultaneously indicates two essential components of individual and collective identity: reality and fiction. Playing on the fusion between image as truthful representation and self-

image as normative ideal, social agents construct accounts of their (and their predecessors') activity in which the borderlines between the real and the imaginary are easily crossed. In Islamic culture, the self-representations of the law and its practitioners are invested by the specific religious ideals of the latest monotheistic faith. The ideals, symbols, dogma and eschatology of Islam inscribed in the liturgical recitation of the Qur'an and the Arabic script of 'Uthman's (the fourth caliph, d. 35) edition, were ever present in the jurists' images of themselves and their activity, infiltrating and compounding the factual and objective dimension of these images. The legal sources/symbols of the Hadith and the Sunna illustrate the double ingression of the religious ideal and the objective fact in Islamic juristic discourse. As material sources of law — texts, reports, and statements of legal maxims — the Hadith and Prophetic/Companion Sunna could not but reflect the juridical practices and conceptions of those upholding them; minor problems of chronology aside, this is a sociological truism. On the other hand, as the Prophet's and his Companions' precedent and dicta, the Sunna and Hadith function as ultimate symbols of Muslim piety, the model Islamic way of life. Such duality of function of Hadith and Sunna allows a benign margin of freedom in attributing existing, *de facto* rulings to the person of the Prophet and his Companions. Affirming a real continuity[25] between their own legal practices and those of their most lofty predecessors, the jurists could and did

claim a dual achievement: expediency and piety.

We proceed with an analysis of the notion of the Sunna, and the varieties of methods it inscribed on the Muslim juristic imagination during the first two centuries of the Hijra. For, under what might at one level be reasonably regarded as a monolithic concept, the Sunna admit of a plethora of meanings, connotations and legal techniques. Two major and overlapping conceptions of the Sunna contended for the recognition of the community in the formative period: Sunna as living practice, *'amal*; and Sunna as oral and written reports, *hadith* or *khabar*. The first meaning was most defended by Malik ibn Anas, the jurist from Madina whose name is attached to the Maliki school of law; the second was the battle cry of the conservative traditionists, *al-muhaddithun*, who shunned independent reasoning in law altogether.

Fiqh and Hadith, Fiqh versus Hadith

The Hadith trend in Islamic law, commencing in the first century, gaining momentum during the whole expanse of the second century and culminating in the six canonical third-century Hadith collections of Muslim, al-Bukhari, Ibn Maja, Abu Dawud, al-Tirmidhi and al-Nasa'i — to cite only the most orthodox editions of a voluminous literature[26] — had its own historical roots and causes, which were not always the same as those of Fiqh,

or jurisprudence properly speaking.[27] The contrast and interaction between Hadith and Fiqh culminated in the figure of al-Shafi'i (d. 204), whose synthesis of *khabar* and *ijtihad* — textual report and jurisprudential reasoning — was a self-conscious and determined effort to harmonize these two fundamental trends of Islamic law in its formative period.[28] The tension between the narrators of Prophetic and Companion lore (*muhaddithun*) and the independent-minded legists (*fuqaha'*) could be portrayed from a variety of angles and perspectives: competition for juridical, communal and political recognition; differences in mode of reasoning and in substantive rulings; and variation in the emphasis on practice vis-à-vis textual report. A sort of division of labor existed in the juristic community by virtue of which some excelled in reporting and collecting Prophetic and Companion legal precedent, while others were more concerned with continuing and elaborating on extant traditions. No sharp boundary is to be drawn, however, between the two trends of Fiqh and Hadith, as both quite often found expression in the same individual judge or legist. The contrasting practices of one of the most prominent jurists of the first century, the *faqih* Sa'id ibn al-Musayyib (d. 93), testify to the early, complex, interlacing and concordant/discordant relations between Fiqh and Hadith.

The antipathy of the general run of Hadith narrators for the exercise of personal judgment in religio-legal matters found expression in a common adage attributed to the Prophetic epoch:

"Those of you most ready to venture legal judgment (*futya*) are the most ready for Hell." Sa'id ibn al-Musayyib was nicknamed "Sa'id the Daring" (*Sa'id al-jari'*) for his audacity in trodding new territory in his rulings. Ibn Qayyim al-Jawziyya informs us:

> Sa'id ibn al-Musayyib was versatile in legal judgment (*wasi' al-futya*). Ibn Wahb reports... that Abi Ishaq said: "In those times, I witnessed many a man asking for a ruling, with people sending him from one circle (*majlis*) to another, for they hated to engage in legal judgment; invariably the man would end up at the circle of Sa'id ibn al-Musayyib."[29]

Yet the self-same Sa'id was the son-in-law of Abu Hurayra,[30] the notorious narrator of Prophetic Hadith, from whom he transmitted a number of traditions. Furthermore, "he transmitted the (legal) knowledge of 'Umar... and was the most knowledgeable person in Madina about the legal cases (*qadaya*) of the Prophet, p.b.u.h., and about the cases of Abu Bakr, and the cases of 'Umar, and the cases of 'Uthman..."[31]

No doubt Sa'id had collected an inventory of legal material acclaimed as emanating from the Prophet and his generation, and he put this information to use when trying to sort out solutions to the new cases presented to him. There is no mention of the specific logical means he employed to this effect, but it could be surmised from the preceding that his methods leaned on the reflective and the innovative just as much as on the transmission of precedent. The following is a sample of

the numerous rulings in Malik's *Muwatta'* that are credited to Sa'id's name: if a man gives his wife the choice of divorce, and she does not separate from him but stays with him, then there is no divorce; if a group of (five or seven) men kill a man unjustly, then all of them must suffer death (transmitted from 'Umar b. al-Khattab); there is no compensation due to the injury caused by an animal (attributed to the Prophet); if a slave who is married to a free woman dies, leaving children from her, and he was not manumitted (*lam yu'taq*) before his death, then the children's allegiance (*wala'*) is to the patrons of the mother; if a sale transaction comprises uncertainty (*gharar*), then the sale is prohibited (from the Prophet).[32]

The tension/harmony between Fiqh and Hadith is partly explicable by the aforementioned dual nature of the practices of each camp. The literalist drive of Hadith jurists, namely their endorsement of none but the most straightforward and obvious meaning of the Prophet's words and deeds, to the exclusion of all speculation, might bewilder the present-day observer: How could a legal system develop and flourish with such a minimal role assigned to ratiocination? The answer lies in the exemplar of piety and devotion to the Prophet which those jurists sought to erect. Adhering to the letter of the Prophet's phrase, with no admixture on the part of the jurist, was a stronger assertion of pious devotion and thus it was carried to a great extreme. This mode of juristic thought had its

paradoxical side, as extreme fidelity to the letter of transmitted Prophetic narrative meant, on occasion, adhering to contradictory reports and rulings. Al-Layth ibn Sa'd reprovingly comments on this trait of the *muhaddith* mentality as it appears in the master narrator figure of Ibn Shihab al-Zuhri [d. 124]:

> Ibn Shihab [al-Zuhri] gave accounts at great variance (*ikhtilaf kathir*) with one another. If some of us wrote to him, he would respond, according to his judgment and knowledge, with three distinct types (of ruling) on the same case, each contradicting the other (*yanqud ba'daha ba'dan*); and he would not feel (the inconsistency of) what passed in his judgment.[33]

For what dominated the *muhaddith* mind was not the canon of logical coherence, viz., that of global and systematic legal reasoning. Rather, the narrator/scholar was content in his atomistic universe of textual fidelity: his total reverence for the ideal of Prophetic Discourse underlies his submission to the narrative as transmitted in all its materiality, discreteness, and possible alterity vis-à-vis other such narratives. This of course does not signify that Hadith scholars were insensible to blatant contradictions in their reports, but that what was uppermost in their minds was the faithful reporting of Prophetic and Companion utterance and deed, leaving the disentanglement of the narratives to the more reflective-minded jurists.

Law as Practice: *'Amal*

A fundamental aspect of early Islamic jurisprudence was its embeddedness in the living practices of law across the Muslim communities in the Hijaz, Iraq, Syria and Egypt. It is needless to say that on many points of law the contention between jurists was precisely on the actual content of the Prophet's and Companions' legal precedents. Yet it is possible to elicit a strand of argument that was shared by a significant number of legists: the claim that their position reflected the living practice of their community as inherited from the generation of the Prophet. In his epistle to the Caliph al-Mansur, Ibn al-Muqaffa' (d. 140) describes and objects to this usage of the title of "Sunna" to designate the legal practices in place, an indication that the Sunna was indeed conceived by some judges and jurists as the actually implemented set of rulings. He chastises those judges

> who claim to adhere to the Sunna, while making a Sunna what is not a Sunna (*yaj'al ma laysa sunnatan sunnatan*), to the point of sentencing to death with no evidence or proof of the ruling which they claim to be a Sunna: if asked about the matter, they could not say that the death penalty was applied at the time of the Prophet, p.b.u.h., or that of the leaders of guidance (*a'immat al-huda*, i.e., the first four caliphs) after him.[34]

Nowhere is the notion of the Sunna as the living practice (*'amal*) of the community more pronounced than in the legal

epistemology of the Madinan jurist Malik ibn Anas (d. 179), whose reflection on the grounds and justification of the legal structure and discourse in existence in his native city of Madina was roughly contemporaneous with the redaction of the epistle of Ibn al-Muqaffa' cited above. Malik's model legal system is that of the city of the Hijra, al-Madina, with all the real imprint and symbolic lore it carries of the Prophet's practices and those of his illustrious Companions and the Four Caliphs. In his letter to the Egyptian jurist al-Layth ibn Sa'd, Malik expresses his discontent with the latter's legal responses (*fatawa*) as being at variance with the juridical traditions of Madina:

> I have learned that you advise people with rulings on many topics, rulings which are at odds with what people follow here, in our city. You — with your sincerity, achievement and stature in your country — need to fear for yourself and to follow what leads to salvation... Everybody should follow the people of Madina: the Hijra was to Madina; the Qur'an was enunciated in Madina, permitting what is permitted and prohibiting what is prohibited. The Prophet, p.b.u.h., in their midst, the people of Madina witness the revelation... the Prophet rules and they obey him; he legislates for them (*yasunn lahum*) and they abide... In his wake came the most loyal to him of his Community, governing and adjudicating: what they knew, they implemented; and about what they had no knowledge, they inquired; then they chose the most veridical (information), exercising discernment and being in temporal proximity (to the time of the Prophet)... Then came the Successors in their wake, following the same path and abiding by the

> same laws (*sunan*). So if the law in Madina is explicit and practiced, I do not see why anyone should follow another law that is different from that heritage which no one (except the Madinans) should claim as his.[35]

Malik is willing to recognize the right of the jurists of other parts and cities to practice their own version of the Sunna of God and His Prophet. He is not willing, however, to relinquish what he believes to be Madina's exclusive claim to embody in its legal tradition the most authentic rendering of God's law. The arguments he adduces in the above letter in support of the privileged status of Madinan practice are not easy to rebut, and they served well in the propagation and appeal of the Maliki doctrine among many legists in various parts. His notion of Madinan law as the legislation of the Prophet (*yasunn lahum*) as it is transmitted directly from the Prophet's generation through the succeeding generations of Madinans evinces a rather conservative bent: the Sunna is here in Madina, "explicit and practiced." Consequently, and as a matter of principle, there is no justification for jurists in other parts to deviate from the practice of Madina. If, in reality, such deviation is a frequent occurrence, it is to be tolerated, but no one should claim that their local law approaches the status of Madinan practice in religious standing, authority or veracity. From his religiously privileged residence of Madina, Malik's juristic vision embodies both the monistic and universal pluralistic dimensions of Islamic law. To be universal signifies the recognition of differences in legal decisions

among Muslims: this Malik does with a liberal spirit of acceptance vis-à-vis the systems in place in the various Muslim communities. On the other hand, Islamic legal pluralism at its best does not imply any disavowal of commitment to a particular set of rulings as the one truthful expression of Shari'a; neither Malik nor al-Shafi'i, nor any of the great legal minds of Islam advocated the dilution of the individual jurist's belief in the superiority of one legal system — that of his conviction — over all the rest.

Law as Narrative: *Khabar*

In the symbolically charged ambience of piety and devotion to the legacy of the central figure of Islam, a thorny issue hovered in the consciousness of the devout *faqih*s: to what extent should narrations of Prophetic practice and precept be accepted as authentic, reliable reports? In practice, the applied criteria for the authenticity of reported Hadith varied, and a number of common problems attached to this theme had crystallized by the time of the great al-Shafi'i (d. 204). The centrality of the legal report (*khabar*) from the Prophet is highlighted by al-Shafi'i's distinction between two kinds of reported precedent of the Prophet:

> The (legal) report (*al-khabar*) from the Prophet is of two kinds. The first is the report of the many from the many from the Prophet (*khabar 'amma 'an 'amma 'an al-nabi*), indicating what is binding for worshippers to be effected

> in their words and acts, and specifying their rights to their persons and their possessions: no one should be ignorant of this (kind of legal information) whose knowledge should be equal between the scholars (*ahl al-'ilm*) and the commoners (*al-'awam*).

As far as this type of legal information is concerned, there is no doubt about its authenticity, being confirmed by multiple sources and recognized as such by the Muslim community. However, there is a second type of legal information to which only the juridical elite have privileged access, and it is in this type of report that the reliability of the transmitter is crucial:

> The second kind is the specialist report (*khabar khassa*) of particular rulings... whose knowledge is restricted to those specialists with the requisite capacity, to the exclusion of the majority.... With respect to this (second kind of legal Prophetic narrative), the scholars should, God knows better, accept the report of the truthful (transmitter) as being reliable.[36]

Malik's insistence on the fact that the law is practice, '*amal*, needs to be understood in the light of a competing conception of the Sunna as the oral or textual report from the Prophet, *khabar*. Giving primacy to reported Prophetic utterance or act over the inherited practice of Madina was not a popular theme with Malik, who was more inclined to extract his rulings from the living traditions than from the authority of statements. However, transmitted reports and Prophetic narratives were the central theme and religious

banner of a concurrent movement in Islamic law in the second century, namely, the formidable Hadith trend, which, as we have seen, did not fail to affect jurisprudence proper. This conception derives the Sunna or the law from the reported words and deeds of the Prophet, irrespective of whether or not it was subsequently applied by the Companions. Thus al-Shafi'i states:

> The Hadith of God's Messenger is valid on its own, not by the practice of someone else after him; if there were a practice (*'amal*) of one the Companions, and a report from the Prophet (*khabar 'an al-nabi*) were found which contradicts that practice, then the Companion would abandon his practice in favor of the report from God's Messenger; once verified, the report must be promptly implemented, even if it was not a previous practice of the Companions.[37]

In support of his position, al-Shafi'i mentions significant rulings by the Companion-Caliph 'Umar b. al-Khattab in which 'Umar changed his practice upon learning — through authentic report — of different rulings by the Prophet. We mention the following two: 'Umar used to exclude the wife of the assassinated man from inheriting any portion of his blood-money (*diya*), until he was told that the Prophet had once ruled for the woman's right to inherit from her husband's blood-money; upon hearing this he reversed his practice. As for the blood-money of the stillborn infant, 'Umar was on the point of ruling that if the infant was killed after birth, then the Prophetic precedent sets the compensation at one hun-

dred camels; however, if the foetus was killed while still in the womb, and the infant was born dead, then no blood-money is due. Then he was informed that when the two wives of a certain man quarreled, and one hit the other, causing her to give birth to a dead child, the Prophet had ruled that a slave must be paid as compensation. Upon learning this, ʻUmar ruled according to the report from the Prophet.[38] Al-Shafiʻi concludes:

> When the Sunna of the Prophet was found, ʻUmar had to abandon reliance on his own practice. Consequently, the people should abandon every practice which contradicts the rediscovered Sunna. The example of ʻUmar refutes the view that, in order to be accepted, the Sunna of the Prophet requires antecedent application; it also shows that the Sunna is not affected by anything which disagrees with it.[39]

In answer to the question of why Muslims should trust the single transmitter whose report from the Prophet is not confirmed by any other chain of transmission except the one stated by him, al-Shafiʻi invokes three reasons: 1) the argument from the structure of political power in Islam; 2) the argument from the lofty Successors; 3) the argument from judicial procedure on witness testimony. Al-Shafiʻi explicates the universal structures of power and its delegation in the Muslim community: "The Prophet delegated his power only to the truthful, and all his delegates were single men. Also I have not heard, after God took His Messenger unto Him, that

the community disagreed that its caliph is one, and that the district-governor is one, and that the district-judge is one."[40] In other words, if the whole political and judicial structure of authority is based on confidence in and obedience to a single individual, why should the transmission of specialized legal information be treated differently? Consequently, the *faqih*s or legal specialists should not hesitate to recognize and rule by the Prophet's precedent even when it is transmitted by a single reporter (*khabar al-wahid*).

The argument from the lofty predecessors, the Successors of the Prophet, confers the prestige of tradition and precedent on the acceptance of the report by the single individual:

> I do not know of any of the Successors (*al-tabi'in*), through whom something was transmitted, who did not accept a solitary report (*khabar wahid*), rule by it and have recourse to it. [Sa'id] Ibn al-Musayyib accepts the sole report of Abu Hurayra from the Prophet and makes it a Sunna (*wa yaj'aluhu sunnatan*); and 'Urwa [ibn al-Zubayr; *faqih*, d. 94] does the same with 'Aisha's [the Prophet's wife] narrative from the Prophet, making it a Sunna... and similarly all the Successors in Madina did the same.[41]

Al-Shafi'i's third argument proceeds from the similarity he perceives between the judge's criteria for admitting the testimony of the single witness and the admission of the report by the single transmitter of Prophetic Hadith. Three possibilities present themselves: the judge knows that the witness is reliable, in which case he admits his testimony; the judge knows that the witness

is unreliable and therefore rejects his testimony; the judge has no sufficient information on the truthfulness and moral probity of the witness, in which case he withholds judgment on the validity of his testimony. Al-Shafi'i calls for the adoption of the same criteria with respect to the narrator of Hadith: "We reject a *hadith* when the evidence requires its rejection, and we accept it when the evidence requires its acceptance, just as we explained regarding witnesses."[42]

Notes

1 Michel Foucault, "Prison Talk," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. and trans. Colin Gordon (New York: Pantheon Books, 1980), p. 50.

2 For a more detailed definition of pluralism in legal systems, the reader might profitably consult Jean-Paul Charnay, "Pluralisme normatif et ambiguïté dans le Fiqh," *Studia Islamica* 19 (1963), pp. 65-82. A highly critical comparative analysis of pluralism in the Hanafi school of Islamic law and in modern French law with regard to the regulation of marriage and divorce is found in Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts," *Studia Islamica* 30 (1969), pp. 73-118.

3 Muhammad ibn Idris al-Shafi'i, *Al-Risala*, ed. Ahmad Shakir (Beirut: Dar al-Kutub al-'Ilmiyya, n.d.), sections 120, 135, 136.

4 Al-Muzani, *Al-Mukhtasar*, published in Muhammad ibn Idris al-Shafi'i, *Al-Umm*, ed. Muhammad Zahri al-Najjar, 8 vols. (Cairo: Maktabat al-Kulliyat al-Azhariyya, 1961), vol. 8, *Kitab Mukhtasar al-Muzani*, p. 1.

5 The complex notion of the Sunna as the repository of the

Prophet's and his Companions' legal practice is a main theme of the two sections, "The Historical Scene" and "Images of the Law," in the discussion below.

6 "Toeing the line" in this context signifies the formal adoption of Shari'a as the law of the state, which, given the generally despotic character of caliphal rule, did not exclude direct violations of the legal precepts through arbitrary decrees, corruption and threats to judges. For a comprehensive account of the working of the Muslim judiciary in different periods and parts of the Islamic realm, see Émile Tyan, *Histoire de l'organization judiciaire en pays d'Islam*, 2nd ed. (Leiden: E.J. Brill, 1960).

7 Ibn al-Muqaffa', *Al-'Adab al-Saghir wa al-'Adab al-Kabir wa Risalat al-Sahaba*, ed. Y. Abu Halqa (Beirut: Maktabat al-Bayan, 1960), pp.166-167.

8 Abu Yusuf's wide-ranging legal interests did not exclude the law of public finance; he elaborated the first Islamic theory of taxation in his famous treatise, *Kitab al-Kharaj* (*The Book of Land Tax*).

9 The reality of disagreement among jurists was such that a special genre of juristic literature, *al-khilafiyyat*, devoted to the discussion of the legal differences between schools, came into being in the third century of the Hijra and continued into the classical period. In this regard, the famous historian and Qur'anic exegete, al-Tabari (d. 310 A.H.), who also tried his hand at *fiqh*, produced one of the earliest of such accounts, *Kitab Ikhtilaf al-Fuqaha'* (*The Treatise on the Disagreement of Jurists*).

10 In this regard, Z.I. Ansari remarks: "Coming to the usages of the term *istihsan* in Abu Yusuf and Shaybani one gets the impression that the term was formulated in opposition to *qiyas* and the purpose was not to deny the legitimacy of *qiyas* as such, but to restrict its scope so as to avoid the unhappy consequences that might follow from adhering to *qiyas* rigidly and to affirm the validity of the jurist's discretion to depart from strict analogy on the strength of some overridingly important consideration." (Zafar Ishaq Ansari, "Islamic juristic terminology before Shafi'i: a semantic analysis with special reference to Kufa," *Arabica* 19

(1972), p. 292.
11 See below, the section on "Law as Practice: *'Amal*."

12 See below, the section on "Law as Narrative: *Khabar*."

13 Ibn Qutayba, *Ta'wil Mukhtalaf al-Hadith*, ed. Muhammad al-Najjar (Cairo: Maktabat al-Kulliyat al-Azhariyya, 1966), pp. 16-17.

14 Al-Shafi'i, *Al-Umm*, vol. 7, pp. 280-281.

15 The term "positive" as used in connection with Islamic jurisprudence throughout this study designates substantive Islamic law, the material rulings of *fiqh* which Muslim jurists call *furu'*, in contradistinction to *usul al-fiqh*, the science of the foundations of law or legal methodology. The author is aware that this is not the only confusion that may arise when he uses terms from Western languages, such as "pluralism" or "positive law," which possess specific historical meanings for the Western reader, but which can hardly be said to serve unproblematically in the context of classical or even modern Islamic culture. There is no completely satisfactory solution to this problem, and the author requests the reader's indulgence to prune such problematic terms of their specifically Western historical connotations, so far as is possible. An awkward but occasionally necessary reminder is to mentally attach the qualifier "Islamic" to whatever term the reader is wondering about.

16 See Wael Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25 (1993), p. 587.

17 Here I concur with the conclusions reached by Nabia Abbott in her decisive contributions to elucidating the historicity of early Arabic prose writings in her painstaking analyses of Arabic papyri, *Studies in Arabic Literary Papyri*, vol. 1: *Historical Texts*, vol. 2: *Qur'anic Commentary and Tradition*, and vol. 3: *Language and Literature* (Chicago: University of Chicago Press, 1957-1972).

18 Al-Layth ibn Sa'd's letter to Malik is considered to be authentic by the Islamist legal scholar Robert Brunschvig, "Polémiques

médiévales autour du rite de Malik," *Andalus* 15 (1950), pp. 377-435.
19 Al-Layth's letter to Malik, in Ibn Qayyim al-Jawziyya, *I'lam al-Muwaqqi'in 'an Rabbal-'Alamin*, 4 vols. (Cairo, n.d.), vol. 3, p. 72. The careers of Sa'id ibn al-Musayyib and Ibn Shihab al-Zuhri will serve to illustrate the mosaic of relations between Fiqh and Hadith, jurisprudence and Prophetic narrative, in the next section. The contribution of Rabi'a b. Abi 'Abd al-Rahman to the Madinan legal tradition is marked by his innovative spirit and the unhesitating expression of his personal opinion, earning him the nickname *Rabi'a al-Ra'y*, "Rabi'a of the Opinion" (ibid.).

20 Sahnun, *Al-Mudawwana al-Kubra*, 16 vols. (Cairo, 1323-1324 A.H.), vol. 1, p. 115.

21 Al-Layth to Malik, in Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, pp. 72-73.

22 Malik ibn Anas, *Muwatta'*, 2 vols., ed. F. 'Abd al-Baqi (Cairo, 1951), pp. 724-725.

23 Al-Layth to Malik, in Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, p. 73.

24 Ibid.

25 The exact measure of reality to be ascribed to this continuity is the object of a great controversy in contemporary Islamic scholarship revolving around the question of the historical reliability of early Hadith literature as an authentic record of the Prophet's and the Companions' words and deeds. On the skeptical side figure such works as Ignaz Goldziher's *Muslim Studies*, 2 vols. (London: Allen & Unwin, 1966), vol. 2 (translated from the German *Muhammedanische Studien*, first published in 1890); Joseph Schacht's *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); and his *Introduction to Islamic Law* (Oxford: Clarendon Press, 1964). On the opposite side stand Nabia Abbott's *Studies in Arabic Literary Papyri* (vol. 2, *Qur'anic Commentary and Tradition*); Muhammad Mustafa al-'Azmi, *Studies in Early Hadith Literature* (Beirut: Al-Maktab al-Islami, 1968); and his more recent study *On Schacht's Origins of Muhammadan*

Jurisprudence (New York: Wiley, 1985). A somewhat intermediate position finds expression in G.H.A. Juynboll, *Muslim Tradition: Studies in the Chronology, Provenance, and Authorship of Early Hadith* (Cambridge: Cambridge University Press, 1983).

26 Preceding the six classical Hadith works and the *Musnad* of Ibn Hanbal in the latter part of the third century of the Hijra were the voluminous Hadith compilations of 'Abd al-Razzaq (d. 211 A.H.; eleven volumes) and Ibn Abi Shayba (d. 235 A.H.; fifteen volumes), both works known under the appellation of *Al-Musannaf* (*The Assortment*).

27 It should be mentioned here that Hadith encompasses a wider repertoire of Prophetic lore than the purely legal narratives that were the concern of jurists. The properly legal Hadith, styled *halal wa haram*, "the lawful and the prohibited," coexisted with edificatory, ethical (*targhib wa tarhib*), historical (*maghazi*), biographical (*sira*), and eschatological material that far outnumbered it. The political significance of the historical and biographical information, touching as it did on the roles of the various Arab clans and prominent figures in the Prophet's saga, was a permanent feature of the Hadith literature, and explains in part the inconsistencies of much of that literature.

28 On al-Shafi'i's unique achievement of a unified Islamic legal methodology, see Norman Calder, "*Ikhtilaf* and *Ijma'* in Shafi'i's *Risala*," *Studia Islamica* 58 (1983), pp. 55-81.

29 Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 1, p. 18. Ibn Qayyim makes an interesting remark on the ethnic character of these early Muslim jurists, indicating that a good number of them were *mawali*, non-Arab converts to Islam: "When the 'Abadillah passed away, 'Abd Allah ibn 'Abbas, and 'Abd Allah ibn al-Zubayr, and 'Abd Allah b. 'Amr ibn al-'As, and 'Abd Allah ibn 'Umar, jurisprudence fell to the lot of the *mawali* in all the parts: thus 'Ata' b. Abi Rabah was the jurist of Mecca, and Tawuus the jurist of Yemen, and Yahya b. Kathir the jurist of Yamama, and Ibrahim the jurist of Kufa, and al-Hasan the jurist of Basra, and Makhul the jurist of Syria, and 'Ata' al-Khurasani the jurist of Khurasan; except for Madina, which God had favored with a Qurayshite, Sa'id ibn al-

Musayyib, the unchallenged jurist of Madina." (Ibid.)

As to the sociological structure of these first-century circles of jurists, G.H.A. Juynboll supports the existence of loose associations of sympathizers around individual legists, rather than the more rigid structure implied by Schacht's use of the term "schools" throughout his *Origins ofMuhammadan Jurisprudence* See Juynboll, "Some notes on Islam's first *fuqaha'* distilled from early hadith literature," *Arabica* 39 (1992), p. 301.

30 Among the other Companions of the Prophet, Abu Hurayra's standing as a narrator of Prophetic dicta was rather problematic, to say the least, as the following account from Ibn Qutayba testifies: "Abu Hurayra accompanied the Prophet, p.b.u.h., for about three years. He related much information *(riwaya)* from the Prophet, outliving him by about fifty years…. So when it came to bear that the information he related was not similar to anything communicated by the majority of the Prophet's Companions and earlier associates, he became suspect in their eyes and they rejected his information; they asked him: How is it possible that you alone heard this! Who heard it with you?" (Ibn Qutayba, *Ta'wil Mukhtalaf al-Hadith*, p. 38). In later centuries, Abu Hurayra's reputation as a transmitter of Hadith does not seem to have suffered much from this early criticism, although some present-day Muslim Hadith commentators and critics are willing to cast serious doubt on the authenticity of his narrative. See G.H.A. Juynboll, *The Authenticity of the Tradition Literature: Discussions in Modern Egypt* (Leiden: E.J. Brill, 1969).

31 Ibn Qayyim, *I'lam al-Muwaqqi'in*,vol. 1, p. 18.

32 Malik ibn Anas, *Muwatta' al-Imam Malik*,al-Shaybani's redaction, ed. 'Abd al-Wahhab 'Abd al-Latif, 2nd ed. (Cairo, 1967), sections 571, 671, 677, 732, 775.

33 Al-Layth to Malik, in Ibn Qayyim, *I'lam al-Muwaqqi'in*

34 Ibn al-Muqaffa', *Al-'Adab al-Saghir wa al-'Adab al-Kabir wa Risalat al-Sahaba*, p. 167.
35 Malik's letter to al-Layth, in al-Qadi 'Iyad's manuscript, *Tartib*

al-Madarik, quoted by Ahmad Abu Zahra, *Malik*, 2nd ed. (Cairo: Maktabat al-Anglo Misriyya, 1952), pp. 122-123.

36 Muhammad ibn Idris al-Shafi'i, *Ikhtilaf al-Hadith*, ed. 'Amer Ahmad Haydar (Beirut: Mu'assasat al-Kutub al-Thaqafiyya, 1985), pp. 37-38.

37 Al-Shafi'i, *Al-Risala*, sections 1164-1166.

38 Ibid., sections 1172-1178.

39 Ibid., section 1171, in the context of sections 1168-1170.

40 Al-Shafi'i, *Ikhtilaf al-Hadith*, p. 42.

41 Ibid., p. 46.

42 Ibid., p. 290.

Chapter 2

Methodological Pluralism

Inna sa'yakum la-shatta. (Qur'an)
Your endeavor is multifarious.

There are two salient aspects of Islamic law in its formative period in the first three centuries of the Hijra: 1) the creative tension arising between technical legal reasoning (*fiqh*) and the religious ethical trend of Prophetic narrative (*hadith*), which tension seems not to have been destructive of innovation and diversity in Muslim juristic thought, but rather to have contributed to the pluralism of Islamic substantive law; and 2) the grounds and methods advocated by al-Shafi'i (d. 204), the founder of systematic Islamic legal epistemology (*usul al-fiqh*), to confer validity on judicial decisions, thus resulting in a synthesis of precedent and reflection, of the normative and the innovative, which was to serve the *usuli*s (theoreticians) of each school in voicing their distinctive methodologies.

In mainstream (Sunni) Muslim understanding, al-Imam al-Shafi'i is credited with the work of consolidating *fiqh* on a firm and secure religious basis via the elevation of Prophetic Hadith to canonical authority as a sacred source of law. Thus one way to address the matter of the identity and the plurality of Islamic law is to consider the following question: Were al-

Shafi'i's methods of restricting juridical thought to deductive and inductive inference from the Qur'an and Prophetic *sunna*, hegemonic and eliminative of legal pluralism at the time of their introduction? Or rather, in the context of Mu'tazilite opposition to the established practice or *sunna* of the *fiqh* schools — an opposition which, as will shortly be demonstrated, threatened to wipe out whole areas of the law in the name of sole allegiance to the Qur'anic Text and Reason — did al-Shafi'i provide the school legists with the exegetical and theoretical means of conferring legitimacy on and defending their historical doctrines against the Mu'tazilite party?

The role of both the Hadith movement and al-Shafi'i in the development of Islamic law seems, in retrospect, to present a strong case for the oft-repeated claim that Muslim jurists are essentially confined to the fixed meanings of the sacred texts. In no other earlier episode in the development of *fiqh* is there such marked insistence and such determined will to abide by the Qur'anic and, more significantly, by the Hadith texts, than in al-Shafi'i. Sympathetic to the Hadith's cause, he affirms:

> All that the Messenger of God ruled concerning what is not in the Book, and what we have written... of God's grace to mankind in teaching (them) the Book and Wisdom, is a proof that Wisdom is the *sunna* of God's Messenger.... So whoever accepts God's rulings in His Book, accepts the dicta of the Messenger of God, for God has ordered His

> creatures to obey His Messenger and to abide by his dicta.... Thus to comply with both God's Book and the *sunna* of God's Messenger, is to comply with each in obedience to God.[1]

Nicknamed "*nasir al-hadith*" (the vindicator of Prophetic dicta) in Iraq, al-Shafi'i engaged the fight for the delimitation of the grounds of judicial decisions. With his characteristic acumen, he established an order of rank among the grounds for judicial rulings which sets Prophetic precedent on an equal footing with Qur'anic text: "It is not permissible for a judge or a mufti to judge or to rule except by a binding dictum which is from the Book or the *sunna*, or what the scholars unanimously profess, or by analogy (*qiyas*) with some of the preceding."[2]

The equality, so relentlessly defended by al-Shafi'i, between the Qur'an and the Sunna, Revelation and Muslim historical precedent, proved to be of great significance in justifying the existing legal norms and practices against the radical criticism of the Mu'tazilites. The latter were powerful contenders for juristic authority from the *kalam* (rational theology) circles who were exploiting a basic weakness of *fiqh*, namely the differential credibility of its two authoritative sources. The Qur'an, in 'Uthman's *Mushaf*, was publicly recognized as the true expression of God's will, whereas the Sunna or transmitted reports of the past practice of the Muslim community's authoritative figures — Prophetic, Companion, Successor — could not claim a similar allegiance from a purely critical perspective. In criticizing the precedent/norm-

oriented thought of pro-Hadith jurists, the prominent figure al-Jahiz (d. 255) of the Mu'tazilite faction ridicules the former, comparing them to commoners, and appeals to reason (*al-'aql*) against the authority of precedent: "The advocates of Prophetic dicta (*ashab al-hadith*) and the commoners are those who imitate and do not reflect; they do not deliberate, and yet imitation is unacceptable to reason (*al-taqlid marghub 'anh fi hujjat al-'aql*) and it is prohibited in the Qur'an."[3]

The Mu'tazilites — who were not a school of law proper — marked *sunna* reports for deletion as grounds for legal decisions, as being subject to all the vagaries of human error and bias in their transmission. They accepted only the Qur'anic rulings, calling for the exercise of free reasoning in all legal matters not touched upon in the Qur'an: "How could you accept reports [about legal practice] that are dubious, whereas I accept only what is manifest by God in His Book whose letter is beyond doubt,"[4] as al-Shafi'i represents a Mu'tazilite, in his credulous naiveté, reprimanding him.

Al-Shafi'i categorically rejects such freelance juristic speculation. The actual historical import of al-Shafi'i's position against free reasoning in law, however, can better be seen as a defense of the substantive law already in existence, against the amateur and subjectivist trends of the Qur'an party, *ahl al-kalam*, who objected to the admission of established judicial practice on the same footing as the Qur'an. The critical and

liberal-sounding phraseology of these "rationalists" notwithstanding, their activity in *fiqh* was parasitic, "throughout dependent upon the development of legal doctrine in the schools of law proper."[5] The implementation of their Qur'an cum Reason thesis would have meant the fragmentation of the normative historical basis of Islamic law embodied in the legal precedents and practices of Muslim communities. Al-Shafi'i perceived that, in practice, this appeal to the authority of Reason would translate into ruling according to the different reasons of individuals, leading to the total dismemberment of the law:

> So if a ruler or a judge is presented with a case and, claiming that a decision cannot be made by studying the text or by analogy, he follows his preference, then he must allow others to prefer differently. Every ruler and judge would then decide according to his preference, and the same case would be subject to contradictory rulings. If they do this, they have forfeited their function since they would be deciding according to their whims.[6]

If we add the fact that apart from some penal, marriage, and inheritance clauses, substantive legal matter is absent from the Qur'an — a circumstance that resulted in the legists having recourse to Prophetic, Companion and Successor *sunna*or precedent in fiscal, property, contract and constitutional law — then al-Shafi'i's role in consolidating the rising *fiqh* structures of substantive law in the face of the over-critical Qur'anists becomes obvious. In the words of John Burton,

> Shafi'i met the challenge to the *Fiqh* represented in the exclusive claim advanced on behalf of the Qur'an by improving the documentation of the Sunna's claim.... He was determined to yield nothing to the Qur'an party. He saw that what must be done was so to interweave the Sunna with the divine command to obey Muhammad that the dangers threatening to wipe out whole areas of the *Fiqh* could be repelled.[7]

By providing the legal specialists of the schools with the requisite logical and exegetical tools in their search for sacred sanction for their distinctive doctrines, al-Shafi'i's techniques allowed for the symbolic identification of the schools' normative precedents with the *sunna* of the Prophet: the substantive *fiqh* of the schools, sedimented in the *Asl* of the Hanafis and the *Muwatta'* and *Mudawwana* of the Malikis, withstood the pro-Hadith onslaught by introducing formalistic changes favoring the figure of the Prophet as the symbolic authority behind the law.[8] Al-Shafi'i and his disciples crowned the formal victory of Hadith by developing a whole new corpus of substantive law — enunciated in *Al-Umm* — exemplifying their adherence to Prophetic *sunna*, thus paradoxically creating a new school of law, the Shafi'i *madhhab*. Thus the ambivalence of human achievement: the jurist whose normative strictures were intended to unify Islamic law on a common textual basis employed those very same strictures to institute a novel legal corpus, confirming the already existing pluralism of *fiqh*.

An Illustration from Contract Law

Underlying the common ideological and religious convictions of Muslim legists was their commitment to the maintenance of their distinctive school rulings. Evidence from the classical period tends to support the conclusion that it was the schools' competing legal judgments which were being preserved under the unassailable mantle of the Prophet rather than any unitary and fixed meanings of the Qur'an and Hadith. As an illustration of the plurality and flexibility of substantive law in classical Islam, I will examine the position of Muslim jurisprudence regarding a problem which is intimately connected with the fundamental issue of freedom of contract in commercial transactions. It will be shown that there exist two opposing principles in Islamic contract law — the Hanafi and the Hanbali — each claiming the authority of a distinct prophetic *hadith* behind it.

It is a principle of Hanafi law that stipulations (*shurut*) in a contract which are over and above those implied by its nature or by custom are legally inadmissible, and that their occurrence in a contract invalidates the totality of the contract. The Hanafi legist al-Kasani (d. 587) explains:

> [In a sale contract], stipulations which are neither necessitated by the contract nor customary practice in the community, but which are of benefit to the seller or to the buyer — such stipulations render the transaction null and

> void. Thus the following contracts are legally invalid: if one sells a house and stipulates in the sale contract that the seller is to inhabit the house for a month before the buyer takes delivery of it; if one sells (a parcel of) land and stipulates that he is to cultivate it for a year [before the buyer takes possession of it]; if one buys (a piece of) cloth and stipulates in the sale contract that the vendor is to tailor it into a shirt....[9]

No doubt such a ruling is at loggerheads with the spirit of free commercial transaction in which the parties to a contract are at liberty to agree to as many conditions as they see fit, as long as these stipulations are within the general orbit of the law. In justification of their position, Hanafi legists credit the Prophet as having said, "no sale that has an additional stipulation attached to it is permissible (*la bay' bi-shart*)";[10] another justification of this principle is the prohibition of concluding a contract within a contract or a deal within a deal (*safaqa fi safaqa*), for fear of committing usury (*riba*).[11]

In contradistinction to the Hanafis, Hanbali jurists admit as legally valid sale contracts with additional conditions attached to them. Thus a stipulation which is extraneous to the main contract and which benefits one of the parties to the transaction is permissible. In the legal opinion of the Hanbali jurist Shams al-Din ibn Qudama (d. 682),

> The contract is valid if the buyer stipulates an additional condition to his benefit such as the transport of the firewood or the tailoring of the cloth. Also, the transaction is

> valid if the seller stipulates an additional condition to his benefit such as inhabiting the house for one month before its delivery to the buyer.... The advocates of opinion (*ra'y*, i.e., the Hanafis) reject the validity of these contracts because it is reported that the Prophet forbade the conclusion of a sale contract containing an extraneous condition. However, it is not true that the Prophet forbade these transactions. What the Prophet forbade was the contract comprising *two* additional stipulations: he did allow the contract comprising *one* such stipulation.[12]

Consequently, it appears that the validity of a sale contract containing a single extraneous condition is supported by a different variant of the first *hadith*. Appealing to this variant, the Hanbali legists produced legal rulings contrary to those pronounced by the Hanafis. The former rule that only contracts with two additional stipulations are legally inadmissible, while those containing just one such stipulation are admissible.

The presence of two contradictory rulings in Islamic contract law on the issue of multiple conditions in a contract is significant for two reasons, among others. First, it is an example of the absence of consensus between schools on the very content of Prophetic sayings. For though both of the parties adhere to the principle of the sanctity of Hadith, the variation in reported narratives leads to great fluidity in practice, amounting to a difference in rulings on the same issue. In this case, it is the fluidity of the sacred texts themselves which is the direct cause of the flexibility of the law. Secondly, the example shows that

the general classificatory scheme, *ra'y* (opinion) versus *hadith* (precedent), does not always reflect the actual complexity of juristic positions. Both the advocates of *ra'y*, the Hanafis, and the supporters of *hadith*, the Hanbalis, appeal to Prophetic narrative. However, whereas one would expect the first to be the more liberal group, thus allowing for adding stipulations to the contract, it is the religiously stricter Hanbalis who champion greater liberty of transaction.[13]

Nascent Philosophies of Law

A straightforward way of presenting Islamic legal philosophy would be to investigate the topics and chapters of a manual in *usul al-fiqh*, the official science of the foundation and methods of the law in the traditional system of Islamic learning. In this essay, however, I have chosen the rather different course of reflecting on significant statements uttered by the founding jurists of Islam. Under the three themes of the Law and the Truth, the Law and the State, and the Law and the Text, I wish to bring to light salient methodological features in the thought of Abu Hanifa (d. 150), Malik (d. 179), and al-Shafi'i (d. 204), respectively. That some of these latent features and presuppositions of the nascent Muslim legal mind are at variance with traditional Muslim and long-cherished Western views about the nature of Islamic law is to be expected. In the second

century of the Hijra, Muslim legal thinking is still fresh and, like all youth, exhibits a spontaneity and vitality that is absent from the later systematizations.

Before proceeding further with our inquiry, two precautionary remarks are in order. First, the discussion below does not pretend to expound the legal methods of Abu Hanifa, Malik, or al-Shafi'i in their entirety. Only some aspects of their modes of thought are selected for commentary and investigation, which aspects need not be the only or even the dominant tendency in the overall methodology of the jurist in question. My excuse in venturing on such a path is that what may appear hidden and secondary from a global perspective, might nevertheless have been decisive in the micro, detailed processes of thinking and argumentation. Also, whatever the degree to which the following analysis reflects the dominant patterns of reasoning in each jurist, it remains an attempt to bring into the open certain aspects of early Muslim legal methodology which are significant and interesting from a modern viewpoint.

My second remark touches on the credibility of the sources in their reports of statements, positions and encounters of the great figures of Islamic jurisprudence. Given the material and symbolic importance of their contributions to Muslim societies, there is room for forgery in these reports, with no way of absolutely verifying that certain words or ones similar in content were actually uttered. In this regard, we are aided by the fact

that many of the themes under discussion were identified as characteristic of their authors by both followers and opponents, so that the risk of blatant falsity is minimal. As for those who remain in doubt about the authenticity of the extant reports, I can only say that whoever their authors may be, we are left with the materiality of these statements and have the choice of either explicating their meaning or ignoring their existence.

The Law and the Truth: Abu Hanifa's Critical Constructivism

Studies of early Muslim jurisprudence[14] substantiate the view that during its formative period in the second century of the Hijra, Muslim legal methodology was rent in two. There were the opinion-favoring legists (*ahl al-ra'y*) who, given the limited scope of the Qur'an in legal matters, resorted to personal reasoned judgment in their practice. Holding the opposite position were the precedent-oriented traditionists (*ahl al-hadith*), whose primary concern was the textual justification of juridical doctrine by the Qur'an and, more crucially — given the limited scope of Qur'anic legislation — by injunctions and rulings from the Prophet, his Companions (*al-sahaba*), and the latter's Followers (*al-tabi'un*), to the exclusion of individual opinion. Arabic sources depict the tension between the two camps, each defending its own methods and impugning those

of the other. Thus Abu Hanifa, the illustrious eponym of the Hanafi school of law, renowned for his creative juristic thought beyond textual sources and precedent in his attempt to circumvent the domain of possible litigation,[15] used to be ridiculed by more conservative circles: "He is most knowledgeable about what does not exist and most ignorant of what really exists."[16]

It would be anathema to certain ears to hold that the rulings and decisions of Muslim *fuqaha'* express these legists' own opinions and personal understanding of God's law. For then the dimension of subjective creativity would invest the Law with all the facets of impermanence and mobility consequent upon such creativity. And yet this characterization of his activity as essentially subjective opinion is very pronounced in Abu Hanifa: "This ruling of ours is an opinion (*qawluna hadha ra'y*), and it is the best opinion we could muster. So if someone produces a better ruling than ours, then he is closer to the truth than we are."[17] Juridical truth for Abu Hanifa is unique and unchanging, it is God's Law — this is a matter of principle, definitive, final. But in the interstices of legal problem-solving there arises another philosophy of law, more receptive to the creative and subjective element. Abu Hanifa is noted for his interest in solving abstract legal cases (*masa'il*), and it is his direct experience of the precarious and provisional character of such solutions that prompts him to adopt a critical stance vis-à-vis his own juristic pronouncements.

This conception of legal judgment as something that is subject to change and modification is underlined by the erstwhile Imam. In contemporary philosophical parlance, the method described by Abu Hanifa could be labeled as critical constructivism. His remarks to one of his most prominent students, Abu Yusuf Ya'qub — who, in the company of other disciples, used to write down Abu Hanifa's solutions — demonstrate the critical spirit animating his work. He exclaims, "Ya'qub! Don't write what you hear from me. I might hold an opinion today and abandon it tomorrow! And I might hold an opinion tomorrow and abandon it the day after!"[18] The constraints that Abu Hanifa's method of creative opinion faces are the logical constraints of consistency. Formal logic abhors contradiction and seeks, as it should, mutual coherence between statements, theories and propositions relating to the same subject matter. Hence the creative process of constructing new legal solutions that are inconsistent with those of yesterday is at loggerheads with the static logic of consistency.

Absence of contradiction, self-consistency, identity, all speak the same language, that of an idealized value, the accomplished juridical Truth, a value that Abu Hanifa is skeptical of achieving. Through his actual practice, Abu Hanifa comes to acknowledge the function of the subjective mind as that which constructs legal rules, while he simultaneously expresses skepticism about its ability to attain the self-identical Truth.

In response to an interlocutor who questions him, "Is this ruling of yours the indubitable truth (*al-haqq al-ladhi la shakka fih*)," Abu Hanifa poignantly retorts, "By God, I don't know! It could be the indubitable falsehood."[19] The task of the jurist, therefore, is not to seek finality and closure of doctrine, but rather to be ever ready to wield criticism in a never-ending search for God's Law.

Abu Hanifa's speculative and highly critical procedures of juristic construction, as exemplified above, do not satisfy the practical requirements of everyday judicial decision. The practicing judge values stability of legal doctrine, an essential condition for the uniformity and social recognition of his rulings. This might partially explain the fact that Abu Hanifa never assumed the office of judge,[20] and that his two most renowned disciples, Abu Yusuf and al-Shaybani, who became prominent judges of the 'Abbasid State,[21] had to temper some of his theoretical formulations so as to render them more practicable.

Abu Hanifa's logical dexterity is evidenced by the great lengths to which he could go in justifying a technical ruling of his, as the following example from contract law testifies. Contrary to his general rule which invalidates contracts with attached conditions or stipulations, Abu Hanifa makes an exception in the sale of a slave with the attached condition (by the vendor) that the buyer manumit him. Abu Hanifa considers such a contract to be valid if the buyer in fact manumits the slave. By contrast, Abu Yusuf and

al-Shaybani rule that as a matter of principle the contract is invalid, irrespective of whether or not the buyer manumits the slave. Al-Kasani's account elucidates the legal principles involved and the complexity of Abu Hanifa's reasoning:

> All three [Abu Hanifa, Abu Yusuf and al-Shaybani] share the view that the manumission stipulation does not accord with the (sale) contract; the contract implies ownership, and ownership implies the liberty of disposing of the owned object. However, the manumission stipulation signifies a mandatory act which is incongruent with this liberty and contradicts it. Abu Yusuf and Muhammad [al-Shaybani], God's mercy be upon them, conclude that the sale is not permissible. Abu Hanifa considers it (the sale) to be permissible. The reason he gives is that the manumission stipulation (also) accords with the contract since the manumission is termination of ownership, and termination of ownership signifies its (prior) recognition.... Abu Hanifa's position, God have mercy on him, is that the manumission stipulation accords with the contract in one respect and contradicts it in another respect... so that if the buyer manumits the slave, the contract becomes permissible.[22]

The Law and the State: Malik's Pluralistic Pragmatism

The spirit of Malik ibn Anas (d. 179) — the Madinan master of the Maliki school of jurisprudence and the author of the earliest extant manual of Islamic law (*Al-Muwatta'*) — evinces a similar drive against the rigid unitary closure of law, though

for reasons that are different from those of Abu Hanifa. Malik's legal method is notorious for its insistence on the twin notions of common practice in Madina (*'amal ahl al-Madina*)[23] and social utility (*maslaha*), and it will be shown that these two principles are connected in his juristic philosophy.

The social utility of a legal dictum is to a large measure a function of its accommodation of the norms — commercial, family and penal — already practiced in the community, so that the validity and soundness of a legal system depends on its concordance with the patterns of thought and action in existence. Such a philosophy of law is styled "pragmatism," and it is naturally prone to be pluralistic. As human communities have different histories, customs and traditions, the law of each would reflect its specific habits and norms, with no ultimate criterion of preferential selection among them.

To be sure, it would be unhistorical to expect Malik to adopt this universalistic version of pluralistic pragmatism. Yet, in the Islamic context, his response to the impatience of the Caliph Harun al-Rashid (d. 193) with the differences in rulings among Muslim jurists is very revealing:

> O Commander of the Believers, the Companions of God's Messenger, p.b.u.h., have disagreed in matters of substantive law (*ikhtalafu fi al-furu'*), being dispersed in different regions; and each party considers itself right... The disagreement of scholars is a mercy (*rahma*) from God to this Community. Every party adheres to what it considers valid,

and each follows proper guidance (*kullun 'ala huda*), and each seeks God.[24]

More revealing of Malik's pragmatic pluralism is his encounter with the 'Abbasid Caliph al-Mansur (d. 158) who proposes to the Madinan jurist — perhaps instigated by the advice of his state official, Ibn al-Muqaffa' (see above) — that his legal treatise, *Al-Muwatta'*, be the single law of the Islamic State:

> "I have decided to take your book, *Al-Muwatta'*, so that copies of it are made, and to send a copy to each district of Muslims, ordering them to abide by its content to the exclusion of any other, and to forsake anything else of this new science; for I am convinced that the knowledge of the people of Madina and their science are the root of this new science," he said. Then I [Malik] retorted, "Commander of the Believers, don't do this! People had received sayings and heard traditions and related incidents, and each party accepted what they had received, and ruled by it, and believed it — traditions going back to the Companions of the Messenger of God and others. Forcing them to renounce what they believed is hard; so let people follow their ways and what the inhabitants of each part choose for themselves."[25]

Two contrasting philosophies of law emerge from this dialogue between Malik and the highest authority of the state. The state's political demand for a unified legal structure for the various communities on its territory is echoed in the rationalizing, centralizing voices of al-Mansur and al-Rashid. Underlying the desire of the ruler for a uniform and universally applicable

code of law is the relative facility of administration, control and resolution of judicial conflicts under such a system — to which should be added the strong religious Muslim ideology of a single and unique Law, God's Shari'a. To this unificatory and universalizing demand of the Muslim ruler, Malik opposes the multiple realities of legal practice among the various Muslim communities. It is not advisable, he says, to ignore the existing differences in juridical doctrine and practice among Muslims: as the Companions of the Prophet and their Successors dispersed in different parts, they spread different legal views and interpretations, each considering his view to be most consonant with God and the Prophet. The central government, Malik contends, should recognize and accept the actual regional plurality of Islamic law as something beneficial, a God-sent mercy to the *umma*, instead of seeking to impose a single law whose implementation would necessarily be painful and arbitrary for the Muslim communities.

The Law and the Text: Al-Shafi'i's Skeptical Hermeneutics

In its specific historical context we have seen that al-Shafi'i's vindication of Precedent (*sunna*) against innovation in *fiqh* does not appear as the conservative watershed of Islamic law that one might take it to be. A closer examination shows al-Shafi'i

to be engaged in a strategic battle for the preservation of *fiqh*, providing the logical and technical means for its legitimation in terms of the Islamic symbols of authority. Though not consciously designed for this purpose, certain aspects of his method in effect contribute to consolidating the pluralistic spirit of Islamic law via the justification and acceptance of disagreement among legists. Al-Shafi'i's legal epistemology, as will shortly be shown, evinces an extraordinarily open attitude to the varieties of possible interpretation of Qur'anic and Hadith texts, coupled with a healthy skepticism regarding the prospect of the unification of *fiqh*. Despite his unitary ideology, al-Shafi'i himself appears to have actively contributed to the pluralistic dimension of Islamic jurisprudence by propounding a distinctively liberal doctrine of legal reasoning having analogy (*qiyas*) as its cornerstone.

To be sure, al-Shafi'i's conservatism leads him to identify creative thought (*ijtihad*) in law with the process of seeking analogies with the sacred material texts in existence, namely Qur'anic and Prophetic statements: "He said: What is analogy (*qiyas*)? Is it intellectual effort (*ijtihad*)? Or are they distinct? I [al-Shafi'i] answered: They are two names with the same meaning."[26] The mental procedure of reaching a new ruling by analogy with a given textual ruling involves the determination of an essential feature common to the case at hand and the textual ruling, a determination which necessitates in-

tellectual effort. Al-Shafi'i sees this mode of legal reasoning as the only one admissible:

> Juridical truth cannot be known except from God, either textually or by indication (*nassan aw dalalatan*) from God. And God has rendered the truth in His Book and the Precedent of His Prophet... For whatever (legal problem) faces a Muslim, there is either a binding (textual) ruling or an indication of the way to truth (*'ala sabil al-haqq fihi dalalatun mawjudatun*). Consequently, if there is an explicit ruling, it should be implemented; if the ruling is not explicit, the indication of the way to truth should be sought by intellectual effort. Hence, intellectual effort is (reasoning by) analogy (*wa al-ijtihad al-qiyas*).[27]

However, al-Shafi'i remarks, the intellectual process of discovering the common ground between the original Text and the new situation — so vital for the adequacy of the analogy — is neither uniquely determined nor certain to attain its object: "Legal knowledge obtained through analogy (with sacred texts) is based on the analogical meaning which is apparent to the one performing it, not to the generality of scholars; the hidden meaning (of sacred texts) is known only to God."[28] An interpretation seeking an implicit meaning comprises a subjective element which may vary from one interpreter to another. Also, being a process of unearthing a hidden meaning, it is subject to the vicissitudes of subjective interpretation in the sense of there being no guarantee or certainty about its correctness. Hence his above characterization of analogical

interpretation as simply an *indication* of the truth and not a proof of truth. The associated theory of interpretation may be styled a "skeptical hermeneutics," stressing, as it does, the need for an interpretive effort, while recognizing the ultimate ineffability of the meaning sought.

It follows that while God's and the Prophet's words have a unique and definite content, the jurists exercising the analogy may differ in interpreting them. Al-Shafi'i recognizes both the agreement of Muslim legists and their disagreement. He emphasizes this point by introducing a technical distinction between two kinds of analogical inference:

> Analogy is of two kinds. One is that in which the matter (at hand) is in the meaning of the original (text) (*an yakun al-shay' fi ma'na al-asl*); then the interpreters (*al-quyyas*) do not differ about it. (The second) is when the matter has similarities to the originals (*an yakun al-shay' lahu fi al-usul asbah*); then the matter at hand should be linked to the most appropriate and most similar feature: in this, the interpreters might differ (*wa qad yakhtalif al-qayisun fi hadha*).[29]

Al-Shafi'i's two types of analogical reasoning correspond respectively to what, in modern terminology, could be called "deductive analogy" and "hypothetical analogy." The first type is unproblematic since the common feature justifying the inference from the original Text to the case in question is explicit in the meaning of the textual ruling: thus the Qur'anic interdiction of the consumption of pork (*lahm khinzir*) applies

unproblematically in the case of ham, as the textual expression "*lahm khinzir*"[30] unambiguously refers to all varieties of pork; this is a deductively secure inference with no room for contention. It is the second type of analogical inference, the hypothetical analogy, which results in disagreements in legal decisions. This is due to the absence of an apparent identity between the textual meaning and the case at hand — leaving the jurist with mere similarities and resemblances. Then the jurist-interpreter has to determine the relevant aspect of similarity, i.e., the resemblance which is most significant and most appropriate to the matter at hand. In such a context, al-Shafi'i says, the reasoning retains both a hypothetical and a subjective character, and leads to disagreement among legists: "And both judges have ruled oppositely on the same matter. This is disagreement (*ikhtilaf*), but each has done what he is supposed to do."[31]

The critical issue of the prohibition of usury (*riba*) in *fiqh* is a demonstration of the aleatory and objectively undecidable element in the technique of analogical interpretation as explicated by al-Shafi'i. The various schools of law subscribe to the general Qur'anic — but vague — prohibition of usurious transactions: "God permits sale and forbids usury."[32] However, it is the following saying from the Prophet which constitutes the textual base for distinctive school interpretations:

> (Exchange) gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt; (exchange)

> the same quantity for the same quantity, and from the hand to the hand: If there is excess, it is usury (*wa al-fadl riba*). When the (exchanged) items are not of the same kind, sell as you wish but from the hand to the hand.[33]

A principle issue debated by Muslim legists concerns the characteristic property (*'illa*) that can be extracted from this Prophetic text for the determination of usurious commodities (*al-amwal al-rabawiyya*), namely the items whose exchange can be forbidden; once this defining property has been revealed, the Prophetic ruling can be extended beyond the six items referred to in the text. Two significant interpretations — a Hanafi and a Shafi'i — of the defining character of usurious commodities arise from the elaborate arguments of the legists. In the following paragraphs, I expose just the conclusions of those interpretations.

In line with their abstract reasoning, the Hanafis maintain that what is common to the transactions mentioned in the above *hadith* are the following two aspects: 1) they all exchange quantifiable items (gold, silver, wheat, barley, dates and salt exist in measurable quantities); and 2) they all exchange items of the same kind (gold for gold, etc.). The Hanafis conclude that the necessary condition for usury is the conjunction of two features: quantifiability and identity of kind.[34] The Prophet is thus understood as forbidding any exchange of quantifiable items which are of the same kind whenever the exchanged items are not equal in value.

The Shafi'is, on the other hand, perceive that the objects referred to by the Prophet allow for a division in terms of two categories: 1) gold and silver represent the category of fungible things; 2) wheat, barley, dates and salt belong to the category of edible things. The class of usurious objects, therefore, is defined by fungibility and edibility, the two features underlying the explicit wording of the *hadith*.[35] Although the items that could be the object of usury prohibition in Shafi'i interpretation overlap with the items considered by the Hanafis, the *'illa* of the former items does not cover, for example, iron, copper or other metals which are neither fungible nor edible. Hence the exchange of non-precious metals of the same kind but in unequal quantity constitutes usury — and is illegal — for the Hanafis; the same transaction is considered not to be usurious and is permissible in Shafi'i law. Given the impossibility of questioning the Prophet about his intention in the reported saying, no objective way presents itself for deciding the original meaning of the text, and the contention between the two interpretations remains objectively undecidable. The exact intent remains hidden, becoming an object of controversy and varying interpretations among the jurists.

Al-Shafi'i's theory of hypothetical analogy with the authoritative Text as a means of deriving legal rules thus comprises an explicit recognition of subjective human evaluation in juridical reasoning and a pronounced skeptical outlook. The uni-

tary demand for conformity with the Text of the Book and Hadith is only half met in practice. In the person of al-Shafi'i, that distinguished spokesman of conservatism, the ruse of *fiqh* successfully interiorizes the reality and the principle of difference (*ikhtilaf*): individual reasoning through analogy with the sacred corpus — one of the main logical tools of innovation in Islamic law — leads to differences in rulings. Al-Shafi'i reflects on disagreement in judicial decisions by explaining that the common aspect justifying an analogy with a revealed ruling — the *'illa* of later jurists — is known only to God, never an object of human certainty.

Conclusion

The dominant theological justification and other ideological and procedural assumptions — such as deference to the Precedent (*sunna*) of the Prophet and his Companions — might tempt one to conclude that free and innovative reasoning was shunned by Muslim legal thought from its inception, contributing to a petrification of Islamic law in self-identical, unchanging and uniform maxims. Yet such a conclusion appears very problematic for Muslim legal epistemology of the second century of the Hijra. Insofar as an undifferentiated concept of epistemology is used to cover both the spontaneous method-

ological reflections of early jurisprudence *and* the theory of its justification, the epithets "self-identical" and "uniform" retain a misleading ambiguity. If applied to the ideological narrative in which the traditional legists saw the *raison d'être* of their endeavor — deriving subjective satisfaction as Muslim believers through construing their activity as the mere disclosure of an already existing set of legal rules, God's and the Prophet's immutable Law — then surely this vision is unitary enough.

However, the preceding analysis should make one wary of sweeping statements affirming an essential uniformity of method in Islamic law. Such statements simply ignore the existence of a legal epistemology more subtle and pluralistic than the theological discourse of justification. A different epistemological discourse, more sensitive to their concrete modes of reasoning, emerges from the living experience of the early jurists. Appearances to the contrary, Muslim legal methodology was not a monolithic set of postulates commanding universal agreement among Muslim jurists of the second century. Over and above their shared views of the Divine Nature of the law, there exist significant differences in their actual methods of legal reasoning.

In the three figures of Abu Hanifa, Malik and al-Shafi'i, it is possible to discern three distinct modes of conceiving the foundation of law, to wit: in creative opinion (*ra'y*); in local practice (*'amal*); and in (Prophetic) Precedent (*sunna*). These

different philosophies of law might not have been as consciously and as systematically entertained as was the over-arching theological justification of legal dicta expressing God's Ordinance for mankind. However, they were instrumental as ways of producing legal rules, as the foregoing analysis of the spontaneous reflections of the jurists tends to confirm. Thus Abu Hanifa sees one significant source of his rulings to be his personal judgment (*ra'y*), a creative and subjective source, under the aegis of change, and never attaining the certainty of Truth; Malik refers the origin of his juridical pronouncements to the practice of the legists and people of Madina (*'amal ahl al-Madina*), and ascribes those differing from his to the local juridical practices of other regions; and al-Shafi'i restrains innovation, confining legal reasoning to analogy with the existing Precedent-Text of the Hadith and the Qur'an, while simultaneously conceding that disagreement (*ikhtilaf*) is the natural concomitant of analogical thinking.

In light of the above considerations, the critical issue of the identity of Islamic law acquires a new significance. On top of the acclaimed unitary philosophy — the hegemonic self-image of sacred provenance — Muslim legal minds superimposed other, multiple, and more substantive philosophies of law. A critical constructivism (Abu Hanifa), a pluralistic pragmatism (Malik), and a skeptical hermeneutics (al-Shafi'i) make their appearance as more particular methods of deriving juridical rules. In the

wake of a radical monotheistic revolution, the great jurists of second-century Islam work — like many present-day jurists — under the general methodological assumption of realism, namely the view that legal truth is objective, one, and immutably self-identical. Yet they do not see eye to eye on the actual methods they employ to derive the law. These methods appear to diverge, leading to a pluralistic reality of contrasting legal philosophies and competing judicial rulings.[36]

Notes

1 Muhammad ibn Idris al-Shafi'i, *Al-Risala* (Cairo: Al-Halabi Press, 1969), p. 22.

2 Muhammad ibn Idris al-Shafi'i, *Al-Umm*, 8 vols. (Cairo: Kulliyat al Azhariyya, 1961), vol. 7, pp. 270-271. For the role of analogical reasoning in al-Shafi'i's legal philosophy, see the section below on "The Law and the Text."

3 *Al-Fusul al-Mukhtara min Kutub al-Jahiz* (Cairo, 1930), p. 125.

4 Al-Shafi'i, Al-*Umm*, vol. 7, p. 250.

5 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), p. 258.

6 Al-Shafi'i, *Al-Umm*, vol. 7, p. 273.

7 John Burton, *The Collection of the Qur'an* (Cambridge: Cambridge University Press, 1977), p. 26.

8 This is borne out by the persistence of the characteristic positions

and differences of the Fiqh *madhahib* as evidenced by their respective compendia. Even al-Shafi'i's normative and technical methods of *usul al-fiqh* (Science of the Grounds of Law) could not succeed in homogenizing Islamic law, the polemic between the major schools now (after al-Shafi'i) being conducted at the epistemological level. John Burton, in the most sophisticated work to date in English on the Usul theories of abrogation (*naskh*), underscores the real divergence underlying formal agreement: "[Al-Shafi'i's] opponents [schools' jurists], who clearly were not prepared to jettison the results of several previous generations of scholars, adopted the new tools of the *usul*, as they had previously adapted their argumentation to accommodate the *hadith*, using them to justify and so preserve intact their main *Fiqh* teachings.... Each *madhhab* produced its *usul* literature, [namely] a series of rationalised justifications of the local school *Fiqh*.... One seldom reads... of a scholar abandoning his original *Fiqh* or *usul* viewpoint owing to his finding the representative of the rival *madhhab* adducing more convincing evidence or more cogent logic." *The Sources of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), p. 15; *The Collection of the Qur'an*, p. 11.

9 Abu Bakr al-Kasani, *Kitab Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, 7 vols. (Cairo, 1327-1328 A.H.), vol. 5, p. 169.

10 Al-Sarakhsi (Hanafi jurist, d. 490 A.H.), *Al-Mabsut*, 30 vols. (Cairo: Sa'ada Press, 1324 A.H.), vol. 13, p. 13.

11 Al-Kasani, *Kitab Bada'i'*, vol. 5, p. 169. The general theory of the interdiction of usury in Islamic law is treated in the section below on "The Law and the Text."

12 Shams al-Din ibn Qudama, *Al-Sharh al-Kabir 'ala al-Muqni'*, published in the margin of Muwaffaq al-Din ibn Qudama, *Al-Mughni*, 12 vols. (Cairo, 1341 A.H.), vol. 4, pp. 49-51.

13 For a comprehensive treatment, see Oussama Arabi, "Contract Stipulations (*Shurut*) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya," *International Journal of Middle East Studies* 30 (1998), pp. 29-50.

14 See Ignaz Goldziher, *The Zahiris*, trans. Wolfgang Behn

(Leiden: E.J. Brill, 1971), pp. 3-19; Schacht, *Muhammadan Jurisprudence*, pp. 21-81.
15 Abu Hanifa's creativity in legal subjects did not operate in a vacuum. He absorbed the Iraqi tradition of Ibrahim al-Nakha'i, a prominent early Iraqi master of jurisprudence, studying for 18 years under Hammad Ibn Abi Sulayman (d. 120 A.H.), a disciple of the former.

16 A statement by Raqaba ibn Masqala (d. 129 A.H.), cited in Ibn 'Abd al-Barr, *Jami' Bayan al-'Ilm wa Fadlihi*, 2 vols. (Cairo, 1346 A.H.), vol. 2, p. 145.

17 A saying attributed to Abu Hanifa in al-Khatib al-Baghdadi, *Tarikh Baghdad*, 14 vols. (Cairo, 1931), vol. 13, p. 352. Whether Abu Hanifa actually made this statement is immaterial from our perspective, as we seek the spirit rather than the letter of his jurisprudence, and the sources agree that the spirit of his jurisprudence was animated by the prevalence of opinion (*ra'y*).

18 Ibid., p. 402.

19 Ibid.

20 It is reported that shortly before his death, Abu Hanifa was jailed by the 'Abbasid Caliph al-Mansur for having refused to accept the function of judge. See ibid., pp. 228-229.

21 Abu Yusuf Ya'qub (d. 182 A.H.) and Muhammad al-Shaybani (d. 189 A.H.) both studied under Abu Hanifa and were the main transmitters of his legal doctrine. Preserved in their multiple writings, Abu Hanifa's and their own legal opinions became the accredited corpus (*al-asl, zahir al-riwaya*) for the later generations of Hanafi jurists. Abu Yusuf was Chief Justice under the caliphates of al-Mahdi, al-Hadi and al-Rashid, while al-Shaybani assumed the office of judge under the last of these.

22 Al-Kasani, *Kitab Bada'i'*, vol. 5, p. 170. What transpires from this account is that Abu Hanifa grants primacy to the consent of the buyer to manumit the slave, over and above his right to freely dispose of him, so that by agreeing to the manumission stipulation,

the buyer has relinquished his liberty as future owner, willingly accepting this restriction to the single act of manumitting the slave.

23 The practice of the people of Madina (*'amal ahl al-Madina)* was a complex notion for Malik, comprising the consensual juridical practice in Madina after the example of the Prophet and his Companions, *as well as* the results of the independent reflection of Madinan legal minds, notably Sa'id ibn al-Musayyib (d. 94 A.H.) and Rabi'a ibn Abi 'Abd al-Rahman (d. 136 A.H.). The latter, nicknamed "Rabi'a of the Opinion" (*Rabi'a al-ra'y*), was a master of Malik.

24 Al-Suyuti, *Tizyiin al-Masalik fi Manaqib Malik*(Cairo, n.d.), p. 46. Malik's pluralistic attitude came to be enshrined in a famous Prophetic *hadith*: "*Ikhtilaf ummati rahma*" (Difference in my community is a mercy).

25 This statement is an excerpt from an alleged conversation between Malik and the 'Abbasid Caliph al-Mansur, in which the former declines the caliph's proposition (to Malik) of preparing a unified legal code for the whole Muslim realm. See Ibn 'Abd al-Barr, *Al-Intiqa' fi Fada'il al-Thalatha al-A'imma al-Fuqaha'*(Cairo: Al-Qudsi Press, 1350 A.H.), p. 41.

26 Al-Shafi'i, *Al-Risala*, p. 205.

27 Al-Shafi'i, *Al-Umm*, vol. 7, p. 271; *Al-Risala*, p. 206.

28 Al-Shafi'i, *Al-Risala*, pp. 206-207.

29 Ibid., p. 207.

30 Qur'an, *Al-An'am*: 145.

31 Al-Shafi'i, *Al-Risala*, p. 214. This is al-Shafi'i's conclusion to his demonstration of the possibility of disagreement in hypothetical analogy, *ijtihad bi-qiyas*. He is referring to the opposite evaluations by two judges of the moral probity (*'adl*) of a certain witness, as an illustration of the absence of certainty in this type of legal judgment.

32 Qur'an, *Al-Baqara*: 275.

33 Al-Sarakhsi, *Al-Mabsut*, vol. 12, p. 110. This is a shortened version of the Prophetic saying, in which repetitions of the expression "the same quantity for the same quantity, and from the hand to the hand" are omitted.

34 Ibid., pp. 110-111.

35 Ibid., pp. 115-116.

36 Recent work in the sociology of Islamic law tends to support this view. See in particular Baber Johansen's study of the changing doctrines of Hanafi law in adaptation to the new Ottoman structures of land tenure, *The Islamic Law on Land Tax and Rent* (London: Croom Helm, 1988). Haim Gerber, in his *State, Society, and Law in Islam*(Albany, NY: SUNY Press, 1994), contrasts his empirical findings with orientalist preconceptions of Shari'a: "The study casts serious doubt on several fundamental notions concerning the nature of premodern Islamic society — such as the supposed gap between theory and practice, one major expression of which was the province of law.... In the case study presented here [17th-19th century Istanbul and Bursa regions], this supposed gap hardly existed...." (p. 1). The fact that legal theory and practice from the fourth Islamic century onwards was formally restricted to the four mainstream Sunni schools is not by itself proof of ossification or lack of innovation. Rather, it is in the actual school productions of succeeding generations of jurists and in their originality and adaptability to their respective social milieus that an objective assessment should be sought. The sociological study of the substantial works of Muslim legists is still in its infancy, but work in progress suggests that the orientalist image of a classical closure followed by reiteration up to the nineteenth century is at best an oversimplification masking real changes in Islamic substantive law occasioned by socio-historical transformations. Wael Hallaq's pioneering essay, "Was the Gate of Ijtihad Closed?" (*International Journal of Middle East Studies* 16, 1984), as well as his more recent essay, "From *Fatwa*s to *Furu'*: Growth and Change in Islamic Substantive Law" (*Islamic Law and Society* 1, 1994), cast serious doubt on the veracity and consistency of this conventional image.

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