THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

WAEL B. HALLAQ

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CHAPTER 2

The emergence of an Islamic legal ethic

1. THE ARAB CONQUESTS

In 11/632 the Prophet died, leaving unsettled the question of succession. The dispute over governance was resolved in favor of Abū Bakr, a distinguished Meccan of senior age who had adopted Islam when Muḥammad was still preaching his new religion in the city. Abū Bakr's short tenure as caliph, however, allowed him to accomplish little more than to quell the so-called apostasy rebellions that erupted among the Arab tribes upon the death of the Prophet. By the time of his death in 13/634, order was restored, the tribes having been largely subdued. With this reassertion of Islamic dominance over the entire Arabian Peninsula, the nascent state emerged all the more powerful, with a reinforced assurance of its military strength and religious conviction.

The consolidation of the military and political standing of the young state permitted ʿUmar b. al-Khaṭṭāb (ʿUmar I), the second caliph, to undertake intensive military campaigns directed mainly at the Syrian and Iraqian north, ruled, respectively, by the vassal kingdoms of Byzantium and Sasanid Persia. During the two decades of this aggressive and dynamic caliph's rule, much was achieved, in terms of both military expansion and administrative organization. From a historical perspective, his reign was arguably the most momentous of all, for it predetermined the success of the Islamic state enterprise that laid the foundations for the civilization that was to come.

The earliest military campaigns and conquests, although not systematic, were geared toward major centers. The Muslim army consisted primarily of tribal nomads and semi-nomads who, rather than take up residence in the newly won cities of the Fertile Crescent, Egypt and Iran, for the most part inhabited garrison towns, the *amṣār*, as a separate class of conquerors. In her description of the early military encampment of Fusṭāṭ, located at

the head of the Nile Delta, Janet Abu-Lughod characterized the pattern of settlement in all major garrison towns:

During the seven months that the Arab invaders under [the military commander] ʿAmr besieged the Byzantine fortress at Babylon, they pitched their tents on the high dusty plain above riverine Babylon. Once capitulation was achieved, the troops were arranged somewhat more formally. Northeast of the fortress (renamed Qaṣr al-Shamʿ by the Arabs) at the firm bank of the Nile, ʿAmr erected the first mosque in Africa. With the mosque at its core, flanked by the commercial markets which usually accompanied the central mosque in Islamic cities, a quasi-permanent army camp was established. It formed an elongated semicircle stretching as far north as the mouth of the Red Sea Canal and as far south as the inland lake, the Birkat al-Ḥabash.

This was hardly a unique Arab settlement. Indeed, throughout the conquered territories, Arabs set up similar encampments . . . Always located at the edge of the desert, each had a similar plan of widely scattered nuclei. The *raison d'être* of this physical design can only be understood in terms of the social characteristics of the founders. The Arab army consisted of diverse and often incompatible tribes and ethnic groups, was accompanied by a straggling retinue of women, children, and slaves, and was composed of men whose past nomadic life made close quarters repellent . . .

At first, segregation was rigid, with each ethnic group or tribe assigned its own isolated quarter. However, during the sixty years following the conquest, as the temporary camp was transformed into a permanent commercial as well as military settlement, there was both a retrenchment toward the central nucleus at the Mosque of ʿAmr and its radiating markets, and a filling in of the spaces purposely left open by the original plan. The ultimate result was a fairly compact town of a permanent nature, having little relation except in name to the army camp which had been its progenitor.[1]

Under capable military commanders, recruited mostly from Mecca, Medina and the powerful Yemeni/Ḥaḍramawti tribes, the troops subsisted on booty allotted to them in the form of pensions – an important motivation, although certainly not the sole one. Kūfa and Baṣra in southern Iraq and Fusṭāṭ in Egypt constituted the chief settlements at the early stage of conquests. Damascus in Syria was exceptional: here the new arrivals chose to dwell in an already established city – one that was familiar to the Muslim Arabs from before the rise of the new religion.

The Arab conquests were conducted with a clear sense of mission, and were by no means limited to material and territorial gain. The Islamic "cause," in other words, was as much of a driving force as any purely

[1] Janet L. Abu-Lughod, *Cairo: 1001 Years of the City Victorious* (Princeton: Princeton University Press, 1971), 13.

military objective. The new Muslims – at least the leading class – saw themselves as promulgators of a religion whose linchpin and cornerstone was the command of God, a command embedded in, and given expression by, the revealed Book. It did not escape the Muslim political leaders of Medina, the capital, or their military representatives in the garrison towns that their warriors needed to learn the principles of the new order, its new ethic and worldview. Tribal Bedouins to the core, the soldiers found alien the military organization to which they were subjected, and which must have constricted their freedom. Even more alien to them must have been the new ideas of Islam, its mode of operation and its generally non-tribal conception, if not organization. ʿUmar I quickly realized the potentially explosive situation, for he could not count for long upon appeasing the largely Bedouin contingents in his armies through allocations of booty. In each garrison town and in every locale where there happened to be a Muslim population, a mosque was erected.[2] This place of worship was to serve several functions for the emerging Muslim community, but at the outset it was limited mainly to bringing together the Muslims residing in the garrison town for the Friday prayer and sermon – both intended, among other things, to imbue the Bedouins with religious values. The sermon, which played an important role in the propagation of the new Islamic ethic, included extensive passages from the Quran and other messages that were relevant, in the emerging religious ethos, to the living experience of the Muslim community in the garrisons.

To each of these garrison towns ʿUmar I appointed a military commander-cum-administrator who also functioned as propagator of the new religious ideas that were gradually but steadily taking shape. His primary duties were to lead the Friday prayer, distribute booty pensions and command military campaigns. His duties also involved the resolution and arbitration of conflicts that arose between and among the tribesmen inhabiting the garrison town. ʿUmar I's aim, consistent with that of the Prophet before him, was to promote Islamic and, particularly, Quranic values as the basis of communal life, for not only were these values the distinctive features of the new enterprise, they were also essential to its continued success. To this end, he deployed to the garrison towns Quran teachers who enhanced the religious values propagated by the commanders and their assistants.[3] It cannot be

[2] Hoyland, *Seeing Islam*, 561 ff., 567–73, 639.

[3] Abū Isḥāq al-Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, ed. Iḥsān ʿAbbās (Beirut: Dār al-Rāʾid al-ʿArabī, 1970), 44, 51; Muḥammad Ibn Ḥibbān, *Kitāb al-Thiqāt* (Hyderabad: ʿAbd al-Khāliq al-Afghānī, 1968), 149, 157.

overemphasized that the Quran represented the rallying doctrine that shaped the identity of the conquerors, thereby distinguishing and separating them from the surrounding communities.

The new religious ethic needed to be promoted in Arabia itself as much as elsewhere. The greater majority of tribes inhabiting Mecca, Medina, Ṭāʾif and the various agricultural oases, not to mention the nomads of the desert, were still little accustomed to the new political order and even less so to its unworldly and uniquely monotheistic ideas and principles. In the spirit of the Quran, and in accordance with what he deemed to have been the intended mission of the Prophet (to which he himself had contributed significantly), ʿUmar I promulgated a number of ordinances and regulations pertaining to state administration, family, crime and ritual. He regulated, among other things, punishment for adultery and theft, declared temporary marriage (*mutʿa*) illegal, and granted rights to concubines who bore the children of their masters. Similarly, he upheld Abū Bakr's promulgations, such as enforcing the prohibition on alcohol and fixing the penalty for its consumption at forty lashes.[4] He is also reported to have insisted forcefully on adherence to the Quran in matters of ritual and worship – a policy that culminated in a set of practices and beliefs that were instrumental in shaping the new Muslim identity, and that later became integral to the law.

At this early period, the Quran's injunctions, combined with the public policies of the new order, represented the sole modification to the customary laws prevailing among the Peninsular Arabs, laws that contained indigenous tribal elements and, to a considerable extent, legal provisions that had been applied in the urban cultures of the Near East – including the cities of the Hejaz – for over a millennium. These customs and laws were still the only "system" of law known to the conquerors, while the Quranic injunctions contained and symbolized the mission in whose name these conquerors were fighting. When Abū Bakr deployed his armies to conquer Syria, he commanded his generals "to kill neither old man nor child," to establish a covenant with the conquered peoples who did not resist, and "to give them assurances and to let them live according to their laws." On the other hand, he advised: "those who do not receive you, you are to fight, conducting yourselves carefully in accordance with the ordinances and upright laws transmitted to you from God, at the hands of our Prophet."[5]

[4] ʿAbd al-Ghanī b. ʿAbd al-Wāḥid al-Jammāʿīlī, *al-ʿUmda fī al-Aḥkām*, ed. Muṣṭafā ʿAṭāʾ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 463.

[5] Cited from a near contemporary Monophysite source. See S. P. Brock, "Syriac Views of Emergent

While Abū Bakr and ʿUmar I's enforcement of Quranic laws points to the centrality of the Quran in the emerging state and society, it is also clear that the new order had to navigate an uncharted path for which the Quran provided little guidance. A large portion of pre-Islamic Arabian laws and customs remained applicable, and indeed survived into the legal culture that was being constructed. But the new Quranic laws created their own juristic problems that rendered many of the old customary laws irrelevant. For instance, the Quran prohibited the consumption of alcohol, but did not specify a penalty. ʿUmar I soon allocated the punishment of eighty lashes for this infraction, apparently on the ground that inebriation was analogous to falsely accusing a person of committing adultery (*qadhf*), for which offense the Quran fixed the penalty at eighty lashes. The connection between fornication and inebriation is at best tenuous, but the analogy shows us how, from the beginning, the Quran provided the framework for legal thinking, bringing its contents to bear upon as many situations as nominally could be justified. Generally speaking, any matter that could be conceived as falling within its juristic purview, even by tortuous reasoning, was dealt with in Quranic terms or an extension thereof. And it was within this larger framework of the permeating Quranic effect that pre-Islamic customary laws underwent modification or significant change.

The importance of the Quran as the principal guide of Muslim life required the fixing of a vulgate. During Muḥammad's life and immediately thereafter, the text existed as fragments, written down on parchment (sometimes even on shoulder-blades and stones) by a number of Companions, possibly as early as the Meccan period. Some parts of it had also been committed to memory by certain of the Prophet's supporters and relatives. Abū Bakr attempted to create an official collection of the text, but the project seems to have failed. Several versions were still circulating in the conquered territories during ʿUmar I's reign, and various controversies appear to have arisen over the correct reading of given passages. ʿUthmān, the third caliph (23/644–35/655), commissioned Zayd b. Thābit, said to have been the Prophet's scribe, to undertake the task of compiling a standard text, which he seems to have accomplished successfully. Several copies of this text were made and later distributed to the garrison towns, all other previous collections having reportedly been destroyed. The creation of a vulgate must have had a primary legal significance, for it defined the

Islam," in G .H. A. Juynboll, ed., *Studies on the First Century of Islamic Society* (Carbondale: Southern Illinois University Press, 1982), 9–21, at 12, n.200. For more on how Abū Bakr's policy contributed to legal construction, see Schacht, *Origins*, 204–05.

content of the Quran and thus gave the legally minded a *textus receptus* on which to draw.

2. THE PROTO-*QĀḌĪ*S

The early activity of the Islamic magistrate, the *qāḍī*, may be considered the best yardstick by which we can measure the evolution of an Islamic legal ethic. The question at hand, therefore, is the nature of the early *qāḍī*'s duties and their Islamic content. The sources report that the Prophet himself deployed *qāḍī*s to the lands that came under Medinese dominion, particularly the Yemen. ʿAlī, who was to become the fourth caliph after ʿAbū Bakr, ʿUmar I and ʿUthmān, is said to have been, together with Muʿādh b. Jabal and Abū Mūsā al-Ashʿarī, one such *qāḍī*.[6] The same sources, however, are not clear as to whether these were appointed as *qāḍī*s per se or as governors. In due course, it will become obvious that their functions involved far more provincial administration as military commanders than anything having to do with law, *stricto sensu*, except for the most basic of matters legal. It is perhaps indicative of the nature of these commanders' involvement in law that when a paternity dispute was brought before the young ʿAlī, he solved it by drawing lots. Upon hearing of ʿAlī's methods, the Prophet reportedly laughed so hard that "his molars came into view." [7] Whether authentic or not, this anecdote – one of many – reveals the primitive nature of the legal reasoning employed by these proto-*qāḍī*s, as compared to the manner in which a later *qāḍī* would have dealt with the case. Yet, we cannot conclude from such anecdotes that ʿAlī's solution necessarily reflected the overall juristic competence of Muslim leadership, for if this were the case, the Prophet would not have been so amused.

The proto-*qāḍī*s whom ʿUmar I is reported to have sent to the garrison towns do not seem to have fared much better. Kaʿb b. Suwar al-Azdī is said to have been appointed by this caliph as *qāḍī* of the military camp of Baṣra in 14/635, and to have remained in office until he was killed in 23/644. The sources report that a dispute over property was brought before Kaʿb: one man had purchased land from another on the understanding that it was cultivable, but the buyer later discovered that the land was barren and rocky. Kaʿb asked the buyer if he would have attempted to nullify the sale had he found gold in the land. Upon hearing a negative answer, Kaʿb ruled

[6] Muḥammad b. Khalaf Wakīʿ, *Akhbār al-Quḍāt*, 3 vols. (Beirut: ʿĀlam al-Kutub, n.d.), I, 84 f., 100.
[7] Ibid., I, 91–95.

that he was not entitled to restitution.[8] As late as 65/684, if not after that, such arbitrary rulings were common. When a charge of fraud was brought before Hishām b. Hubayra – where a group of men was accused of the fraudulent commingling of barley with wheat and selling it as pure wheat – he found the defendants guilty and ordered that their heads and half their beards be shaved as punishment.[9] Now these solutions, dictated by practical considerations and ad hoc common sense, ran counter to the standard principles that evolved later on: in the case of Kaʿb, the buyer would have had the option to void the sale if the object bought was defective, and, in the case of Hishām, payment of damages equal to the reduced value of the wheat would have been due. Kaʿb and Hishām certainly did not have at their disposal the technical legal knowledge necessary to deal with such cases, irrespective of whether or not this knowledge existed in their time. It is significant, however, that these men were appointed to deal with disputes arising in the midst of a population of conquerors.

As for the conquered communities outside what came to be the garrison town of Baṣra – and elsewhere in Iraq – it is likely that they still applied the ancient Mesopotamian law of property rights and damages that allows for some form of restitution.[10] Indeed, it is even more likely that one form of damages or another had for long been known to the Peninsular Arabs who inhabited the trading towns of the Hejaz, and possibly elsewhere. Thus, the fact that Kaʿb, Hishām and ʿAlī resorted to primitive adjudication among the tribal soldiers is no indication in itself that technical legal knowledge was unavailable. The absence of legal acumen among them must therefore be explained by the specific nature of their appointments, and the contexts in which they operated.

The early appointments to *qaḍāʾ* (judgeship) recorded in the sources must be viewed as quasi-legal in nature. Many of the *qāḍī*s appointed were persons whose involvement in the law did not go beyond the experience of having been arbitrators (*ḥukkām*; sing. *ḥakam*). The latter were men deemed to be in possession of experience, wisdom and charisma (as well as, in pre-Islamic times, supernatural powers), to whom tribesmen resorted to adjudicate their disputes. Although their verdicts were not binding in

8 Ibid., I, 279.
9 Ibid., I, 300. Such a punishment, however, was not unknown in the pre-Islamic Near East.
10 Another element of Mesopotamian – in this case Babylonian – law that survived in Islamic law is contractual offer and acceptance. See Joseph Schacht, "From Babylonian to Islamic Law," in *Yearbook of Islamic and Middle Eastern Law* (London and Boston: Kluwer Law International, 1995), 29–33.

the strict legal sense, disputants normally conformed to their findings. Many of the so-called *qāḍī*s were recruited from the ranks of these pre-Islamic arbitrators, although other appointees did not have the benefit of such experience. The sources report that some of the earliest *qāḍī*s were illiterate, as in the case of ʿĀbis b. Saʿīd al-Murādī who was appointed *qāḍī* of the important garrison town of Fusṭāṭ by the caliph Muʿāwiya (41/661–60/80).[11] Yet, his illiteracy did not mean that ʿĀbis lacked the experience and acumen to deal with legal and quasi-legal problems arising mostly from a tribal social context.

It is of fundamental importance to realize that early judicial appointments were neither general in jurisdiction nor intended to regulate and supervise the affairs of the conquered provinces. Rather, they were confined to the garrison towns where the conquering Arab armies resided with their families and other members of their tribes.[12] The policy of the central power at Medina was clear on this matter from the outset: the conquered communities were to regulate their own affairs exactly as they had been doing prior to the advent of Islam. Abū Bakr's letter to his generals is typical, and represents the standard Muslim policy adopted during the entire period of the conquests. The invading Arabs were to "establish a covenant with every city and people who receive[d]" them, and to give these people "assurances and to let them live according to their laws."[13] Thus, the so-called *qāḍī*s appointed to the provinces during the first decades of Islam, and for a while thereafter, were in fact state officials whose jurisdiction did not extend beyond the population of the conquering tribes.

This explains why most early appointments were not related exclusively to *qaḍāʾ*, however general and vague the meaning of this term may have been. With the exception of Syria – the center of Umayyad rule – most appointees had other weighty responsibilities, having to do with policing and financial administration. The illiterate *qāḍī* ʿĀbis b. Saʿīd al-Murādī was charged in Fusṭāṭ with the task of adjudicating conflicts – in keeping, it would seem, with the original meaning of the term "*qaḍāʾ*" – and of heading the police section (*shurṭa*).[14] Egypt appears to have had a high number of such appointments, although this practice existed elsewhere.

[11] Wakīʿ, *Akhbār*, III, 223; Muḥammad b. Yūsuf al-Kindī, *Akhbār Quḍāt Miṣr*, ed. R. Guest (Cairo: Muʾassasat Qurṭuba, n.d.), 311–13.
[12] Abū Zurʿa al-Dimashqī, *Tārīkh*, ed. Shukr Allāh al-Qawjānī, 2 vols. (n.p., 1970), I, 202.
[13] Brock, "Syriac Views," nn. 204–05.
[14] Wakīʿ, *Akhbār*, III, 223.

According to one count, six out of fifteen *qāḍī*s appointed to Fusṭāṭ in this early period were also charged with supervising the *shurṭa*.[15]

Many *qāḍī*s, especially after 50/670, were also charged with the collection of taxes, except, again, in Syria, where the caliphs themselves appear to have taken charge of this function.But as secretaries of public finance (*bayt al-māl*), proto-*qāḍī*s were appointed fairly early, as evidenced by the case of Ibn Ḥujayra, who combined this office with *qaḍāʾ*.[16] The secretariat of finance mainly involved administering the collection and distribution of booty, in the form of pensions, to the conquering tribes of the garrison towns.[17] This function appears to have overlapped with that of the *ʿarīf*, who also distributed stipends to the warrior-tribesmen and managed the payment of blood-money. In some cases, he was also charged with overseeing the property of orphans and of supervising conduct in the markets, as was the case with the renowned *qāḍī* Shurayḥ.[18]

The *qāḍī*-cum-administrator was usually subservient to the chief commander (*amīr*) of the garrison town, who appointed, supervised and dismissed him. The proto-*qāḍī* was seen as the commander's assistant, his *wazīr*, as well as his deputy whenever he quitted the garrison. For example, when Muʿāwiya left for the Battle of Ṣiffīn in 38/658, the proto-*qāḍī* Faḍāla b. ʿUbayd al-Anṣārī acted as governor of Syria during his absence.[19] However, in some cases, the appointment to *qaḍāʾ* was conferred upon the same person designated chief commander, as evidenced in the case of ʿUbayd Allāh b. Bakara, who was given the title of "*amīr* and *qāḍī*" over Baṣra.[20] During Muʿāwiya's reign, Faḍāla too was charged with military duties, including raiding, as well as *qaḍāʾ*. This tradition of dual appointment continued as late as the middle Umayyad period. Around 100/718, for instance, ʿAbd al-Raḥmān al-ʿUdharī combined the *qaḍāʾ* of Damascus with the military post of commander.[21]

The fact that some *qāḍī*s who performed financial, military and policing tasks were illiterate strongly suggests that *qaḍāʾ* was limited in nature – limited, that is, in terms of both geography and jurisdiction.

[15] Irit Bligh-Abramsky, "The Judiciary (Qāḍīs) as a Governmental-Administrative Tool in Early Islam," *Journal of the Economic and Social History of the Orient*, 35 (1992): 40–71, at 46.

[16] Kindī, *Akhbār*, 317; Wakīʿ, *Akhbār*, III, 225.

[17] For other appointments which combined *qaḍāʾ*, financial and policing responsibilities, see Wakīʿ, *Akhbār*, I, 118; III, 225, 226, 227, 322; Kindī, *Akhbār*, 322, 324, 327, 332.

[18] Wakiʿ, *Akhbār,* II, 196, 212; Kindī, *Akhbār*, 325.

[19] Dimashqī, *Tārīkh*, I, 198–99; Shīrāzī, *Ṭabaqāt*, 43; Emile Tyan, *Histoire de l'organisation judiciare en pays d'Islam*, 2 vols., 2nd ed. (Leiden: E. J. Brill, 1960), I, 132 ff.

[20] Wakīʿ, *Akhbār*, I, 302.

[21] Bligh-Abramsky, "Judiciary," 44–45.

Geographically, it was restricted to the garrison towns and their inhabitants, and jurisdictionally, to disputes and conflicts that arose among tribal groups whose main occupation was soldiering. During the first decades of Islam, when military activities were at their peak, it cannot be expected that the Arab soldiers would experience the entire gamut of social and economic life that fully developed urban populations knew and lived. But since these soldiers inhabited the garrison towns together with their families and fellow tribesmen, the problems that they encountered would most often have related to family status, inheritance and crime – all of which areas were fairly well regulated either by Quranic legislation or tribal customary law.[22] It was only with the passage of time, when this occupying population settled in these towns, that their life acquired its own complexity, and was expanded into a full-fledged society whose daily, mundane problems spanned the entire range of law. This was to become the state of affairs nearly a century after Muḥammad's death, as reflected in the changing character of the *qāḍī*'s office.

The *qāḍī*'s function as a magistrate, initially limited, underwent gradual expansion. Criminal jurisdiction seems to have been assigned to this office as a distinct category sometime in the 40s/660s, that is, during Muʿāwiya's reign. Sulaym b. ʿItr[23] is reported to have been the first *qāḍī*, at least in Fusṭāṭ, to be charged, among other things, with the specific responsibility of adjudicating criminal cases among the conquering tribes inhabiting this garrison town.[24] Sulaym reportedly conveyed to the secretary of the military register (*ṣāḥib dīwān al-jund*) the amount of compensation to which an injured party was entitled, whereupon the secretary disbursed – over a three-year period – the compensation to this party out of the pension of the convicted assailant.[25]

The *qāḍī*'s office and the tasks that it involved expanded primarily in a religious direction, however. Despite the lack of formal legal education (which Islamic culture had not yet developed), and the patent illiteracy of some of them, *qāḍī*s were expected, if not required, at least to have a degree of religious knowledge. At the time this meant possessing a reasonable knowledge of the legal stipulations of the Quran plus knowledge of the rudimentary socio-religious values the new religion had developed. When Marwān b. Ḥasan was appointed governor of Egypt in 65/684, he called on

[22] Wakīʿ, *Akhbār*, III, 224–25.
[23] An alternative rendering of this name, provided by Wakīʿ, is Sulaymān b. ʿAnz.
[24] Kindī, *Akhbār,* 309.
[25] Ibid.

ʿĀbis b. Saʿīd, then the *qāḍī* of Fusṭāṭ, with the intention of checking his credentials. Having heard that ʿĀbis was illiterate, Marwān was concerned about his competence. It is reported that the first question he asked him was whether he knew the Quran, especially its laws of inheritance.[26]

A significant function of the early *qāḍī*s was story-telling. It appears that many officials were appointed with the double function of *qāḍī* and story-teller (*qāṣṣ*; pl. *quṣṣāṣ*). This function usually entailed recounting stories of a generally edifying nature, related to the Quranic narratives of ancient peoples and their fates, biblical characters and, more importantly, the exemplary life of the Prophet. The first official appointment was made by Muʿāwiya in, or sometime immediately after, 41/661,[27] with the specific duty of "cursing the enemies of Islam" after the morning prayer and of explaining the Quran to worshipers after the Friday prayer. This last performance may have ranged from popular ceremonies to a more serious discussion of the Prophet's biography and interpretation of the Divine Text. The latter activities, it should be noted, may well have marked the beginning of scholarly circles in Islam, an intellectual institution that was to develop during the next four centuries into a full-fledged system of legal education, among other things.

Story-telling was not limited to official appointment, however, since many *quṣṣāṣ* were already active on a private level before Muʿāwiya incorporated some of them into government ranks. In fact, they may have been associated with the so-called *akhbārī*s who, since pre-Islamic days, had been collecting reports of ancient events, genealogies and poetry. The story-tellers appear to have played a role in the then emerging religious life of Iraq, Medina and other cities, but there is little to suggest that they were appointed, at that time and in this capacity, to government posts.[28] Be that as it may, their appearance is a strong indication of the rapid evolution of the religious orientation that emphasized the Quranic and Prophetic narratives. The fact that many proto-*qāḍī*s were also appointed as story-tellers is significant because this government policy provides evidence of

[26] Wakīʿ, *Akhbār,* III, 223. This report must be authentic, since the sources make no mention whatsoever of Prophetic Sunna or consensus, the knowledge of which became – a century or two later – as essential to the *qāḍī* as the Quran. The veracity of this report is also corroborated by the fact that ʿĀbis' appointment was renewed even though he answered the question in the negative, saying that whatever he did not know he would enquire about in learned circles. Ignorance of the Quran would automatically disqualify any later would-be *qāḍī*, and such a state of affairs would not have a chance of coming down in the form of a report.

[27] Dimashqī, *Tārīkh*, I, 200.

[28] Muḥammad Ibn Ḥibbān, *Kitāb Mashāhīr ʿUlamāʾ al-Amṣār*, ed. M. Fleischhammer (Cairo: Maṭbaʿat Lajnat al-Taʾlīf wal-Tarjama wal-Nashr, 1379/1959), 73, 75, 79 and *passim.*

the development of the religious character of the *qāḍī*'s office. Although some story-tellers were regarded as little better than charlatans, most of the early *qāḍī*s who functioned in a dual capacity as *quṣṣāṣ* appear to have been men of piety and faith. The *qāḍī* and story-teller Sulaym b. ʿItr, for example, is characterized in the sources as a pious man who reportedly spent his nights reading the Quran.[29]

But knowledge of the Quran and various religious narratives should not be taken to mean that the proto-*qāḍī*s always applied Quranic law, even if there was a growing tendency to do so from the very beginning. The application of Islamic content to the daily life of the community came after the articulation of a certain ethic, depending on the particular sphere of life or the case at hand. In matters of inheritance, for instance, where the Quran offered clear and detailed provisions, the proto-*qāḍī*s seem to have applied these provisions as early as the caliphates of Abū Bakr and ʿUmar I; indeed, we earlier saw examples of governmental insistence on faithful adherence to the Quranic stipulations on inheritance. On the other hand, many areas of life were either lightly touched by Quranic legislation or not at all. Even such Quranic prohibitions as those pertaining to wine-drinking were not immediately enforced, and remained largely inoperative at least for several decades after the death of the Prophet. In fact, the early Kūfan legists permitted its consumption. Furthermore, it is telling that Shurayḥ, portrayed in the Muslim tradition as an archetypal *qāḍī* of legendary proportions, is commonly reported to have indulged in drinking doubly distilled, strong intoxicants.[30] Telling, because if a *qāḍī* such as Shurayḥ was publicly involved in practices so flagrantly contradictory to the Quranic letter and spirit, then one can safely assume that, apart from certain highly regulated areas in the Quran (marriage, divorce, inheritance, etc.), there was little concern at the time for an Islamic system of legal morality. (This is to assume that law and morality in developed Islamic law were not only intertwined, but often interchangeable.)

3. THE RELIGIOUS IMPULSE

Shurayḥ's habitual consumption of alcohol (*ṭilāʾ*) is reported in the sources without censure. No doubt, the practice must have been viewed by later

[29] Wakīʿ, *Akhbār*, III, 221. For a detailed discussion of story-tellers, see K. ʿAthamina, "al-Qasas: Its Emergence, Religious Origin and its Socio-Political Impact on Early Muslim Society," *Studia Islamica*, 76 (1992): 53–74.

[30] Wakīʿ, *Akhbār*, II, 212, 226.

believers as abhorrent, but it was understood – even tolerated – in the case of this early figure who had converted to a religion that had barely emerged. In the nearly 200-page biography dedicated to Shurayḥ by Wakīʿ,[31] no condemnation or criticism of his practice is recorded. Nor is there any reproach directed at the influential and highly learned lady who, in the 60s/680s, used to offer wine to men on their way to pilgrimage.[32] It is a reflection of the growth of religious sentiment that in less than two decades after Shurayḥ's career had ended, censure of wine-drinking – as well as other practices condemned by the Quran – began to surface. In 89/707, ʿImrān b. ʿAbd Allāh al-Ḥasanī, *qāḍī* of Fusṭāṭ since 86/705, convicted in his court a scribe of ʿAbd Allāh b. ʿAbd al-Malik, then Egypt's governor. The charge was wine-drinking, and the evidence was witness testimony. The governor accepted the verdict, but refused to allow ʿImrān to implement any penalty. The latter resigned his post in protest, after failing to persuade the governor to change his mind.[33] The change from an environment in which a *qāḍī* himself would indulge in drinking alcohol publicly to one in which another would resign a fairly lucrative post in protest against official interference with his attempts to punish the same behavior is indeed remarkable.

ʿImrān's confrontation with the governor took place in a social and ethical environment that was significantly different from the one that had existed half a century before. By the year 60/680, most of the Prophet's generation, even young contemporaries, were dead.[34] Many of these must have believed in the message brought to them by Muḥammad, but they – especially those who had only briefly been his supporters – could hardly have internalized the spirit of the new, as yet largely undeveloped, religion. After all, the great majority were tribal Bedouins whose way of life did not conform readily to the principles and imperatives of the Quranic worldview; indeed, for many, the material gain brought about by the conquests was the main attraction of the new order. Nonetheless, they did fight in the name of Islam, and they must have accepted, in one form or another, its basic ideas.

[31] Ibid., II, 189–381. For a detailed discussion of Shurayḥ's career, see Khaleelul Iqbal Mohammed, "Development of an Archetype: Studies in the Shurayḥ Traditions" (Ph.D. dissertation, McGill University, 2001).

[32] Dimashqī, *Tārīkh*, I, 333.

[33] Kindī, *Akhbār*, 328.

[34] Only a few Companions remained alive after this time. ʿAbd Allāh b. ʿĀmir was one of the last to die, in 89/707. See Ibn Ḥibbān, *Mashāhīr*, 17.

The subsequent generation – those who were born and raised during the early military and ideological expansion of Islam – grew up under the influence of Quranic teachings and various kinds of religious preaching and instruction. Unlike their parents, who had become Muslims at a later stage in their lives, often under coercion (by virtue of the apostasy wars), they, together with the children of non-Arab converts, imbibed from infancy the rudimentary religious morality and values. By the time they reached majority, they were frequent mosque-goers (i.e., regular consumers of religious preaching and religious acculturation), and were involved in various activities relating to the conquests and building of a religious empire. It was therefore the learned elite of this generation – which flourished roughly between 60/680 and 90/708 – who embarked upon promoting a religious ethos that permeated – indeed, impregnated – so much of Muslim life and society.

It was this ethos that ʿImrān, the *qāḍī* we just encountered, was attempting to reinforce. Many *qāḍī*s like him began to show interest in religious narrative, including stories and biographical anecdotes about the Prophet. The story-tellers were among those who promoted this narrative, which was to become paradigmatic. By the 60s/680s, some *qāḍī*s had started propounding Prophetic material, the precise nature of which is still unclear to us. Ṭalḥa b. ʿAbd Allāh b. ʿAwf, the *qāḍī* of Medina between 60/679 and 72/691, is said to have narrated Prophetic reports that the famous Ibn Shihāb al-Dīn al-Zuhrī (d. 124/741) memorized and later transmitted.[35] Our sources suggest that he was one of the first *qāḍī*s to be associated with this activity, although he may have engaged in it only after his tenure as a judge.[36] Among the other *qāḍī*s who reportedly narrated Prophetic material were Nawfal b. Musāḥiq[37] and ʿUmar b. Khalda al-Zuraqī, who succeeded Ṭalḥa to the office between 76/695 and 82/701.[38]

That the initial interest in Prophetic narrative began nearly half a century after the Prophet's death is a problem worth explaining, especially in light of the fundamental importance of the authority of *ḥadīth* (the textual narrative of what the Prophet had said, done or tacitly approved) to later law and legal theory. The new preoccupation with Prophetic material reflected a dramatic change of attitude in a considerable body of writings

35 Ibid., 122; Wakīʿ, *Akhbār*, I, 120.
36 Ibn Ḥibbān lists his death as having occurred in 97/715: *Thiqāt*, 122.
37 Ibid., 272.
38 Wakīʿ, *Akhbār* I, 125, 130.

found in papyri, inscriptions and elsewhere.[39] One such change may be found in Umayyad numismatics. [40] Upon the accession of Marwān in 64/683, the coins begin, for the first time, to exhibit the formula "The Messenger of God" (*Rasūl Allāh*), a formula that was to remain a standard feature of Arab numismatics.[41] The earliest inscription bearing this formula appears to be that engraved on the southern, south-western and eastern outer faces of the Dome of the Rock, dated 72/691.[42] All other evidence from early sources appears to support the view that legal authority during the better part of the first Islamic century was in no way exclusively Prophetic. It must be remembered that by the time Muḥammad died, his authority as a Prophet was anchored in the Quranic event and in the fact that he was God's spokesman – the one through whom this event materialized. To his followers, he was and remained nothing more than a human being, devoid of any divine attributes (unlike Christ, for instance). But by the time of his death, when his mission had already met with great success, he was the most important living figure the Arabs knew. Nonetheless, these Arabs also knew of the central role that ʿUmar I, Abū Bakr and a number of others had played in helping the Prophet, even in contributing to the success, if not survival, of the new religion. Like him, they were charismatic men who commanded the respect of the faithful (and in the case of ʿUmar I, the ability to instill fear in his adversaries). Inasmuch as Muḥammad's authority derived from the fact that he upheld the Quranic Truth and never swerved from it, these men – some of whom later became caliphs – derived their own authority as privileged Companions and caliphs from the same fact – namely, upholding the Quranic Truth. This is not to say that caliphal authority was necessarily or entirely derivative of that of the Prophet; in fact, it ran parallel to it. Muḥammad was the messenger through whom the Quranic Truth was revealed – the caliphs were the defenders of this Truth and the ones who were to implement its decrees.

The caliphs – until at least the middle of the second/eighth century – tended to see themselves as God's *direct* agents in the mission to implement His statutes, commands and laws. The titles they bore speak for themselves: "God's Deputy on Earth" and "The Commander of the

[39] See Hoyland, *Seeing Islam*, 545 ff., 687 ff.

[40] Patricia Crone and M. Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), 24–25.

[41] The coins themselves are dated 66/685 and 67/686. See Hoyland, *Seeing Islam*, 694, no. 21; for the Umayyad–Sasanid coin of Baṣra's governor Khālid b. ʿAbd Allāh, minted in 71/690–91. see ibid., 695, no. 26.

[42] Ibid., 696–97.

Faithful." They held their own courts and personally acted as *qāḍī*s.[43] In fact, throughout the entirety of the first Islamic century, they adjudicated – in practical terms – the majority of issues that required authority-statement solutions, without invoking Prophetic authority. As late as the 90s/710s, and for some decades thereafter, most *qāḍī*s appear to have relied on three sources of authority in framing their rulings: the Quran, the *sunan* (including caliphal law) and what we will call here discretionary opinion (*ra'y*). Abū Bakr b. Ḥazm al-Anṣārī, *qāḍī* of Medina after 94/712, drew explicitly on these three sources in nearly all of his decisions reported in biographical works.[44] The same is true of Iyās b. Muʿāwiya, Baṣra's *qāḍī* around the same time, whose rulings are also described in detail by Wakīʿ.[45] The *qāḍī*s' practice of writing letters seeking caliphal opinion on difficult cases confronting them in their courts was evidently a common one. So were caliphal letters to the *qāḍī*s, most of which appear to have been solicited, although some were written on the sole initiative of the caliph himself or – presumably – in his name, by his immediate advisors. Iyās, for instance, used to grant neighbors – merely by virtue of being neighbors – the right of preemption (*shufʿa*), a practice that did not seem to accord, for some reason, with caliphal public policy.[46] On hearing of Iyās' practice, ʿUmar II (99/717–101/720) wrote a letter ordering him to confine preemption rights to domiciles having a shared right of access (e.g., two houses sharing one gate) and to properties owned as partnerships of commixion.[47] The same caliph wrote to another *qāḍī* in Egypt imposing a similar, but even more restrictive decree, saying: "We used to hear (*kunnā nasmaʿ*) that preemption rights can be enjoyed by the partner only, not by the neighbor."[48] It seems reasonable to infer that many *qāḍī*s were in the habit of bestowing rights of preemption on the neighbor, and this caliph deemed it necessary to intervene.

[43] Crone and Hinds, *God's caliph*, 43.
[44] Wakīʿ, *Akhbār*, I, 135 ff.
[45] Ibid., I, 312–74.
[46] Preemption is the right to buy an adjoining property by virtue of the fact that the neighbor has priority, over any third party, to ownership of that property. For a description of preemption law in later doctrine, see Ibn Naqīb al-Miṣrī, *ʿUmdat al-Sālik*, trans. N. H. M. Keller, *The Reliance of the Traveller* (Evanston: Sunna Books, 1993), 432–34; Schacht, *Introduction*, 142. It is likely that the caliphal restriction of this right was due to the fact that such laws as applied by Iyās b. Muʿāwiya would ultimately have led to Muslims being deprived of the right to purchase houses in the predominantly non-Muslim cities and towns that had been conquered.
[47] Wakīʿ, *Akhbār*, I, 332. Partnership of commixion refers to a property owned by two or more persons without clear definition of their individual shares in it, such as a residential property inherited by two or more persons.
[48] Kindī, *Akhbār*, 334–35.

Caliphal legislation and legislative intervention, however, did not always derive authority from the office itself, as has been argued by some scholars.[49] The incipit of ʿUmar II's statement ("We used to hear") clearly refers to past authority, in this case unidentified. Much of caliphal legal authority rested on precedent, mainly generally accepted custom and the practice of earlier caliphs, of the Prophet's close Companions and, naturally, of the Prophet himself. In fact, any good model was to be emulated. ʿUmar I reportedly advised Shurayḥ to see that his rulings conformed with Quranic stipulations, the decisions (*qaḍāʾ*, but not yet the Sunna) of the Messenger of God and those of the "just leaders."[50] There is no reason to believe that the caliphs themselves did not abide by the same sources for legal guidance. When ʿIyāḍ al-Azdī, Egypt's *qāḍī* in 98/716, asked ʿUmar II about a case apparently involving criminal liability pertaining to a boy who had violated a girl with his finger, the caliph answered: "Nothing has come down to me in this regard from past authorities." He delegated to the *qāḍī* full authority to deal with the case "in accordance with your discretionary opinion (*raʾy*)."[51] Had the caliphs been legislators in their own right, they would have had their own codes of law, and ʿUmar II would not have hesitated to rule in this matter. The caliphs and their office, in other words, were not independent agents of legislation, but integrally dependent on prior exemplary conduct and precedent, only one source of which happened to be the decisions of previous caliphs. (It must be emphasized here that not all caliphs enjoyed equal religious authority. Abū Bakr, ʿUmar I, ʿUthmān and ʿUmar II seem to have enjoyed a higher level of legal authority than other caliphs.)

The *qāḍī*s operated within the same scheme of authoritative sources. In the late 60s/680s, some four decades after the death of ʿUmar I, the Medinese *qāḍī* ʿAbd Allāh b. Nawfal appears to have used this caliph's practice, among other things, as the basis for his rulings.[52] So did Abū Bakr b. Ḥazm al-Anṣārī, Iyās b. Muʿāwiya and others.[53] But all of these men resorted also to the Quran and to their own notions of reasoning and precedent. ʿUmar II reportedly declared on one occasion that *qāḍī*s must be cognizant of the rulings and *sunan* that came before them.[54] In short, the sources of authority that governed the emerging Islamic law were

[49] Crone and Hinds, *God's Caliph*.
[50] Wakīʿ, *Akhbār*, II, 189.
[51] Kindī, *Akhbār*, 334. The judge ruled for the girl, granting her fifty *dīnār*s in damages.
[52] Wakīʿ, *Akhbār*, I, 113.
[53] Ibid., I, 139, 325, 326, 330, 332 and *passim*.
[54] Ibid., I, 77.

three: the Quran, the *sunan* and discretionary opinion. It is to the latter two that we shall now turn.

Sunna (pl. *sunan*) is an ancient Arab concept, meaning an exemplary mode of conduct, and the verb *sanna* has the connotation of "setting or fashioning a mode of conduct as an example that others would follow." As early as the fifth century AD, the Arabs of the north saw Ishmael, for instance, as a sort of saint who provided them with a model and a way of life.[55] In pre-Islamic Arabia, any person renowned for his rectitude, charisma and distinguished stature was, within his family and clan, deemed to provide a *sunna*, a normative practice to be emulated. The poet al-Mutallamis, for instance, aspired to leave "a *sunna* that will be imitated."[56] Some caliphal practices came to constitute *sunan* since they were viewed as commendable. When ʿIyāḍ b. Ghunm conquered Rahā during ʿUmar I's reign, he was invited to dinner in the city's church by its patriarch, an invitation he immediately refused. His reason for refusal was ʿUmar I's conduct when he visited Jerusalem following the city's conquest: the caliph had turned down a similar invitation from that city's patriarch.[57] For ʿIyāḍ, ʿUmar I's refusal constituted a *sunna*. The concept of *sunna* thus existed before Islam and was clearly associated with the conduct of individuals, and not only with the collective behavior of nations, as is abundantly attested in the Quran.

When the caliphs and proto-*qāḍī*s referred to *sunan*, they were speaking of actions and norms that were regarded as ethically binding but which may have referred to various types of conduct. Such *sunan* may have indicated a specific way of dealing with a case, of the kind that ʿUmar II failed to discover when answering his *qāḍī*'s question about the girl's rape, or ʿUmar I's refusal of the patriarch's invitation. But they could also have constituted, collectively, a general manner of good conduct, such as when it was said (and quite often it was) that "so-and-so governed (or, for a *qāḍī*, 'adjudicated a case') with justice and followed the good *sunna*." The earlier Prophets, as well as Muḥammad, represented a prime source of *sunan*. In a general sense, therefore, *sunan* were not legally binding narratives, but subjective notions of justice that were put to various uses and discursive strategies.

[55] Irfan Shahid, *Byzantium and the Arabs in the Fifth Century* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 1989), 180.

[56] M. M. Bravmann, *The Spiritual Background of Early Islam* (Leiden: E. J. Brill, 1972), 139 ff. See also Zafar Ishaq Ansari, "Islamic Juristic Terminology before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa," *Arabica*, 19 (1972): 255–300, at 259 ff.

[57] Abū Muḥammad Aḥmad Ibn Aʿtham, *al-Futūḥ*, 8 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), I, 252.

During the first decades of Islam, it became customary to refer to the Prophet's biography and the events in which he was involved as his *sīra*. But while this term indicates a manner of proceeding or a course of action concerning a particular matter, *sunna* describes the manner and course of action as something established, and thus worthy of being imitated.[58] Yet, the Prophet's *sīra*, from the earliest period, constituted a normative, exemplary model, overlapping with notions of his Sunna. At the time of his election as caliph, for instance, ʿUthmān promised to follow "the *sīra* of the Prophet." This phrase in ʿUthmān's oath refers to the personal and specific practice of the Prophet, a practice that is exemplary and thus worth following. It was the violation of this practice that allegedly led to ʿUthmān's assassination. ʿUthmān, an early poem pronounced, violated the established *sunna* (*sunnat man maḍā*), especially the Prophet's *sīra* which he had promised to uphold.[59]

In a meticulous study of the earliest Islamic discourse, Bravmann has convincingly argued that the concepts of *sīra* and *sunna* were largely interchangeable, both possessing the notions of exemplary conduct, with the difference that *sunna* has the added element of an established conduct, rooted in past practice. He has also shown that these concepts refer to personal, individual practices, and not to long-standing, collective customs and practices of uncertain origins.

> *Sunna* (pl. *sunan*) in the early Arab and Islamic conception basically refers to usages and procedures established by certain individuals and not to the anonymous practice of the community. Indeed, "the practice of the community" . . . , which of course exists, is in the Arab conception based on the practices and usages created and established by certain individuals, who acted in such and such a specific way, and hereby – intentionally – instituted a specific practice.[60]

By the caliphate of ʿUthmān (23/644–35/656), the Prophet's *sīra* and Sunna no doubt carried significant weight as exemplary conduct. In fact, evidence suggests that the Sunna of the Prophet emerged immediately after his death, which was to be expected given that many far less significant figures had been seen by the Arabs as having laid down *sunan*. It would be difficult to argue that Muḥammad, the most influential person in the nascent Muslim community, was not regarded as a source of normative practice. In fact, the Quran itself explicitly and repeatedly enjoins believers to obey the Prophet and to emulate his actions. The implications of Quran

[58] Bravmann, *Spiritual Background*, 138–39, 169.
[59] Ibid., 126–29, 160.
[60] Ibid., 167; also at 130, 154–55.

4:80 – "He who obeys the Messenger obeys God"– need hardly be explained. So too Quran 59:7: "Whatsoever the Messenger ordains, you should accept, and whatsoever he forbids, you should abstain from." Many similar verses bid Muslims to obey the Prophet and not to dissent from his ranks.[61] Moreover, Quran 33:21 explicitly states that "in the Messenger of God you [i.e., believers] have a good example." All this indicates that to obey the Prophet was, by definition, to obey God. In establishing his *modus operandi* as exemplary, the Prophet could hardly have received better support than that given to him by the society in which he lived and by the Deity that he was sent to serve.

One of the first attestations of "the Sunna of the Prophet" appears toward the end of ʿUmar I's reign, probably around 20/640. In an address to his army, the Muslim commander Yazīd b. Abī Sufyān declared that he had just received orders from that caliph to head for the Palestinian town of Qīsāriyya in order to take it "and to call the people of that area to the Book of God and the Sunna of his Messenger."[62] Probably in the same year, but certainly before the death of ʿUmar I in 23/644, "the Sunna of the Prophet" and that of Abū Bakr were invoked.[63] Similarly, in 23/644, ʿUthmān and ʿAlī, the two candidates for the caliphate, were asked whether they were prepared to "work according to the Sunna of the Prophet and the *sīra*s of the two preceding caliphs," Abū Bakr and ʿUmar I.[64] During his caliphate, ʿUmar I apparently referred to the decisions of the Prophet in a matter related to meting out punishment for adulterers, and in another in which the Prophet enjoined him to allot distant relatives the shares of inheritance to which they are entitled.[65] Subsequently, the number of references to "the Sunna of the Prophet" increased, frequently with specific mention of concrete things said or done by the Prophet, but at times with no other substantive content than the general meaning of "right and just practice." This is also the connotation attached to many early references to the *sunan* of Abū Bakr, ʿUmar I, ʿUthmān and others. By such references it was meant that these men set a model of good behavior in the most

[61] See, e.g., Quran 3:32, 132; 4:59 (twice), 64, 69, 80; 5:92; 24:54, 56; 33:21; 59:7.
[62] Ibn Aʿtham, *Futūḥ*, I, 244.
[63] Ibid., I, 248.
[64] Ansari, "Islamic Juristic Terminology," 263.
[65] G. H. A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth* (Cambridge: Cambridge University Press, 1983), 26–27. For other instances in which ʿUmar I refers to the "Sunna of the Prophet," see Ansari, "Islamic Juristic Terminology," 263; Bravmann, *Spiritual Background*, 168–74.

general meaning of the term, not that they necessarily or always laid down specific rulings or ways of dealing with particular issues.

The vitally important issues raised in the Quran represent a portrait of concrete Prophetic Sunna. It would be inconceivable that all these issues, many of which we enumerated in chapter 1, should have been confined to the Quran alone. Matters pertaining to alms-tax, marriage, divorce, inheritance, property and criminal law, among many others, are treated by the Quran in detail and are represented in concrete Sunna.

That the Prophet was associated with a *sunna* very soon after, if not upon, his death cannot be doubted. What is in question therefore is whether or not his Sunna came to constitute an exclusive or even an exceptional source in terms of model behavior. And the answer is that it did not until much later, perhaps as late as the beginning of the third/ninth century. However, the process that ultimately led to the emergence of Prophetic Sunna as an exclusive substitute for *sunan* was a long one, and passed through a number of stages before its final culmination as the second formal source of the law after the Quran. During the first few decades after Muḥammad's death, his Sunna was one among many, however increasingly important it was coming to be. In the hundreds of biographical notices given to the early *qāḍī*s by Muslim historians, it is striking that Prophetic Sunna surfaces relatively infrequently – certainly no more frequently than the *sunan* of Abū Bakr and ʿUmar I.

The second stage of development appears to have begun sometime in the 60s/680s, when a number of *qāḍī*s, among others, began to transmit Prophetic material, technically referred to by the later sources as *ḥadīth*. This activity of transmission is significant because it marks the beginning of a trend in which special attention was paid to the Sunna of the Prophet. It is also significant because it was the only *sunna* to have been sifted out of other *sunan*, and to have been increasingly given an independent status. No religious scholar or *qāḍī* is reported to have studied, collected or narrated the *sunan* of Abū Bakr, for instance; nor that of the more distinguished ʿUmar I. The fact that the Prophet's Sunna acquired an independent and special status is emblematic of the rise of the Prophet's model as embodying legal, not only religious, authority.[66] In fact, the appearance of "The

[66] For distinctions between religious and legal forms of authority, see Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), ix, 166–235.

Messenger of God" on Umayyad coins of this period points to the rise of other forms of Prophetic authority as well.

Even non-Muslim sources of the period attest to this development. Writing in 687 (68 H), the western Mesopotamian John bar Penkaye speaks of the current problems and issues distracting the Muslims of his day. In the course of his narrative, he depicts the Prophet as a guide and instructor whose tradition the Arabs upheld "to such an extent that they inflicted the death penalty on anyone who was seen to act brazenly against his laws (*nāmōsawh*)."[67] This narrative surely cannot be taken at face value, for it presents the Prophet as a full-fledged legislator, no matter what law was being applied. What John may have been trying to convey was the image that his Muslim sources were seeking to construct of the Prophet. The fact remains, however, that, by at least the sixties of the first century, a Prophetic super-model had begun to emerge.[68]

The isolation of Prophetic Sunna from other *sunan* constituted an unprecedented and a fundamental transformation. It was both the result of a marked growth in the Prophet's authority and the cause of further epistemic and pedagogical developments. Epistemic, because the need to know what the Prophet said or did became increasingly crucial for determining what the law was. In addition to the fact that Prophetic Sunna – like other *sunan* – was already central to the Muslims' perception of model behavior and good conduct, it was gradually realized that this Sunna had an added advantage in that it constituted part of Quranic hermeneutics; to know how the Quran was relevant to a particular case, and how it was to be interpreted, Prophetic verbal and practical discourse, often emulated by the Companions, was needed. And pedagogical, because, in order to maintain a record of what the Prophet said or did, approved or disapproved, certain sources had to be mined, and this information, once collected, needed in turn to be imparted to others as part of the age-old oral tradition of the Arabs, now imbued with a religious element.

Along with the Prophet's Companions, the story-tellers contributed to the crystallization of the first stage of Prophetic dicta. Both of these groups constituted the sources from which the Prophetic biography, in both its real and legendary forms, was derived. At this early stage, however, all Prophetic information was practice-based, oral, fluid and mixed with non-Prophetic material. The story-tellers appear to have spoken of the fates of the Israelites and the Egyptian Pharaohs as much as they spoke of the

[67] Hoyland, *Seeing Islam*, 196–97, 414.
[68] For several non-Muslim sources describing Muḥammad as a law-giver, see ibid., 414.

Prophet himself, for these former were of primary interest to the story-tellers' audience, who saw themselves as victorious chastisers of other nations that have swerved from the Path of God. The story-tellers, in other words, had several and varied interests in propounding Prophetic material, probably little of which, by the seventh decade of the Hijra (680s AD), was of a strictly legal nature.[69]

On the other hand, the men and women who had been close to the Prophet, especially those who had interacted with him on a daily basis, could speak in real and credible terms of details of the Prophet's life. They knew him intimately, and they knew the Quran equally well. These persons, and to a lesser extent the story-tellers, kept the memory of the Prophet alive, and it was these people and the information they stored in their minds and imaginations that became important for another group of Muslims: the legists. This is not to say, however, that the story-tellers and legists were separate groups, since some of the former also belonged to the latter.

It is important to realize that the Muslim leadership, including the caliphs, was acting within a social fabric inherited from tribal Arab society in which forging social consensus before reaching decisions or taking actions was a normative practice. This is one of the most significant facts about the early Muslim state and society. In the spirit of this social consensus, people sought to conform to the group, and to avoid swerving from its will or normative ways, as embodied in a cumulative history of action and specific manners of conduct. What their fathers had done or said was as important as, if not more important than, what their living peers might say or do. When an important decision was to be taken, a precedent, a *sunna*, was nearly always sought. This explains why ʿUmar II, when asked about the aforementioned case in which a girl was raped, answered that nothing "had come down" to him "from past authorities." The caliph, with all his authority and might, *first looked for precedent*. What he was looking for was nothing short of a relevant *sunna* that represented the established way of dealing with the case at hand. It should not then be surprising that the Prophet's own practice was largely rooted in certain practices, mostly those deemed to have fallen within the province of *sunan*.[70]

[69] On the relationship between story-telling and Sunna/*ḥadīth*, see Gregor Schoeler, *Charakter und Authentie der muslimischen Überlieferung über das Leben Mohammeds* (Berlin: W. de Gruyter, 1996), 108, 116 and *passim* (see index, under *quṣṣāṣ*).

[70] A well-studied example is that of "surplus of property." The Prophet is said to have spent the surplus of his personal revenue on the acquisition of equipment for war-like projects, whereas the pre-Islamic Arabs used to spend theirs on charitable and social purposes. ʿUmar I adopted this practice as a Prophetic Sunna. See Bravmann, *Spiritual Background*, 129, 175–77, 229 ff.

Like ʿUmar II, all of the early caliphs, *qāḍī*s and pious men were in search of such *sunan*. The Quran, or at least its major legal provisions, reigned supreme in the hierarchy of authoritative legal sources, a status that it had achieved prior to the Prophet's death. But when the Quran lacked relevant provisions, the natural thing to do was to look for leading models of behavior or a collective conduct dictated by a perception of a good course of action. It was expected therefore that the Prophet's *sīra* should have been the focus of such a search, for he was the most central figure of the Muslim community, the Umma. It was this constant pursuit of a model combined with available Prophetic dicta (accumulated during the first few decades after Muḥammad's death) that explain the emergence by the 60s/680s of a specialized interest in his Sunna.

This is not to say, however, that the Prophetic Sunna replaced, except in a slow and gradual fashion, other sources of authority, or that it was committed to writing at an early date. By this time, Prophetic Sunna was, among the available *sunan*, no more than a *primus inter pares*, used by *qāḍī*s along with the *sunan* of Abū Bakr, ʿUmar I, ʿUthmān, ʿAlī and other Companions. In fact, even during much later periods, reference to non-Prophetic *sunan* was not uncommon. The *sunna* of ʿUmar II, for instance, remained a constant point of reference for more than a century after his death.[71] Furthermore, as we have seen, caliphs and *qāḍī*s alike made reference to *sunan* in a general sense, this being an invocation of fair, just and good conduct, even of the common customary laws of pre-Islamic Arabia. Some of the *sunan*, we may recall, were lacking in concrete subject matter.

Apart from this repertoire of *sunan* and the superior Quran, the *qāḍī*s and caliphs also relied heavily on discretionary opinion, which was, during the entire first Islamic century and part of the next, a major source of legal reasoning and thus of judicial rulings. In section 1 above, we detailed a number of examples illustrative of the operation of this sort of thinking. Another example of discretionary opinion was the positing of a minimal rule of evidence, such as the acceptance of the testimony of one man and two women in cases of divorce. This rule of procedure was applied by Iyās b. Muʿāwiya, for instance. However, the latter's contemporary, the *qāḍī* ʿAdī b. Arṭaʾa, refused to allow women's testimony in divorce, and, when

[71] ʿUmar II's "model behavior" was the basis for the later designation "Renewer of the Second Century," a title bestowed on the most prominent scholars of Islam. ʿUmar II was the only caliph (and in a sense non-scholar) to receive this title. See Ella Landau-Tasseron, "The Cyclical Reform: A Study of the *Mujaddid* Tradition," *Studia Islamica*, 70 (1989): 79–117; Wakīʿ, *Akhbār*, III, 8, 33.

he heard that Iyās had done so, he wrote to ʿUmar II asking for an authoritative ruling on this procedural matter. ʿUmar II pronounced Iyās mistaken, upholding ʿAdī's practice.[72] Iyās is also reported to have disallowed the marriage of young women with undersized heads; for this, he thought, was an indication that such women had not reached full mental capacity.[73] In the case of a man who caused another man's slave to lose his arm, Iyās ruled that the ownership of the slave be transferred to the defendant, although the latter had to pay the equivalent of slave's value to the original owner, presumably the plaintiff.[74]

Discretionary opinion, however, included other elements, not all of which were based on personal reasoning, as illustrated by the cases adjudicated by Iyās. Around 65/684, Shurayḥ was asked by another *qāḍī*, Hishām b. Hubayra, about the value of criminal damages for causing the loss of any of the hand's five fingers, and in particular whether or not they are of equal value. Shurayḥ answered: "I have not heard from any one of the people of *raʾy* that any of the fingers is better than the other."[75] Here, "the people of *raʾy*" are persons whose judgment and wisdom is to be trusted and, more importantly, emulated. In Shurayḥ's usage, *raʾy*, or discretionary opinion, comes very close to the notion of *sunna* – from which, in this case, *raʾy* cannot in fact be separated.

From the very beginning, *raʾy* stood as the technical and terminological counterpart of *ʿilm*, which referred to matters whose settlement could be based on established norms that one could invoke from the past. *Raʾy*, on the other hand, required the application of new norms or procedures, with or without reference to past experience or model behavior. While both might apply to social, personal, legal and quasi-legal matters, they stood distinct from each other. With regard to a military issue, the commander ʿAmr b. al-ʿĀṣṣ was prepared – around the year 20/640 – to act on the basis of norms derived analogically from situations in the past, but refused to make use of his own *raʾy* on that very question. In another situation, ʿUmar I called upon his advisors to give him their counsel on the basis of both their *ʿilm* and *raʾy*.[76] In both cases, *ʿilm* reflected knowledge of past experience – what we might call an authority-statement. At this juncture, it is instructive to note that with the gradual metamorphosis of the content

[72] Wakīʿ, *Akhbār*, I, 330.
[73] Ibid., I, 356.
[74] Ibid., I, 335.
[75] Ibid., I, 299.
[76] Bravmann, *Spiritual Background,* 178, 184.

of past, secular experience into a Prophetic and religious narrative, authority-statements became gradually less secular, acquiring an increasingly religious meaning. This metamorphosis is evidenced in the absorption of pre-Islamic customary and other practices into caliphal and Prophetic *sunan*; the latter would emerge more than two centuries later as the exclusive body of authority-statements.

Yet, inasmuch as *raʾy* was at times dependent on *ʿilm*, so was *ijtihād*, a concept akin to *raʾy*. *Ijtihād*, from the very beginning, signified an intellectual quality supplementing *ʿilm*, namely, the knowledge of traditional practice and the ability to deduce from it, through *raʾy*, a solution.[77] It is no coincidence therefore that the combination *ijtihād al-raʾy* was of frequent use, signaling the exertion of *raʾy* on the basis of *ʿilm*, knowledge of the authoritative past.

Technically, *ʿilm*, *raʾy* and *ijtihād* were interconnected and at times overlapping. So were the concepts of *raʾy* and derivatives of *ijmāʿ*, consensus, a concept that was to acquire central importance in later legal thought. The notion of consensus met *raʾy* when the latter emanated from a group or from a collective tribal agreement. Consensual opinion of a group (*ijtamaʿa raʾyuhum ʿalā* . . .) not only provided an authoritative basis for action but also for the creation of *sunan*. A new *sunna* might thus be introduced by a caliph on the basis of a unanimous resolution of a (usually influential) group of people. Other forms of consensus might reflect the common, unanimous practice of a community, originally of a tribe and later of a garrison town or a city.

4. CONCLUSIONS

Whatever "law" existed during the first few decades after the Prophet's death, it was restricted in application to the garrison towns of the Arab conquerors and to the sedentary towns and agricultural oases of the Hejaz, the only territories that came under the direct control of the early caliphs. The tribal nomads of the Peninsula, on the other hand, were not subjected to such control, while the conquered populations were deliberately left to govern themselves by their own denominational laws and canons. (This picture was to persist throughout later centuries, when the Bedouin populations of the Near Eastern deserts and the Atlas mountains of North Africa, among others, remained largely outside the purview of Islamic

[77] Ibid., 186–88.

law; so did the Christian and Jewish minorities, the unconverted remnants of the conquered populations.)

The new leadership of the Islamic state realized the importance of the policy of religious indoctrination, which they viewed as essential to achieving unity among the unruly tribal Arabs engaged in the conquests. Booty alone could not appease them for long, and the need was felt – especially during the caliphate of ʿUmar I – for implanting a religious (Islamic) ethic that had earlier been the driving force among the Prophet's supporters. Rallying around the cause of Islam meant the propagation of the Quranic ethic, at that time the only ideological tool of the new military and religious state. To this end, the early caliphs built mosques in each garrison town, and deployed Quranic teachers who enhanced the military commanders' religious program already in place. Private and public preachers whose function overlapped with that of the story-tellers and the commanders, were as much part of this religious deployment as the *qāḍī*s were. The religious activities of the commanders, the Quranic teachers, story-tellers, preachers and *qāḍī*s all combined to propagate an Islamic religious ethic and instill it in the hearts and minds of the new Muslims. In all of this, the Quran was again the most fundamental and pervasive element, whose spirit – if not yet letter – was totally, or near totally, controlling. In this sense, Islamic law as Quranic law existed from the very beginning of Islam, during the Prophet's lifetime and after his death.[78]

The first *qāḍī*s were appointed exclusively to the garrison towns where they acted as arbitrators, judges and administrators. Their role was in part a continuation of the pre-Islamic tribal practice of arbitration, since many of them had earlier functioned in that capacity, and the Arab tribes that fell under their jurisdiction were accustomed to this type of conflict resolution. These proto-*qāḍī*s applied Quranic law in conjunction with an amalgam of other laws derived from model behavior (*sunan*), customary Arabian practices, caliphal decrees and their own discretionary opinion. But these were not distinct categories, for Arabian customs were often based on what was perceived as *sunan*, and these latter at times represented the practices of the caliphs, of the Prophet himself and of his influential Companions. At

[78] This assertion is made having duly taken note of such writings as those of Schacht, *Origins*; P. Crone, "Two Legal Problems Bearing on the Early History of the Qur'ān," *Jerusalem Studies in Arabic and Islam*, 18 (1994): 1–37; J. Burton, *The Collection of the Qur'ān* (Cambridge: Cambridge University Press, 1971); J. Wansbrough, *Qur'ānic Studies* (Oxford: Oxford University Press, 1977); J. Wansbrough, *The Sectarian Milieu* (Oxford: Oxford University Press, 1978). Cf., in this regard, J. Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000), 123, n. 22.

other times, these customs were the normative ways of Arabian life, dictated by social consensus and/or the exemplary behavior of charismatic leadership. Even discretionary opinion (*raʾy*) was often based on *sunan*, given expression by the conduct or opinion of *ahl al-raʾy* who (to put it tautologically) at times fashioned the *sunan*.

During the half century following Muḥammad's death, Prophetic Sunna (based in part on his *sīra*) was only one of several types of *sunan* that constituted an authoritative legal source for *qāḍī*s, although it certainly gained increasing importance during this period. Thus, far from possessing the status of the exclusive sunnaic source of legal behavior that it would later acquire, there is no indication that it was distinguished from the other *sunan* during this period, although in stature it may have been more prestigious. This situation was to change soon, however. Beginning in the 60s/680s, many *qāḍī*s and learned men began to recount Prophetic biography as a separate oral genre, distinguished from the *sunan* of Abū Bakr, ʿUmar I and others. The beginnings of specialization in what gradually came to be an independent field of knowledge marked the rudimentary beginnings of a fundamental transformation that culminated in Prophetic Sunna as the exclusive source of *sunan*-based law, steadily pushing aside the other *sunan* and finally replacing them almost completely some two centuries later. Meanwhile, between the early 60s/680s and the late 80s/700s, there was a noticeable shift toward the adoption of Prophetic Sunna, although other sources, including caliphal authority, non-Prophetic *sunan*, and discretionary opinion continued to share the landscape of the world of the *qāḍī*sʾ and legally minded scholars.