THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

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CHAPTER 5

Prophetic authority and the modification of legal reasoning

1. SUNNAIC PRACTICE VS. PROPHETIC *ḤADĪTH*

It is by now clear that during most of the first century H, the concept of Prophetic Sunna was part and parcel of the *sunan*, i.e., instances of model, binding precedent established by a long list of venerated predecessors. References to *sunna* and *sunna māḍiya* were not always made with the Prophet alone in mind; it was not infrequently the case that other *sunna* founders were, as individuals, the point of such references. Nor was it unusual for *sunna* to refer to the collective conduct of individuals belonging to successive generations, it being assumed that they were all prominent figures who had, by their actions, sanctioned an earlier *sunna* and thereby bestowed their authoritative approval on it. As we have seen, the Prophet himself became the ultimate source of otherwise ancient Arabian *sunan* by virtue of the fact that he merely adopted them (later on, this became the third sub-type of Prophetic Sunna, known as "tacit approval"; the other two were based on the Prophet's own statements and actions, respectively). In other words, in the Muslim tradition, Muḥammad became the initiator of a multitude of *sunan* that were ultimately disconnected from their pre-Islamic past to form an integral part of Prophetic Sunna.

The dramatic increase in Prophetic authority also meant projecting on Muḥammad post-Prophetic *sunan* as well. Legal practices and legal doctrines originating in various towns and cities in the conquered lands, and largely based on the Companions' model, began to find a representational voice in Prophetic Sunna. The projection of the Companions' model back onto the Prophet was accomplished by a long and complex process of creating the narrative of *ḥadīth*. Part of this narrative consisted in the Companions' recollection of what the Prophet had said or done, but another part of it involved extending the chain of authority back to the

Prophet when it in fact had previously ended with a Companion. The creation of massive quantities of *ḥadīth* – including fabrications that had little to do with what the legal specialists knew to be the continuous tradition of legal practice – began to compete not only with Arabian, caliphal and Companion *sunan*, but also with those of the Prophet that had become the basis of legal practice.

Before we proceed, a fundamental point with regard to the proliferation of Prophetic *ḥadīth* must be made. Until recently, modern scholarship seems to have agreed on the notion that the rise of this genre signified the emergence of Islamic law out of secular beginnings, what Joseph Schacht has labeled the "administrative" and "popular" practices of the Umayyads.[1] In other words, law could become Islamicized only upon the creation of a link between secular legal doctrine and the verbal expression of Prophetic Sunna, namely, the *ḥadīth*. This understanding can be validated only if we assume that the *sunan* that appeared prior to Prophetic *ḥadīth* were not conceived by the new Muslims as being religious in nature, namely, that they were disconnected from any religious element that may be defined as Islamic, however rudimentary. But this assumption can in no way be granted since the *sunan*, which preeminently included Prophetic *sīra* and Sunna, were religious and furthermore inspired by the early Muslims' interpretation of what Islam meant to them. They also included *sunan* of the Companions and early caliphs that must be seen, *on their own*, as representations of Islam's religious experience. That these *sunan* and interpretations constituted a rudimentary form of Islam made them no less Islamic than other, later, discourses. That they were dynamic and constantly evolving is self-evident; but to dismiss them as non-religious or non-Islamic just because they underwent significant changes that made them unrecognizable as predecessors of the later, "settled" religious forms is to miss the meaning and historical significance of Islam's first century.

If one accepts the fact that Abū Bakr and ʿUmar I's *sunan*, to use only two examples, were established by these two men in the spirit of the then understood Quranic and Prophetic mission – as two leading Companions who understood best what the Prophet and "Islam" meant to achieve – then one cannot argue that these *sunan* were secular and thus lacking in Islamic, religious content. To argue thus would amount to reducing Islam to a monolith, excluding from it anything that does not fit into our

[1] Schacht, *Origins*, 190–213; Schacht, *Introduction*, 23–27.

conception of what mainstream Islam is or should be. And it was these *sunan* – many of them the genuine *sunan* of the Prophet himself – that constituted much of what later became known as Prophetic *ḥadīth*. Modern research has shown that the emergence of *ḥadīth* involved a lengthy process that involved projecting back Companion and other post-Prophetic narrative onto the Prophet himself, thereby attributing the *sunan* of the former to the latter. This very process in fact attests to how the ancient *sunan* were viewed as embodying a sufficient degree of Islamic content so as to qualify for substitution by Prophetic narrative. To argue that it was only with the emergence of Prophetic *ḥadīth* that Islamic, religious law arose amounts therefore not only to constructing a myth but also to overlooking the entirety of the first Hijri century as one of religious history, however inchoate the Islamic values may have been during that time.

Nor is it reasonable to argue that the body of *ḥadīth* that began to proliferate at the turn of the second century H was fabricated in its entirety, for this argument would overlook the Prophetic *sunan* that had existed from the very beginning. Yet, it is undeniable that much of the *ḥadīth* is inauthentic, representing accretions on, and significant additions to, the Prophetic *sīra* and *sunan* that the early Muslims knew. As we have seen, many of these additions were the work of the story-tellers and tradition-(al)ists, who put into circulation a multitude of fabricated, even legendary, *ḥadīth*s. Indicative of the range of such forgeries is the fact that the later traditionists – who flourished during the third/ninth century – accepted as "sound" only some four or five thousand *ḥadīth*s out of a corpus exceeding half a million. This is one of the most crucial facts about the *ḥadīth*, a fact duly recognized by the Muslim tradition itself.

For reasons that are not entirely clear, but which may have been connected with the rise of political and theological movements in Iraq – the centre-stage of the empire – much of the *ḥadīth* fabrication seems to have occurred in that region's garrison towns which, by the beginning of the second/eighth century, had developed into full-fledged urban centers. As literary narrative that had undergone tremendous growth, the *ḥadīth* was no longer an authentic expression of the fairly modest range of genuine Prophetic *sunan* and *sīra*. Masses of *ḥadīth*s, all of them equipped with their own chains of transmission, were put into circulation throughout the Muslim lands, but they often contradicted the memory and practice of Muslim communities in some regions. Nowhere was this more obvious than in the case of the Hejaz, especially Medina, where the legal scholars believed that their memory of the Prophet's actions – performed there as

part of his Sunna – still survived amongst them. For these scholars, the Prophetic Sunna and their own practice were identical, and reference to one was nearly always a reference to the other, although it was often the case that the Prophetic example was both implied and even taken for granted rather than explicitly mentioned. With the rapid proliferation of *ḥadīth* narratives during the course of the second/eighth century, significant differences between *ḥadīth* and Prophetic Sunna frequently became apparent – especially to those living in the Prophet's homeland. For the latter, these *ḥadīth* could be an importation from Iraq or elsewhere (including some probably originating in Medina itself), having nothing to do with what they viewed as the "true" and "authentic" Sunna preserved by the actual practice of their own community. For Medinan scholars then, the true Sunna of the Prophet was attested by their own practice, the ultimate proof of past Prophetic *sunna* (*sunna māḍiya*), and not by a literary narrative that had nothing to commend it except its own affirmation of itself.

Ibn al-Qāsim (191/806), a Medinese scholar, explains this duality in the Prophetic model. Speaking of one *ḥadīth*, he says:

> This tradition [*ḥadīth*] has come down to us, and if it were accompanied by a practice passed to those from whom we have taken it over by their own predecessors, it would be right to follow it. But in fact it is like those other traditions which are not accompanied by practice . . . These things could not assert themselves and take root, [for] the practice was different, and the whole community and the Companions themselves acted on other rules. So the traditions remained neither discredited nor adopted in practice, and actions were ruled by other traditions which were accompanied by practice.[2]

The continuous practice of the Medinese, as reflected in the cumulative, common opinion of the scholars, thus became the final arbiter in determining the content of the Prophet's Sunna. The literary narrative of *ḥadīth* acquired validity only to the extent that it was supported by this local usage. In other words, *ḥadīth* lacking foundations in practice was rejected, while established, past practice (*sunna māḍiya*, *al-amr al-mujtamaʿ* ʿ*alayhi* ʿ*indanā*, etc.)[3] constituted an authority-statement fit to serve as the basis of legal construction even if not backed by *ḥadīth*.

It would be a mistake, however, to view the Medinese doctrine as a categorical rejection of *ḥadīth* in favor of local practice, as some modern scholars have done. What was at stake for the Medinese was not a

[2] Cited in Schacht, *Origins*, 63.
[3] Mālik b. Anas, *al-Muwaṭṭaʾ* (Beirut: Dār al-Jīl, 1414/1993), 664, 665, 690, 698 and *passim*.

distinction between Prophetic and local, practice-based authority, but rather one between two competing conceptions of Prophetic sources of authority: the Medinan scholars' conception was that *their own* practice represented the logical and historical (and therefore legitimate) continuation of what the Prophet lived, said and did, and that the newly circulating *ḥadīth*s were at best redundant when they confirmed this practice and at worst, false, when they did not accord with the Prophetic past as continuously documented by their own living experience of the law. Nor is it to say that the sunnaic practice itself stood as the ultimate authority, as a self-justifying body of doctrine. Rather, it was clearly based on Companion and, consequently, Prophetic authority. Mālik's *Muwaṭṭa'* – an accurate account of Medinese doctrine as it stood by 150/767 or before –[4] contains 898 Companion reports, but as many as 822 for the Prophet alone. The latter were deemed authentic by virtue of the fact that they – or most of them – reflected the actual practice of the Medinese.

The Iraqians, and particularly the Kūfans, also displayed a duality in their conception of *sunna*, but this conception was different from the one held by the Medinese in at least two respects. First, the Kūfan practice could not (and did not) claim the continuity of Prophetic practice that the Medinese were able to do. In fact, the term "practice" (*'amal*), including any expression connoting notions of "practice," was virtually nonexistent in the Kūfan discourse, although "*sunna*" for them at times referred to legal practice. Nor were references to uninterrupted past practices as frequent as those made by the Medinese. Second, the Iraqians could never claim the consensual unanimity that the Medinese easily claimed for their practice. At the same time, however, the Iraqian concept of Prophetic Sunna was not always expressed in *ḥadīth* from the Prophet. Their *sunna* was embedded in the legal realia of practice and, like that of Medina, did not always need to be identified as Prophetic. It was nearly always understood to have emanated from the Prophetic past, although the scope of this past often exceeded that of the Prophet himself to include the experience of some of his Companions. The formal narrative that came to be known as *ḥadīth* not only excluded non-Prophetic elements but included, in addition, variants to the then-existing local practice.

The Iraqians rationalized their reliance on Prophetic Sunna by accepting as part of their doctrine those Prophetic traditions that were widespread in the community, together with others that were deemed reliably

[4] Wael Hallaq, "On Dating Mālik's *Muwaṭṭa'*," *UCLA Journal of Islamic and Near Eastern Law*, 1, 1 (2002): 47–65, at 53.

transmitted by individuals (what we will call "solitary" reports). More importantly, the Iraqians, like the Medinese, saw themselves as connecting their own practice with the Prophetic past through an appeal to the Companions, many of whom had left the Hejaz to settle in the garrison towns of southern Iraq. They accepted as authoritative those Companion reports or rulings not contradicted by the reports of other Companions or by those of the Prophet. The operative assumption here was that the absence of contradictory information from other Companions was a decisive argument in favor of the reports' truth, since this silence in their view demonstrated not only the Companions' unanimous approval of the practice but also their certain knowledge of what the Prophet's Sunna was. For the Iraqians, therefore, this mode of documentation established a link, however indirect, between their practice, or "living tradition," and the Prophet's Sunna.

Like the Medinese notion of Prophetic Sunna, the Syrian concept, as reflected in the doctrine of Awzāʿī, was the uninterrupted practice of Muslims, beginning with the Prophet and maintained by the early caliphs and later scholars. Awzāʿī refers to the practices of the Prophet without adducing *ḥadīth* accompanied by chains of transmission, all as part of an uninterrupted practice that came down to him and to his contemporaries from Prophetic times.

This picture of legal practice as Prophetic Sunna is the hallmark of developments at least until the end of the second century (ca. 815 AD). Each locale, from Syria to Iraq to the Hejaz, established its own legal practices on the basis of what was regarded as the *sunna* of the forefathers, be they the Companions or the Prophet, although the latter more often than not merely sanctioned the ancient Arabian *sunan*. Medina was the abode of the Prophet, whose own actions contributed to the formation of a fairly unified practice. In Kūfa, Baṣra and Damascus, the Prophetic example was embodied in his Companions who migrated to these regions and who carried with them the Prophetic legacy, however this legacy might have been interpreted or applied in one place or another. Thus the ancient Arabian concept of *sunna*, largely if not exclusively secular, was transformed into a religious paradigm, undergoing a process whereby it increasingly focused on the Prophet as person. The pre-Islamic *sunan* adopted by the Prophet, like those *sunan* sanctioned by the post-Prophetic generations, in time became lodged within the realm of Prophetic authority. The Prophet, in time, was to emerge as the single axis of this authority.

The logic of the Prophet's centricity appeared on the scene soon after his death, and started to assert itself by the sixth or seventh decade of the Hijra

(ca. 680 AD). But its most obvious manifestation occurred during the second half of the second century (770–810 AD) and thereafter, when his authority became most paramount. The central phenomenon associated with this process was, however, the proliferation of formal *ḥadīth* which came to compete with the practice-based *sunan* – what we call here sunnaic practice. The competition was thus between a formal and nearly universal conception of the Prophetic model and those local practices that had their own view of the nature of Prophetic Sunna. With the emergence of a mobile class of tradition(al)ists, whose main occupation was the collection and reproduction of Prophetic narrative, the formal, literary transmission of *ḥadīth* quickly gained the upper hand over sunnaic practice. The tradition(al)ists were not necessarily jurists or judges, and their impulse was derived more from religious ethic than from the demands and realities of legal practice; nevertheless, at the end of the day, their *ḥadīth* project proved victorious, leaving behind a distant second the local conceptions of Prophetic Sunna – a Sunna that did not have the overwhelmingly personal connection to the Prophet claimed by the tradition(al)ist version. That many of the local jurists participated in the tradition(al)ist project to the detriment of their own sunnaic practice is eloquent testimony to the power of the newly emerging *ḥadīth*.

The power of the formal *ḥadīth* to captivate the minds of Muslims can be explained in at least two ways: First, unlike the sunnaic practice, which had no objectively defined pedigree, *ḥadīth documented*, or *attempted to document*, the Sunna as a historical event, attested by persons who had themselves engaged in transmitting it. This mode of documentation not only proved successful for the tradition(al)ists, but also captured the imagination even of the historians who recorded the annals of Islam. Second, the *ḥadīth* was a universal body of knowledge, borne and worked out by a large and mobile class of scholars who, on the whole, had no particular loyalty to a regionally based practice. It is no coincidence that the rise of *ḥadīth* occurred simultaneously with the evolution of Muslim communities in the vast, non-Arab regions of the empire, especially in the eastern provinces of the Iranian world. Urban Muslim communities in these regions did not possess practice-based *sunna* (as had developed in the Hejaz, Iraq and Syria), and the *ḥadīth* was a convenient means through which these communities could acquire a source for their own legal practice. Thus, both documentation and lack of particular practice-based loyalties rendered the *ḥadīth* universally appealing, except to those jurists and judges who remained loyal to their own version of sunnaic practice. (This is not to suggest that the latter version was less faithful to the

Prophetic example, for in all likelihood it was more consistent with actual Prophetic history than the extremely rich, but highly contradictory and inconsistent, narrative of formal *ḥadīth*. It would be ironic, therefore, if the very narrative that claimed the authority to unravel the true Prophetic example ended by masking rather than revealing this Prophetic history.)

By the end of the second/eighth century, it had become clear that the tradition(al)ist movement was in a position to permit it to achieve significant victory over sunnaic practice, a victory that would be complete about half a century – or more – later. For Shāfiʿī (d. 204/819), who was one of the most vocal *ḥadīth* protagonists of his day, Prophetic Sunna could be determined only through formal *ḥadīth*. He attacked the sunnaic practice as a mass of inconsistencies, decidedly inferior to what he saw as the authentic *ḥadīth* of the Prophet. His theory – and he was no doubt the first to theorize in this regard to any significant degree – is to be expected, since by his time Prophetic *ḥadīth* had become rampant and the tradition(al)ist movement dominated to an unprecedented degree. The most distinctive feature of his theory was the paramount importance of this form of *ḥadīth*, which he took to override the authority of Iraqian, Medinese and Syrian sunnaic practices. Yet, his insistence on the supremacy of Prophetic *ḥadīth* (and the Quran) as the paramount sources of the law did not gain immediate acceptance, contrary to what some modern scholars have argued.[5] It took more than half a century after his death for the *ḥadīth* to become (with the Quran, of course) the exclusive material source of the law, thereby once and for all trumping sunnaic practice.[6]

What strengthened the case of the traditionalists was the crucial development of the science of *ḥadīth* criticism, known as *al-jarḥ wal-taʿdīl*. This science, which focused mainly on establishing the credibility of traditionists, had as its central task the scrutinizing of the chains of transmission, thereby establishing for "sound" *ḥadīth*s a continuous series of trustworthy transmitters going back to the Prophet himself. This "scientific" documentation of *ḥadīth*, we have said, proved to be an attractive feature and one that was conducive to the propagation and success of *ḥadīth* over and against sunnaic practice.

[5] For a revision of this position, see the important article by Susan Spectorsky, "*Sunnah* in the Responses of Isḥāq B. Rāhawayh," in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 51–74.

[6] Although – as we shall see in chapter 6, section 2 below – the later Mālikites continued to uphold a revised form of the sunnaic, consensual practice of Medina. See Abū al-Walīd al-Bājī, *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl*, ed. ʿAbd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1986), 480–85.

2. CONSENSUS

During the first two centuries H (seventh–eighth centuries AD), the concept of consensus could hardly be distinguished from sunnaic practice, since the sanctioning authority of the latter resided in the overwhelming agreement of the legal specialists who collectively upheld this practice. Conversely, general acceptance by the community at large, and by the community of specialists in particular, were deemed two of the most essential features of sunnaic practice. Agreement on this practice – what we call here, somewhat anachronistically, "consensus" – was often employed as argument against *ḥadīth*s that were not transmitted "by many from many" – namely, "solitary" or "individual" *ḥadīth*s. At times, this agreement was invoked to sanction the authenticity of a *ḥadīth* that supported a particular doctrine of sunnaic practice. The point to be made here is that by deeming consensual sunnaic practice to be determinative of which *ḥadīth*s were credible and which were not, this practice was raised in effect to the first source of law, save perhaps for the Quran.

During most of the first two centuries H, the notion of consensus was expressed by various verbs or through compound expressions, rather than by the later technical term *ijmāʿ* (lit., agreement, and thus consensus). The Medinese often expressed it in terms such as "the matter on which we agree." The Kūfans characterized it as the "opinion on which the people of Kūfa agree."[7] More frequently, however, claims for consensus were neither direct nor positive. Medinese consensus was often reflected in statements about the unanimity of sunnaic practice, such as "this is the matter that the people [of Medina] have continuously upheld," or "the Sunna on which there is no disagreement among us."[8] Thus, the lack of a fixed technical term for consensus does not mean that during this period the notion of consensus was rudimentary or even underdeveloped; on the contrary, it was seen as binding and, furthermore, determinative of *ḥadīth*.

As the other side of the coin of sunnaic practice, consensus represented the final argument on all matters. In other words, it could not be conceived as being subject to error, since any acknowledgment that sunnaic practice was fallible would have cast the entire edifice of legal doctrine into doubt. This epistemic quality of certitude placed consensus in diametrical opposition to *raʾy* which, by definition, represented the opinion of an individual jurist. Thus, whereas consensus generated a unity of doctrine, *raʾy*

[7] Ibid. See also Mālik, *Muwaṭṭaʾ*, 452, 454, 456; Ansari, "Islamic Juristic Terminology," 285, 287.
[8] Mālik, *Muwaṭṭaʾ*, 463, 558, and *passim*.

generated disagreement (to develop later as a field of study on its own, designated by the technical expression *ikhtilāf* or *khilāf*.)

As an expression of sunnaic practice, consensus was not conceived merely as "the agreement of recognized jurists during a particular age," a definition that became standard in later legal theory. Rather, consensus during this early period strongly implied the agreement of scholars based on the continuous practice that was, in turn, based on the consensus of the Companions. It should be stressed here that the latter was viewed as essential to the process of foregrounding later doctrine in Prophetic authority, since the consensus of the Companions, *ipso facto*, was an attestation of Prophetic practice and intent. The Companions, after all, could not have unanimously approved a matter that the Prophet had rejected or prohibited. Nor, in the conception of early jurists, could they have pronounced impermissible what the Prophet had declared lawful.

The conviction of the Medinans that their city and its law were the locus of Prophetic action seems to have affected their conception of both their sunnaic practice and consensus. The chief Medinan scholar, Mālik, emphasized that it was Medina that the Prophet had made his home, and that it was in Medina that the Quran was revealed. This city had been led by the Prophet, who ordered its life and who set examples (*sunan*) to be followed by its community of believers. What these believers and the succeeding generations of Medinans had accomplished was upholding the Prophetic example through, in effect, living it. With this conception in mind, Mālik declared Medinan consensus to be binding on all jurists, local or otherwise. [9] The Medinese certainty of their ways, Prophetically inspired and dictated, allowed them to declare the Medinese example – expressed in its consensus – as the standard norm from which deviation could not be allowed.

Thus understood, Medinan consensus cannot be viewed as a provincial concept, as some modern scholars have argued.[10] If the Medinans referred to their own consensus exclusively, as they did, it was because they believed that theirs represented the ruling consensus. The Iraqians, on the other hand, did not have the benefit of a direct Prophetic foregrounding, since their highest authorities were Companions (although these latter did forge the necessary link with the Prophetic past). In their polemical bid for doctrinal legitimacy, the Iraqian jurists often – but by no means always – claimed universal consensus for certain of their doctrines, bringing in

[9] Ansari, "Islamic Juristic Terminology," 284–85.
[10] Schacht, *Origins*, 83–85.

the Medinese, Meccans, Kūfans and Baṣrans. Such doctrines, however, were Iraqian, and if a universal consensus was claimed for them, it was by virtue of the fact that they represented a common denominator of the sunnaic practices of the Companions. In other words, Iraqian consensus, no less than was the case with Medina (and, for that matter, Syria), was the other side of the coin of Iraqian sunnaic practice.

The force of Medinese sunnaic-consensual practice as the supreme model manifested itself in the fundamental issue of rationalizing consensus. The growth in the religious values and impulse of Islam, coupled with the development of technical legal thought, produced – as part of the theoretical sophistication of Islamic jurisprudence – the need to justify what came to be considered "secondary" sources of the law, sources that did not directly issue from the Divine. Consensus, originating in pre-Islamic Arab tribal conduct, was one of these. By the middle of the second/eighth century, it had inextricably merged with the sunnaic practices of various Muslim communities, thus acquiring a religious character. It was at that time that Muslim jurists felt the need to anchor their consensus in religious texts. Shaybānī appears to have been among the first to do so, invoking the *ḥadīth*: "What Muslims consider to be good is good in the view of God."[11] (This *ḥadīth* was soon classified as weak, and consensus was justified by other means.)[12] Shaybānī's reliance on *ḥadīth* reflected the rising importance of textual sources as competitors of sunnaic, consensual practice. But it also reflected the Kūfan knowledge that the pedigree of their sunnaic practice did not extend directly down to the Prophet himself, but only to his Companions who, by implication and extension, connected the Prophetic past with the practice of the present. This the Medinese had no problem with. They could claim the Prophet as their final, direct authority, one who created the Sunna for the Companions by means of actually applying it before them. Mālik therefore did not feel the need to invoke *ḥadīth*s as an integral part of his reasoning, for the sunnaic, consensual practice of his city was in itself evidence of the authoritative character of consensus. If the Medinese adopted a doctrine by virtue of their agreement on it, then everyone had to adopt it, for by definition it was embedded in the continuing Prophetic experience that the Medinese put into practice each day of their lives.

[11] On Shaybānī and the larger issue of grounding consensus in revelation, see Wael Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies*, 18 (1986): 427–54, at 431.

[12] Ibid.

3. LEGAL REASONING

In chapter 2, we saw that *ra'y* represented the opinions of the proto-*qāḍī*s and legal scholars, as well as of the caliphs. Nearly all those who were involved in matters legal, from the very beginning until the end of the second/eighth century (and for decades thereafter), employed it in their reasoning. Whether based on knowledge of precedent (*'ilm*) or not, *ra'y* encompassed a variety of inferential methods that ranged from discretionary and loose reasoning to arguments of a strictly logical type, such as analogy or the *argumentum a fortiori*. The Medinese, the Iraqians and the Syrians made extensive use of it during the second/eighth century, subsuming under it nearly all forms of argument.

However, with the development of the circles of legal specialists and with the evolution of new forms of scholarly debate and dialogue, legal reasoning was soon to become more and more elaborate. Sophisticated techniques of reasoning began to surface by the very beginning of the second/eighth century, although much of the old, and somewhat archaic, juristic formulations were not phased out completely. *Ra'y*, therefore, became the umbrella term for a wide variety of legal arguments, and it remained for nearly a century thereafter the standard term designating legal inferences.

During the second half of the second/eighth century, a new generation of scholars was reared in an environment permeated by Prophetic *ḥadīth,* which had come to assert, more than at any time before, the personal authority of the Prophet. The more pronounced this authority became, the less freedom the jurists had in expounding discretionary opinion. For, after all, the *raison d'être* of Prophetic authority was its ability to induce conformity of conduct to the Prophetic model. Insofar as it included discretionary and personal opinion, *ra'y* stood as antithetical to this notion of authority.

Because it included what later came to be considered loose methods of reasoning, *ra'y* inevitably acquired negative connotations, and as a result suffered a significant decline in reputation toward the end of the second/eighth century. It was not fortuitous that this decline coincided with the rise of *ḥadīth* as an incontestable expression of Prophetic Sunna. The latter, in other words, could leave no room for human discretion, since its very existence demanded that a choice be made between human and Prophetic/Divine authority. The former obviously was no match for the latter.

But by the middle of the second century (ca. 770 AD), and long before *ḥadīth* asserted itself as an unrivaled entity, *ra'y* had incorporated

systematic and logical arguments of the first rate, arguments that were in turn far from devoid of sunnaic support. These types of argument could not have declined with *raʾy*, and had to be protected as valid forms of reasoning. In a gradual process of terminological change that began immediately after the middle of the second/eighth century and which reached its zenith sometime before the middle of the next century, *raʾy* appears to have been broken down into three categories of argument, all of which had originally been offshoots of the core notion.

The most general of these categories was *ijtihād*, which term, during the first/seventh and most of the second/eighth century, appeared frequently in conjunction with *raʾy*, namely, *ijtihād al-raʾy*. In this early period, whenever *ijtihād* stood alone, it denoted the "estimate" of an expert, i.e., the evaluation of damages in terms of financial or other compensation.[13] But when combined with *raʾy*, it meant the exertion of mental energy for the sake of arriving, through reasoning, at a considered opinion. Later, when the term "*raʾy*" was dropped from the combination, *ijtihād* came to stand alone for this same meaning, but this terminological transformation was short lived, as we shall see in due course.

The second category of arguments to emerge out of *raʾy* was *qiyās*, signifying disciplined and systematic reasoning on the basis of the revealed texts, the Quran and *ḥadīth*. This is not to say that *qiyās* as a procedure became known only after *raʾy* experienced a decline, for the concept was already known, without its later name, as early as (if not long before) the beginning of the second/eighth century. The Iraqians used it, without calling it such, extensively; indeed, Shāfiʿī repeatedly calls them the "Folk of *Qiyās*."[14] In fact, they seem to have employed this procedure more extensively than others did, and all indications point to the likelihood that the legal culture of Islamic (and very possibly pre-Islamic) Iraq favored this method of reasoning. Long before Shāfiʿī, Kūfan jurists realized that *qiyās* had to rest on the texts and that it could not be used in the presence of established sunnaic and textual rules.[15]

A characteristic feature of jurisprudential terminology before Shāfiʿī is that most *qiyās* reasoning was not labeled as such but operated under the general guise of the term "*raʾy*" and its derivatives. When later jurists, including Shāfiʿī, looked back at the contents of earlier *raʾy*, they discerned therein unambiguous forms of *qiyās*. However, by the end of that century,

[13] Schacht, *Origins*, 116. This meaning of *ijtihād* was to persist for many centuries thereafter.
[14] Ibid., 109.
[15] Ansari, "Islamic Juristic Terminology," 290–91.

qiyās as a distinct term had become fairly widespread, and Shāfiʿī began using it in a technical sense.[16] But for Shāfiʿī, *qiyās* was a near synonym of *ijtihād*, involving specific methods of legal reasoning. As explained earlier, however, *ijtihād* lost this sense at a point soon after, or probably during, Shāfiʿī's lifetime. In the legal theory (*uṣūl al-fiqh*) of the later schools, *ijtihād* universally came to mean the effort exerted by the jurist in exercising his interpretive and reasoning faculties – an elaborate process that included *qiyās* as well as more general and wide-ranging methods of a hermeneutical or linguistic nature. In other words, *ijtihād* after Shāfiʿī ceased to be equated simply with *qiyās*, and indeed this jurist seems to have been alone in equating the two concepts.

For jurists after Shāfiʿī, *ijtihād* encompassed, among many other things, *qiyās*. The latter, on the other hand, emerged as the standard term designating those strictly and systematically reasoned arguments of *raʾy* that were based on the revealed texts. The most common argument subsumed under *qiyās* is analogical reasoning, which can range from the simplest to the most complex of forms. Thus, if grape-wine is textually prohibited because of its intoxicating quality, then date-wine, by analogy, would also be prohibited, since the latter is an inebriating substance.[17] A more complex analogy may be seen in a case involving the purchase of a married female slave. The Iraqians argued that the buyer had the option (*khiyār*) of canceling the sale within three days, and of recovering the price from the seller. The reasoning behind this ruling is that the goods purchased (in this case the female slave) contained a defect entitling the buyer to exercise the option of cancellation. The defect, analogically inferred, lay in the buyer's inability to exercise his full rights of ownership over the slave since the fact that she was married ruled out the possibility of having sexual intercourse with her. The marriage of the slave therefore constituted – in this particular context – an impediment similar to an actual defect rendering her unfit for sexual relations with her master.[18]

Qiyās encompassed other forms of argument that had been known – again without being designated by technical terms – as early as the first century H.[19] One of the most common of such arguments was the *a fortiori*,

[16] Muḥammad b. Idrīs al-Shāfiʿī, *al-Risāla*, ed. M. Kīlānī (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1969), 205–19, trans. M. Khadduri, *Islamic Jurisprudence: Shafiʿi's* Risala (Baltimore: Johns Hopkins University Press, 1961), 288–303.

[17] Mālik, *Muwaṭṭaʾ*, 737–38.

[18] Muḥammad b. al-Ḥasan al-Shaybānī, *al-Aṣl*, 5 vols. (Beirut: ʿĀlam al-Kutub, 1990), V, 173; see also Mālik, *Muwaṭṭaʾ*, 544–45.

[19] Schacht, *Origins*, 99, 110, 124 f.

in both of its forms, the *a maiore ad minus* and the *a minore ad maius*. If the consumption of any quantity of wine, however small, is prohibited in the revealed texts, then a larger quantity would obviously be equally prohibited. The same is the case with selling it: if drinking it is unlawful, then selling it, though less offensive, would be equally impermissible.[20]

The third and final category of arguments that came under the heading of *ra'y* was *istiḥsān*, commonly translated as "juristic preference." We have no adequate definition of this reasoning method from the period before Shāfi'i, most of our knowledge of it being derived either from Shāfi'ī's polemics against it (which are hardly trustworthy) or late Ḥanafite theoretical reconstructions of it (which involve an ideological remapping of history). It seems, however, safe to characterize the second-/eighth-century meaning of *istiḥsān* as a mode of reasoning that yields reasonable results, unlike strictly logical inference such as *qiyās* which may lead to an undue hardship. But it was also employed as a method of equity, driven by reasonableness, fairness and commonsense. For example, according to strict reasoning, punishment for thievery (cutting off the hand) is to be inflicted on the person who moves the stolen goods from the "place of custody" (*ḥirz*), irrespective of whether or not he had accomplices. According to *istiḥsān*, if a group commits theft, but only one person moves the stolen object from its *ḥirz*, then all must face the same penalty.[21] This latter mode of reasoning was deemed preferred, for, since the rationale of punishment is deterrence, all participating thieves should be held accountable.

The Iraqians used *istiḥsān* extensively (again mostly without giving it this designation) as early as the beginning of the second/eighth century, and the Kūfan jurist Shaybānī, half a century later, would devote an entire chapter to it in his *Aṣl*, entitled, significantly, "The chapter of *istiḥsān*," in which a large number of such cases are included.[22] This does not mean, however, that all these cases fell under the "loose" reasoning which later non-Ḥanafite jurists accused the Iraqians of employing, since many were textually based and, furthermore, exhibited the systematic and strict arguments of *qiyās*. Nor does the existence of such a chapter mean that other sections of Shaybānī's work were devoid of cases of *istiḥsān*, since such cases can be found throughout Iraqian works, whether penned by Shaybānī or

[20] Mālik, *Muwaṭṭa'*, 737–39. For a more detailed discussion on how these arguments developed in later legal theory, see Hallaq, *History*, 96–99.
[21] Cited in Ansari, "Islamic Juristic Terminology," 294.
[22] Shaybānī, *Aṣl*, III, 43–137.

by others. Like *raʾy*, which acquired a bad name by virtue of its having included personal opinions that lacked formal grounding in the revealed texts, *istiḥsān* too shared a similar fate of rejection. But unlike *raʾy*, it survived in the later Ḥanafite and Ḥanbalite schools as a secondary method of reasoning, though not without ingenious ways of theoretical rehabilitation.[23]

The jurist whose work best exemplifies this transition from what we may call the pre-*ḥadīth* to the *ḥadīth* period was Shāfiʿī. This is not to say, however, that he effected any significant change in Islamic legal development, for he was merely one among many who contributed to this process. It is a mistake – which Joseph Schacht and others[24] have committed – to credit him with having transformed Islamic jurisprudence into what came to be its mature form. But we shall return to this theme later.[25]

Shāfiʿī is important chiefly because his later work represents a defense of Prophetic *ḥadīth* as an exclusive substitute for sunnaic practice. Of almost equal importance in this context, however, is what this defense entailed in terms of legal reasoning. In respect of *raʾy*, his work is remarkable because it manifests a stage of development in which *raʾy* meets with the first major attack in an offensive that ultimately led to its ouster (terminologically and to a certain extent substantively) from Islamic jurisprudence. Categorically labeling *raʾy* as arbitrary, he excluded it, along with *istiḥsān*, from the domain of reasoning altogether. *Ḥadīth* at the same time comes to reflect divine authority, leaving no room for human judgment. As a methodical inference dictated by textual imperatives, *qiyās* (or *ijtihād*) thus became the exclusive method of legal reasoning, based on the Quran, the Sunna of the Prophet (as expressed by *ḥadīth*) and the consensus of the scholars.[26] It was to be used, however, only in the absence of a relevant text, and then sparingly. By virtue of the fact that it was based on such sources, *qiyās* could not repeal or supersede them.

Shāfiʿī appears to have been the first jurist consciously to articulate the notion that Islamic revelation provides a full and comprehensive evaluation of human acts. The admittance of *qiyās* (*ijtihād*) into his jurisprudence was

[23] Hallaq, *History*, 107–13. See also chapter 5, section 3 and chapter 6, section 1 below.

[24] Schacht, *Origins*; N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 53 ff.

[25] In chapters 6 and 7, below. But see also Wael Hallaq, "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 25 (1993): 587–605.

[26] The view that Shāfiʿī upheld the concept of community consensus has been revised by Joseph Lowry, "The Legal–Theoretical Content of the *Risālā* of Muḥammad b. Idris al-Shāfiʿī," (Ph.D. dissertation, University of Pennsylvania, 1999), 471 ff.

due to his recognition of the fact that this divine intent is not completely fulfilled by the revealed texts themselves, since these latter do not afford a direct answer to every eventuality. But to Shāfiʿī, acknowledging the permissibility of *qiyās* does not bestow on it a status independent of revelation. If anything, without revelation's sanction of the use of this method it would not have been allowed, and when it is permitted to operate it is because *qiyās* is the only method that can bring out the meaning and intention of revelation regarding a particular eventuality. *Qiyās* does not itself generate rules or legal norms; it merely discovers them from, or brings them out of, the language of revealed texts.

Much of Shāfiʿī's theory ultimately harks back to his vehement defense of Prophetic *ḥadīth* as the universal substitute for sunnaic practice. His careful definition of *qiyās* and the limit beyond which it cannot be employed was little more than a veiled attack against *istiḥsān*, which he saw as being part of the arbitrary, personal opinions characteristic of the dangerously speculative *raʾy*. If the *ḥadīth* was to thrive and be given a definite and enduring place in the law, it had to be taken seriously as the foundation of reasoning. The semiotic structure, so to speak, of sunnaic practice made it too vague as a medium for deriving rules, for it lacked textual specificity and left too much room for human deliberation and intervention. In other words, the latitude accorded to human interpretation was too great for Shāfiʿī, whose reformulation of divine authority required taking the Prophet's life as the exclusive model. And the best way to know what that model represented was the *ḥadīth*s – that is, those traditions that could be studied, verified as reliable and then exploited as text and language. *Qiyās* (and *ijtihād*), therefore, must be a systematic and well-defined method that is fully controlled as an interpretive and inductive/deductive tool. This mode of reasoning is the only guarantee that one is adhering closely to God's intentions, and the only way to achieve compliance with these intentions is through the study of the Prophet's *ḥadīth*, namely, *a study of texts* that will lead to reasoning and, finally, inference of rules.

The centrality of the *ḥadīth* thesis to Shāfiʿī's theory led him to formulate, and indeed articulate, other principles of interpretation. One such principle was that *qiyās* must be based on the outward meaning (*ẓāhir*) of the texts, thus excluding the possibility of overinterpretation that allows for arbitrary reasoning – a characteristic feature of *raʾy*. Furthermore, *qiyās* cannot be based on an exception, and *ḥadīth*s reflecting exceptions in the Prophetic conduct thus had to be excluded from the realm of reasoning. These two cardinal principles of interpretation proved permanent, and

were adopted by the mainstream theory that prevailed during later centuries.

4. CONCLUSION: THE HIERARCHY OF LEGAL SOURCES

As we shall see in chapter 6, there was no question in the legal theory that emerged during the fourth/tenth century as to the correct hierarchy of legal sources. The Quran came first, at least formally and in terms of prestige and sanctity. The Sunna, wholly represented by *ḥadīth*, formed the second material source of the law, followed, in order of importance, by consensus and *qiyās*. The first two may be described as material sources, while the latter two (especially *qiyās*) are procedural, drawing on the former. This typology was distinctly of later provenance, and Shāfiʿī knew it only in outline and without conscious articulation. Part of the reason why he did not articulate this theory, or for that matter any such comprehensive theory, was the fact (as we have stressed) that his central theoretical concern was to install Prophetic *ḥadīth* as the exclusive source of Sunna that emerged as a substitute for sunnaic practice. Installing *ḥadīth* in this central position entailed the elaboration of a new theoretical construct that would account, from various perspectives, for this somewhat new idea. As we remarked earlier, the introduction of *ḥadīth* into a paramount position would have remained meaningless without a redefinition of the methods of legal reasoning that reveals, after all, the intent of *ḥadīth*; hence the emphasis on, and (re)definition of, *qiyās* over and against more liberal modes of *raʾy* reasoning, modes that suited the non-textual nature of sunnaic practice. The fact that *ḥadīth* was text-based required of Shāfiʿī that he elaborate a theory of linguistic–legal interpretation in order to accommodate this genre in a larger theoretical framework, one that reflected the *unmediated* authority of the Prophet. The attack on *raʾy* and the advocacy of a controlled method of *qiyās* were expressions of this accommodation. We would do well to keep in mind that Shāfiʿī's writings carried this specific agenda; and once the fight for the cause of *ḥadīth* was won, Shāfiʿī's theoretical construct became irrelevant and thus fell into disuse.[27] Shāfiʿī thus could hardly have elaborated a general legal theory that anticipated what was to be accomplished much later. Since his concern was not the elaboration of a general legal theory, his discourse lacked a conscious articulation of the sources and their hierarchy.

[27] Hallaq, "Was al-Shafiʿi the Master Architect?"

This is not to say, however, that he operated without some assumption of source-hierarchy, for even the jurists before him, such as Shaybānī, did. A close look at his writings reveals that this hierarchy (lacking, as expected, any express formulation) was, from top to bottom: the Quran; the Sunna of the Prophet; consensus; and *qiyās*/*ijtihād*. His understanding was that inasmuch as the Quran can explain the Sunna, the Sunna can in turn explain ambiguous provisions in the Quran. *Qiyās* can make sense only when based on the two primary sources, as well as on the substantive law sanctioned by consensus. Finally, the latter can come into operation on the basis of the three other sources, always assuming that *qiyās* is textually supported.

If Shāfiʿī's theory did not consciously articulate a hierarchy of sources, the same can be said of any other works written prior to this jurist's death, for legal theorization had not yet emerged. The absence of theoretical discussion, however, does not necessarily mean that jurists worked without operative assumptions, and it is these assumptions that allow us to reconstruct an outline of their hierarchy of sources. It is obvious, I think, that the Quran was generally deemed as the first and highest source of the law from the beginning. This position not only has the support of the overwhelming body of evidence, but is the only position that makes sense within the historical context of formative Islamic history. The primacy of the Quran must therefore be taken for granted, as it was by the Companions, by the legal specialists who flourished at the end of the first century and by later jurists before and after Shāfiʿī.

The next legal source during the second/eighth century was, as we have seen, sunnaic practice. Although it may not have determined the meaning of Quranic provisions, it certainly influenced – by the nature of things – their interpretation. But it did determine which *ḥadīth*s should be accepted and which not. As a rule, only *ḥadīth*s not contradicted by sunnaic practice were accepted as credible and thus fit as bases for legal construction. The force of this sunnaic practice could not, however, be separated from the concept of consensus. The former could not have risen to paramountcy without unanimous or near-unanimous agreement, and this is precisely the phenomenon of consensus. Sunnaic practice therefore presupposed consensus.

This is why we must insist that the second source of second-/eighth-century jurisprudence was a compound construct of sunnaic–consensual practice. It represented a unitary source that was almost invariably and often interchangeably expressed by both sunnaic and consensual terms, as evidenced in the aforementioned language of Mālik's

Muwaṭṭa'.[28] It was only with the introduction of *ḥadīth* as the exclusive representation of Prophetic Sunna – which entailed the dismemberment of sunnaic practice – that consensus was conceptually dissociated from the sunnaic elements. Sunnaic, consensual practice stood then *en bloc* between the Quran and *ra'y*, the third source of second-/eighth-century jurisprudence. But *ra'y* too was to undergo a fate similar to that of sunnaic practice, with the result that many of its liberal methods of reasoning were gradually suppressed. Shāfiʿī was one of those who contributed to this process, but he could never have accomplished such a historical feat single-handedly and, more importantly, could not have anticipated developments nearly a century after his death.

[28] See n. 3, above.