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THE FORMATIVE PERIOD

INTRODUCTION

IN its developed form, Islamic legal theory came to recognize a variety of sources and methods from and through which the law might be derived. Those sources *from* which the law may be derived are the Quran and the Sunna or example of the Prophet, both of which provide the subject matter of the law. Those sources *through* which the law may be derived represent either methods of legal reasoning and interpretation or the sanctioning instrument of consensus (*ijmāʿ*). Primacy of place within the hierarchy of all these sources is given to the Quran, followed by the Sunna which, though second in order of importance, provided the greatest bulk of material from which the law was derived. The third is consensus, a sanctioning instrument whereby the creative jurists, the *mujtahid*s, representing the community at large, are considered to have reached an agreement, known retrospectively, on a technical legal ruling, thereby rendering it as conclusive and as epistemologically certain as any verse of the Quran and the Sunna of the Prophet. The certitude bestowed upon a case of law renders that case, together with its ruling, a material source on the basis of which a similar legal case may be solved. The *mujtahid*s, authorized by divine revelation, are thus capable of transforming a ruling reached through human legal reasoning into a textual source by the very fact of their agreement on its validity. The processes of reasoning involved therein, subsumed under the rubric of *qiyās*, represent the fourth source of the law. Alternative methods of reasoning based on considerations of juristic preference (*istiḥsān*) or public welfare and interest (*istiṣlāḥ*) were of limited validity, and were not infrequently the subject of controversy.

Now, the declared, and indeed main, purpose of Islamic legal theory was to formulate rulings (*aḥkām*) concerning cases whose solutions had not

been explicitly stated in the first two material sources.[1] And these constituted the greater part of the law. The formulation of solutions entailed developing a rich variety of interpretive methods by means of which the legal effects of the Quran and the Sunna could be determined. It also entailed the elaboration of a theory of abrogation, whereby one Quranic verse or Prophetic report is deemed to repeal another verse or report. Furthermore, there arose the need to establish the authenticity or inauthenticity of Prophetic reports, since it is in these that the Sunna of the Prophet is expressed and embedded. Probing authenticity meant scrutinizing the transmitters of each report and the modes of its transmission. This in turn led to a classification of reports in accordance with the epistemic value each enjoyed.

It is with this broad outline in mind that we shall attempt to sketch the stages through which the sources of law evolved during the first three Islamic centuries. We shall argue that by the end of the second/eighth century, legal theory had emerged in only a rudimentary form, and that it was not until the beginning of the fourth/tenth century that it reached the final stage of its formation as an integrated methodology.

Before we proceed, however, two historiographical remarks are in order. First, it is my assumption, justified by the absence of noteworthy evidence to the contrary, that the Quran originated during the lifetime of the Prophet and that it reflected events and ideas that occurred then. Therefore, whatever the Quran says about an event or an idea during the Prophet's lifetime, I take to be an authentic representation of that event or idea. Second, but more historiographically problematical, is the authenticity of the reports about the deeds and utterances of the Prophet. Goldziher, Schacht and Juynboll,[2] among others, argued that we have good reason to believe that Prophetic reports were fabricated at a later stage in Islamic history and that they were gradually projected back to the Prophet. Schacht placed the beginnings of the Sunna, and the verbal reports that came to express it, toward the end of the first century A.H. and the beginning of the second (ca. 720 A.D.), whereas Juynboll conceded that they may have surfaced a quarter of a century earlier.[3] However, mounting recent

[1] Another important function of legal theory, one that is assumed and rarely articulated in works of *uṣūl al-fiqh*, is the justification and "re-enactment" of the processes of legal reasoning behind existing rules. An example of this justification and re-enactment is found in Taqī al-Dīn ʿAlī al-Subkī, *Takmilat al-Majmūʿ*, 12 vols. (Cairo: Maṭbaʿat al-Taḍāmun, 1906), X, 13–98.

[2] I. Goldziher, *Muslim Studies*, ed. S. M. Stern, trans. C. R. Barber and S. M. Stern, 2 vols. (London: Allen & Unwin, 1967–71), II, 17–251; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); G. H. A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth* (Cambridge: Cambridge University Press, 1983).

[3] For a useful summary of the views about the origins of Prophetic Sunna, see David S. Powers, *Studies in Qur'an and Ḥadīth: The Formation of the Law of Inheritance* (Berkeley: University of California Press, 1986), 2 ff. See also Harald Motzki, "The *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī as a Source of Authentic *Aḥādīth* of the First Century A.H.," *Journal of Near Eastern Studies*, 50 (1991): 1 f.

research, concerned with the historical origins of individual Prophetic reports,[4] suggests that Goldziher, Schacht and Juynboll have been excessively skeptical and that a number of reports can be dated earlier than previously thought, even as early as the Prophet. These findings, coupled with other important studies[5] critical of Schacht's thesis, go to show that while a great bulk of Prophetic reports may have originated many decades after the Hijra, there exists a body of material that can be dated to the Prophet's time. Therefore, I shall not *a priori* preclude the entirety of Prophetic reports as an unauthentic body of material, nor shall I accept their majority, even though many may have been admitted as authentic (*ṣaḥīḥ*) by the Muslim "science" of *ḥadīth* criticism.

THE QURAN AS A LEGAL DOCUMENT

While it is true that the Quran is primarily a book of religious and moral prescriptions, there is no doubt that it encompasses pieces of legislation, strictly speaking. In propounding his message, the Prophet plainly wished to break away from pre-Islamic values and institutions, but only insofar as he needed to establish once and for all the fundaments of the new religion. Having been pragmatic, he could not have done away with all the social practices and institutions that prevailed in his time. Among the multitude of exhortations and prescriptions found in the Quran, there are many legal and quasi-legal stipulations. For example, legislation was introduced in select matters of ritual, alms-tax, property and treatment of orphans, inheritance, usury, consumption of alcohol, marriage, divorce, sexual intercourse, adultery, theft, homicide and the like.

Muslim jurists and modern scholars are in agreement that the Quran contains some 500 verses with legal content. In comparison to the overall bulk of Quranic material, the legal verses appear exiguous, giving the erroneous impression that the Quran's concern with legal matters is merely

[4] See, for instance, Powers, *Studies in Qur'an and Ḥadīth*, 8 and generally; David S. Powers, "The Will of Saʿd b. Abī Waqqās: A Reassessment," *Studia Islamica*, 58 (1983): 33–53; Motzki, "The *Muṣannaf*," 1–21; Uri Rubin, "'Al-Walad li-l-Firāsh': On the Islamic Campaign against 'Zinā'," *Studia Islamica*, 78 (1993): 5–26.

[5] Notable of these studies are those by M. M. Azami, *Studies in Early Hadith Literature* (Beirut: al-Maktab al-Islāmī, 1968); M. M. Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (New York: John Wiley, 1985); Nabia Abbott, *Studies in Arabic Literary Papyri*, II (Chicago: University of Chicago Press, 1967), 5–83; Fuat Sezgin, *Geschichte des arabischen Schrifttums*, I (Leiden: E. J. Brill, 1967), 53–84 and generally.

incidental. At the same time, it has frequently been noted by Islamicists that the Quran often repeats itself both thematically and verbatim. If we accept this to be the case, as Goitein has argued, it means that the proportion of the legal subject matter (in which repetition is virtually absent) to non-legal subject matter is larger than is generally thought. And if we consider the fact that the average length of the legal verses is twice or even thrice that of the average non-legal verses, it would not be difficult to argue, following Goitein, that the Quran contains no less legal material than does the Torah, which is commonly known as "The Law."[6]

Even in Mecca, Muhammad already thought of the community that he hoped to create in terms of a political and social unit. This explains his success in organizing the Arab and Jewish tribes into a body politic immediately after arriving in Medina. The so-called Constitution he drafted there points to a mind highly skilled in formulaic legal documents, which is hardly surprising in light of the legal thrust of the Quran and the role Muhammad himself had played as an arbitration judge (*ḥakam*). In Medina, Muhammad continued to act in the latter capacity for some time, relying in his decisions, so it seems, upon the prevailing customary law and tribal practices. From the Quran we learn that at a certain point after his arrival in Medina, Muhammad came to think of his Message as one that carried with it the Law of God, just as the Torah and the Gospel did. Sūra 5, revealed at Medina, marshals a list of commands, admonitions and explicit prohibitions concerning a great variety of issues, from eating swine meat to theft. Throughout, references to the Jews and Christians and to their respective scriptures recur. In 5:43 God asks, with a sense of astonishment, why the Jews resort to Muhammad in his capacity as a judge "when they have the Torah which contains the Judgment of God." The Quran continues: "We have revealed the Torah in which there is guidance and light, [and by which] the Prophets who surrendered [to God] judged the Jews, and the rabbis and priests judged by such of Allah's Scriptures as they were bidden to observe." In the next two verses, the Quran turns to the Christians, saying in effect that God sent Jesus to confirm the prophethood of Moses, and the Gospel to reassert the "guidance and advice" revealed in the Torah. "So let the People of the Gospel judge by that which God had revealed therein, for he who judges not by that which God revealed is a sinner" (5:47).

This clearly demonstrates that the Quran considered the Jews and Christians not only as possessors of *their own* respective divine laws, but also

[6] See S. D. Goitein, "The Birth-Hour of Muslim Law," *Muslim World*, 50, 1 (1960), 24. The next three paragraphs draw in part on this article.

as bound by the application of these laws. If the Jews and Christians were so favored, then what about the Muslims? The Quran here does not hesitate to provide an explicit answer: "We have revealed unto you the Book [i.e., the Quran] with the truth, confirming whatever Scripture was before it . . . so judge between them by that which God had revealed, and do not follow their desires away from the truth . . . *for we have made for each of you* [i.e., Muslims, Christians and Jews] *a law and a normative way to follow.* If God had willed, He would have made all of you one community" (5:48=; italics mine). Of course, God did not wish to do so, and He thus created three communities with three sets of laws, so that each community could follow *its own* law. And as was the case with the Christians and Jews, Muhammad is repeatedly commanded throughout the Quran[7] to judge by what God has revealed unto him, for "who is better than God in judgment?" (5:49–50).

Goitein argues that Sūra 5, or at least verses 42–50 therein, was precipitated by an incident in which certain Jewish tribes resorted to the Prophet to adjudicate amongst them. It is unlikely that such an incident took place after 5 A.H., since the repeated reference to the rabbis implies a substantial Jewish presence in Medina, and this could have been the case only before the end of the fifth year of the Hijra. Be that as it may, the incident seems to have marked a turning point in the Prophet's career. Now he began to think of his religion as one that should afford the Muslim community a set of laws separate from those of other religions. This may also account for the fact that it is in Medina that the greatest bulk of Quranic legislation took place.

This is not to say, however, that the Quran provided Muslims with an all-encompassing or developed system of law. What the Quranic evidence mentioned above does indicate is a strong tendency on the part of the Prophet toward elaborating a basic legal structure.[8] This tendency finds eloquent testimony in the stand of the Quran on the matter of the consumption of date- and grape-wine. In the Meccan phase, wines clearly were permitted: "From date-palm and grapes you derive alcoholic drinks, and from them you make good livelihood. Lo! therein is indeed a portent for people who have sense" (16:67). In Medina, the position of the Quran changes, expressing an ambivalent sense of dislike toward alcoholic beverages. "They ask you [i.e., Muhammad] about wine and gambling. Say: 'In

[7] Quran 2:213; 3:23; 4:58, 105; 5:44–5, 47; 7:87; 10:109; 24:48, generally. Q. 5:44, for instance, states: "He who does not judge by what God has revealed is a disbeliever."

[8] That Muhammad had upheld a law particular to the new religion is also attested in the Armenian chronicle written in the 660s and attributed to Bishop Sebeos. See P. Crone and M. Cook, *Hagarism: The Making of the Muslim World* (Cambridge: Cambridge University Press, 1977), 7.

both there is sin, and utility for people"' (2:219). The sense of aversion subsequently increases: "O you who believe, do not come to pray when you are drunken, till you know what you utter" (4:43). Here, one observes a provisional prohibition which relates to consuming alcohol only when Muslims intend to pray. Finally, a categorical command is revealed in 5:90–91, whereby Muslims are ordered to avoid alcohol, games of chance and idols altogether.[9] It is interesting that the final, decisive stand on alcohol occurs in Sūra 5 which, as we have seen, marks a turning point in the legislative outlook of the Prophet.

This turning point, however, should not be seen as constituting an entirely clean break from the previous practices of the Prophet, for he had played all along the role of a judge, both as a traditional arbitrator and as a Prophet. The turning point marked the beginning of a new process whereby *all* events befalling the nascent Muslim community were henceforth to be adjudicated according to God's law, whose agent was none other than the Prophet. This is clearly attested not only in the Quran but also in the so-called Constitution of Medina, a document whose authenticity can hardly be contested.[10]

That all matters should have been subject to the divine decree must not be taken to mean that all problems encountered by Muhammad were given new solutions. Although a credible historical record of this early period is still awaited, we may assert that, with the exception of what may be called Quranic legal reform, the Prophet generally followed the existing pre-Islamic Arab practices. Two examples may serve to illustrate the point.[11] The first is the customary law of bartering unripe dates still on the palm tree against their equal value in picked dried dates. The second concerns the law of *qasāma* (compurgation), according to which, if the body of a murdered person is found on lands occupied by a tribe, or in a city quarter, domicile, etc., fifty of the inhabitants must each take an oath that they have neither caused the person's death nor have any knowledge as to those who did. Should there be less than fifty persons available, those who are present must swear more than once until fifty oaths have been obtained. By so

[9] On the verses relating to intoxicants, see Muqātil b. Sulaymān, *Tafsīr al-Khams Mā'at Āya*, ed. I. Goldfeld (Shafā'amr: Dār al-Mashriq, 1980), 141–44; Abū 'Ubayd al-Qāsim b. Sallām, *Kitāb al-Nāsikh wal-Mansūkh*, ed. John Burton (Bury St Edmunds: St Edmundsburgh Press, 1987), 87–88.

[10] For the Quran, see n. 6 above. On the Constitution of Medina, see R. B. Serjeant, "The 'Constitution of Medina'," *Islamic Quarterly*, 8 (1964): 3; reprinted in R. B. Serjeant, *Studies in Arabian History and Civilization* (London: Variorum, 1981).

[11] Ritual laws, such as prayer and fasting, may be cited as additional survivals from pre-Islamic Arabia to the new religion. See S. D. Goitein, *Studies in Islamic History and Institutions* (Leiden: E. J. Brill, 1966), 73–89, 92–94.

doing, they free themselves from any liability, but are nonetheless not exempt from paying the blood-money to the agnates of the person slain. Both of these practices were recognized by later Muslim scholars as pre-Islamic customary practices that were sanctioned by the Prophet himself.[12]

JURISPRUDENCE IN THE FIRST CENTURY H. (CA. 620–720 A.D.)

During the few decades after the Prophet's death, when conquest was being undertaken and when the capital of the state was still in Medina, there were mainly two sets of principles and laws on the basis of which the leaders of the nascent Muslim community fashioned their conduct: pre-Islamic Arab customary law and the Quran. The former was still the only "system" of law known to the conquerors, and the latter contained and symbolized the Mission in whose name these conquerors were fighting. The importance of the Quran and its injunctions for the early Muslims can hardly be overstated. Early Monophysite sources inform us that when Abū Bakr, the first caliph (d. 13/634), deployed his armies to conquer Syria, he addressed his generals with the following words:

> When you enter the land, kill neither old man nor child . . . Establish a covenant with every city and people who receives you, give them your assurances and let them live according to their laws . . . 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.[13]

In this passage the reference to the Quran is unambiguous, although one is not entirely sure whether or not the "upright laws" refer to legal ordinances other than those laid down in the Quran. Noteworthy, however, is the contrast drawn between the laws of the conquered nations and the law transmitted from God through the Prophet. Abū Bakr's orders to allow the mainly Christian inhabitants of Syria to regulate their affairs by their own laws echo the passages in the fifth Sūra, where each religion is enjoined to apply to itself its own set of laws. Here, Abū Bakr is implicitly and, later in the passage, explicitly adhering to the Quran's letter and spirit, and in a sense to the personal stand adopted by the Prophet on this issue which is inextricably connected with the very act of revelation. But more on this point later.

[12] See Muḥammad Ibn Ḥazm, *Mu'jam al-Fiqh*, 2 vols. (Damascus: Maṭba'at Jāmi'at Dimashq, 1966), II, 838–39.

[13] Cited in S. P. Brock, "Syriac Views of Emergent Islam," in G. H. A. Juynboll, ed., *Studies on the First Century of Islamic Society* (Carbondale: Southern Illinois University Press, 1982), 12, 200.

The paucity of documentation on the early period makes it difficult for us to draw a complete picture of the sources from which legal practices were derived. However, it is fairly clear that the early caliphs, including the Umayyads, considered themselves the deputies of God on earth, and thus looked to the Quran as a source from which they could draw their legal decisions.[14] As evidenced in the orders he gave to his army, Abū Bakr seems to have generally adhered to the prescriptions of the Quran. Among other things, he enforced the prohibition on alcohol and fixed the penalty for its violation at forty lashes.[15] While his enforcement of this law indicates the centrality of the Quranic injunctions, it also demonstrates that beyond the Quranic prohibition there was little juristic experience or guidance to go by. For instance, the punishment for intoxication, thought to have been fixed arbitrarily, was soon altered by ʿUmar and ʿAlī to eighty lashes, 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. ʿUmar, who was the first to impose the new penalty for inebriation, is also reported to have insisted forcefully on the Muslims' adherence to the Quran in matters of ritual, and these became an integral part of the law.

The increasing importance of the Quran as a religious and legal document manifested itself in the need to collect the scattered material of the Book and to establish therefrom a vulgate. ʿUthmān, who followed in the footsteps of his two predecessors in enforcing the rulings of the Quran, was the man who took charge of the task. The collection of the Quran must have had a primary legal significance, for it defined the subject matter of the text and thus gave the legally minded a *textus receptus* on which to draw. The monumental event of establishing a vulgate signified the rudimentary beginnings of what may be described as a "textual" attitude toward the Quran, an attitude which reached its zenith only centuries later.

During the ensuing decades, Muslim men of learning turned their attention to the explicit legal contents of the Quran. Again, the paucity of credible sources from this period frustrates our attempts at gaining a comprehensive view of historical developments. Nonetheless, from the scope of activities that took place in connection with developing a theory of abrogation, we can derive some clues as to the extent to which the Quran played a role in elaborating Islamic jurisprudence.

The rudimentary beginnings of the theory of abrogation seem to have

[14] See Patricia Crone and Martin Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), 56 and generally.

[15] ʿAbd al-Ghanī b. ʿAbd al-Wāḥid al-Jamāʿīlī, *al-ʿUmda fi al-Aḥkām fi Maʿālim al-Ḥalāl wal-Ḥarām*, ed. Muṣṭafā ʿAṭā (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 463.

arisen in response to the need for reconciling what appeared to the early Muslims as seeming contradictions within the body of legal verses in the Quran. The most immediate concern for these Muslims was neither theology nor dogma – matters that acquired significance only later – but rather the actions through which they realized and manifested obedience to their God, in adherence to the Quranic command. In other words, Islam meant, as early as the middle of the first century, adherence to the will of God as articulated in His Book. Thus it was felt necessary to determine the Quranic stand with regard to a particular issue. When more than one Quranic decree was pertinent to a single matter, such a determination was no easy task. To solve such difficulties, questions about the chronological order in which different verses had been revealed became essential.

Although the Companions of the Prophet reportedly were involved in beginning such discussions, Muslim sources make relatively few references to their contributions to this field. It was the generation of the Successors that was closely associated with discussions on abrogation and with controversies about the status of particular verses. Ibrāhīm al-Nakhaʿī (d. 95/713), Muslim b. Yasār (d. 101/719), Mujāhid b. Jabr (d. 104/722) and al-Ḥasan al-Baṣrī (d. 110/728) were among the most prominent in such discussions.[16] Qatāda b. Diʿāma al-Saddūsī (d. 117/735) and the renowned Ibn Shihāb al-Zuhrī (d. 124/742) have also left us writings which attest to the beginnings of a theory of abrogation, a theory which by then had already been articulated in literary form.[17] Though their original works in all probability were subjected to redaction by later writers, the core of their treatises has proven difficult to dismiss as inauthentic.[18] Even if this core is reduced to a minimum, it manifests an awareness, on the part of these scholars, of the legal thrust of the Quranic text. For it is clear that the treatises were concerned exclusively with the ramifications of those verses that had direct bearing on legal issues.

It is likely that the theory of abrogation developed in a context in which some Quranic prescriptions contradicted the actual reality and practice of the community, thus giving rise to the need for interpreting away, or canceling out, the effect of those verses that were deemed inconsistent with other verses more in line with prevailing customs. However the case may be, the very nature of this theory suggests that whatever contradiction or problem needed to be resolved, this was to be done within the purview of

[16] See David S. Powers, "The Exegetical Genre *nāsikh al-Qur'ān wa-mansūkhuh*," in Andrew Rippin, ed., *Approaches to the History of the Interpretation of the Qur'ān* (Oxford: Clarendon Press, 1988), 119.

[17] Andrew Rippin, "Al-Zuhrī, *Naskh al-Qur'ān* and the Problem of Early *Tafsīr* Texts," *Bulletin of the School of Oriental and African Studies*, 47 (1984): 22 ff.

[18] Ibid.

Quranic authority. This is in agreement with the assertion that the Umayyad caliphs saw themselves not only as the deputies of God on earth, and thus instruments for carrying out God's justice as embodied in the Quran, but also as the propounders of the law in its (then) widest sense.[19] In addition to fiscal policy and the laws of war, they regularly concerned themselves with establishing and enforcing rules regarding marriage, divorce, succession, manumission, preemption, blood-money, ritual and other matters.[20] The promulgation of these rules was carried out in the name of the Lord, whose deputies these caliphs claimed to be.

At the same time, to say that all such promulgations originated, even indirectly, in the Quran would be to overstate the matter. The text comprises some 500 legal verses, and these cover a relatively limited number of legal issues and, furthermore, treat of them selectively. Thus the question that suggests itself here is what was the other material source, or sources, from which the law was derived? At the outset of this chapter mention was made of the Prophet's Sunna as the second source of the law according to later legal theory. To what extent, if at all, did first century jurisprudence draw on this source?

The term *sunna* means an exemplary mode of conduct and the perfect verb *sanna* has the connotation of "setting or fashioning a mode of conduct as an example for others to follow." 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 the latter term indicates a manner of proceeding or a course of action concerning a particular matter, the former, Sunna, describes the manner and course of action as something established, and thus worthy of being imitated.[21] For the contemporaries and immediate successors of Muhammad, an awareness of a particular Prophetic *sīra* did not entail an understanding that they were bound to follow the example of the Prophet's manner of conduct.

However, some evidence indicates that the Sunna of the Prophet became an established concept soon after his death. For the notion of *sunna* as model behavior had been in existence long before Muhammad began his mission. As early as the fifth century A.D., the Arabs of the north saw in Ishmael a sort of a saint who provided them with a model and a way of life.[22] In pre-Islamic Arabia, any person renowned for his rectitude, charisma and distinguished stature was, within his family and clan, considered to provide a *sunna*, a normative practice to be emulated. The poet al-

[19] Crone and Hinds, *God's Caliph*, 53. [20] Ibid.
[21] M. M. Bravmann, *The Spiritual Background of Early Islam* (Leiden: E. J. Brill, 1972), 138–39, 169.
[22] Irfan Shahid, *Byzantium and the Arabs in the Fifth Century* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 1989), 180.

Mutalammis, for instance, aspired to leave "a *sunna* which will be imitated."[23] 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 attested in the Quran.

Accordingly, it would be difficult to argue that Muhammad, 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 Muslims to obey the Prophet and to emulate his actions. The implications of Q. 4:80 – "He who obeys the Messenger obeys God," – need hardly be explained. So too Q. 59:7: "Whatsoever the Messenger ordains, you should accept, and whatsoever he forbids, you should abstain from." Dozens of similar verses bid Muslims to obey the Prophet and not to dissent from his ranks.[24] Moreover, in Q. 33:21 it is explicitly stated that "in the Messenger of God you [i.e., Muslims] have a good example."

It may be argued that obedience to the Prophet was incumbent upon Muslims while the Prophet was alive, but that after his death they might have felt free to decide their own affairs as they saw fit, without his deeds and utterances being a model which they were bound to follow. But this argument is hard to accept in view of two considerations. First, Muhammad, like all the other leading figures who preceded him in pre-Islamic Arabia, represented a source of normative behavior for his contemporaries and successors; the association of certain individuals with an ideal *sunna* constituted an integral ingredient in the social value structure of Arabia, with or without Islam. Second, the Quran forcefully sanctioned this established structure and the place of the Prophet in it, and further enhanced his personal authority by bestowing on him the status of the Messenger of God. To obey him, by definition, was to obey God. In establishing his *modus operandi* as exemplary and worthy of being emulated by contemporary and later generations, the Prophet hardly could have received better support than that given by the society in which he lived and by the Deity he was sent to serve.

The most persuasive argument in support of the early origins of "the Sunna of the Prophet" is the term's attestation by the middle of the first century at the latest,[25] indeed, as early as 23 H., when 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* of the two

[23] Bravmann, *Spiritual Background*, 139 ff. See also Zafar Ishaq Ansari, "Islamic Juristic Terminology before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa," *Arabica*, 19 (1972), 259 ff.
[24] See, e.g., Q. 3:32, 132; 4:59 (twice), 64, 69, 80; 5:92; 24: 54, 56; 33:21; 59:7.
[25] Ansari, "Islamic Juristic Terminology," 264; Crone and Hinds, *God's Caliph*, 59–61.

preceding caliphs," Abū Bakr and ʿUmar.[26] It is reported that, even earlier, ʿUmar 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 the distant relatives the shares of inheritance to which they were entitled.[27] Subsequently, the number of references to the "Sunna of the Prophet" increased, frequently with reference to concrete things said or done by the Prophet.[28] In a number of instances, however, the expression "Sunna of the Prophet" referred to no substantive or concrete matter, but rather to "right and just practice." This is also the connotation attached to many early references to the *sunna*s of Abū Bakr, ʿUmar, ʿUthmān and others. By such *sunna*s it was meant that these caliphs set a model of good behavior, not that they necessarily laid down specific rulings.[29]

From the foregoing, one concludes that a Sunna of some kind was associated with the Prophet. Whether this is the same Sunna attributed to him one or two centuries later is a question we will now attempt to answer. We must begin by looking at the content of Prophetic Sunna during the two or three decades following the Prophet's death. There is little doubt that the core of Sunnaic material that was inspired by the vitally important issues raised in the Quran represents a portrait of the actual Sunna enacted by the Prophet. It would be inconceivable that all these issues were confined to the Quran and excluded from the Sunna. Such matters as pertain to inheritance,[30] taxes[31] and property,[32] and which were dealt with in a range and variety more or less equal to the range and variety in which these matters were recorded in the Quran, are examples of authentic Sunna; their inauthenticity, in fact, cannot be established.[33]

As noted, Muhammad had an open mind toward those pre-Islamic Arab customs that he did not regard as endangering the establishment of his new religion.[34] The law of *qasāma* represented one such customary practice that he sanctioned and applied in a litigation that was brought against the Jews of Khaybar. The law was considered by later jurists as having been derived

[26] Ansari, "Islamic Juristic Terminology," 263.
[27] Juynboll, *Muslim Tradition*, 26–27. For other instances in which ʿUmar refers to the "Sunna of the Prophet," see Ansari, "Islamic Juristic Terminology," 263; Bravmann, *Spiritual Background*, 168–74.
[28] Crone and Hinds, *God's Caliph*, 71 and generally, and sources cited in the previous two notes.
[29] Crone and Hinds, *God's Caliph*, 55.
[30] Powers, "The Will of Saʿd" 33–53; Powers, *Studies in Qur'ān and Ḥadīth*.
[31] Juynboll, *Muslim Tradition*, 24–25.
[32] Bravmann, *Spiritual Background*, 176, 229 ff.
[33] See sources quoted in the previous three notes.
[34] Numerous such customs and practices which were adopted by the new Muslim religion have been documented in Khalīl ʿAbd al-Karīm, *al-Judhūr al-Tārikhiyya lil-Sharīʿa al-Islāmiyya* (Cairo: Sīnā lil-Nashr, 1990), 15–19, 23–26, 36–47, 71–82, 85–98.

from his Sunna; interestingly enough, they explicitly acknowledged that it originally had been a pre-Islamic practice.[35] The fifth-/eleventh-century jurist Ibn Ḥazm, admitting the Jāhilī origin of *qasāma*, declared that "it is not lawful to disregard [the law of] *qasāma*, since it is not permissible to adhere to some laws applied by the Prophet and cast aside others. For all [laws] come from God, and all are binding."[36] It is interesting to note here the transformation of a law from the "heretical" Jāhilī environment to the realm of the divine, a transformation accommodated through the agency of the Prophet.

Similarly, it was a pre-Islamic Arab practice to distribute any surplus of property (*faḍl al-māl*) for social and charitable purposes. The Prophet applied this principle, which the jurists later thought to be his practice. And inasmuch as it was considered a Prophetic Sunna, it became part of the Sharīʿa.[37]

In the second half of the first century, when the capital of the Islamic empire was transferred to Damascus, and vast territories came under Islamic rule, a third element became a constituent part of the Prophetic Sunna. This was the administrative and legal practices then prevailing in the newly occupied lands. The customary law of pre-Islamic Arabia continued to be applied with regard to many matters that were brought before the Umayyad rulers, but this law was obviously insufficient to deal with the varied and intricate problems that arose in the new provinces. These problems were solved by Muslim judges who often invoked laws that had prevailed prior to the Islamic conquest.[38] It was through the practice of these judges that the administrative and legal subject matter predominating in the provinces entered the body of the Prophetic Sunna. This process of assimilation was aided by the activities of religious scholars, and especially by story-tellers, who spread stories with ethico-legal content about the Prophet and his immediate followers. Although these stories were partly inspired by what the Prophet had actually done or approximately said, they also contain statements that expressed the local practices and norms prevailing in the conquered provinces; and these latter were endowed with the authority of the new religion by having been attributed either to the Prophet or to his Companions.

The enormous growth in the body of materials attributed to the Prophet

[35] Ibn Ḥazm, *Muʿjam al-Fiqh*, II, 838; see also ʿAbd al-Karīm, *al-Judhūr al-Tārikhiyya*, 89–91.
[36] See, e.g., Ibn Ḥazm, *Muʿjam al-Fiqh*, II, 838.
[37] Bravmann, *Spiritual Background*, 176, 229 ff. Included in the Sharīʿa in the same fashion were prayer and fasting. See Goitein, *Studies*, 73–89, 92–94.
[38] See Gladys Frantz-Murphy, "A Comparison of the Arabic and Earlier Egyptian Contract Formularies, Part II: Terminology in the Arabic Warranty and the Idiom of Clearing/Cleaning," *Journal of Near Eastern Studies*, 44 (1985): 99–114.

and his Companions generated an interest, particularly among pious scholars, to investigate the soundness and authenticity of these materials and the credibility of those who narrated them. This interest gave rise to two fundamental concepts in first-century legal thought, namely, *ḥadīth* and *isnād* (the chain of transmission). The early and informal investigation of the credibility of informants gradually gave way to an increasing awareness of the importance of establishing criteria by which the sound – or what was thought to be sound – reports from the early paragons could be sifted from the massive body of spurious material. But it was not until the second and third centuries that this activity developed into a full-fledged science. The *ḥadīth*, on the other hand, represented reports or verbal transmissions which conveyed the contents of Sunna. Encapsulating the Sunna in *ḥadīth* was inevitable, since it was the only way in which the contents of the Sunna could be defined, transmitted and investigated.

At the end of the first century, the process of expressing the Sunna through the medium of verbal transmission was by no means complete. A Prophetic Sunna concerning a certain theological position, for instance, was known to Ḥasan al-Baṣrī although he was unable to produce a verbal transmission attesting to it.[39] It appears that the process of verbal transmission began some time after the demise of the generation of the Companions, who knew first hand what the Prophet was saying and doing. But verbal transmission, in the form that subsequently came to be known as *ḥadīth*, was only beginning to emerge and did not encompass the whole material of the Sunna, which was still being informally circulated by storytellers and others. This explains why Ḥasan al-Baṣrī could know of a "Sunna from the Prophet" but could not adduce a verbal transmission to express the contents of that Sunna.

By the end of the first century, a part of the Prophet's Sunna had become the subject of intense interest among certain groups. The Umayyad caliph ʿUmar II (99–101/717–19) is the first major figure associated with the collection of the Prophetic Sunna, or, at least, with that Sunna that touched on fiscal and administrative matters. Upon his accession to power, he is reported to have rebuked one of his administrators for not following the Sunna of the Prophet and for not abandoning "the innovations that took place after [the Prophet's] Sunna."[40] He is also reported to have asked Abū Bakr al-Anṣārī and others to "look for what there is of the *ḥadīth* of the Apostle and of his Sunna."[41] The task of coordinating the material he received from his subordinates was assigned to Zuhrī, and

[39] Ansari, "Islamic Juristic Terminology," 263–64.
[40] Cited in Juynboll, *Muslim Tradition*, 35.
[41] Cited in Abbott, *Studies*, 26.

copies seem to have been publicized in the provinces for the benefit of judges and administrators.[42] But ʿUmar's enterprise failed, for it appears that at that time disregarding the Prophet's Sunna was not yet looked upon as a serious matter.

The increasing importance of the Sunna toward the end of the first century represents only one expression of the rapidly growing tendency toward adopting revealed sources as the ultimate guide of Muslim conduct. It was in this period, we may recall, that the theory of abrogation was beginning to take shape. And it was in this period that the first generation of legists, such as the distinguished Ibrāhīm al-Nakhaʿī, were active, elaborating the core of a positive legal doctrine, particularly the branches of the law that dealt with rituals, inheritance, alms-tax, marriage, divorce and other matters. Significantly, it was during this period that the well-known "travel in search of knowledge" (*ṭalab al-ʿilm*) became a common practice. "Search for knowledge" meant at the time a search for the textual sources of Islam within the central lands of the empire, and *ḥadīth* was the foremost goal for students and scholars alike.

ʿIlm came to signify knowledge of the Quran and the Sunna. Its binary opposite was *raʾy*, that is, considered opinion. An opinion arrived at on the basis of *ʿilm* amounted to *ijtihād*, a term that was used ordinarily in conjunction with the word *raʾy*. *Ijtihād al-raʾy* thus meant the intellectual activity or the reasoning of the legal scholar whose sources of knowledge are materials endowed with religious (or quasi-religious) authority.[43]

At a time when the textual sources of religion were not yet established and when their controlling authority was far from exclusive, such practices as *raʾy* would not have been censured. In fact, by the eighth decade of the first century, the term was used to indicate sound and considered opinion. The poet ʿAbd Allāh b. Shaddād al-Laythī (d. 83/702) regarded the approval given by *ahl al-raʾy* (the people of good sense) to be a desideratum for acquiring a good reputation in society.[44] But this was soon to change. The increasing importance of religious texts gradually ousted *raʾy* from the realm of legitimacy. The beginning of this process seems to have been, again, associated with the last quarter of the first century, and, more particularly, with ʿUmar II. As caliph, he is said to have demanded of any judge he appointed that he be possessed of *ʿilm* and that he resort, when in doubt, to those who were adept in *ʿilm*, not *raʾy*.[45]

[42] Ibid., 30–31.
[43] Bravmann, *Spiritual Background*, 177–78, 193–94.
[44] His poem is excerpted in Sayyid Aḥmad al-Hāshimī, *Jawāhir al-Adab fī Adabiyyāt wa-Inshāʾ Lughat al-ʿArab*, 2 vols. (Beirut: Muʾassasat al-Risāla, n.d.), I, 190. On the positive connotations of *raʾy* in the early period, see also Schacht, *Origins*, 128 (on the authority of Goldziher).
[45] Juynboll, *Muslim Tradition*, 36.

JURISPRUDENCE IN THE SECOND CENTURY H. (CA. 720–815 A.D.)

Contrary to the notions currently prevalent among modern scholars, the overwhelming body of evidence indicates that Islamic jurisprudence did not begin around 100 H., but that the state of affairs as it existed at the turn of the second century constituted a further stage in a process of development that had begun much earlier. There is no evidence that distinguishes the period around 100 H. as a time in which new institutions or concepts came into being. Our centennial division must therefore be understood as a convenient way of presenting the material, and not as conforming to any chronology of significant events.

The last quarter of the first century saw an upsurge of intellectual legal activity in which Arab Muslims and non-Arab converts took part. Interest in legal issues no longer was limited to an elite who were privileged to have been affiliated with the Prophet or with his Companions. This increasing interest in these issues was reflected in the evolution of various centers of legal activity throughout the Islamic lands. In the beginning of the second century, the most prominent centers were the Hijaz, Iraq and Syria. Egypt became such a center soon thereafter.

During this period, legal activity drew on the Quran and on what was thought to be the practices of the Prophet and of the early Muslims who had surrounded him and who were vested with special religious authority by virtue of the presumption that they knew the Prophet's intentions at first hand. But to no lesser an extent was legal activity influenced by the administrative and judicial practices prevailing in the various provinces, and these differed from one region to another. As seen by the scholars of each region, their own practice constituted a *sunna*, a body of average doctrine that expressed both practical and ideal elements. Although the practical elements were in large part identical with administrative and judicial practices existing in each region, and thus were not necessarily the products of the Quran or the religious and ethical material related on the authority of the Prophet and his Companions, they were subjected, from the beginning, to a process in which they were gradually imbued with a religious and at times ideal element.

Injecting these practices with a religious element meant nothing more than claiming them to be doctrines enunciated or adopted by an earlier authority, usually a Successor or a Companion. But the attribution of doctrines to older authorities, which often was authentic, did not stop at the level of a Successor or a Companion. The differences among the geographical schools (as well as among scholars within each school) amounted

in fact to a competition among conflicting doctrines. And in order to lend a doctrine an authority sufficient to guarantee its "success" over and against competing doctrine – say one attributed to a Companion – the chain of authority of the first doctrine was extended to the Prophet himself.

This process of projecting legal doctrines backward, mainly from the Successors to the Companions, and ultimately to the Prophet, was a lengthy one; it began some time toward the end of the first century and continued well into the third. The beginnings of this process are associated with the scholars of Iraq. The Kufans, in particular, appear to have been the first to attribute the doctrine of their school to Ibrāhīm al-Nakhaʿī, whose generation represented the earliest specialists in the law. The Iraqi scholars Ḥammād b. Sulaymān (d. 120/738) and Ibn Abī Laylā (d. 148/765) represent two successive stages in which there is a slow but steady growth in the body of Prophetic reports. By the time of the latter, who was a contemporary of Abū Ḥanīfa (d. 150/767), the reliance on Prophetic reports was still relatively insignificant. Abū Ḥanīfa, for instance, had a limited number of *ḥadīth*s at his disposal, and whatever he used was by and large considered suspicious by the later *ḥadīth* critics.

Another contemporary of Abū Ḥanīfa, the Syrian jurist Awzāʿī (d. 157/774), used relatively few Prophetic reports, though he often referred to the "Sunna of the Prophet." The technical relationship between the Sunna and the reports that express it is still tenuous in Awzāʿī, for he considers an informal report or a legal maxim without *isnād* sufficient to attest to the Prophetic Sunna. But like the great majority of his contemporaries and immediate predecessors, Awzāʿī viewed the practice (=*sunna*) of his community as having been continuous since the Prophet, and as having been maintained throughout by the caliphs and the scholars. Awzāʿī, in other words, projects the entire body of his doctrine, including elements of provincial customary practice, back to the Prophet, without, however, feeling bound to adduce formal reports.[46] That the legists in the first and second centuries thought their doctrines to carry an authority extending back to the Prophet is clear. Also clear is the fact that these doctrines encompassed, aside from the Quran, two types of legal material that hailed from two radically different sources. The first was Arabian, associated with the pre-Islamic laws and customs that were practiced or approved by the Prophet, and the second provincial, gradually but systematically assimilated into the normative practices of the Muslim community, practices that were perceived by Muslims to derive from the Sunna of the Prophet. However, by the time of Abū Ḥanīfa and Awzāʿī, it was still largely immaterial to

[46] Schacht, *Origins*, 70 ff.

express the body of doctrine embodying these practices in the form of reports from the Prophet.

It was the generation that flourished in the second half of the second century that began, albeit inconsistently, to anchor its doctrines in Prophetic reports. The increasing reference to reports coincided with another process in which reports were projected, more than ever before, to the Prophet himself. Again, the Iraqis stood in the forefront: their doctrines were not only the most advanced in technical legal thought, but also reflected the highest stage of development in the construction of a body of Prophetic *ḥadīth*, both in content and transmission. Although the doctrine of Abū Yūsuf (d. 182/798), a student of Abū Ḥanīfa, already represented an advance over that of his master, it was Aḥmad b. Ḥasan al-Shaybānī (d. 189/804) who insisted for the first time that no legal ruling can be valid unless it is based upon a binding text, by which he meant the Quran and Prophetic *ḥadīth*, although reports from the Companions still played some role in his doctrine. The elimination of the role of the Companions' reports from the construction of the law was completed by Muḥammad Ibn Idrīs al-Shāfiʿī (d. 204/820) who insisted, consistently and systematically, that the Quran and the Sunna of the Prophet are the sole material sources of the law.

Shāfiʿī's theory of *ḥadīth*, which represented a middle position between two extremes, was by no means universally accepted at the time. On the one hand stood a group of scholars who thought that all human conduct must be firmly regulated by authoritative texts, and that human reasoning has no place in religious matters. On the other hand stood the rationalists, many of whom belonged to the Muʿtazilite movement, who attempted to discredit such texts and held the Quran sufficient to explain everything. They dismissed reports conveyed through single (or a few) chains of transmission and demanded that for a report to be accepted it must be transmitted by many from many. Some Iraqi scholars, probably associated with the Muʿtazilites, set aside any report that was contradicted by another, and instead resorted to their own reasoning. They were also inclined to dismiss reports by maintaining that they were applicable to the Prophet alone, not to his followers. Like the rationalists, they rejected solitary reports, but argued that a report might be accepted if it is related through at least two lines of transmission, by analogy with the accepted number of witnesses in the law of evidence.[47]

With the emergence of a powerful movement which aimed at anchoring

[47] On these groups as well as on the development of the *ḥadīth* movement in the second century, see ibid., 27 ff., 40 ff., 47 ff., 51, generally.

all law in religious, authoritative texts, the nature of legal thinking changed. The concepts of *raʾy* and *ijtihād*, and the types of reasoning they encompassed, underwent a change in both structure and meaning. By the middle of the second century (and perhaps earlier), the term *raʾy* indicated two types of reasoning. The first was free human reasoning based on practical considerations and bound by no authoritative text. The second was free reasoning based on such a text and motivated by practical considerations. With the growth of the religious movement during the second century, the first type of reasoning was gradually abandoned in favor of the second, and even this was to undergo, in turn, two significant changes. On the one hand, the attribution of the authoritative texts constituting the bases of this kind of reasoning and ascribed to a class lower than that of the Prophet were gradually upgraded to the status of Prophetic Sunna. Shāfiʿī's doctrine represents the culmination of this process. On the other hand, the quality of reasoning was to change in favor of stricter and more systematic methods. Even the term *raʾy*, having been so deeply associated with arbitrary forms of reasoning, was completely abandoned and replaced by other terms which came to acquire positive connotations. *Ijtihād* and *qiyās* were two such terms, encompassing all forms of methodical reasoning on the basis of the Quran and the Sunna.

The transformation from the old ways of reasoning subsumed under *raʾy* to the new methods of *qiyās* and *ijtihād* was gradual. By the middle of the second century we find that the Iraqis, and even the Medinese, at times introduce under *raʾy* strict and systematic methods of reasoning. By the beginning of the third/ninth century, *raʾy*, as both a technical term and a method of free reasoning, seems to have lost, for the most part, its grounds in legal discourse. The alternatives, *qiyās* and *ijtihād*, became widespread after the time of Shāfiʿī, and their adoption was in no small measure due to the fact that they were not associated with the now derogatory connotation of arbitrary opinion. We recall that *ijtihād*, even when coupled with the term *raʾy*, indicated, as early as the first century, reasoning based on authoritative texts (*ʿilm*).

It is clear that labels for types of reasoning in this period were far from fixed, and that *raʾy*, for instance, could encompass as well strict forms of reasoning concerning a particular case. It appears that the rulings reached through these forms of reasoning were later identified with *qiyās*, and those associated with free human reasoning with *istiḥsān*, a term that came into use around the middle of the second century.[48] Systematic legal reasoning in turn was often, but certainly not always, described as *qiyās*, which seems

[48] Ibid., 112.

to have encompassed at least two distinct methods. The first was analogy, that is, when two cases are "brought together" due to a common meaning. The Iraqis and the Medinese, and later Shāfiʿī himself, resort to it, but do not call the common meaning ʿilla (*ratio legis*), a term that emerged only later. The Iraqis also subsume under *qiyās* the *a fortiori* argument in both of its forms, the *a maiore ad minus* and the *a minore ad maius*.[49]

Ever since the formation of the geographical schools of law took shape during the first half of the second century H., the idea of consensus had played a significant role in sanctioning their doctrines. The concept of consensus (*ijmāʿ*) had been in existence since pre-Islamic times, and referred to the conscious formal agreement of the tribe.[50] In the early schools, consensus expressed the average doctrine on which the scholars and the community, whether in a particular region or at large, were in agreement. For the Iraqis, consensus extended in theory to all countries, but in practice it had a local character. On matters related to general practice, all Muslims were deemed to participate in forming consensus, whereas on technical points of the law, the scholars had a monopoly. The Medinese, on the other hand, while at times sharing with the Iraqi concept its claim to universality, limited their consensus to the common practice at Medina. Be that as it may, once a doctrine became subject to consensus it was considered, by those who were party to it, final and immune from error.[51]

Although consensus, in one form or another, had always been part of the make-up of the geographical schools of law, there was no attempt at first to anchor it in any authoritative text. With the growth in the body of *ḥadīth*, however, and with the concurrently increasing tendency to ground all law in the Sunna of the Prophet, there were attempts toward the end of the second century to justify consensus on the basis of Prophetic reports. The earliest and most notable attempt was made by Shaybānī who declared on the authority of the Prophet that "Whatever the Muslims see as good is good (*ḥasan*) in the eyes of God, and whatever they see as bad is bad in the eyes of God." But Shāfiʿī seems to have rejected this report since it clearly smacks of *istiḥsān*, a principle he abhorred. Instead, as we shall see, he resorted to other Prophetic reports as well as to the Quran.

Shāfiʿī flourished in a period when a powerful group of traditionalists advanced the thesis that nothing that the Muslim community says or does should escape the sanction of the Quran and the reports of the Prophet. At the same time, this group militated against a tendency that had become entrenched in Islam since the first century, namely, the tendency to ignore

[49] For the logical properties of these arguments, pp. 96–99 below.
[50] Bravmann, *Spiritual Background*, 194–98. [51] Schacht, *Origins*, 82, 85, 88.

the Prophetic reports and insist on human reason as the final judge on matters not regulated by the Quran. Shāfiʿī elaborated his concept of how the law should be formulated against the backdrop of a reality thoroughly permeated by the conflict between the traditionists and the rationalists. His concept constituted in effect a rudimentary theory of law, a theory that was in one sense caused by, and in another the result of, that conflict.

THE BEGINNINGS OF LEGAL THEORIZATION

Shāfiʿī's legal theory, as indeed all his *corpus juris*, underwent a transformation from what is known as the "old doctrine" to the "new," in which he seems to have reached a fresh understanding of the law. Reportedly born in Palestine and raised in the Hijaz, Shāfiʿī lived in the major centers of learning, where he became exposed to all the influential trends of legal learning. We do not know at what point of his life he decided to abandon the "old doctrine," but it is highly likely that it was in Egypt after 198/813, some six years before his death. There he seems to have revised his treatise on some aspects of legal theory, a treatise he titled *al-Kitāb*, but which subsequently came to be known as *al-Risāla*. Both words mean "epistle," this being an accurate description of the work which was originally written for, and then in fact sent to, ʿAbd al-Raḥmān b. Mahdī, who died in 198/813–14.

The *Risāla* reportedly was the first work written on legal theory to be designated as *uṣūl al-fiqh*, a compound term which appeared much later. In this treatise, Shāfiʿī attempted to set forth a theory that describes, and in fact prescribes, the methods by means of which law is formulated. As suggested earlier, the work constituted a reaction to the trends and movements that prevailed in second-/eighth-century jurisprudence. In order to understand the thrust of the work, we shall examine it according to the same manner and arrangement in which it is presented by Shāfiʿī.

Shāfiʿī opens his work with a reference to two types of communities, one that worshipped idols and possessed no divine book, and another that did possess one which it altered and corrupted. The latter are the Jews and Christians, while the former are the pre-Islamic, polytheistic Arabs of the Peninsula. The peninsular Arabs, however, were sent a Prophet, Muhammad, who conveyed to them a Book, and they have thus become bound by the wishes of God as expressed in that Book. Now in possession of scripture, they have become duty-bound to cast their personal predilections and desires aside and to abide by the dictates of an all-encompassing revelation. Nothing that befalls Muslims, severally and collectively, is neglected in the Book. The Muslim community and its affairs, we are to

understand, are sublime enough to command the attention of God Himself. What seems to be here an ennoblement of the human condition is nothing more than an assertion directed against contemporary rationalists who held that man can determine the quality of his acts by his own reason and without the intervention of a deity.

The recipients of a divine revelation, Muslims are duty-bound to attempt to gain and augment *ʿilm*, that is, knowledge of the scripture in its direct as well as oblique meanings. For God has revealed His precepts in a variety of forms. In one form, He unequivocally states in the Quran certain rulings, such as those related to prayer, alms-tax, pilgrimage, fasting, etc. In another form, the rulings are stipulated in the Quran in general terms, the details of which the Prophet has laid down in his Sunna. God has also decreed certain rulings through His Prophet, without there being any reference to them in the Quran. Finally, the revealed texts, the Quran and the Sunna, provide, in the absence of explicitly formulated rulings, indications and signs (*dalālāt*) which lead to the discovery of what God intended the law to be. In sum, God left nothing outside the compass of His decree; revelation is all-inclusive.[52]

It is noteworthy that the all-inclusiveness of revelation means, in Shāfiʿī's view, not only that positive law must ultimately rest on the divine texts, but also that the methods by which that law is discovered must rest on those same texts. The Quran as a source of law hardly needed any justification, though the same cannot be said of the Sunna of the Prophet, as we shall see. The preoccupation of Shāfiʿī's *Risāla* was primarily to justify the authoritative bases of, first, the Sunna, and, second, consensus and *qiyās*. Aside from the fact that the Quran's authority was seen as self-evident, it was too well established as a source of law to warrant any justification. But this was not the case with the three remaining sources. In advocating a paramount place for Prophetic Sunna in the law, Shāfiʿī was addressing, if not reacting to, those who resorted to any means by which they could diminish its juristic role. And in advocating *qiyās*, he was responding to the traditionists who spurned reason as a means of expounding the law. Consensus, or its binary opposite, disagreement (*ikhtilāf*), acquires importance in Shāfiʿī's legal theory mainly as a result of the differing methods used by the jurists in interpreting the texts and in reasoning on their basis. Otherwise, Shāfiʿī's chief concern was with the Sunna and its ramifications in the law.

Having enumerated the types of language in which God chose to reveal His legal judgments, Shāfiʿī goes on to establish the authoritative basis of

[52] Muḥammad b. Idrīs al-Shāfiʿī, *al-Risāla*, ed. Muḥammad Sayyid Kīlānī (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1969), 15 ff. Henceforth quoted as *Risāla*.

method by which the linguistic signs and indications must be interpreted in order for them to yield what the jurist believes to be God's law. The justification of this method, which he calls *ijtihād* as well as *qiyās*, rests with the Quranic injunction to pray in the direction of the Kaʿba: "Turn your [Muhammad's] face towards the Sacred Place of Worship, and you [Muslims], wherever you may be, turn your faces [when you pray] towards it" (2: 144, 150). Shāfiʿī argues that in their prayer Muslims are commanded to face the Kaʿba even when it is beyond the range of their sight. They are under the obligation to attempt to discover the direction of the Holy Site by seeking, through the exercise of their mental faculties, indications and signs which might lead them to know that direction. For after all, he maintains, God has stated that He created stars, mountains, rivers, light, darkness, etc., so that the Muslims may be guided by them (Q. 6:97, 16:16). The strict implication of these verses is that Muslims are not at liberty to pray in the direction they deem desirable, but rather are bound to exert the utmost mental effort in seeking the location of the Kaʿba. By analogy, he reduces, Muslims are under an obligation to determine the legal values governing their conduct, values that are hidden in the language of the texts.[53]

Once Shāfiʿī has established the textual, authoritative basis of *ijtihād* (*qiyās*), he delimits the scope of this method. Obviously, when the Book or the Sunna provides the legal solution to a particular problem, no inference is needed. But when there arises a new case for which the texts provide no express solution, the exercise of *ijtihād* becomes not only necessary but obligatory. In the absence of a formulated textual solution, the jurist must look for a parallel textual case for which a solution is provided. If the new case has the same *ratio legis* (*maʿnā*; lit. meaning) as that given to the parallel textual case, the ruling in the text must be transferred to the new case. But such a *ratio legis* is not always capable of identification, in which event the jurist must locate all cases in the texts that resemble the new case, and must transfer the ruling of the most similar case to the new case at hand. These two methods, one based on a *ratio legis*, the other on a similitude, are, together with the *a fortiori* argument, the exclusive constituents of *ijtihād* (*qiyās*). Any inference that is governed by less than the strict implications and significations of the texts is invalid and hence impermissible. It is on these grounds that Shāfiʿī spurned *istiḥsān*, a method of reasoning that he regarded as based merely on free human reasoning guided by personal interests and whims. *Istiḥsān*, he thought, amounts to indulging in base pleasures.[54]

Risāla, 16–18.

Ibid., 219–44; Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-Umm*, 7 vols. (Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya, 1325/1907), VII, 267–77.

Shāfiʿī at this point abandons the discussion of *ijtihād*, only to come back to it toward the end of the treatise. There he stipulates the conditions that the jurist must fulfill in order to qualify for practicing *ijtihād*, including knowledge of the Arabic language, of the legal contents of the Book, of its particular and general language, and of the theory of abrogation (*naskh*). The jurist must be able to employ the Sunna in interpreting those Quranic verses that are equivocal, and in the absence of a Sunna he must be aware of the existence of a consensus which might inform the case at hand. Finally, he must have attained majority, be of sound mind, and willing and ready to exert his utmost intellectual effort in solving the case.[55]

Shāfiʿī then turns to the Quran and insists that no foreign vocabulary may be found in it and that it was revealed in pure Arabic. He considers a masterly knowledge of the Arabic language to be one of the qualities necessary for a "proper understanding" of the texts. Knowledge of areas required for such understanding include, among others, the theory of abrogation, the texts containing commands and prohibitions (*amr/nahy*), consensus and disagreement (*khilāf*). Although Shāfiʿī does not explain why he chooses to discuss these areas of knowledge, we can infer that he deems them to be necessary for the practice of *ijtihād*, because they constitute a safeguard against arbitrary interpretation of the texts.

Another aspect of such knowledge relates to general and specific (*khāṣṣ/ʿāmm*) words used in the Quran. In a brief discussion, Shāfiʿī introduces some principles of hermeneutics and remarks that at times a general Quranic text is particularized by a Prophetic Sunna. This brings him to a rather lengthy exposition of the binding force of Prophetic Sunna, a theme that recurs throughout the treatise. The constant and consistent attention accorded the role and function of the Sunna, and the sheer bulk of the discussions devoted to it, constitute eloquent testimony to Shāfiʿī's motive for composing the *Risāla*. It would not be an exaggeration to state that the treatise represents a defense of the role of Prophetic reports in the law, as well as of the methods by which the law can be deduced from those reports. Any concern with topics that appear on the surface to be unconnected with the Prophetic Sunna and *ḥadīth* has ultimately to bear, directly or obliquely, upon the Sunna and its role in the law.

The Sunna, Shāfiʿī argues, may correspond to, overlap or depart from Quranic rulings. The fact that the Prophet followed the commands of God is evidence that his Sunna conforms, and represents a parallel, to the Quran. That it overlaps with the Quran means that it agrees with the Quran on general principles, while providing additional details explaining these

[55] *Risāla*, 211–19.

principles, thus going beyond the scope of the Book. The Sunna departs from the Quran in the sense that it provides legislation on matters on which the Quran is silent.[56]

Only with regard to this last category, Shāfiʿī remarks, were the scholars in disagreement. They disagreed on this category only insofar as its source of authority is concerned, not on its validity as such. One group of scholars has argued that since God made it incumbent upon Muslims to obey the Prophet – a point that is of central importance in Shāfiʿī's *Risāla* – He mandated to His Prophet the power to legislate where the Quran is silent. Another group rejected this category altogether, arguing that there is nothing in the Sunna that has not been laid down in the Quran. Shāfiʿī mentions other groups who proffered other explanations, and then goes on to explain those types of the Sunna that are supported by the Book and those that are not. In either case, it is clear to Shāfiʿī that nothing whatsoever in the Sunna contradicts the Quran; the Sunna merely explains, supplements or particularizes the Quran.

At this point Shāfiʿī devotes a lengthy discussion to the relationship of the Sunna to the Quran, including the abrogation of one by the other. To illustrate the harmonious relationship between the two sources, he discusses their contribution to the construction of the law of marriage. In His Book, God has forbidden men to have sexual relations with women except through marriage and concubinage. The Prophet's Sunna came to complement this decree by providing details for what constitutes a valid marriage. Accordingly, the Prophet stipulated that for a marriage to be valid, the woman who is a *thayyib* (non-virgin), a divorcée or a widow must express her consent, and furthermore that there must be two witnesses who will attest that the marriage contract was concluded. From the Prophetic stipulation that such a woman must express her consent it is inferred, Shāfiʿī maintains, that her counterpart, the man, must also express his consent. If the woman has not been previously married, she must be given in marriage by a guardian who is usually the nearest male agnate. Shāfiʿī includes this last condition without specifying the source from which it was derived. Dowry is recommended; it is neither obligatory nor a condition for a valid marriage. We know that it does not constitute such a condition because the Quran does not require it. On what grounds he deems it to be recommended, Shāfiʿī does not say.[57]

Further regulations pertaining to marriage are provided by the two textual sources. The Quran prohibited marriage between a man and his wife's sister. The Prophet went farther and considered marriage between a

[56] Ibid., 52. [57] Ibid., 54 ff., 58 ff., 61 ff., 68 ff.

man and his maternal and paternal aunts to be prohibited. The Quran allows a man to marry up to four wives, and the Prophet prohibited more than four. He also prohibited marriage to a woman during the waiting-period that follows her divorce or the death of her husband. The Sunna provides a multitude of other regulations which represent supplements to the Quran or details for general principles laid down therein.

Later on in the treatise, however, Shāfiʿī cautions that some Prophetic reports, though authentic and sound, must not be extended to govern new cases. Those reports that came to qualify or mitigate a Quranic judgment are intended to regulate only those specific cases for which they were enacted, and they ought not to be used in *qiyās*. The same principle applies to a universal Sunna that was qualified by the Prophet himself for the purpose of making an exception in a particular case. The Sunna, for instance, decrees that the blood-money paid for the murder of a male or a female person is a hundred or fifty camels, respectively. The Prophet, however, ruled that for the murder of a fetus the blood-money due is five camels, irrespective of the fetus's sex. The report about the fetus, which makes no distinction between sexes, is applicable exclusively to the murder of fetuses. Shāfiʿī, however, does not expound on the criteria for determining which reports are to be treated as limited to the particular cases they govern and which are not.[58]

Once the authority and the relationship of the textual sources have been established, Shāfiʿī moves on to a second level of analysis, one that is principally epistemological. Knowledge (*ʿilm*) according to Shāfiʿī is of two types: one type belongs to the generality, that is the community-at-large, the other belongs to the specialists, namely, the legal scholars. The first type, being textual, is widespread among all people, and is transmitted from the generality by the generality. The fact that it is transmitted in this manner, we are to understand, guarantees its authenticity and precludes the possibility of any disagreement on its substance as well as on its transmission. All this, coupled with the fact that its interpretation is subject to no disagreement, renders it certain. Examples of this type of knowledge are the five prayers and the obligation to fast in Ramadan.[59]

The second type of knowledge is not to be found in the Book, nor can most of it be attested in the Sunna. Whatever Sunna there is to sustain this knowledge, it is transmitted by channels fewer than those through which the first type is reported. To put it differently, it is transmitted from a few by a few, and these are the specialists. This knowledge, being subject to

[58] Ibid., 237–44.

[59] Ibid., 154 ff. On this and other related issues, see Norman Calder, "*Ikhtilāf* and *Ijmāʿ* in Shāfiʿī's *Risāla*," *Studia Islamica*, 58 (1984): 57 ff.

varying interpretations and derived by means of *qiyās*, can yield only probability.

In contradistinction to the first type of knowledge whose apprehension and performance is incumbent upon all Muslims, the second type entails duties for only a few. Shāfiʿī here argues, again on the basis of textual evidence, that certain religious responsibilities incumbent upon Muslims may be considered fulfilled if a sufficient number of individuals perform them. Such is the obligation to conduct holy war against the infidels; if part of the Muslim community performs that task, the obligation imposed upon the entire community is waived. Those who do not participate in waging the war are not guilty of sin, since the act of launching war is performed on their behalf, and yet those who do participate will acquire a double reward. From this it is deduced that some of the Muslims, here the legists, must be in charge of probing and interpreting the law on behalf of the entire community, since it is incumbent upon the community to attempt to discover God's law so that they may order their lives in accordance with it.[60]

The uncertainty surrounding the second type of knowledge requires that Shāfiʿī explain how it is to be employed in the construction of the law. It must be established that Prophetic reports related by a few from a few, technically known as solitary traditions (*khabar al-khāṣṣa* or *khabar al-wāḥid*), go back as far as the Prophet. He who transmits them must be trustworthy, pious, of sound mind, and knowledgeable of the meaning of the report he relates. He must convey the reports verbatim and must avoid narrating the meaning in his own language. For should he misunderstand the meaning of the report he is narrating, he would in effect be changing the contents of the report. Thus a literal transmission would safeguard against any change in that meaning.[61]

The aggregate of these conditions is not alone sufficient to establish the authority of the solitary report, although they do go as far as to make such authority highly probable. Therefore, in order to render it completely binding, Shāfiʿī invokes the practice of the Prophet, citing a number of cases in which the Prophet accepted and acted upon reports conveyed to him by a single person. Furthermore, he claims that a consensus in the past and in recent times has been reached on the authoritativeness of solitary reports.[62]

Like the solitary report, consensus too must rest on textual evidence. When consensus is reached on the basis of an unambiguous text, then the force of the text, Shāfiʿī seems to argue, justifies consensus, since the text, being certain, allows for no disagreement whatsoever. Such a consensus

[60] Ibid. [61] *Risāla*, 160. [62] Ibid., 175 ff.

would, in effect, be tantamount to knowledge of the first type – knowledge conveyed by the generality from the generality. But even if consensus is not known to be based on a text, the community, when it arrives at such a consensus, is deemed infallible since it cannot in its entirety be ignorant of the Sunna of the Prophet. We know, Shāfiʿī argues, that the community can agree neither on an error nor on a matter that is contrary to the Prophet's Sunna. The authority for this knowledge stems from two reports, from which Shāfiʿī deduces, by a rather strained argument, that the majority cannot fall into error.[63]

Thus, it is obvious that, for Shāfiʿī, all knowledge possessed by the generality and transmitted from the generality is certain, whereas knowledge that is the domain of the specialists is not. Accordingly, a consensus of the specialists that is transmitted by the specialists is not certain. Neither is any ruling arrived at by means of *qiyās* or *ijtihād*, for these are methods of reasoning and interpretation that are susceptible to error.

When the texts explicitly state the ruling of a case, then there should be no room for doubt whether or not it is God's intention. However, when the texts provide only indications and signs, the jurist then must attempt to find out the divine intention, although there is no guarantee that the ruling he reaches will be identical with that which is lodged in God's mind. But such a ruling must be accepted as true, insofar as it is derived from the texts. The justification for this is again found in the Quranic injunction that Muslims, wherever they are, must turn toward the Kaʿba when they pray. The obligation to pray in the direction of the Kaʿba, when it is out of their sight, is tantamount to the obligation to find out God's ruling without it being explicitly stated in any text. In locating the direction of the Kaʿba the believers have been provided with stars, mountains, rivers, day and night as instruments of guidance; and in disclosing God's law, they have been likewise provided with textual indications and signs.

Shāfiʿī's analogy serves to introduce a related matter. Just as two men may determine the location of the Kaʿba differently, so may two jurists arrive at different solutions to the same legal problem. Obviously, one of them must be in error, though more often than not this cannot be determined. Whatever the case, they are equally obligated to attempt to discover the law, and they are both rewarded for their efforts. To maintain that because error is possible no *ijtihād* should be undertaken is tantamount to arguing that no prayer should be performed until certainty about the location of the Kaʿba is attained – an argument that is plainly objectionable.

[63] Abū Bakr Aḥmad Ibn al-Ḥusayn al-Bayhaqī (d. 458/1065) reports that Shāfiʿī also resorts to a Quranic verse in justification of consensus, namely, 4:115. See his *Aḥkām al-Qurʾān*, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1975), I, 39. For a detailed treatment of this issue, see W. B. Hallaq, "On the Authoritativeness of Sunnī Consensus," *International Journal of Middle East Studies*, 18 (1986): 431 ff.

Toward the end of the treatise, Shāfiʿī reintroduces the subject of *qiyās* and *ijtihād*, which he had dealt with in the beginning of his work. We recall that he already discussed two forms of analogical argument under the rubric of *qiyās*, one based on a *ratio legis*, the other on a similarity. He now introduces a third argument under the nomenclature of *qiyās*, namely, the *a fortiori* inference, in both of its forms, the *a minore ad maius* and the *a maiore ad minus*. "If God forbids a small quantity of a substance, we will know that a larger quantity is equally forbidden . . . and if He permits a large quantity of something then a lesser quantity of the same thing is *a fortiori* permitted." Interestingly, Shāfiʿī's example in illustration of the use of this inference derives from ethical rather than strictly legal subject matter. Quoting Q. 99:7–8 ("He who does good an atom's weight will see it [in the Hereafter] and he who does ill an atom's weight will see it"), he remarks that the reward or punishment of those who do good or evil more than an atom's weight will be, respectively, greater.

In establishing the general principles of legal reasoning, Shāfiʿī insisted that no legal ruling can be propounded if it is not ultimately anchored in the Book of God and/or in the Sunna of His Prophet. In fact, it can be safely stated that Shāfiʿī's purpose in writing the *Risāla* was to define the role of the Prophetic Sunna in the law, and to establish the methods of reasoning and interpretation by means of which the law can be deduced from it. It is no wonder then that the bulk of the treatise is devoted to a discussion of the Sunna, its types, interpretation, and its function in elaborating the Sharīʿa. Nearly everything else seems tangential, discussed to a greater or lesser extent in order to shed light on, or expound, the Sunna. In insisting on Prophetic Sunna as the only binding textual authority next to the Quran, Shāfiʿī was arguing for a law that would be exclusively divine in its origin, and this required that he explain the manner in which non-textual sources – i.e., consensus and *qiyās* – may be utilized while maintaining the fundamental proposition that law derives from the Divine will.

With its predominant interest in, and elaboration of, the legal science of Prophetic reports, it may appear that the *Risāla* discusses legal theory only inadvertently. This is further evidenced by the manner in which non-Sunna topics are dealt with. Not only are they given less than a full, and far from systematic, treatment, but they are scattered throughout the treatise as if they were subservient to more central themes and imperatives. This in fact is obviously the case. In theorizing about the law, it was clearly the Prophetic Sunna that was Shāfiʿī's first and last concern.

THE EMERGENCE OF LEGAL THEORY

Modern scholarship has accorded Shāfiʿī the distinction of being the founder of the science of legal theory (*uṣūl al-fiqh*), and his *Risāla* is now thought to be not only the first work expounding the subject, but the model that later jurists and theoreticians strove to imitate. This conception of Shāfiʿī as the "Master Architect" of legal theory has as its corollary the notion that, once he elaborated his theory, *uṣūl al-fiqh* came into existence and that later authors simply followed in his footsteps. In other words, an unbroken continuity in the history of legal theory is assumed between Shāfiʿī's *Risāla* and the later writings on the subject.

Recent research has shown that such a continuity never existed and that the image of Shāfiʿī as the founder of *uṣūl al-fiqh* is a later creation.[64] There is ample evidence in the sources to show that even as late as the end of the third/ninth century, legal theory as we now know it, and as we assume it to have issued from Shāfiʿī's work, had not yet come into existence. It is striking that that century produced no complete treatise on *uṣūl al-fiqh*. In fact, Shāfiʿī's *Risāla* is rarely mentioned in the writings belonging to that century, and, furthermore, it elicited neither commentary nor refutation by the authors of that period, when the genre of commentary and refutation became a part of the written discourse. On the other hand, with the advent of the fourth/tenth century, Shāfiʿī's *Risāla* attracts a number of commentaries and at least two rebuttals. It is also no coincidence that with the appearance of commentaries on, and refutations of, the *Risāla*, there emerges for the first time a sizable number of complete works of *uṣūl al-fiqh*, works that treat of this discipline as an *organically structured* and comprehensive methodology.

The absence of interest in Shāfiʿī's legal theoretical discourse may be explained in part by the fact that the *Risāla* does not offer an exposition of a legal theory proper. The treatise, as we have seen, is largely preoccupied with *ḥadīth*, and offers only a few basic principles: (1) that law must be derived exclusively from revealed scripture; (2) that the Prophetic Sunna constitutes a binding source of law; (3) that contradiction exists neither between the Sunna and the Quran nor among verses or *ḥadīth*s within each of these two sources; (4) that the two sources complement each other hermeneutically; (5) that a legal ruling derived from unambiguous and widely transmitted texts is certain and subject to no disagreement, whereas a ruling that is inferred by means of *ijtihād* and *qiyās* may be subject to dis-

[64] For this and the following paragraphs, see W. B. Hallaq, "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?," *International Journal of Middle East Studies*, 25 (1993): 587–605.

ement; and finally (6) that *ijtihād* and *qiyās*, as well as the sanctioning ument of consensus, are prescribed by the revealed sources.

brief comparison of the subject matter of the *Risāla* with that of later s of legal theory reveals that a host of questions, fundamental and d indispensable to *uṣūl al-fiqh*, are entirely absent from the *Risāla*. stions of legal language, which occupy on average one-fifth to one-th of the space in later treatises, are virtually non-existent in the *Risāla*. r questions pertaining to consensus, abrogation, legal reasoning, cau- n etc. also receive little attention, if any.

dmittedly, the absence from the *Risāla* of a number of fundamental ents of legal methodology does not entirely explain the marginal s of the work during the century that followed its author's death. After he work, notwithstanding its predominant occupation with *ḥadīth*, certain guiding principles of legal interpretation and reasoning. her reason why the treatise failed to interest Shāfiʿī's immediate suc- rs appears to be the unprecedented synthesis that Shāfiʿī attempted to between the theses of the then two major camps dominating the e of law. Among the aforementioned propositions that Shāfiʿī ht together in the *Risāla*, the first four were addressed to the ratio- , whereas the sixth was aimed at the traditionalists. But Shāfiʿī's , embodying this synthesis, appealed neither to the traditionalists nor rationalists. For not only did his theory represent a clean break from revalent doctrines, but also he himself does not seem to have nged to either camp. Evidence from the sources strongly suggests, rary to the conventional wisdom which places Shāfiʿī squarely in the ionalist camp, that for the traditionalists Shāfiʿī was involved with the nalists and Muʿtazilites, and that for the rationalists, he was no minor cate of some fundamental traditionalist doctrines.[65] Both charges be substantiated, and rightly so, in the very synthesis that Shāfiʿī put

he failure of the *Risāla* to arouse the interest of jurists during the ury after its author's death may also be explained in terms of the direc- taken by the religious and legal movement in the course of the nd/eighth and third/ninth centuries. As we have seen, the beginning he second/eighth century witnessed the initial stages of the develop- t of Islamic law and jurisprudence. This phase may be characterized as in which human reasoning, commonly known as *raʾy*, was predomi- . By the middle of the century another competing movement stress- he role of Prophetic reports was on the rise. At the time Shāfiʿī wrote

[65] Ibid., 592 ff.

his *Risāla*, the rationalist movement was only beginning to decline, and this may have been due to the rapid increase in the volume of Prophetic reports that had infiltrated the domain of law. Shaybānī's positive law exhibits, perhaps better than any other, this stage of development, in which *ḥadīth*s constitute an important, but by no means exclusive, element in the law. In Shāfiʿī, as we have seen, revelation – the Quran and the Prophetic reports – represents the ultimate source of law, and *raʾy*, as an expression of rationalist and utilitarian tendencies, is to be wholly expunged. This is precisely where Shāfiʿī was a jurist on his own: while he unconditionally rejected *raʾy* and insisted on the overriding authority of the two primary sources, he salvaged certain elements of what had come under the rubric of *raʾy* and molded them into arguments that may be used in law only insofar as they derive their premises from revelation.

But Shāfiʿī's was not the ultimate synthesis which universally reconciled the doctrines of the rationalists and the traditionalists. After Shāfiʿī, the pendulum of the religious movement shifted farther toward anti-rationalism. The careers and legal doctrines of Aḥmad b. Ḥanbal (d. 241/855) and Dāwūd Ibn Khalaf al-Ẓāhirī (d. 270/883), dominating the legal scene for most of the third/ninth century, exemplify the drastic shift toward traditionalism. While both approved of Shāfiʿī, they went much farther in their emphasis on the centrality of scripture and on the repugnant nature of human reasoning in law. Their positions, however, were by no means identical. Ibn Ḥanbal, as we can glean from his positive law, did not favor the practice of *qiyās*, unless it was absolutely necessary. Dāwūd, on the other hand, rejected it categorically.

There emerges here a clear pattern: Shāfiʿī's predecessors resort to *raʾy* with little attention to the Sunna. Shāfiʿī regulates *raʾy* in the form of *qiyās* and assigns it a role subsidiary to that of the revealed sources, though it remains an essential part of his methodology. Ibn Ḥanbal avoids *qiyās*, but not completely. Dāwūd completely rejects it in favor of a literal reading of the two primary sources. In both time and doctrine, then, Shāfiʿī's position is located midway between the early *raʾy* libertinism and the later Ẓāhirite conservatism.

The rationalist movement, on the other hand, began to experience a process of decline after the middle of the third/ninth century. From this point on, the rationalists drew closer to the traditionalists, but only in one sense: namely, they could no longer afford to ignore the scripture as the exclusive foundation of the law, and they were compelled to submit to the divine decree as the first and last judge of human *sharʿī* affairs. This concession to revelation is clearly attested in the jurisprudential writings of the later Muʿtazilite masters, such as ʿAbd al-Jabbār (d. 415/1024) and Abū

…yn al-Baṣrī (d. 436/1044). On the other side, the traditionalists had to …some concessions. Soon, for instance, the Ḥanbalites, among others, …to disregard their eponym's dislike for *qiyās*, and allow their legal …odology to become virtually interchangeable with that of the other …ols. It is significant that those who did not make these concessions, …as the ultra-traditionalist Ḥashwiyya[66] and the Ẓāhirites, were ulti…y doomed to extinction.

…hat may be seen as a reconciliation between the traditionalists and the …alists – a reconciliation that began to manifest itself only toward the …end of the third/ninth century – may also be seen as a general accep… of the rudimentary principles of Shāfiʿī's thesis. But until the end of …entury, this thesis remained in the minority, and none of Shāfiʿī's fol… appears to have defended it. Muzanī (d. 264/878), who was Shāfiʿī's … disciple and the most likely candidate to have carried on his master's …on, leaned more toward rationality than toward *ḥadīth*, and in any case …ersally thought to have diverged from the legal methodology set by …ī.

…was not until the illustrious Shāfiʿī jurist Ibn Surayj (d. 306/918) and …eneration of his younger contemporaries that the traditionalist–ratio… compromise was finally articulated. Acknowledged as the most dis…shed and faithful follower of Shāfiʿī, Ibn Surayj was universally held …, the jurist who single-handedly defended the Shāfiʿite school and …d it to prominence. He and his disciples combined a knowledge of tra…alism and rationalism, with the result of conceptualizing legal theory …ynthesis between rationality and the textual tradition. Thus, Ibn Surayj …be credited with paving the way for his students, who discoursed on …ynthesis and elaborated it in greater detail. This explains why the first …oremost Shāfiʿite authors who did write works on *uṣūl al-fiqh* were his …nts, such as Ibn Ḥaykawayh (d. 318/930), Ibrāhīm al-Marwazī (d. …951), Abū Bakr al-Fārisī (fl. ca. 350/960), Ibn al-Qāṣṣ (d. 336/947), … Bakr al-Ṣayrafī (d. 330/942), and al-Qaffāl al-Shāshī (d. 336/948), to …ion only a few.

…ith the rise of *uṣūl al-fiqh* in the beginning of the fourth/tenth century, …as a reaction to the increasingly widespread claims that the early …afite masters were the founders of the discipline, the image of Shāfiʿī …e exponent and founder of *uṣūl al-fiqh* begins to take form. About a …ury later the image becomes firmly rooted, as attested in the literature …ing of Shāfiʿī's scholarly virtues (*manāqib*). In the earliest work of …

…the Ḥashwiyya, see A. S. Halkin, "The Ḥashwiyya," *Journal of the American Oriental Society*, …(1934): 1–28.

manāqib available to us, the author, Abū Ḥātim al-Rāzī (d. 327/938), allots a number of chapters to Shāfiʿī's excellent knowledge of the law. In one chapter, which consists of about fifty-one lines (the work as a whole consists of about 2,400 lines), the author discusses Shāfiʿī's proficiency in what he calls *uṣūl al-ʿilm*, by which he clearly means *uṣūl al-fiqh*. Even here, however, the *Risāla* is never mentioned, and nowhere in the entire treatise does Shāfiʿī appear as the founder of the discipline. In the entire treatise, the *Risāla* is mentioned only twice, and then in passing. In both instances, it is referred to in the context not of law but, significantly, of Prophetic reports.

Over a century later, Bayhaqī (d. 459/1066) wrote another work on Shāfiʿī's *manāqib*. For Bayhaqī, Shāfiʿī is now not only a genius of *uṣūl*, but the unrivaled founder of the discipline. The *Risāla*, for its part, is mentioned over eighteen times, and, moreover, receives a comprehensive treatment. In contrast to Rāzī's 51 lines, Bayhaqī allocates a staggering 160 pages, out of a total of 918, to Shāfiʿī as an *uṣūlī*. The depiction of Shāfiʿī as the founder of *uṣūl al-fiqh* is similarly drawn by later authors of the *manāqib* genre. In Fakhr al-Dīn al-Rāzī (d. 606/1209), Shāfiʿī becomes to *uṣūl al-fiqh* "what Aristotle was to logic."[67]

Sometime before Bayhaqī wrote, but certainly after Abū Ḥātim al-Rāzī, Shāfiʿī's image as the founder of *uṣūl al-fiqh* became firmly established. It is not a coincidence that the intervening period between these two authors coincides with the career of Abū Muḥammad al-Juwaynī (d. 438/1046), the last commentator on the *Risāla*. That Shāfiʿī's treatise failed to attract further commentary in the decades and centuries that followed helps to explain the role that Shāfiʿī, as the founder of the discipline, was required to play in his school. Once his image as the founder was established, commentaries on his treatise ceased forever. In a field in which commentaries were the norm, the discontinuity of interest in commenting on the *Risāla* also explains the irrelevance of the work's themes to the far more complex and different methodology of *uṣūl al-fiqh*.

It is a generally accepted view that the *Risāla* represents the first attempt at synthesizing the disciplined exercise of human reasoning and the complete assimilation of revelation as the basis of the law. Since Islamic law finally came to accept this synthesis, we have long been led to believe that *uṣūl al-fiqh* as we know it began with Shāfiʿī. But Shāfiʿī's theory, propounding this synthesis, appeared at a time in which not many were willing to embrace it. For Shāfiʿī's theory to have prevailed immediately after its publication would have required that both the rationalists and the tradi-

[67] Hallaq, "Was al-Shafiʿi the Master Architect," 599 f.

alists should have abandoned their doctrines once and for all. But this ainly did not happen. In fact, the traditionalists rejected his *qiyās*, and rationalists were reluctant, to say the least, to accept his thesis that revon is the first and last judge of human affairs. It was only toward the of the third/ninth century that a genuine synthesis was created ween rationalism and traditionalism. With the emergence of this synis, whose causes and characteristics are yet to be studied, the way to *uṣūl qh* was finally paved. And once this science bloomed, at the hands of afi, Qaffāl and their likes, the rudimentary synthesis created by Shāfiʿī entury earlier became relevant and was thus rejuvenated in the form of mentaries on the *Risāla*. By attributing all the ramifications of the synis to Shāfiʿī, his successors made him, *ex post facto*, the founder of *uṣūl qh*.