# THE OXFORD HISTORY of ISLAM

EDITED BY John L. Esposito

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford New York
Athens Auckland Bangkok Bogotá Buenos Aires Calcutta
Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul
Karachi Kuala Lumpur Madrid Melbourne Mexico City Mumbai
Nairobi Paris São Paulo Singapore Taipei Tokyo Toronto Warsaw

*and associated companies in*
Berlin Ibadan



Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016-4314

Oxford is a registered trademark of Oxford University Press.



Library of Congress Cataloging-in-Publication Data
The Oxford History of Islam/[edited by] John Esposito.
p. cm.
Includes bibliographical references and index.
ISBN 0-19-510799-3 (alk. paper)
1. Islam--History. I. Esposito, John. L.
BP50.095 1999 99-13219
297'.09--dc21 99-13219

Design by POLLEN

5 7 9 8 6

Printed in Hong Kong on acid-free paper

CHAPTER THREE

# Law and Society

## THE INTERPLAY OF REVELATION AND REASON IN THE SHARIAH

**Mohammad Hashim Kamali**

This chapter is divided into several sections, each addressing an aspect of Islamic law that relates to the concerns of Muslim society. The chapter begins with an explanation of the two terms, *Shariah* and *fiqh*, which are often used interchangeably but are not identical. A brief explanation of the differences between these terms sets forth the context for the rest of the chapter. The next section discusses the history and sources of Islamic law. A review of the distinctive contributions of the leading schools of law to the development of fiqh follows. Next is a general characterization of the Shariah, beginning with a discussion of its religious and moral dimensions, followed by explorations of continuity and change, the scope of interpretation, and rational analysis (*talil*). The Shariah is also characterized as pragmatic, and the doctrine of *siyasa shariyya* (Shariah-oriented policy) is explained as an instrument of pragmatism in Shariah. This is followed by a discussion of the status of the individual and the community in Shariah. The chapter ends with a survey of recent reforms in Muslim countries that are seeking to adapt Islamic law to the concerns of modern society.

(Left) The Imam al-Shafii (d. 820) founded one of the four major Sunni schools of law. His tomb in the southern cemetery of Cairo became a focus of veneration; a large mausoleum, covered with a wooden dome, was erected over it in the early thirteenth century. The Shafii school of law is prevalent in Lower Egypt, southern Arabia, East Africa, Indonesia, and Malaysia.

### Shariah and Fiqh: The Duality of Islamic Law

Islamic law originates in two major sources: divine revelation (*wahy*) and human reason (*aql*). This dual identity of Islamic law is reflected in its two Arabic desig-

nations, *Shariah* and *fiqh*. Shariah bears a stronger affinity with revelation, whereas fiqh is mainly the product of human reason. Shariah literally means "the right path" or "guide," whereas fiqh refers to human understanding and knowledge. The divine Shariah thus indicates the path to righteousness; reason discovers the Shariah and relates its general directives to the quest for finding solutions to particular or unprecedented issues. Because the Shariah is mainly contained in divine revelation (that is, the Quran and the teachings of the Prophet Muhammad or the Sunna), it is an integral part of the dogma of Islam. Fiqh is a rational endeavor and largely a product of speculative reasoning, which does not command the same authority as Shariah.

To say that the Shariah is contained in the Quran and Sunna, however, would exclude the scholastic legacy of fiqh and its vast literature from the Shariah. In fact, it is the clear injunctions of the Quran and the Sunna that provide the nucleus of the Shariah. The parts of the Quran that consist of historical data and parables, for instance, are not included. The specific rules of the Quran and the Sunna—collectively known as the *nusus*, which are relatively small in number—represent the core of the Shariah. Shariah is a wider concept than fiqh, however; it comprises the totality of guidance that God has revealed to the Prophet Muhammad relating to the dogma of Islam: its moral values and its practical legal rules. Shariah thus comprises in its scope not only law but also theology and moral teaching. Dogmatic theology (*ilm al-kalam*) is primarily concerned with liberating the individual from belief in superstition and inculcating faith in God and a sense of enlightened conviction in the values of Islam. Morality (*ilm al-akhlaq*) educates the individual in moral virtue, the exercise of self-discipline and restraint in the fulfillment of natural desires. Fiqh is concerned with practical

The Shariah provides clear rulings on the fundamentals of faith and practice, including prayer, fasting, and other devotional matters. At the Haydar Mosque in Kuliab, Tadjikistan, devout Muslims prostrate themselves in prayer towards the Kaaba in Mecca.

Other devotional matters covered by the Shariah include burial. Outside a small mosque at Marbat, Oman, the graves of pious Muslims are aligned so that the deceased can rise and face Mecca on the Day of Final Judgment.

legal rules that relate to an individual's conduct. Fiqh is thus "positive" law, and although much of it is in common with the Shariah, it does not include general guidelines on morality and dogma that are not legally enforceable. Yet jurists agree about the primacy of morality and dogma in the determination of basic values. By comparison, fiqh is described as a mere superstructure and a practical manifestation of commitment to those values.

The Shariah provides clear rulings on the fundamentals of Islam: its basic moral values and practical duties, such as prayers, fasting, legal alms (*zakah*), the *hajj* (pilgrimage to Mecca), and other devotional matters. Its injunctions on what is lawful and unlawful (*halal* and *haram*) are on the whole definitive, and so are its rulings on some aspects of civil transactions (*muamalat*). But the Shariah is generally flexible with regard to most civil transactions, such as criminal law (with the exception of the prescribed punishments or *hudud*), government policy and constitution, fiscal policy, taxation, and economic and international affairs. In many of these areas the Shariah provides only general guidelines.

Fiqh is defined as the knowledge of the practical rules of the Shariah, which are derived from the Quran and the Sunna. The rules of fiqh are thus concerned with the manifest aspects of individual conduct. The practicalities of conduct are evaluated on a scale of five values: obligatory, recommended, permissible, reprehensible, and forbidden. The definition of fiqh also implies that the deduction of the rules of fiqh from the Quran and the Sunna is through direct contact with the source evidence and necessarily involves a certain measure of independent

reasoning and intellectual exertion (*ijtihad*). The ability to use the Quran therefore necessitates the knowledge of Arabic and a certain degree of insight and erudition that an "imitator," or one who memorizes the rules without understanding their implications, could not achieve. A jurist (*faqih*) who fulfills these requirements and has the ability to deduce the rules of the Shariah from their sources is a *mujtahid*, one qualified to exercise independent reasoning.

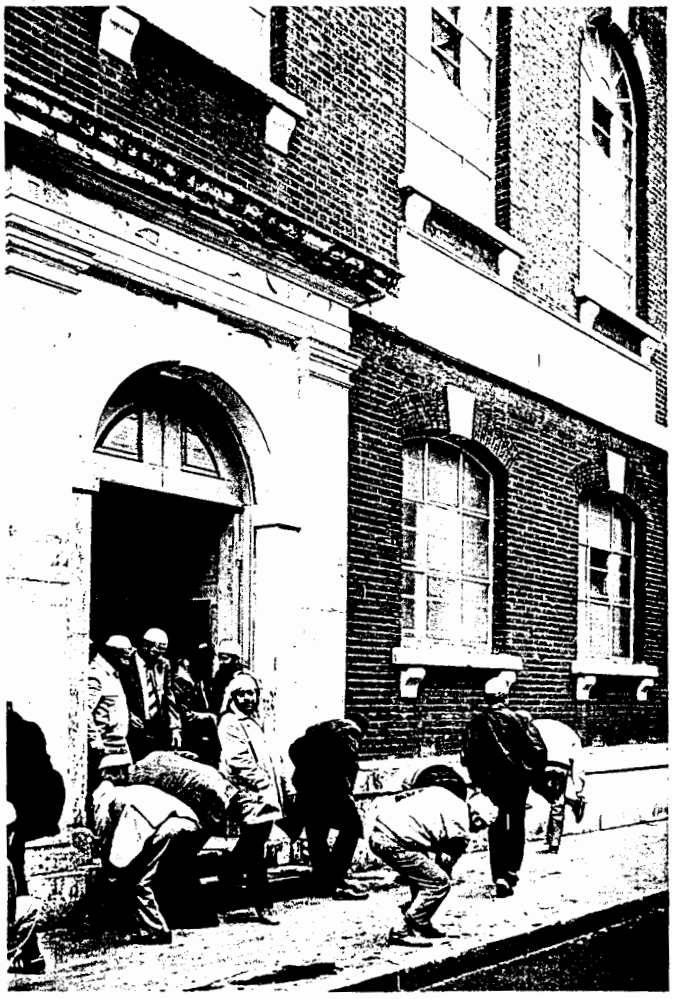
The rules of fiqh may be divided into two types. First, there are rules that are conveyed in a clear text, such as the essentials of worship, the validity of marriage outside the prohibited degrees of relationship, the rules of inheritance, and so forth. These are self-evident and therefore independent of interpretation. This part of fiqh is simultaneously a part of the Shariah. Second, there are rules that are formulated through the exercise of independent reasoning in that part of the Quran and the Sunna that is not self-evident. Because of the possibility of error, the rules that are so derived are not immutable. They are not necessarily an integral part of the permanent Shariah, and the mujtahid who has reason to depart from them in favor of an alternative ruling may do so without committing a transgression. Only when juristic opinion and independent reasoning are supported by general consensus (*ijma*) does that reasoning acquire the binding force of a ruling (*hukm*) of Shariah.

The schools of law vary in their treatment of the contents of fiqh. Broadly speaking, the body of law is divided into two main categories: devotional matters (*ibadat*) and civil transactions (*muamalat*). The devotional matters are usually studied under the six main headings of cleanliness, ritual prayer, fasting, the hajj, legal alms, and *jihad* (holy struggle); the schools of law do not vary much in their treatment of these subjects. Juristic differences among the schools occur mainly in the area of the civil transactions, which are generally studied under the five headings of transactions involving exchange of values, equity and trust, matrimonial law, civil litigation, and administration of estates. Crimes and penalties are often studied under a separate heading (*uqubat*) next to these two main categories. The most detailed exposition of the entire range of fiqh remains the thirty-volume *Kitab al-Mabsut* by Shams al-Din al-Sarakhsi (d. 1083).

## The History of Islamic Law

Islamic legal history is in a sense the history of fiqh rather than of the Shariah. The Shariah had a short history, as its development began and ended in just over two decades during the Prophet's mission in Mecca and Medina. Only the rudiments of fiqh were laid down during this period, and there was no distinction between the legal subject matter of Islam and its other parts at this early stage. *Fiqh* in this period referred to the knowledge of religion in general; the distinc-

tion that confined fiqh to practical legal rules was made by the *ulama* (religious scholars) of later periods. This was to a large extent stimulated by the documentation of *hadith* (a verified account of a statement or action of the Prophet Muhammad) and the extensive materials that were consequently made available for fresh inquiry and research. Legal historians have distinguished six periods in the development of fiqh. In the initial phase—the prophetic period (ca. 610–32 C.E.)—the Quran was revealed and the Prophet explained and reinforced it through his own teaching and practice, the Sunna. There was a general preoccupation with the Quran and the emphasis was not as much on law as on the dogma and morality of Islam. The legal rulings of the Quran, which were mainly revealed during the second decade of the prophetic mission, were primarily issue-oriented and practical. There was no need for speculative legal reasoning (*ijtihad*) simply because the Prophet himself provided definitive rulings on issues as and when they arose.



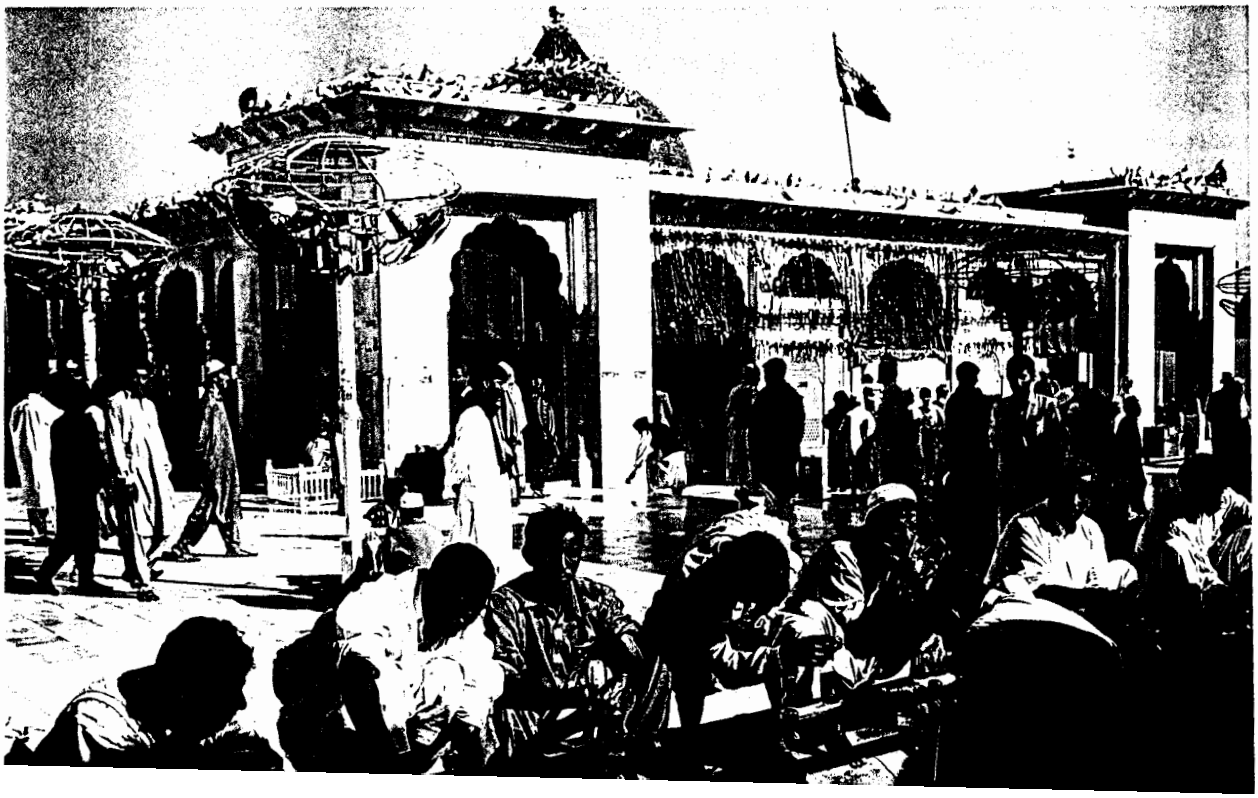
Devotional matters (*ibadat*), including cleanliness and ritual prayer, are treated much the same by all schools of law. For example, everyone must remove shoes before prayer. Here, a group of Muslim men put their shoes back on outside a London mosque as they return to their daily lives.

The second period of the development of fiqh—the era of the Prophet's Companions (ca. 632–61)—is one of interpretation and supplementation of the textual subject matter of the Shariah. In this period fiqh and ijtihad find their historical origins. The Companions of the Prophet took a rational approach toward the textual materials—the Quran and the Sunna. Their understanding and interpretation of the texts were not confined to the meaning of words; rather, the Companions sought to understand their underlying rationale, effective cause, and purpose. The Companions' interpretations are generally considered authoritative, not only because they were the direct recipients of prophetic teachings but also because of their participation and insight into the Quran's phenomenology (*asbab al-nuzul*). The Companions frequently resorted to personal reasoning and consultation in the determination of issues. The first four

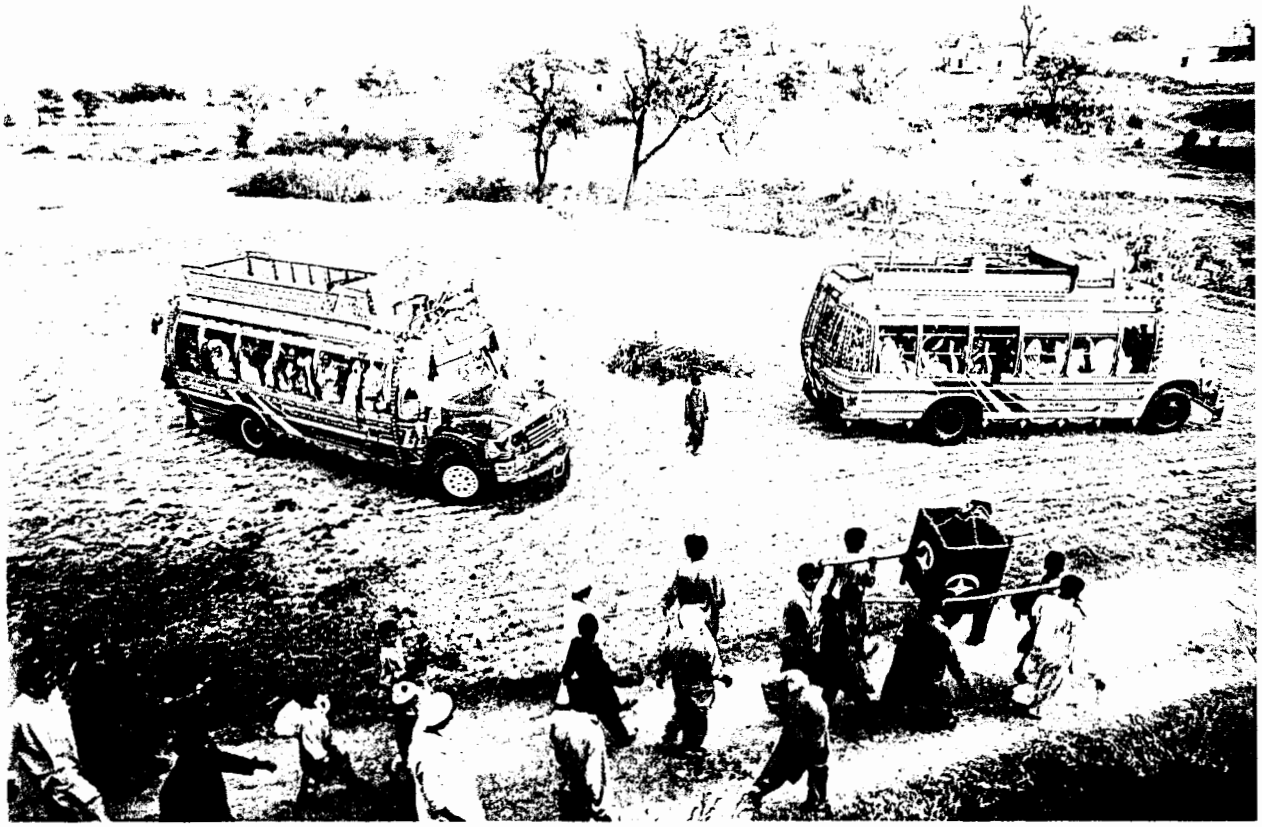
caliphs—Abu Bakr, Umar ibn al-Khattab, Uthman ibn Affan, and Ali ibn Abi Talib, collectively known as the "rightly guided caliphs"—are particularly noted for their interpretations.

The third phase in the development of fiqh, known as the era of the successors, began with the Umayyads coming to power around 661 and ended with that dynasty's demise in 750. Because of the territorial expansion of the Umayyad state, new issues arose that stimulated significant developments in fiqh. This period is marked by the emergence of two schools of legal thought that left a lasting impact on the subsequent development of fiqh: Traditionists (Ahl al-Hadith), who were centered mainly in Mecca and Medina in the Hejaz, and the Rationalists (Ahl al-Ray), who were active in the Iraqi cities of Kufa and Basra. Whereas the Traditionists relied mainly on textual authority and were averse to the use of personal opinion (*ray*), the Rationalists were inclined, in the absence of a clear text, toward a more liberal use of personal reasoning. Although the Traditionists opposed the approach, the Rationalists maintained that the rules of the Shariah, outside the sphere of devotional matters, pursued objectives and were founded in causes that provided the jurist and *mujtahid* with guidelines for further inquiry and research. The secession of the Shiites from the main body of Muslims, the Sunnis, which took place as a result of disagreement over political leadership, led to the emergence of the Shiite school of law during this period. The Shiites maintained that Ali, the cousin and son-in-law of the Prophet, was the rightful caliph and leader, but that his predecessors, Abu Bakr, Umar, and Uthman, denied Ali that right. The Shii school advocated doctrines that are significantly different from those of their Sunni counterparts.

The next two centuries (ca. 750–950), known as the era of independent reasoning, marked the fourth phase in the history of fiqh. This phase saw major developments that were later manifested in the emergence of the legal schools



All schools require ritual ablution (*wudu*) before prayer, and the Muslim must wash the face, hands and arms, head, and feet. Most congregational mosques provide water for washing. Here men are washing before entering the mosque.



Civil transactions (*muamalat*), including matrimonial law and civil litigation, vary significantly according to the different schools of law. This scene shows the bride carried to the groom's car in a traditional doli as she begins her married life with his family in Kashmir.

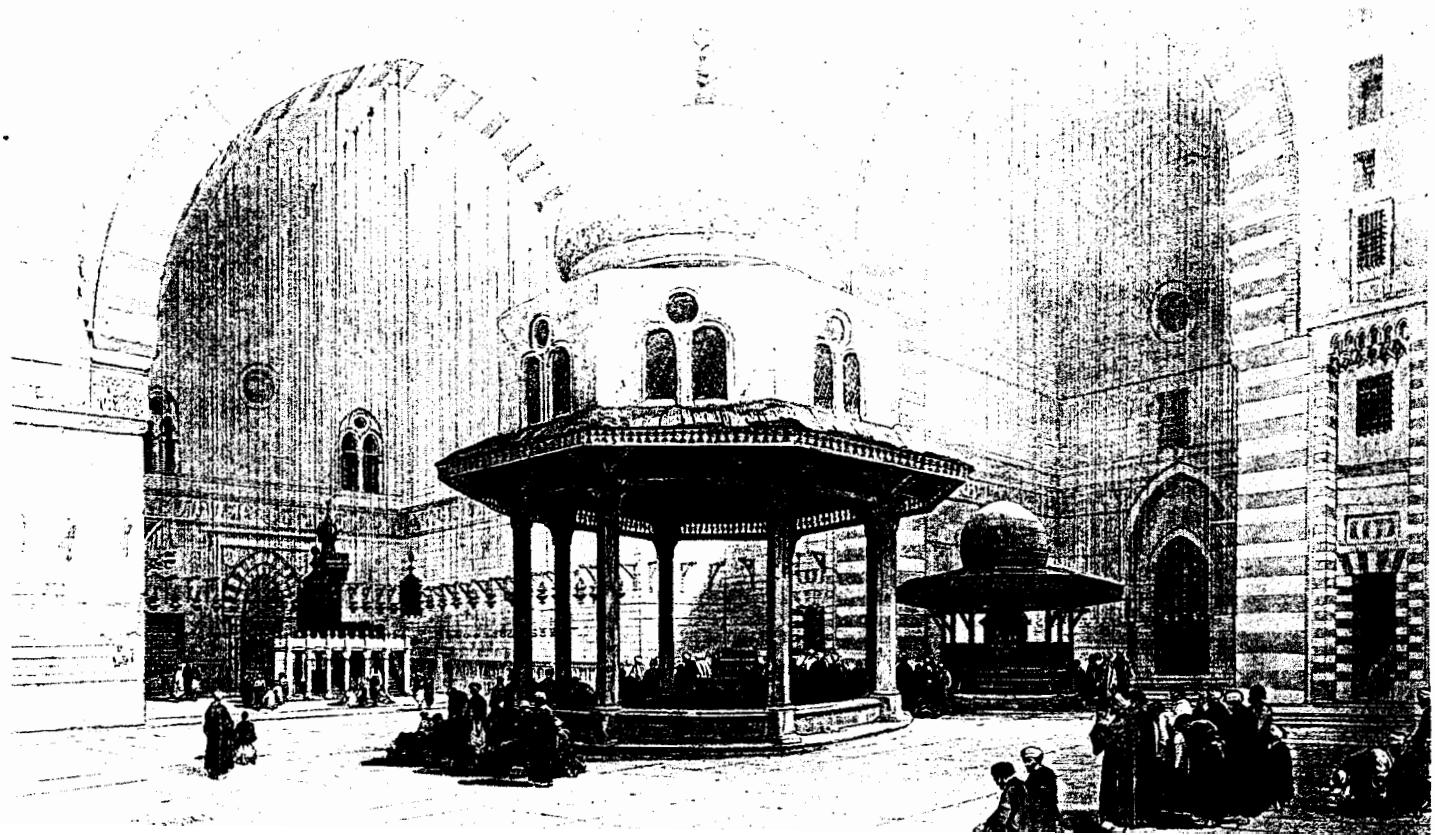
that have survived today: the Hanafi, Maliki, Shafii, and Hanbali. The Hanafi school, named after Abu Hanifah al-Numan ibn Thabit (699–767), presently has the largest following of all the surviving schools, in part because of its official adoption by the Ottoman Turks in the early sixteenth century. Abu Hanifah advocated legal reasoning by analogy (*qiyas*), which gained general acceptance over time, but his liberal recourse to personal opinion and juristic preference (*istihsan*) were criticized by the Traditionists. To this day the Hanafi school has retained its relatively liberal stance. The Maliki school, founded by Malik ibn Anas al-Asbahi (ca. 715–95), led the Traditionist movement in Mecca and Medina and advocated the notion that the Medinan consensus (*ijma*) was the only valid consensus. Despite its traditionalist leanings, however, the Maliki school over time has embraced a number of important doctrines that are inherently versatile, and its jurisprudence is in many ways more open than that of the other legal schools. It is the only school, for instance, that has accepted almost all the subsidiary sources and proofs of the Shariah, about which the other schools have remained selective (accepting some and rejecting or expressing reservations about others). The Maliki school is predominant today in Morocco, Algeria, Tunisia, northern

Egypt, Sudan, Bahrain, and Kuwait; the Hanafi school prevails in Turkey, Pakistan, Jordan, Lebanon, and Afghanistan.

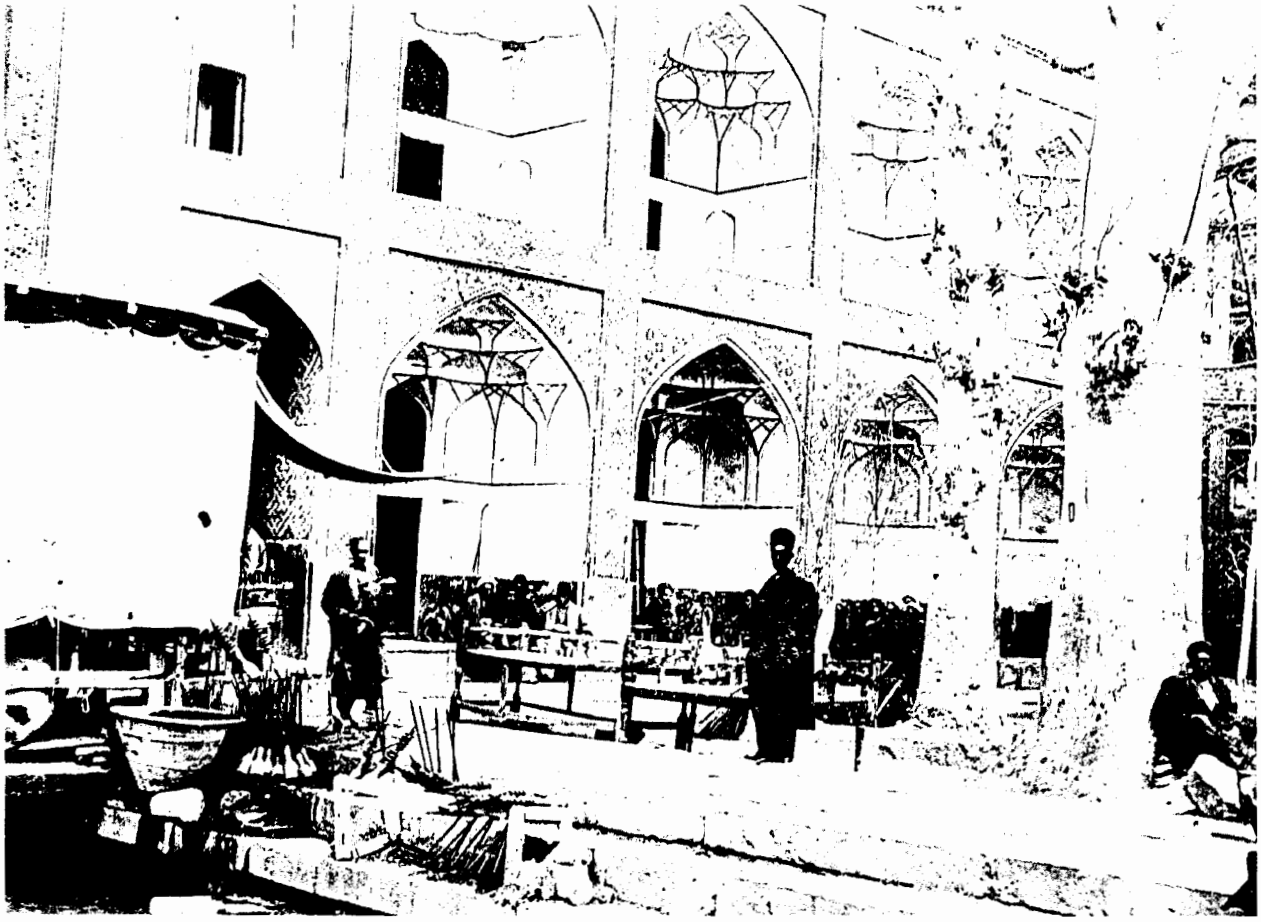
Muhammad ibn Idris al-Shafii (767–820) is also a leading figure in the Traditionist camp, but he tried to reconcile the various trends and strike a middle course between the Traditionists and Rationalists. The controversy between the Traditionists and Rationalists had by al-Shafii's time accentuated the need for methodology. Al-Shafii saw the need to articulate the broad outline of the legal theory of the sources, the *usul al-fiqh*. He spent the last five years of his life in Egypt, where he found the customs of Egyptian society so different from those of Iraq that he changed many of his legal verdicts. The Shafii school is now prevalent in southern Egypt, the Arabian Peninsula, East Africa, Indonesia, and Malaysia, and it has many followers in Palestine, Jordan, and Syria. Even al-Shafii's degree of emphasis on tradition and his strong advocacy of the Sunna did not satisfy the uncompromising Traditionists, who preferred not to rely on human reason and chose instead to base their doctrines as much as possible on the precedents established in the Quran and the hadith. This was the avowed purpose of the two new schools that emerged in the ninth century. The first (and the only successful) of these was the Hanbali school, founded by Ahmad ibn Hanbal (780-855). The other was the Zahiri school of Dawud ibn Ali al-Zahiri (819-91), now extinct. The number of ibn Hanbal's followers declined until the eighteenth-century Wahhabi puritanical movement (named after the scholar Muhammad ibn Abd al-Wahhab) in the Arabian Peninsula gave it a fresh impetus. The Hanbali school is now predominant in Saudi Arabia, Qatar, and Oman.

The fifth phase in the formative history of fiqh began around 950. This period is characterized by the institutionalization of the dominant schools, with emphasis not on new developments but on following precedent (*taqlid*). The jurists

During the era of independent reasoning (*ijtihad*), four major schools of Islamic law developed—the Hanifi, Maliki, Shafii, and Hanbali. Most *madrasas*, or theological colleges, are devoted to a single school, but occasionally all four were included in a single building. The huge funerary complex founded by the Mamluk Sultan Hasan in the mid-fourteenth century in Cairo, seen in David Roberts' nineteenth-century lithograph, has a cruciform congregational mosque with a madrasa for each of the four schools in the corners of the courtyard.



occupied themselves with elaboration and commentaries on the works of their predecessors. By far the longest phase, this period lasted for about nine centuries and witnessed the downfall of the Abbasid and Ottoman Empires, the expansion in the military and political powers of the West, and the industrial revolution and colonial domination of Muslim lands by European powers. The colonial powers propagated their own doctrines and legal codes in almost every area of the law. As a result, fiqh lost touch with social reality and underwent a sustained period of stagnation. Original thinking and direct recourse to the sources of the Shariah, which had characterized the first three centuries of development, were no longer encouraged. A climate of opinion prevailed that the early predecessors had exhaustively used and developed the resources (the Quran and the Sunna), and the digested version of fiqh that they had produced was to be strictly followed. Imitation and following precedent thus gained ground, and the so-called "closure of the gate of ijtihad" followed.



*Madrasas* were initially established by Sunnis to combat the spread of Shiism, but with time, Shiites established madrasas of their own. The Madar-i Shah Madrasa in Isfahan, seen in this early photograph by Captain G. C. Rigby, was built by the Safavid Shah Husayn (1694–1722). Since the Islamic Revolution, it has been returned to its original function as a theological college.

The sixth and final phase in the development of fiqh began at the turn of the twentieth century. It is marked by less emphasis on precedent and greater emphasis on original thinking and the quest to make the Shariah once again relevant to the social reality and experience of contemporary Muslims. The revivification of fiqh and its necessary adjustment to respond to the prevailing needs of society is generally seen as an important component of the Islamic resurgence of the recent decades.

A large number of Sunni jurists have acknowledged the so-called "closure of the gate of ijtihad" and the onset of imitation around the mid-tenth century. The Shiite jurists have held, alternatively, that ijtihad is a collective obligation of all Muslims in the absence of the imam (the divinely appointed leader and successor of Muhammad). Independent reasoning is thus viewed not simply as a meritorious endeavor that might succeed or fail but as an effort to reach the highest possible degree of objective truth in the absence of the infallible imam. This effort must constantly be renewed in the hope of coming ever closer to objective truth. Intellectual exertion thus remains an open process until the return of the imam, who alone can offer certainty and truth. Furthermore, the Shiite imams have gone on record to instruct their disciples to remain diligent in ijtihad, especially regarding the implementation of the general principles of Shariah. In time, Shiite jurisprudence adopted the notion that a fully qualified *mujtahid* (one qualified to exercise independent reasoning) is a representative (*naib*) of the imam and performs the functions of the imam

Before the establishment of *madrasas*, mosques were the traditional setting for teaching and learning, and much instruction still takes place in mosques. Traditionally, the teacher sits against a column or wall surrounded by his students, as here at the al-Aqsa Mosque in Jerusalem.

The mosque of al-Azhar in Cairo, founded under the Fatimids in the tenth century, became a major center of learning in the Arab world. The curriculum there was reformed at the turn of the twentieth century, the time depicted in this photograph, and legal opinions issued by the shaykh there exemplify one type of independent reasoning (*ijtihad*).

regarding judgment and administration of the people's affairs. The leading Shiite mujtahids who expounded Shiite principles included Seyyed Morteza Alam al-Huda (d. 1060), Abu Abd Allah al-Mufid (d. 1044), Muhammad ibn Hassan al-Tusi (d. 1067), and Morteza al-Ansari (d. 1864). Morteza al-Ansari's two major words, *Faraid al-Usul* and *Makasib*, are currently used as textbooks on Shiite law.

In modern times legal interpretation or reasoning has occurred in the following three ways: statutory legislation, judicial decision and learned opinion (*fatwa*), and scholarly writings. Instances of legislative interpretation, which Noel Coulson referred to as "neo-ijtihad," can be found in the modern reforms of family law in many Muslim countries, particularly with reference to polygyny and divorce, both of which have been made contingent upon a court order, and therefore are no longer the unilateral privilege of the husband. Current reformist legislation on these subjects derives some support from the jurists' doctrines of the Maliki and Hanafi schools, but these reforms are essentially based on novel interpretation of the Quran's relevant portions. Numerous instances of independent reasoning are also found in the views of the ulama, such as the collections of published opinions of Muhammad Rashid Rida in the 1920s and those of the late shaykh of Azhar, Mahmud Shaltut, in the 1950s. In

the 1967 case of *Khursid Bibi* vs. *Muhammad Amin*, the supreme court of Pakistan's decision to validate a form of divorce, known as *khula*, that can take place at the wife's initiative, even without the consent of the husband, can be cited as an example of judicial ijtihad. Another example of ongoing reinterpretation is the scholarly contribution of the Egyptian scholar Yusuf al-Qaradawi, who validated air travel by women unaccompanied by male relatives. According to the rules of fiqh that were formulated in premodern times, women were not permitted to travel alone. Al-Qaradawi based his conclusion on the analysis that the initial ruling was intended to ensure women's physical and moral safety, and that modern air travel fulfills this requirement. He further supported this view with an analysis of the relevant hadiths on the subject and arrived at a ruling better suited to contemporary conditions.

## Sources of Shariah: The Quran, the Sunna, and Independent Reasoning

As noted earlier, the sources of the Shariah are of two types: revealed and nonrevealed. There are only two revealed sources—first, the Quran; second, the teaching and exemplary conduct (Sunna) of the Prophet Muhammad, including his sayings, acts, and tacit approval (or lack of condemnation) of the conduct of his Companions and some of the customs of Arabian society. The authority of the Sunna as a source of Shariah as next to the Quran is indicated in the Quran itself. Some disagreement, however, prevailed over the precise meaning and authority of the Sunna until the theologian and jurist al-Shafii addressed the issue in the early ninth century. The legal theory that al-Shafii articulated underscored the normative status of the Sunna as a source of revelation that explained and supplemented the Quran. The nonrevealed sources of Shariah are generally founded in juristic reasoning (*ijtihad*). This reasoning may take a variety of forms, including analogical reasoning (*qiyas*), juristic preference (*istihsan*), considerations of public interest (*istislah*), and even general consensus (*ijma*) of the learned, which basically originates in ijtihad and provides a procedure by which a ruling of juristic reasoning can acquire the binding force of law. Analogy and consensus have been generally recognized by the vast majority of ulama, but there is disagreement over the validity and scope of many of the rational proofs that originate in ijtihad.

The Quran, by its own testimony, consists of the words of God as recited in Arabic to the Prophet Muhammad through the angel Gabriel (Quran 26:193). Much of the Quran was revealed through actual events encountered by the Prophet, and questions asked and answered by him. The Prophet also used the Quran as a basis of his own teaching and adjudication. Nevertheless, the Quran

The Quran, God's word as revealed to the Prophet Muhammad, is the basis of Muslim law. The text is divided into 114 chapters of unequal length. Eighty-five chapters, mostly short, were revealed in Mecca, as shown by the word Mecca written in gold in the margin near the gold chapter heading in this copy of the Quran transcribed by the famous calligrapher Ibn al-Bawwab at Baghdad in 1000–1001.

is neither a legal nor a constitutional document, although legal materials occupy a small portion of its text; less than 3 percent of the text deals with legal matters. The legal contents of the Quran were mainly revealed following the Prophet's migration from Mecca to Medina, where he established a government and the need therefore arose for legislation on social and governmental issues. The contents of the Quran are not classified according to subject. Its pronouncements on various topics appear in unexpected places and in no particular thematic order. This fact has led many thinkers to conclude that the Quran is an indivisible

whole, and its legal parts should not be read in isolation from its religious and moral teachings.

Of the 350 legal verses in the Quran, known as *ayat al-ahkam*, close to 140 relate to dogma and devotional matters, including such practical religious duties as ritual prayer, legal alms and other charities, fasting, pilgrimage, and so forth. Another seventy verses are devoted to marriage, divorce, paternity, child custody, inheritance, and bequests. Rules concerning commercial transactions, such as sale, lease, loan, usury, and mortgage, constitute the subject of another seventy verses. There are about thirty verses on crimes and penalties, another thirty on justice, equality, evidence, citizens' rights and duties, and consultation in government affairs, and above ten on economic matters. The ulama are not, however, in agreement on these figures, as calculations of this nature tend to differ according to the criteria and approach of one's inquiry. It is possible, for instance, to derive a legal ruling from the parables and historical passages of the Quran. Some of the earlier rulings of the Quran were also abrogated and replaced because of new circumstances, although the scope of these abrogations and their precise import is a matter of disagreement among scholars.

As previously noted, the ulama unanimously believe that the normative teachings (the Sunna) of the Prophet are a source of Shariah and that the Prophet's ruling on what is lawful and unlawful (*halal wa haram*) stands on equal footing with the Quran. The words of the Prophet, as the Quran declares, are divinely inspired (Quran 53:3), and obedience to them is every Muslim's duty (Quran 4:80; 59:7). Thus the Prophet's words were normative for those who actually heard them. Subsequent generations of Muslims, who have received the Prophet's words through various verbal and written records, however, had to ascertain their authenticity before accepting them as normative. The evidence of authenticity may be definitive, because it relies on numerous sources of recurrent and continuous testimony (*tawatur*), or it may consist of solitary reports that may not appear to be entirely reliable. One of the first kind of hadith (known as *mutawatir*) is a verbal mutawatir, a word-for-word transmission of what the Prophet said. This is very rare. There are no more than ten such hadiths. Another kind of hadith is known as the *conceptual mutawatir*, wherein the concept is taken from the Prophet but the words are supplied by a narrator. When the reports of a large number of transmitters of hadith concur in their purport but differ in wording, this is considered as mutawatir. This kind of mutawatir is quite frequent and is found in reference to the acts and sayings of the Prophet that explain the essentials of the faith, the rituals of worship, the rules that regulate the application of certain punishments, and so forth. The Companions of the Prophet and subsequent gen-

erations of Muslims have complied with the Prophet's teachings on these matters, and vast numbers of people throughout the ages have consistently adhered to them. Many hadiths on what is lawful and unlawful, as well as those that explain and supplement the injunctions of the Quran, are also classified as this type of mutawatir.

The Sunna relates to the Quran in various capacities. It may consist of rules that merely corroborate the Quran, it may clarify ambiguous parts of the Quran, or it may qualify and specify general rulings of the Quran. These three varieties comprise among them the bulk of the Sunna, and the ulama are in agreement that they are integral and supplementary to the Quran. The Sunna may also consist of rulings on which the Quran is silent, in which case the Sunna represents an independent source of Shariah. There are a number of hadiths that fall under this category; this type of Sunna, known as "Founding Sunna" (*Sunna muassisa*), is the main argument in support of the generally accepted view that the Sunna is not only an explanation and supplement to the Quran, but it is also an independent source of the Shariah.

For the Sunnis, the possibility of divine revelation (*wahy*) ended with the death of the Prophet. For the Shiites, however, divine revelation continued to be transmitted after the Prophet's death, through the line of their recognized leaders or imams. Shiite jurists have thus maintained that in addition to the Quran and the Sunna, the pronouncements of their imams constituted divine revelation and therefore binding law. This is reflected in the Shiite definition of *Sunna*, which under Shiite law includes the sayings, acts, and tacit approvals of the Prophet *and* the imams. The same doctrinal outlook is reflected in the Shiite perception of *ijma* (consensus), which is not possible without the imam's approval. In other words, the consensus of the jurists demonstrates the views of the imams. Consensus thus becomes a part of the Sunna as well as a means of discovering it. In some cases, this means that consensus becomes a carrier of the decrees of the imam. These are undoubtedly important doctrinal differences, yet since the last imam (according to the majority of Shiites) went into occultation and "disappeared" in 874, Shiite jurists have carried the imam's mantle and have played a similar role to that of their Sunni counterparts in expounding and interpreting the Quran and the Sunna.

Another source of Shariah is *ijtihad*, which literally means "striving." It is defined as exertion by a qualified scholar to the best of his or her ability to deduce the ruling of a particular issue from the evidence found in the sources. Unlike the revelation of the Quran and the Sunna, which ended with the Prophet's death, juristic reasoning continues to be the principal source and instrument that keeps the law consistent with the realities of social change. It is a collective obligation (*fard kifai*) of the Muslim community, meaning that the obligation has been met if

performed sufficiently by at least one jurist (*mujtahid*) qualified to exercise independent reasoning. It becomes a personal obligation (*fard ayn*) of all mujtahids when it appears that the obligation has not been met and there is fear that justice may be lost if ijtihad is not immediately attempted.

Historically, analogical reasoning (*qiyas*) represented the most common—according to the theologian al-Shafii, the only valid—form of ijtihad. As a principal mode of ijtihad, analogy ensured the conformity of juristic opinion with the textual rulings of the Quran and the Sunna, which it sought to extend to similar cases. Personal reasoning plays a role in the construction of analogy through the identification of an effective cause (*illah*) beween an original case and a new case. For example, the Quran (24:4) calls for penalizing anyone who slanderously accused chaste women of adultery by eighty lashes of the whip. This punishment was then analogically extended to those who accused innocent men of the same offense because of the commonality of the effective cause—namely of defending the honor of an innocent person—between the original case (women) and the new case (men).

Analogy was thus seen to be the surest way of developing the law within the guidelines of the text. But analogy was not altogether devoid of difficulty, especially in cases in which the analogical extension of a given ruling to a similar but not identical situation could lead to undesirable results. Therefore, some felt the need for a new formula to overcome the rigidities of analogy. The Hanafis developed the doctrine of juristic preference (*istihsan*), which enabled the jurist to search for an equitable solution in the event in which strict analogy compromised the ideals of fairness and justice. Al-Shafii, while strongly in support of analogy, totally rejected the notion of juristic preference, considering it to be no more than an arbitrary exercise in questionable opinions.

Shiite law does not recognize analogy as a source of law. The sixth Shiite imam, Jafar al-Sadiq (699–765), equated such analogical reasoning with pure conjecture and thus rejected it. Shiite law recognizes human reason as a source of law and a means of discovering the Shariah. Reason can thus determine that for certain issues a permissive or prohibitive law necessarily exists. For example, if the revealed law is silent on a certain matter, reason may determine, by reference to the general principles of Shariah and the best interest of human beings, that a certain law exists concerning that matter, especially when jurists realize that the Shariah simply cannot remain indifferent concerning the matter. Addiction to opium was not an issue during the time of the Prophet, for example, and no ruling was issued on it. Yet experience shows with certainty that addiction to opium causes harm and corruption. Because the Shariah forbids corruption, through the application of reason, consumption of opium is therefore considered forbidden. In this manner, reason tells Muslims that when

something is forbidden by law, the means toward procuring it is also forbidden. Human reason thus becomes a proof and source of the Shariah and an important tool in the service of interpretation and ijtihad. Compared with analogical reasoning, human reasoning is a more open concept—it is not encumbered by the sort of technicalities that are involved in analogical reasoning. Analogies cannot be constructed without the prior existence of an original case, a ruling (*hukm*) in the sources, and an effective cause that links the original case to the new case. Human reasoning basically consists of unrestricted reasoning, which does not depend on such requirements. For example, the Quran prohibits alcohol because it is an intoxicant. This prohibition can be extended, by analogy, to narcotic drugs. But no such analogy can be extended to a drug that only causes lapse of memory or blurs the eyesight, for want of the effective cause, intoxication. But these can be prohibited by recourse to human reasoning.

Although the leading schools have also recognized considerations of public interest (*istislah*) as a source of law, they have generally tended to impose a variety of conditions on it because of its strong utilitarian leanings. Only the theologian Malik advocated it as a source of law in its own right, which is why the considerations of public interest are seen as a Maliki contribution to the legal theory of the sources, the *usul al-fiqh*. Whereas analogy operated within the given terms of the existing law, and juristic preference basically corrected the rigidities of analogy, public interest was not bound by such limitations. Furthermore, it vested the ruler and mujtahid with the initiative to take all necessary measures, including new legislation, to secure what he considered to benefit the people.

Almost every major school of law proposed a principle or method to regulate independent reasoning and to ensure its conformity with the overriding authority of divine revelation. Whereas some ulama, such as the Zahiris, confined the sources of law to the Quran, the Sunna, and consensus, the Hanafis added analogy, juristic preference, and custom, and the Malikis added public interest and the notion of "blocking the means" (*sadd al-dharai*), which ensured the consistency of means and ends with the Shariah by blocking the attempt to use a lawful means toward an unlawful end. Examples of this include banning the sale of arms at a time of conflict or forbidding a sale that may merely disguise a usurious transaction. This practice also provides preventive measures that are taken even before the actual occurrence of a feared event, such as banning an assembly that is likely to lead to violence. Although some of the obvious applications of this doctrine were generally accepted, the Maliki school has applied it more widely than most. The Shafii school contributed the doctrine of *istishab* (presumption of continuity), which safeguards continuity and predictability in law and in court decisions by proposing that facts and rules of

law and reason are presumed to remain valid until there is evidence to establish a change. For example, certainty may not be overruled by doubt, and an unproven claim should not affect the basic presumption of innocence and continuity of the existing rights of the people under the Shariah. These doctrines are all designed, each in its respective capacity, to regulate independent reasoning and to provide formulas for finding solutions to new issues. The methods proposed by these doctrines also ensure the conformity of human interpretation and application to the basic principles and objectives of the Shariah. The idea that the law must evolve and develop within the framework of a certain methodology lies at the root of these doctrines.

Historically, ijtihad has been perceived as a concern primarily of the individual scholar and mujtahid. But in modern times, ijtihad has become a collective endeavor that combines the skills and contributions not only of the scholars of Shariah, but of experts in various other disciplines, because acquiring a mastery of all the skills that are important to society is difficult for any one person. Ideally, independent reasoning should be combined with the Quranic principle of consultation (*shura*), making it a consultative process, preferably as an integral part of the workings of the modern legislative assembly. Ijtihad has also been seen in the past as a juristic concept, a preserve of the jurist to the exclusion of specialists in other disciplines. But as a method by which to find solutions to new issues, ijtihad should be exercised by the scholars of Shariah as well as by experts in other disciplines, provided that those who attempt this independent reasoning acquire mastery of the relevant data, the Quaran, and the Sunna. There is thus no reason why experts in Islamic economics and medicine, for example, could not carry out ijtihad in their own fields.

## Scholastic Contributions to Legal Thought

Hanafi application and interpretation of law is distinguished by its rationalist tendency and to some extent by its theoretical leanings in that it deals not only with actual issues but also with theoretical problems that are based on mere supposition. Because he was a merchant, Abu Hanifah's contributions to the law of commercial transactions are particularly noted. Abu Hanifah's legal thought is also distinguished by his emphasis on personal liberty and his reluctance to impose unwarranted restrictions on it. He thus maintained that neither the community nor the government is entitled to interfere with the personal liberty of the individual as long as the individual has not violated the law. Hanafi fiqh thus entitles a woman to conclude her own marriage contract without the consent of a guardian, whereas the other schools have stipulated the consent of a guardian as a requirement of valid marriage. The Hanafis have reasoned that

the Quran (4:6) has endowed the adult female with full authority to manage her own financial affairs. This ruling has been extended by way of analogy to marriage. The majority of jurists of the leading schools, however, have considered this an "analogy with a difference" (*qiyas ma al-fariq*), which treats two different things (property and marriage) on the same footing, and therefore invalid. But Abu Hanifah called for equality (*kafaa*) in marriage and entitled the woman's guardian to seek annulment of a marriage in the event of a wide discrepancy in the socioeconomic status of the spouses. Equality is not a requirement according to the other leading legal schools simply because the guardian's consent is, according to them, a prerequisite of a valid marriage contract. Moreover, Abu Hanifah refused to validate interdiction of the foolish (*safih*) or the insolvent debtor on the analysis that restricting the freedom of these individuals is a harm greater than the financial loss that might otherwise occur. Abu Hanifah also held that no one, including a judge, may impose restrictions on an owner's right to the use of his or her property, even if that property inflicted harm on another person, provided that the harm is not exorbitant. Furthermore, because the judge cannot restrict the owner's liberty, the owner would not want to restrict his or her own liberty either. A charitable endowment (*waqf*) of one's personal property is consequently not binding on the owner, nor on his or her legal heirs. In other words, the owner or dedicator of endowed property is at liberty to revoke the endowment and thereby remove the self-imposed restriction on his or her right of ownership. The other legal schools disagree, mainly because they consider a charitable endowment as a binding commitment that the dedicator of the property must observe, once it has been duly instituted.

In one of his widely quoted statements, which represents a defining principle of the Hanafis, Abu Hanifah declared: "Whenever the authenticity of a hadith is ascertained, that is where I stand." A more general statement, also attributed to Abu Hanifah, is: "When you are faced with evidence, then speak for it and apply it." Consequently, it is evident that on occasions Abu Hanifah's disciples have differed with some of the rulings of the imam on the basis of newly uncovered evidence, often stating that the imam himself would have followed it had he known of it. A ruling by a disciple that differs from that of the imam is thus still regarded as a ruling of the school, sometimes in preference to that of the imam. Another saying of Abu Hanifah that represents another Hanafi principle is: "No one may issue a verdict on the basis of what we have said unless he ascertains the source of our statement." These eminently objective guidelines were upheld during the era of ijtihad, but the ulama of subsequent periods departed from the spirit of that guidance. The early nineteenth-century Hanafi jurist Ibn Abidin thus stated the new position of the school in the following terms: "A

jurist of the later ages may not abandon the rulings of the leading imams and ulama of the school even if he sees himself able to carry out ijtihad, and even if he thinks that he has found stronger evidence. For it would appear that the predecessors have considered the relevant evidence and have declared their preference." The only exception here is made for "situations of necessity," in which case the jurist may give a different verdict to that of the established ruling of the school, if this provides a preferable solution to an urgent issue that is not adequately covered by an established precedent of the school.

The renowned work *Al-Muwatta* (The Straight Path) of the eighth-century theologian Malik ibn Anas al-Asbahi is the earliest complete work of fiqh on record. It relies heavily on the hadith, so much so that many have considered it to be a work of hadith. Because it uses the hadith as basic evidence for juristic conclusions, however, it is rightly classified as a work of fiqh. Notwithstanding his leading position in the Traditionist camp (Ahl al-Hadith), Malik relied extensively on opinion (*ray*)—in some cases he did so even more than representatives of the other leading schools. Malik is the chief source of the two important doctrines of public interest and blocking the means, both of which are eminently rational and rely mainly on personal reasoning. Maliki jurisprudence also attempted to forge a closer link with the practicalities of life in Medina and attached greater weight to social customs than other jurists did. This is borne out by its recognition of the Medinan consensus as a source of law, a concept that is advanced only by the Maliki school. Malik thus validated, on this basis, using the testimony of children in cases of injury, provided they have not left the scene of the incident. He also held that the wife of a missing husband may seek judicial separation after a four-year waiting period. Maliki law also recognized judicial divorce on the grounds of a husband's injurious treatment of his wife. The majority ruling entitles the wife to judicial relief, whereby the court may punish the husband; Maliki law ruled that if the treatment in question amounted to injury (*darar*), the wife could request dissolution of the marriage on that basis. Another Maliki contribution in this area is a type of divorce known as *khul*, in which the wife proposes dissolution of marriage against a financial consideration, usually by returning the dowry she received from her husband. Because the Quran validates khul (2:229), it is recognized by all the legal schools, but it can only be finalized with the husband's consent. Maliki fiqh took this a step further by ruling that if there are irreconcilable differences the court may finalize the divorce even without the husband's consent. By the late twentieth century the Maliki law of divorce had generally been adopted in the reformist legislation of many Muslim countries.

Muhammad ibn Idris al-Shafii's impact, as founder of the Shafii school of law, on the development of Shariah is most noticeable in the area of the methodol-

The Maliki school of law, which is prevalent in North Africa, prohibits an individual from appointing himself the administrator of a pious endowment, and most madrasas there were sponsored by the ruler, the only person who could afford such large sums. The Ben Yusuf Madrasa at Marrakesh, the largest in the Maghreb, was founded by the Saadian ruler Abdallah al-Ghalib in 1564–65.

ogy of law. His contribution is manifested by his pioneering work, the *Risalah*, in which he articulated the legal theory of *usul al-fiqh*, which consequently emerged, around the early ninth century, as one of the most important disciplines of learning in the history of Islamic scholarship. Al-Shafii's role in articulating the methodology of law has often been compared with that of Aristotle in logic. He maintained that the Sunna was a logical extension of the Quran and vindicated the exclusive authority of the prophetic Sunna as a source of Shariah next to the Quran. Al-Shafii's vision of the basic unity of the revealed sources came close to saying that rejecting the Sunna also amounted to rejecting the Quran, and that accepting the one and rejecting the other was untenable. He took his teacher, the theologian Malik, to task for placing undue emphasis on the Medinan consensus and the precedent of the Prophet's Companions at the expense of the Sunna of the Prophet.

In its general orientation Shafii law takes an intermediate posture between the Traditionist stance of the Maliki school and the pragmatism of the Hanafis. Al-Shafii took an objective stand on issues at a time when the Traditionists and Rationalists were engaged in bitter controversies. He was critical of Malik's validation of unrestricted public interest and of Abu Hanifah's frequent concession to specific at the expense of general principles. Al-Shafii's approach to the interpretation of contracts and verification of their validity was almost entirely based on the form rather than the intent of a contract. He thus overruled inquiry into the intention of the parties, even in circumstances that might arouse suspicion. For example, a man is thus within his rights in buying a sword, even if he intends to kill an innocent person with it. A man may likewise buy a sword from someone he saw using that sword as murder weapon. Contracts and transactions are therefore to be judged by their obvious conformity to the law, not by a mere suspicion that they may have violated it. Al-Shafii thus understood the Shariah to be concerned with the evident manifestation of human conduct and maintained that the judge and jurist were not under duty to inquire into the hidden meaning of the text or into the thoughts and motives of individuals. This reliance on the manifest form of conduct, contracts, and transactions is not peculiar to al-Shafii, as the Hanafis have also shown the same tendency, but al-Shafii exhibited it more frequently than most.

Al-Shafii maintained that a jurist should not hesitate to change his previous verdict (*fatwa*) if that would make a better contribution to the quest for truth. Thus, it is noted that he frequently changed his verdicts, and he sometimes recorded different rulings on the same issue. If, for example, a man deceives a woman by presenting her with a false family pedigree, the man is liable to a deterrent (*tazir*) punishment, such as being whipped, imprisoned, or fined. Then two additional views are recorded on the same issue from the imam and neither is given prefer-

ence. The first view entitles the wife to choose either to continue the marriage or to separate. The second view says that the marriage is null and void.

Notwithstanding the common perception or stereotype of the Hanbali school as the most restrictive of the leading legal schools, Hanbali jurisprudence is in some respects more liberal than most. This is indicated by its extensive reliance on considerations of public interest. The imam ibn Hanbali issued a verdict, for example, that permitted compelling the owner of a large house to give shelter to the homeless. He also validated compelling workers and craftspeople who join together to deprive the public of their services to continue to provide those services at a fair wage to avoid inflicting hardship on society. The Hanbali school also takes a considerably more open view of the basic freedom of contract than other schools do. The legal schools differ on whether the norm in contract is permissibility, prohibition, or an intermediate position between the two. The majority tend to be restrictive in maintaining that the agreement of parties creates the contract, but the contract's requirements and consequences are independently determined by Shariah. The parties therefore are not at liberty to alter the substance of these nor to circumvent them in a way that would violate their purpose. The parties making the contract do not create the law but only a specific contract; their stipulations and terms of agreement should therefore be in conformity with the provisions of Shariah. The schools differ over details, however. The Malikis and Hanafis tend to take a moderate position by making many exceptions to the basic norm of prohibition. Similarly, the Shafii position, like that of the Zahiris, tends to proscribe altering the basic postulates and attributes of contracts through mutual agreement. The Hanbalis maintain that the norm regarding contracts is permissibility (*ibaha*), which prevails in the absence of a clear prohibition in the Shariah. The reason is that the Quran has only laid down the general principle that contracts must be fulfilled (Quran 5:1), and that they must be based on mutual consent (Quran 4:19). Because the Lawgiver (God) has not specified any requirements other than consent, consent alone is the validating factor. The will and agreement of the parties can therefore create binding rights and obligations.

The principle of permissibility under Hanbali law can also form the basis for unilateral obligation, which means that the individual is free to commit himself or herself in all situations in which this principle can apply. Thus a man may validly stipulate in a marriage contract that he will not marry a second wife. Because polygyny is only permissible (that is, it is not required) under the Shariah, the individual is free to make it the subject of stipulation. The other legal schools disallow this, saying that the Shariah has made polygyny lawful, a position that should not be circumvented or nullified through contractual stipulation. Therefore, any stipulation that seeks to do so is not binding. Ibn Hanbal stated that stipulations in a

marriage contract must be strictly observed, even more so than in other contracts. Consequently, when one spouse fails to comply with the terms of the agreement, the other spouse is entitled to seek the annulment of the contract.

Shiite law permits temporary marriage (*mutah*) for any period of time up to the maximum of ninety-nine years. Under Shiite law, temporary marriage is a contractual arrangement whereby a woman agrees to cohabit with a man for a specified period of time in return for a fixed remuneration. This arrangement does not give rise to any right of inheritance between the spouses, but the children are legitimate and entitled to inheritance. Sunni law prohibits temporary marriage altogether. The differential rulings of Sunni and Shiite law relate to the interpretation of verses in the Quran (2:236; 4:24); because *mutah* can mean both "temporary marriage" or a "gift of consolation" given to a divorced woman, the Sunnis have upheld the latter meaning and the Shiites the former. The Prophet himself permitted mutah in the early years of Islam, but he later declared it forbidden, according to Sunni but not according to Shiite reports in the Prophetic hadith.

Another area in which Shiite law differs significantly from its Sunni counterpart is the system of priorities in inheritance. Male agnates—such as the father's father, germane brothers (who share both parents) and consanguine brothers (who share a father but have different mothers), and paternal uncles of the deceased—are often entitled to a share of the inheritance, even if there are closer female relatives, under Sunni law, but they are likely to be excluded from inheritance under Shiite law. Whereas Sunni law tends to uphold the basic concept of the extended family, Shiite law rests on the notion of the nuclear family, consisting of parents and lineal descendants. Under both systems the son of the deceased enjoys the same entitlement, but all other male relatives, particularly the collaterals, are often much less favorably placed under the Shiite law. The divergent systems of Sunni and Shiite succession are premised on their respective political and theological doctrines. For example, the principle of Shiite succession that any lineal descendant, particularly the child of a daughter, has complete priority over all collaterals reflects the Shiite view that the political title of the Prophet was properly inherited by his lineal descendant, through his daughter Fatima, not by the agnate collaterals through the Prophet's uncle al-Abbas ibn Abd al-Muttalib (566-ca. 653).

## Salient Features of the Shariah: Religious and Moral Dimensions and Continuity and Change

This section draws attention to some of the characteristic features of the Shariah, such as its identity as a religious law and its capacity to adapt through interpretation and rational analysis. The Shariah is characterized as pragmatic, especially in the area of public policy, and it favors a gradual approach to social reform. The Shariah advo-

cates the moral autonomy of the individual and visualizes a basic harmony between private and public interests, and so the Shariah's orientation toward the concerns of the individual and those of the community as a whole is also discussed.

To say that Islamic law is God-given and an integral part of the religion is to say that adherence to its rules is both a legal and a religious duty of Muslims. Related to this are the concepts of *halal* and *haram*, the permissible and the prohibited. These are legal and religious categories that involve duty toward both God and fellow human beings. The religious and civil aspects of the Shariah tend to enforce one another in that legal compliance, as far as Muslims are concerned, is a religious duty. But for non-Muslims living under Islamic law, the law takes on a civilian character. It is of interest to note, however, that even with regard to Muslims, the jurists have drawn a distinction between the religious and the civilian aspects of the Shariah, especially in the area of civil transactions. In this area the rules of the Shariah are enforced on the basis only of what is apparent, whereas religion decrees based on true reality and intention. Thus the legal status of one act may differ in the judicial context from what it might be in a religious perspective. Judges do not issue judgments on religious considerations alone. This is why Muslim jurists often define their legal status in relationship to particular cases, but religiously it is the reverse.

For example, assume that someone denies that he is a debtor, and the creditor is unable to prove the debt in the court of law. If some property of the debtor comes into the creditor's possession, religion would entitle the creditor to take the equivalent of what is due to him without the debtor's permission. But if the matter is brought before the court, the creditor will not be allowed to take anything unless he proves the claim through legal methods. Consider a situation in which the creditor first waives the debt by giving it to the debtor as charity without actually informing the debtor of the decision, and then changes his mind and sues the debtor for the gift. In this case the creditor is entitled to receive payment judicially but not on religious grounds, as charity may not be revoked and the debtor does not owe the creditor anything in the eyes of God. The distinction here between religious and juridical obligations (*wajib dini* and *wajib qadai*) also signifies the difference between adjudication (*qada*) and a juristic opinion (*fatwa*). The judge (*qadi*) must adjudicate on the basis of apparent evidence and disregard the religious position of the dispute before him, whereas a *mufti* investigates both the apparent and the actual positions and both are reflected in the verdict. If there is a conflict between the two positions, the mufti pronounces his opinion on religious considerations, whereas the judge considers objective evidence only, regardless of the religious motives or personal disposition of the litigants. A pious individual in a court case is not to be treated differently from one of questionable piety or of no apparent dedication to religion.

The scholastic manifestation of this dual approach to rights and duties can also be seen in the different orientations of the legal schools with regard to externality and intent, and the question of the relative value that is attached to the manifest form as opposed to the essence of conduct. As previously noted, the Shafiis and Hanafis tend to stress the externality of conduct without exploring the intent behind it, whereas the Malikis and Hanbalis are inclined toward exploring the intent. These different approaches can be illustrated with reference to the intention behind a marriage contract. If a man marries a woman with the sole intention of sexual gratification followed by a quick divorce, the marriage is invalid according to the Malikis and Hanbalis but lawful according to the Hanafis and Shafiis. When the legal requirements of a valid marriage contract are objectively fulfilled, that is all that is necessary according to the Hanafis and Shafiis, whereas the Malikis and Hanbalis base their judgments on the underlying intent and maintain that evil and abuse should be obstructed whenever they become known.

A consequence of this attitudinal difference can also be seen in the approval or disapproval of legal stratagems (*al-hiyal al-fiqhiyyah*) in such cases as a catalyst marriage (*tahlil*) and usurious sale (*inah*). The former involves a man marrying a woman who has been divorced in order to allow her to remarry her first husband. This is a perversion of the requirement that there be a genuine intervening marriage before a divorced couple can remarry. In usurious sale, person A sells a piece of cloth to person B for $100, payable in one year, and then immediately buys the cloth back for $80, paid then and there. The difference is a disguised usury (*riba*), as it amounts to charging an interest of $20 for a loan of $80 for one year. In both examples, the acts are designed to circumvent the rules of Shariah by violating their intention. Malikis and Hanbalis reject such stratagems altogether, but the Hanafis and Shafiis have upheld them and recognize the legal consequences that flow from them. The Maliki jurist Abu Ishaq Ibrahim al-Shatibi (d. 1388) stated the Maliki position as follows: "Anyone who seeks to obtain from the rules of Shariah something which is contrary to its purpose has violated the Shariah and his actions are null and void."

The Hanbali scholar Ibn Qayyim al-Jawziyyah (1289–1349) held substantially the same position. Al-Shatibi added that the rulings of Shariah regarding what is permissible and prohibited generally consider both the acts and their underlying intention. The Maliki-Hanbali position is also upheld in a hadith-cum-legal maxim that declares, "Acts are judged by the intentions behind them." A Muslim therefore must not seek to legalize for himself or herself something that is prohibited even if he or she obtains a judicial decree to that effect. This conclusion is based on the hadith in which the Prophet adjudicated a case on the basis of apparent evidence, but then said:

> I am but a human being. When you bring a dispute to me, some of you may be more eloquent in stating your cases than others. I may consequently

According to Muslim law, a market supervisor, known in Arabic as *muhtasib*, is in charge of monitoring business transactions in the market. He was authorized, for example, to intervene and stop instances of cruelty to animals. Markets like this one in Kirman in central Iran were typically housed in vaulted structures that protected produce and people from the strong rays of the sun.

> adjudicate on the basis of what I hear. If I adjudicate in favor of someone something that belongs to his brother, let him not take it, for it would be like taking a piece of fire.

This hadith is premised in the binding force of judicial orders in that no one is at liberty to defy them on the basis merely of a moral argument. If a miscarriage of justice is due to false evidence, however, the person who wins the case

because of the false evidence bears a moral responsibility not to insist on enforcement. The Shariah also contains provisions on expiations (*kaffarat*), which are self-inflicted punishments of a religious character that the courts are not authorized to enforce. If a person breaks a solemn oath, for example, he may expiate for it by giving charity sufficient to feed ten poor people or fasting for three days. Other expiations have been provided for in the Quran, but none are legally enforceable.

Morality and religion are thus closely interrelated. The Prophet declared in a hadith that "I have not been sent but to accomplish moral virtues." The moral overtones of the Shariah are clearly seen in its propensity toward duty (*taklif*), so much so that some commentators have characterized the Shariah as "a system of duties" as compared with statutory law, which often speaks of rights. The Shariah clearly recognizes both duty and right, but it is nevertheless indicative of the moral underpinnings of the Shariah that it speaks mainly of duty rather than right. The fact that the Shariah proscribes usury, wine drinking, and gambling, proclaims legal alms as one of its major duties, and encourages "lowering of the gaze" between members of the opposite sex, as well as declaring divorce as "the worst of all permissible things" all reflect the Shariah's moral outlook. This is also evident in the rules pertaining to war, in which the Shariah forbids maiming, injuring children, women, and the elderly, as well as damaging animals, crops, and buildings. The Prophet and the early caliphs condemned cruelty to animals and took to task those who caused hardship to animals and neglected their needs. Although these are not justiciable in the court of law, the market controller (*muhtasib*) is nevertheless authorized to intervene and to stop instances of cruelty to animals. The muhtasib, who became known in the Abbasid period (749–1258) as market controller, mainly in charge of price regulations, was initially the officer in charge of the moral and religious duties of Islam, including the *hisba* (that is, commanding good and forbidding evil). Some of the hisba functions—such as those relating to the observance of religious duties in the fasting month of Ramadan, attendance of Friday congregational prayer, and so on—were gradually abandoned or taken over by other government agencies.

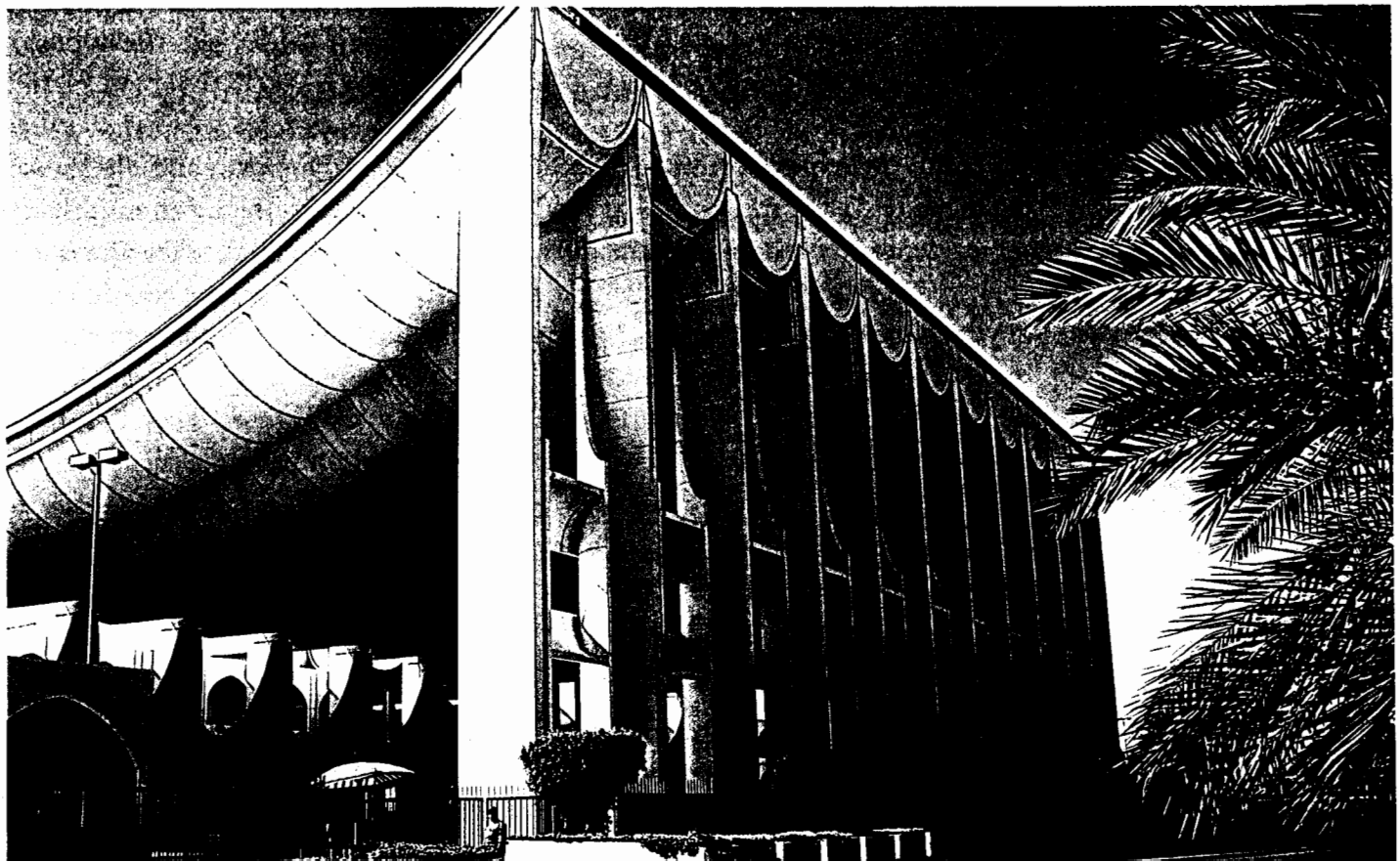
This distinction between the Shariah's moral and legal precepts is also reflected in its scale of five values—obligatory, desirable, neutral, reprehensible, forbidden. Only the two extremes—the obligatory (*wajib*) and the forbidden (*haram*)—are legal categories. The remaining three categories, which cover a much larger area, are basically moral and not justiciable. A substantive distinction between the religious and legal aspects of conduct can be seen even within the two categories of obligatory and forbidden. Religious obligations, such as prayer, fasting, and the hajj, are classified as "pure right of God" (*haqq Allah*) and

are normally not justiciable. They differ in that respect from those obligations that fall under the right of human beings (*haqq al-adami*), such as debt repayment or spousal support. These rights *can* be made the subject of a judicial order.

It is often said that Islamic law is immutable because it is divinely ordained. Yet, in its philosophy and outlook, divine law itself integrates a certain amount of adaptability and change. Some of the basic principles of the Shariah, such as justice, equality, public interest, consultation, enjoining good, and forbidding evil, are inherently dynamic. They are therefore immutable in principle, but they remain open to adaptation and adjustment on the level of implementation. The fundamentals of the faith and the practical pillars on which those fundamentals stand—the basic moral values of Islam and its clear injunctions—are on the whole permanent and unchangeable. But in many other areas of the law, the Shariah only provides general guidelines, the details of which may be adjusted and modified through the exercise of human reasoning.

The overriding objectives of Shariah are the promotion of human dignity, justice, and equality; the establishment of a consultative government; the realization of the lawful benefits of the people; the prevention of harm (*darar*); the removal of hardship (*haraj*); and the education of the individual by inculcating in him or her a sense of punctuality, self-discipline, and restraint. In their broad scope these objectives are permanent and unchangeable. When the Quran and the Sunna identify a certain objective to be of overriding importance, then all measures that can be taken toward its realization are automatically protected by the Shariah, provided that they are clear of distortion and abuse. In other words, the means toward attaining those ends are of as much value as the ends themselves. The ulama have attempted to classify the basic benefits (*masalih*) into the three broad

The basic objectives of the Shariah are conveyed in the Quran and the Sunna. They include establishing a consultative government. Many modern Muslim states have parliaments. The Kuwait Parliament building was designed by the Danish architect J. Utzon.



yet interrelated categories: essential interests (*daruriyyat*), complementary interests (*hajiyyat*), and desirabilities (*tahsiniyyat*). The contributions of the Maliki jurist al-Shatibi to these, and to the philosophy of Shariah in general, are particularly noted. Only the main categories of benefits are predictable in advance; their details are changeable according to the circumstances of time and place, however. They need therefore to be identified and pursued as and when they arise.

The means toward securing the Shariah's recognized objectives are flexible, as they are not specified in the sources and therefore remain open to considerations of public policy and justice. For example, vindicating the truth is an objective in its own right. Truth may be established by the testimony of upright witnesses or by other means as they become available, such as sound recording, photography, and laboratory analysis, which are perhaps even more reliable than verbal testimony. The Shariah only specifies the end that must be sought, but it leaves open the means by which the ends are achieved. Another example is the issue of female witnesses and the fiqh rule that the testimony of two females is equal to that of one male. This was the conclusion of the ulama of the past, whose reading of the Quranic text in light of the prevailing conditions of earlier times was generally accepted and perhaps also justified in the Quran. There is a reference in the Quran that validates the testimony of men and women, in that order, but the text does not preclude the testimony of female witnesses. The reading of the Quran should be goal-oriented and responsive to the realities of contemporary Muslim society. If the overriding objectives of the Quran, truth and justice, are now better served by admitting equally the testimony of female witnesses, especially when they might be the only witnesses available in a particular case, the judge would not hesitate to admit them; the rules of fiqh on this subject may also be adjusted in the future to that effect.

## The Scope of Interpretation and Reasoning

There are two types of rules of Shariah that occur in the Quran and the Sunna: definitive (*qati*) and speculative (*zanni*). Definitive rules refer to injunctions that are self-evident and need no interpretation. Some of the injunctions of the Quran are conveyed in this form; they are definite and self-contained. There are also instances in which the Quran lays down a basic rule, which, however definitive, needs to be supplemented; in this case, the necessary details are often supplied by the Sunna. The definitive injunctions of the Quran and the Sunna constitute the common core of unity among the various legal schools and among Muslims in general. It is thanks mainly to definitive injunctions that the Shariah is often described as a diversity within unity: unity in essentials but diversity in details; unity on matters of belief, on what is permitted or prohibited, but diversity in values that fall below

these categories. A legal text is classified as speculative when it is conveyed in a language that leaves room for interpretation and human endeavor.

Also in the Quran and the Sunna are instances in which a legal text may be definitive in some respects but speculative in others. For example, the Quran injunction "forbidden to you (in marriage) are your mothers and your daughters . . ." (4:23) conveys a definite meaning on the basic prohibition it contains, but questions arise about whether the word *daughters* includes, in addition to legitimate biological daughters, illegitimate daughters, stepdaughters, granddaughters, and foster daughters. And if so, are they all entitled to inheritance? Because *daughters* is a general word, it includes all of its possible meanings; this is the Hanafis' interpretation. But the majority of legal scholars maintain that this is conjectural and the application of all of its possible meanings is not a matter of certainty. Although the Hanafis conclude that *daughters* includes all daughters, the majority of legal scholars do not, for example, include illegitimate daughters in that meaning. There is a similar debate with regard to the ablution (*wudu*) for ritual prayer. This is necessary, as the Quran says, when one touches (*lamastum*) a member of the opposite sex (Quran 4:43). The precise meaning of the word—whether it means merely touching or sexual intercourse—is a matter of disagreement among the leading legal schools. The scope of such interpretations is not confined to words but extends to entire sentences and the meaning conveyed in a particular context. Even with regard to such basic prohibitions as murder and theft, questions arise as to the precise definition in the Quran. For example, does stealing from a deceased person or picking pockets fit the standard definition of theft? By far, the larger portion of the Quran's legal content is speculative in this sense, although the whole of the Quran is definitive in respect of authenticity.

The jurists have differed in their approach to interpretation. Although some schools like the Zahiris took a literalist approach to interpretation, the majority have included allegorical interpretation (*tawil*) in addition to interpretation proper (*tafsir*). They have validated interpretation based on personal opinion (*tafsir bil ray*) in addition to interpretation founded on valid precedent (*tafsir bil mathur*) in their understanding of the Quran and the Sunna. Whereas interpretation proper signifies interpretation based on the actual words of the text, allegorical interpretation includes the more remote interpretations, such as the implied and metaphorical meanings that fall beyond the confines of the text.

Because the Quran is characteristically devoted to broad guidelines and principles, its language is often versatile. Because of this versatility, "every scholar who has resorted to the Quran in search of solution to a problem," commented the jurist al-Shatibi in *Muwafaqat*, "has found in the Quran a principle that has provided him with some guidance on the issue." Al-Shatibi also observed that the specific rulings of the Quran are often related to a better understanding of its general principles. For exam-

ple, the following proclamations in the Quran lay down basic values rather than specific rules and procedures: "God permitted sale and prohibited usury" (Quran 2:275); "God does not intend to impose hardship upon people" (Quran 5:6); the charge to believers to "cooperate in pursuit of good works and piety and cooperate not in hostility and sin" (Quran 5:2); another charge to believers to "obey God and obey the Messenger and those who are in charge of affairs" (Quran 4:59), or the preceding text in the same chapter (Quran 4:58), addressing believers to "render the trust *al-amanat* to whom that they belong and when you judge among people, you judge with justice"; and the proclamation regarding punishment "and the recompense of evil is an evil equivalent to it, but one who forgives and makes reconciliation, his reward is with God" (Quran 42:40). (*Amanat* here include a variety of public functions—a witness in court, a judge, the guardian of a minor, or a holder of public office—and also an object that is borrowed on trust. Because a reference to justice immediately follows in the verse, justice is understood to be one of the most important amanat.) In each case, the text is concerned with laying down a basic norm and a general principle, which may well relate to new developments and be given a fresh interpretation in light of unprecedented issues. This is evident in the following commands and statements: to "consult them [the community] in their affairs" (Quran 3:159), to "fulfill your contracts" (Quran 5:1), to "devour not each other's property in vain, unless it be through lawful trade by your mutual consent" (Quran 4:29), and the statements that everyone is responsible for his own conduct and "no soul shall be burdened with the burden of another" (Quran 6:164), the statement that "God commands justice and fairness" (Quran 16:90), the statement that "one who is compelled without intending to violate or revolt is not to be blamed" (Quran 2:173), and so forth.

Ratiocination (exact reasoning) is a step beyond interpretation in that interpretation is confined to the words and sentences of the text, while ratiocination looks into the text's rationale and purpose. When the Quranic legislation is compared with modern statutes, it is notable that the textual rulings of the Quran are not confined to a series of commands and prohibitions; rather, they are an appeal to the reason and conscience of its audience. The Quran on numerous instances expounds the rationale, cause, objective, and purpose of its rulings, the benefit or reward that accrues from conformity to its guidance or the harm and punishment that may follow from defying it. This aspect of the Quran, known as *talil* (rational analysis), is also manifested in the affirmative stance that the Quran takes to the exercise of reason and in the frequent references that it makes to those who think, who inquire into the world around them and investigate, those who possess knowledge and draw rational conclusions from their observations. Rational analysis is an essential component of analogical reasoning in that analogy cannot be constructed, as previously noted, without the identification of an

effective cause that is in common between the original case and the new case. Rational analysis is not valid with regard to devotional matters, but outside this sphere the Shariah encourages investigation and inquiry into its rules. Ratiocination in the Quran means that the laws of the Quran are not imposed for the sake of mere conformity to rules, but that they aim at the realization of certain benefits and objectives. When the effective cause, rationale, and objective of an injunction are properly ascertained, they serve as basic indicators of the continued validity of that injunction. Thus when a ruling of the Shariah outside the sphere of worship no longer serves its original intention and purpose, it is the proper role of the scholar to substitute a suitable alternative.

In the precedent of the Companions of the Prophet, instances can be found in which some of the rulings of the Quran and the Sunna were suspended or replaced because they no longer served the purpose for which they were initially introduced. Thus the second caliph, Umar ibn al-Khattab, suspended the share of the *muallafah al-qulub* (friends of the faith) in the tax revenues of *zakah*. These friends were people of influence, not necessarily devout Muslims, whose cooperation was important for the victory of Islam. The Quran (9:60) had assigned a share for them, which the caliph discontinued on the ground that "God has exalted Islam and it is no longer in need of their support." The caliph thus departed, on purely rational grounds, from the letter of the Quran in favor of its general purpose, and his ruling is generally held to be in harmony with the spirit of the text. Also noted in the hadith is a case in which the Prophet declared a request by some Companions, made at a time of price hikes in commodities, to introduce price control in the Medinan market on the ground that this might amount to an unfair imposition on the traders. But changed circumstances some sixty years later prompted the Medinan ulama to validate price control, coming to the opposite conclusion based on the same concerns the Prophet had expressed—to prevent unfair trading and abuse—although this time the harm was likely to affect the community as a whole. According to another report, the Prophet's widow Aishah reversed the ruling of the hadith that had allowed women to attend the mosque for congregational prayers, stating that owing to the spread of corruption, the Prophet would have done the same were he alive. Because of changing conditions in modern times, the prevailing custom permits women's participation in almost all walks of life, and it would not make sense now if the mosque were to be the only place where women could not go. The specific cause and argument may vary in each case, but the basic rationale in these examples is the concern that the people benefit and the aversion to irrational conformity to rules that is at the root of the idea of talil. Rational analysis is therefore indispensable to the notion of independent reasoning. Only the Zahiris opposed it, but the majority of jurists upheld it on the analysis that a mechani-

According to one report, the Prophet's widow Aishah reversed the practice that had allowed women to attend the mosque for congregational prayer. In many places, including this mosque in Regent's Park, London, women still pray in a separate area.

cal reading of the Quran, oblivious of public welfare and driven only by considerations of conformity and imitation, should be avoided.

## Graduality and Pragmatism: Shariah-Oriented Policy

Islamic law favors a gradual approach to social reform to avoid hardship that may be caused by confrontation with the existing reality and customs. This is illustrated by the fact that the Quran was revealed over a period of twenty-three years, and much of it was revealed in relation to actual events. The Meccan portion of the Quran was devoted mainly to moral teaching and instruction in the new religion, and it contained little legislation. Legislation in social affairs is almost entirely a Medinan phenomenon. Even in Medina, some of the Quran's laws were revealed in stages. The final ban on drinking wine, for instance, was preceded by two separate declarations—one merely referred to the adverse effects of intoxi-

The rules governing the dress appropriate for women vary according to different interpretations of the Shariah by the various schools of law. In the Islamic Republic of Iran, for example, women must cover their entire bodies except their faces, and many women there wear a *chador* or full veil.

cation and the other proscribed drinking during ritual prayer. Both measures prepared the ground for the final step that banned drinking altogether. This manner of legislation can also be seen in reference to the five daily prayers, which were initially fixed at two and later were raised to five, and the legal alms, which was initially an optional charity and became obligatory after the Prophet's migration to Medina; fasting was also optional at first and was later made into a religious duty. Some of the Quran's earlier rulings were subsequently abrogated and replaced in light of new circumstances that the community experienced.

Islamic law therefore advocates realistic reform, but it does not favor abrupt revolutionary change. This is conveyed in the response, for example, that the Umayyad caliph Umar ibn Abd al-Aziz (682 or 683–720) gave to his ambitious son Abd al-Malik, who suggested to his father that God had granted him the power to decisively fight corruption in society once and for all. The caliph advised his son against such a course, saying that Almighty God Himself denounced wine drinking twice before he banned it. The caliph said: "If I take sweeping action even in the right cause and inflict it on people all at once, I fear revolt and the possibility that they may also reject it all at once." Commenting on this, Yusuf al-Qaradawi wrote: "This is a correct understanding of Islam, the kind of understanding that is implied in the very meaning of fiqh and would be unquestionably upheld by it."

The pragmatism of the Shariah is also manifested in the frequent concessions it makes concerning those who face hardship—for instance, difficulties the sick, the elderly, pregnant women, and travelers might find in daily prayers and fasting. It also makes provisions for extraordinary and emergency situations in which the rules of Shariah may be temporarily suspended on grounds of necessity. Thus, according to a legal maxim, the verdict of the mufti must take into consideration the change of time and circumstances. For instance, people were not allowed in the early days of Islam to charge a fee for teaching the Quran, as this was considered an act of spiritual merit. But when people did not volunteer and the teaching of the Quran suffered a decline, the jurists consequently issued a verdict that reversed the position and allowed teachers to be paid. Another example is the pragmatic verdict of Imam Malik that permitted the pledging of allegiance (*bayah*) to the lesser qualified of two candidates for leadership, if that were deemed to be in the public interest. The normal rule required, of course, that allegiance should only be given to the best qualified candidate. Similarly, normal rules require that a judge must be a qualified jurist and scholar, but a person of lesser qualification may be appointed should there be a shortage of qualified people for judicial posts. This also applies to a witness, who must be an honest person. If, however, the only witness in a case is a less-than-honest person the judge may admit the witness and adjudicate the case if this is the only

reasonable alternative available. Finally, the Prophet's widow, Aishah, reported that "the Prophet did not choose but the easier of two alternatives, so long as it did not amount to a sin." Thus the judge, jurist, and ruler are advised not to opt for more onerous decisions if easier options could be equally justified.

In its broad scope, Shariah-oriented public policy (*siyasah shariyyah*) authorizes government leaders to conduct government affairs in harmony with the spirit and purpose of the Shariah, even at the expense of a temporary departure from its specific rules. The two most important objectives of this policy are the realization of social benefit and the prevention of evil. Shariah-oriented policy is an instrument of good government, and it applies both within and outside the parameters of the established Shariah, although some ulama have held that there is no policy outside the Shariah itself. According to the Hanbali scholar Ibn Qayyim al-Jawziyyah in *Al-Turuq al-Hukmiyyah* (Methods of Judgment):

> *Siyasah shariyyah* includes all measures which bring the people closer to beneficence and furthest away from corruption, even if it has not been approved by the Prophet (peace be upon him) nor regulated by divine revelation. Anyone who says that there is no *siyasah shariyyah* where the Shariah itself is silent is wrong. . . .

Any measures taken by a lawful ruler that in his judgment secure a benefit or repel a mischief fall within the ambit of siyasah. The scope of public policy (*siyasah*) is therefore exceedingly wide, as it encompasses matters of concern not only to law but also to economic development, administration, and politics. The Quranic authority for siyasah is found in its principle of enjoining good and forbidding evil, which is enunciated in several places in the Quran. There are also numerous instances of siyasah in the Sunna of the Prophet and in the precedent of the pious caliphs (the four caliphs who ruled during the forty years immediately after the Prophet's death). Siyasah thus enables government leaders and judges to be effective in responding to circumstances, both under normal conditions and in emergency situations. Ibn Qayyim thus observed that whoever sets free the accused for want of witnesses after he takes an oath swearing his innocence, even though he has the reputation for corruption and robberies, verily acts contrary to siyasah. Conversely, it would be contrary to siyasah for a judge to treat a first offender with the same degree of severity as a recidivist who has an established record of criminality and violence.

Shariah-oriented policy may operate in any of the following four ways: First, it can restrict what is permissible in order to secure a benefit or to prevent harm. An example of this is the caliph Umar ibn al-Khattab's decision to ask the people not to consume meat on two consecutive days in a week at a time when meat was in short supply in Medina. Other examples might be to specify a maximum

acreage for certain agricultural crops or to restrict imports of certain items in order to protect national industries.

Second, it can legislate both within and outside the Shariah-regulated areas. This is an extensive field in which policy can be used to great advantage, not only in the sense of administering the existing Shariah but also in initiating new law in other areas. Legislation may be introduced to implement the Quranic injunctions on consultation, equality, and justice—subjects on which basic guidelines are found in the Quran but that must be adequately regulated in light of prevailing conditions. The ruler may also initiate new legislation. An example of this is the precedent set by the caliph Umar, who was once making one of his night tours of Medina when he heard the persistent cries of a child. He alerted the child's mother but later he heard that the infant was still crying. Upon further inquiry, it turned out that the woman had weaned the child too early, because the caliph had allowed only children who had been weaned to obtain welfare assistance. Consequently, the caliph issued orders that entitled children of all ages to welfare assistance.

Third, there is the possibility of selecting one of several available solutions. Should there be several juristic views on a certain issue, the ruler may select one that he considers to be most suitable. When he does so, his ruling becomes the authoritative ruling of the Shariah to the exclusion of all other interpretations. This is the subject of a legal maxim that reads: "The command of the imam puts an end to disagreement."

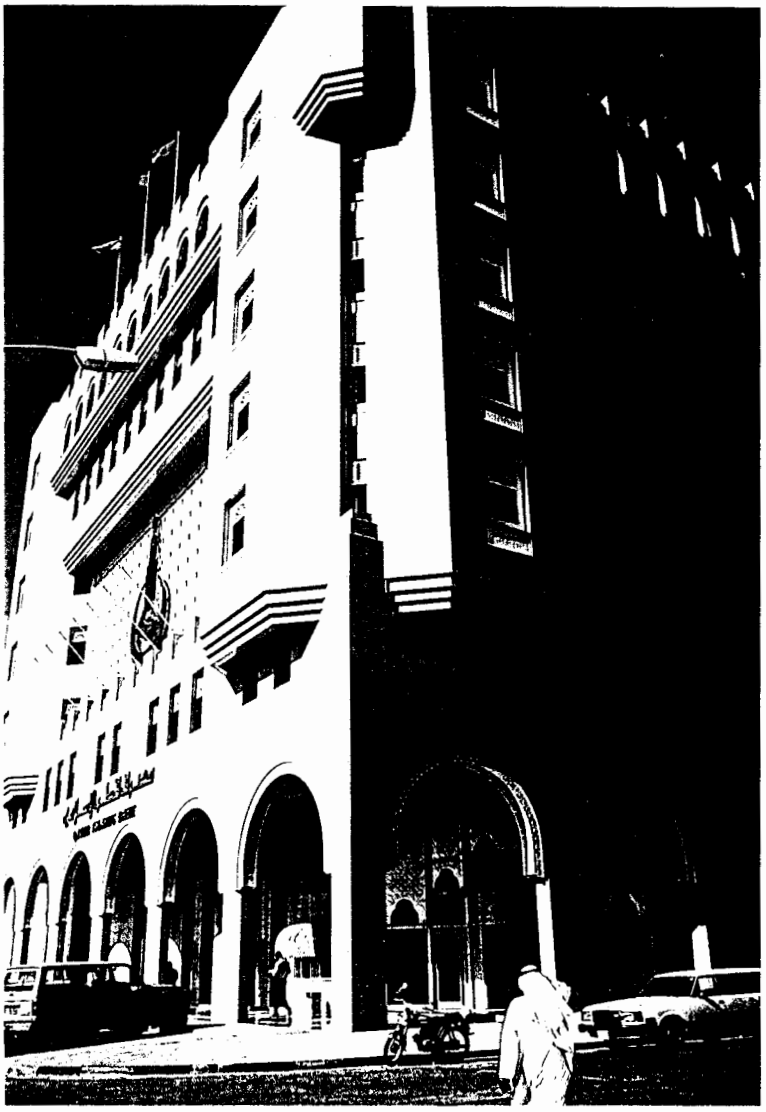
And finally, in the area of penal law, applying the deterrent punishment (*tazir*), which is an instrument of siyasah, enables the judge to exercise flexibility in selecting both the type and the quantity of punishment that might seem suitable in a case before him. This punishment may vary from a mere verbal admonition to corporal punishment to imprisonment and fines. It may be ordered only by competent authorities and only as a result of conduct that amounts to a violation. In other words, the judge may not create the offense and may only penalize what is a violation under Shariah in the first place.

## The Community Versus the Individual

Many commentators have held the view that the divine Shariah does not relate to the concerns of society in the way that human-made laws are expected to do. Instead of taking its origin from the needs and aspirations of society, Islamic law expects the society to conform with its mandate. In this view, Islamic law is shown to be nonparticipatory and authoritarian. But attention must be given to a different side of this picture: Islamic legal theory also incorporates general consensus (*ijma*), considerations of public interest (*istislah*), and social custom (*urf*)

among the recognized sources of Shariah. Consensus is particularly important because it is the binding source that ranks in authority next to the Quran and the Sunna. Furthermore, the Quran proclaims consultation as a principle of government and a method that must be applied in the administration of public affairs. Islamic legal theory thus recognizes a number of nonrevealed sources that are eminently participatory and founded in social need and consensus. From this perspective, Islamic law responds positively to the prospect of legislation on rationalist and utilitarian grounds that accommodate social change.

The populist base of Islamic law is strong enough to persuade many Muslim commentators to embrace the minority view that sovereignty in an Islamic state belongs to the Muslim community (*ummah*). This is because in the constitutional theory of the Shariah, the head of state acts in his capacity as the representative (*wakil*) of the people, and he may be deposed by the people in the event of a flagrant violation of the Shariah. Legal theory recognizes general consensus as a binding source of law, and the government is also bound by the Quranic mandate to consult the community in public affairs. The conclusion is that the Muslim community is the repository of what is known as executive sovereignty. The majority view, however, is that sovereignty in the Islamic state belongs exclusively to God, whose will and command, which is the Shariah, binds the community and state. The dignified status of the community finds support in its Quranic designation as the vicegerent of God in the earth (Quran 22:31) and the declaration that God has subjugated the earth and the entire created universe for the benefit of human beings (Quran 45:12).



Muslim law extends into many areas of finance and banking. Muslims are obliged to pay alms and are forbidden to practice usury. Islamic banks, as in this example from Doha, in Qatar, combine modern finance with the requirements of Muslim law.

Public interest is not only recognized as a source of law, but Islamic law further requires that governmental affairs must be conducted in accordance with public interest. This is the subject of a legal maxim that declares: "The affairs of the imam are determined by reference to public interest." According to another

legal maxim, instances of conflict between public and private interests must be determined in favor of public interests. Public interest is thus the criterion by which the success or failure of government is measured from the perspective of the Shariah.

Furthermore, the Quran and the Sunna are emphatic on solidarity with the vast majority of the community of believers (*jamaa*). In a number of places the Quran simultaneously praises and defines the Muslim community as "a midmost nation" (2:143), a nation of moderation that is averse to extremism; "it enjoins good and forbids evil" (3:109); a community that is committed to the truth and administers justice on its basis (7:181); a community that advocates unity and shuns separation (3:102 and 21:92); and a community that in its advocacy of truth is a witness unto itself and over mankind (16:89 and 2:143). The jurists have consequently formulated the doctrine of the infallibility of the collective will of the community, which is the doctrinal basis of consensus. Although consensus consists of the agreement of the jurists, they must act in the capacity of the representatives of the community. Representation as such does not change the original locus of authority, which still remains the Muslim community. The Sunna is also emphatic on solidarity with the community, which is the subject of numerous hadiths, including the following: "Whoever separates himself from the community and dies, dies the death of ignorance [*jahiliyyah*]"; and "Whoever boycotts the community and separates himself from it by the measure of a span is severing his bond with Islam."

Notwithstanding the concern of the Shariah for social well-being, the Shariah is also inherently individualist. Religion is a matter primarily of individual conscience. As religious law, the Shariah exhibits the same tendency. The individualist orientation of the Shariah is manifested in a variety of ways, including the fact, for instance, that the rules of Shariah are addressed directly to the legally competent individual. The Shariah's focus on the individual was evidently strong enough to persuade the Kharijites (literally, "outsiders"), who boycotted the community in the early decades of Islam, and the Mutazilite followers of Abu Bakr al-Asamm in the late eighth-century emigration to embrace the minority view that forming a government was not a religious obligation. For the Shariah addresses the individual directly; if every individual complied with the Shariah, justice and peace would prevail even without a government. These and similar views were expressed within a context that assumed basic harmony between the interests of the individual and those of the community. This is a corollary of the Quranic doctrine of monotheism (*tawhid*), that is, the oneness of being that encourages unity and integration in Islamic thought and institutions and discourages duality and conflict: God created the universe and every part of it is reflective of the unity of its source and consequently synchronized with every

other part. Religion is inseparable from politics, morality, and economics, just as the human personality cannot be compartmentalized into religious, political, and economic segments.

Broadly speaking, Islam pursues its social objectives through reforming the individual. The ritual ablution before prayer, the five daily prayers, fasting during the month of Ramadan, and the obligatory giving of charity all encourage punctuality, self-discipline, and concern for the well-being of others. The individual is also seen not just as a member of the community and subservient to the community's will, but also as a morally autonomous agent who plays a distinctive role in shaping the community's sense of direction and purpose. This can be seen, for example, in the conditions that the Quran and the Sunna have attached to the individual's duty of obedience to the government, and the right the individual is simultaneously granted to dispute with the rulers over government affairs (Quran 4:59). The individual obeys the ruler on the condition that the ruler obeys the Shariah. This is reflected in the declaration of the hadith that "there is no obedience in transgression; obedience is only in righteousness." The citizen is thus entitled to disobey an oppressive command that is contrary to the Shariah. The hadiths convey a general ruling that applies to all contexts, military or otherwise. But the general ruling of the Quran and the Sunna, according to the majority (excluding the Hanafi school), is speculative and may be specified or qualified on rational grounds. Other hadiths substantiate the moral autonomy of the individual. One of these instructs the believers to "tell the truth even if it be unpleasant"; the other declares that "the best form of *jihad* [holy struggle] is to tell a word of truth to an oppressive ruler." Because these hadiths are also conveyed in general terms, their messages are not confined to moral teaching; rather, they may be adopted into legal rules.

The dignity of the human being is a central concern of Islamic law. This is the clear message of many of God's proclamations in the Quran: "We have bestowed dignity on the progeny of Adam" (17:70), "We created humans in the best of forms" (95:17), and in the affirmation that "I breathed into Adam of My spirit" (38:71) and "endowed him with a spiritual rank above that of the angels" (2:30 and 17:70). The five essential values of Shariah, on which the ulama are in agreement—faith, life, intellect, property, and lineage—are premised on the dignity of the human being, which must be protected as a matter of priority. Although the basic interests of the community and those of the individual may be said to coincide within the structure of these values, the focus is nevertheless on the individual.

The Quranic principle of enjoining good and forbidding evil is supportive of the moral autonomy of the individual. This principle authorizes the individual to act according to his or her best judgment in situations in which his or her

intervention would advance a good purpose. The individualist moorings of this principle can be seen in a hadith that addresses the believers in the following manner: "If any of you sees an evil, let him change it by his hand, and if he is unable to do that, let him change it by his words, and if he is still unable to do that, then let him denounce it in his heart, but this is the weakest form of belief." This principle assigns to the individual an active role in the community in which he or she lives. It also validates in principle the citizen's power of arrest, but it is only on grounds of caution that the police have been made the exclusive repository of this power. The jurists have dealt with the details of this concept at length. Suffice it to say that a person must act out of conviction when he believes that the initiative taken is likely to achieve the desired result. He is advised not to do anything if he is convinced that his intervention, however well intended, might cause a harm equal to or greater than the one he is trying to avert.

Another Quranic principle that supports moral autonomy of the individual is that of sincere advice (*nasihah*), which entitles everyone to advise and to alert a fellow citizen, including the head of state and his officials, to what she considers to be of benefit or to what may rectify an error on her part. The main difference between the principle of enjoining good and forbidding evil and that of sincere advice is that the former is concerned with events that are actually witnessed at the time they occur, but the latter is not confined to the actual moment of direct observation. Therefore it is more flexible. The broad scope of sincere advice is clearly depicted in a hadith in which the Prophet declared that "religion is good advice." Religion, in other words, is meant to be the agent of benefit and a reminder to good. These individualist leanings of the Shariah are also evident from the familiar tone of the Quranic address to the believers to "take care of your own selves. If you are righteous, the misguided will not succeed in trying to lead you astray . . ." (Quran 5:105). Within the context of matrimony, for example, the Shariah opts for the separation of property, and the wife's right to manage her own financial affairs remains unaffected by her marriage. Once again, although Islam encourages the call to religion (*dawa*), it proclaims nevertheless that "there shall be no compulsion in religion" (Quran 2:256). For example, a husband is required to respect the individuality of his non-Muslim wife; he is therefore not allowed to press her into embracing Islam.

The individualist propensities of Islamic law can also be seen in the history of its development. For instance, Islamic law is often characterized as the jurists' law, developed mainly by private jurists who made their contributions primarily as pious individuals rather than as government functionaries and leaders. This aspect of Islam's legal history is also seen as a stabilizing factor in that it was not particularly dependent on government participation and support. Governments came and went but the Shariah remained as the common law of the Muslims.

Another dimension of Islam's individualist propensities is that relations between governments and the ulama remained generally less than amicable ever since the early years of the Umayyad rule (661-750). The secularist tendencies of the Umayyad rulers marked the end of the "Righteous Caliphate"; the ulama became increasingly critical of this change of direction in the system of government. The ulama retained their independence by turning to prominent individuals among them, which led eventually to the formation of the schools of law that bore the names of their founders (Hanafi, Maliki, and so on). One of the consequences of this pattern of development was that Islamic law made few concessions to the government. The immunities against prosecution, for example, which are enjoyed to this day by the monarch, the head of state, state assemblies, and diplomats in other legal systems, are totally absent in Islamic law. No one can claim any immunity for his or her conduct merely on account of social and official status. Trial procedures in the courts of Shariah consequently did not permit the judge to treat the head of state, if he were involved in a dispute, any differently than other citizens. There have been many instances of this in legal history.

The schools of law functioned as guilds and professional associations in which outstanding contributions found recognition and support, even if they went against official policy. The two most important principles of Islamic law—personal reasoning (*ijtihad*) and general consensus (*ijma*)—can be conducted by jurists without depending on the participation of the government in power. These two principles manifested the nearest equivalent of parliamentary legislation in modern times. Personal reasoning has almost always been practiced by individual jurists. General consensus is broadly described as the unanimous consensus of the qualified scholars (*mujtahidun*) of the Muslim community on the ruling of a particular issue. As such, consensus can be initiated by individual jurists, concluded, and made binding on the government even without the latter's participation. Neither ijtihad nor ijma were institutionalized and have remained uninstitutionalized to this day. The jurist who carries out independent reasoning in theory enjoys complete independence from government and is only expected to act on the substantive merit of each case in line with the correct procedure of ijtihad. It is not surprising therefore to see that commentators have described Islamic law and its main advocates, the ulama, as champions of the rights of the individual and bulwarks against arbitrary exercise of official power.

## Consolidation, Reform, and the Current Status of Islamic Law

Poor access to Islamic law has been one of the problems that has hampered efforts toward the revival of rational and independent reasoning. The bulk of

scholastic Islamic law is contained in voluminous works of medieval origin in Arabic, which are poorly classified and difficult to use; this scholarship tends toward scholastic exclusivism and isolation. The 1876 Ottoman work entitled *Mejelle* was an attempt by the Turkish government and the ulama to codify the Hanafi law of civil transactions. It contains 1,851 articles that primarily address contracts and transactions, evidence and court procedures, but it excludes family law. It was followed in 1917 by the promulgation in Turkey of the Law of Family Rights. This law used Hanafi fiqh as well as that of the other three legal schools more widely than the *Mejelle*. Although Turkey itself abandoned these laws, the works remained influential nevertheless. The 1929 Egyptian Law of Personal Status drew not only from the justice legacy of the four leading schools but also from the opinions of individual jurists, when these issues were deemed to be conducive to public interest. The 1953 Syrian Law of Personal Status was another step in the direction of attempting independent reasoning through the modality of statutory legislation. This neo-ijtihadi approach to legislation was followed by similar attempts in Morocco, Tunisia, Iraq, and Pakistan, where statutory reforms were introduced in the traditionally Shariah-dominated laws of marriage, polygyny, and divorce.

The Islamic Law Conference that was held in Paris in 1951 called for the compilation of a comprehensive encyclopedia of fiqh, and several projects were undertaken toward that end. The University of Damascus began a project in 1956, and the governments of Egypt and Kuwait started their own projects in 1951 and 1971, respectively. The Egyptian and Kuwaiti encyclopedias, both bearing the title *al-Mawsua al-Fiqhiyya*, have each exceeded thirty volumes. The Kuwaiti edition is soon to be completed, but its Egyptian counterpart is far from ready. These and other compilation projects have shown latitude by treating the major schools of fiqh strictly on the merit of their contributions. The information compiled is relatively free of sectarian bias. Yet by the very terms of their reference, the encyclopedic collections were designed to consolidate rather than to reform existing Islamic law. Undoubtedly they provide valuable resources, but they consist basically of an uncritical description of the scholastic heritage of fiqh.

The need was then felt to supplement and enrich the scope of these endeavors by establishing a forum to facilitate collective interpretation on new issues. A project was undertaken by the Organization of Islamic Conference, which led to the formation of the Fiqh Academy in Jidda, Saudi Arabia, in 1981 and another Fiqh Academy in Mecca by the Muslim League. India and Pakistan have each established fiqh and Shariah academies of their own. There are also a number of international institutes and organizations that undertake specialized research in Islamic legal themes. An even earlier attempt along these lines was made by al-Azhar University in Cairo, which set up the Islamic Research Academy in 1961.

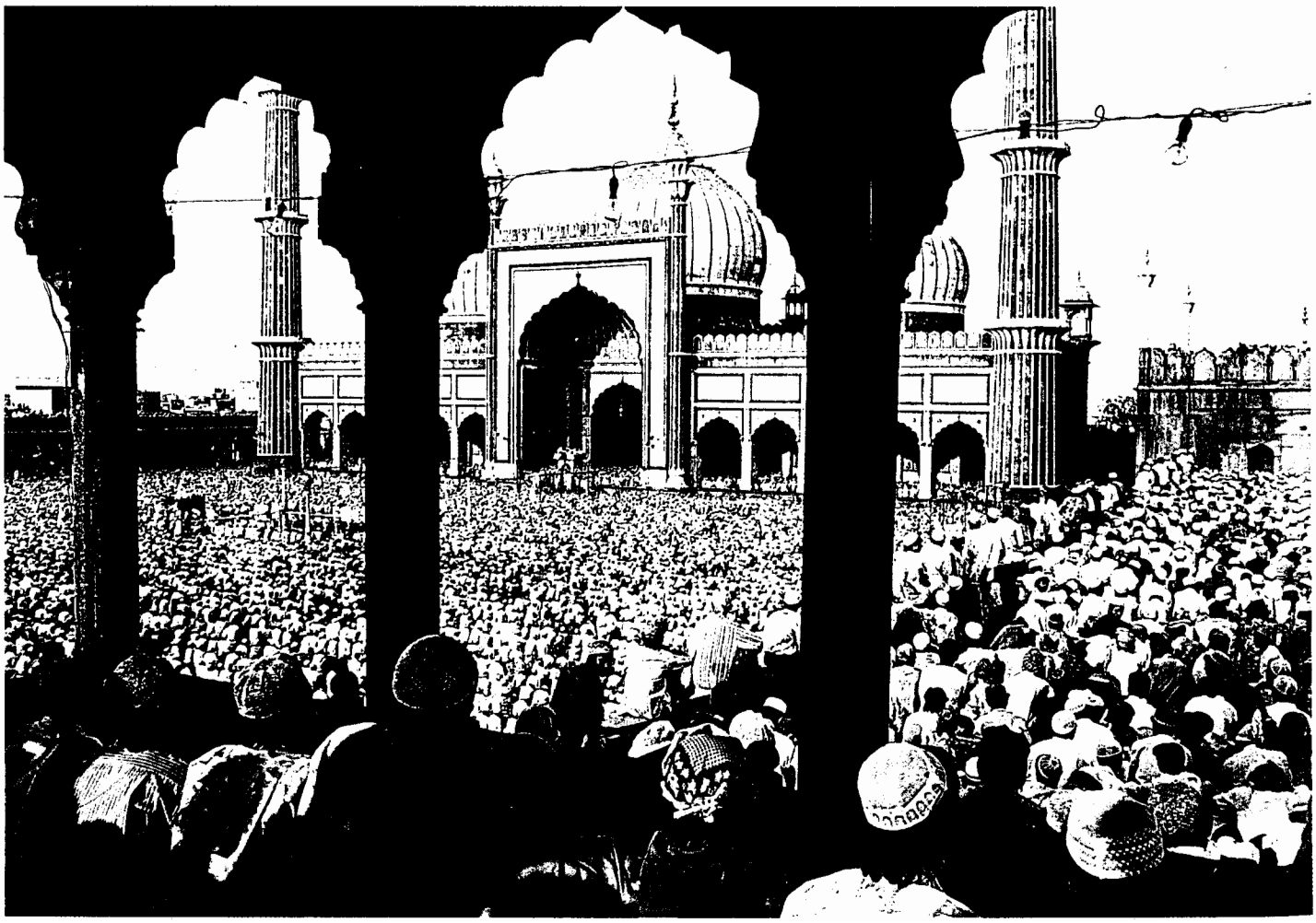
Following that, King Abdul Aziz University in Jidda established its International Center for Islamic Economic Research in 1977. The International Islamic University of Malaysia and that of Islamabad started operations in the early 1980s and both institutions are currently building a stronger and more balanced infrastructure for specialized research efforts in Islamic law.

Islamic law relates to society more effectively in some areas than others. In the areas of matrimonial law and inheritance, the Shariah has remained in force with revisions and has been adopted by statutory legislation in almost every Muslim country. Saudi Arabia and Afghanistan have generally retained the Shariah. In most other areas, however, the Shariah has been marginalized for many reasons. Some of the earlier distortions, such as the closing of the door of ijtihad and the ensuing prevalence of the imitative tradition of taqlid, were exacerbated by persistent alienation between the ulama and government. This was condoned and reinforced by the subsequent domination of Western colonialism and the ascendant secularity that came with it. Western law dominated almost every aspect of the law, from constitutional to commercial law, to civil litigation, criminal procedure, and evidence. The abolition of Shariah courts in Egypt in the late nineteenth century was followed by similar developments in other countries and the prevalence of national courts that often combined elements of both Western and Shariah laws. This pattern is currently prevalent in most Muslim countries, although some countries, such as Malaysia, operate a dual system of national and Shariah courts, each having separate jurisdictions. In recent decades many Muslim countries have attempted to revive the Shariah on a selective basis and in varying degrees. Only Iran has adopted it generally. Measures have also been taken in Middle Eastern countries, Pakistan, Sudan, Egypt, and elsewhere to confirm that their constitutions and laws of court procedure, property, and evidence are acceptable to the Shariah. The latest development in Malaysia was the government's announcement in early 1997 that they would raise the status of the Shariah courts, to bring them up to that of the civil courts. Islamic laws of transactions have also seen a concerted revivalist effort in the wake of successful experiments in Islamic banking. Considerable interest is also taken by Islamic institutions of higher learning in the Islamization of disciplines, with a view to harmonizing the teaching of social sciences and humanities with Islamic values and outlook.

These efforts continue, but they have not been devoid of difficulties because of political upheavals and unrest that have been a feature of the Islamic resurgence movement in recent decades. Governments in Muslim lands are apprehensive of these movements and the prospect of the ulama and Islamist ascendancy to power. The Algerian experience in the mid-1990s, which has involved violent confrontation between the religious strata and government, and

the collapse in June 1997 of the Islamist government in Turkey are cases in point. Iran's example of Islamic revolution evidently has not been followed in other Muslim countries. To a large extent, this revolution has remained a significant but nonetheless exceptional development.

The individualist propensities of the Islamic legal theory have already been discussed in this chapter. The question now is whether the contemporary Muslim community has inherited a legacy that is often at odds with their prevailing political reality and experience. Perhaps Islamic legal thought has traveled too far in its individualist, even antigovernment, orientation to offer easy options in an era in which the nation-state and its legal machinery have become increasingly collectivist and representative. Unless reformist measures are introduced to make independent reasoning a concern of the legislative assembly and parliament, its practice by the private jurist is no longer a realistic alternative. Regarding the principle of consensus, it basically envisioned the agreement of private jurists who are relatively uninvolved in state affairs. As such, the main issue is also one of institutionalization and the prospect of making it a part of the normal function of the state machinery, measures that



The community of believers is exemplified by the gathering of Muslims for communal prayer in the congregational mosque at noon on Fridays and for major religious holidays.

have been suggested more than half a century ago but that have remained unfulfilled. The secularist orientations of the nation-state in present-day Muslim countries are not particularly conducive to the revival of consensus and independent reasoning as the principal modes of statutory legislation. But even so, a basic change of direction appears to have taken place, as there is now greater awareness of Islamic values. Furthermore, the pressure of public opinion in countries with majority Muslim populations is likely to influence government policy in making the Shariah a reality of Muslim life. The era of revolution seems to be waning, and it is increasingly giving way to selective and gradual restoration of the Shariah through the recognized channels of legal reform.